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WERE DENIED BY THE

SUPREME COURT OF TEXAS

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COURT OF CIVIL APPEALS

PRIOR TO FEBRUARY 3, 1904.

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INTERNATIONAL & G. N. R. CO. et al. v. STARTZ.

(Supreme Court of Texas. Dec. 3, 1903.)

CARRIERS—CARRIAGE OF STOCK—NEGLIGENCE—EVIDENCE—ADMISSIBILITY—TRIAL BY COURT—REVIEW—CONTRACT OF CARRIAGE—LIABILITY OF INITIAL CARRIER.

1. In an action against a carrier for negligence in the transportation of cattle, whereby they lost weight in transit, accounts sales rendered to plaintiff by his commission merchants, giving the weight of the cattle when sold at their destination, the prices received, etc., were hearsay, and inadmissible in behalf of plaintiff.

2. Where there is competent evidence to support the judgment in a case tried to the court, the admission of incompetent evidence is not ground for reversal.

3. In an action against a carrier for negligence in the transportation of cattle, whereby they lost weight in transit, a telegram to plaintiff, stating the loss in weight, was hearsay and incompetent.

4. Where, in a case tried to the court, the only definite evidence furnishing a basis for the judgment was hearsay, which the court ruled inadmissible, it could not be presumed that he disregarded it, and based his judgment on the indefinite evidence.

5. Where the receipt given by a carrier on accepting a shipment of cattle relieved it from liability for injuries on connecting lines, and, in an action by the shipper against it and the connecting carriers, the complaint alleged partnership and agency between the carriers, which allegation was denied by the initial carrier's plea, and not sustained by evidence, it was not jointly liable for the negligence of connecting carriers.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by August G. Startz against the International & Great Northern Railroad Company and others. Judgment for plaintiff was affirmed in the Court of Civil Appeals (74 S. W. 1118), and defendants bring error. Reversed.

S. R. Fisher and J. H. Tallichet, for plaintiffs in error. J. D. Guinn, for defendant in error.

WILLIAMS, J. This action was begun by defendant in error against the International

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& Great Northern Railroad Company, the Texas & Pacific Railway Company, and the St. Louis, Iron Mountain & Southern Railway Company to recover damages for injuries to cattle shipped over the lines of defendant from New Braunfels, Tex., to East St. Louis, Ill. The petition alleged that, in the carriage of the cattle, defendants were co-partners, and each the agent of the other. The International & Great Northern Railroad Company denied, under oath, this allegation, but neither of the other defendants did so. The cattle were received by the International & Great Northern Railroad Company at New Braunfels, under a written contract agreeing to carry them from that point to Longview, its terminus; stating the destination to be East St. Louis, and relieving it from liability for injuries which might occur on any other line. Neither of the other carriers was mentioned in the contract, and no contract or other undertaking of theirs is shown, except such as arose from their transportation of the cattle. The district court rendered judgment against all of the defendants, jointly and severally for \$2,000, the whole amount of the damage sustained by the cattle in transit; the judge finding that part of the injury was caused by the first carrier, and part of it by the others, but that the evidence did not enable him to determine what part of the whole was caused by either.

During the trial, plaintiff offered in evidence accounts sales rendered to him by his commission merchants, giving the weights of the cattle when sold, the prices received, and other facts which need not be stated, and these were admitted over the objection of defendants that they were hearsay. This objection was, we think, well taken, and should have been sustained. The papers contained only the ex parte statements of a third party, which was clearly hearsay. Counsel for defendant in error does not contend otherwise, but insists that there was other competent evidence to support the judgment, and that, as the case was tried before the judge, the admission of incompetent evidence is not ground for reversal. The rule of practice as-

serted in this contention is correct, but we are unable to apply it to this case, for the reason that it is by no means clear that the judgment is supported by other competent evidence. The plaintiff's chief complaint was that, by reason of delay and improper treatment in shipment, the cattle lost weight, and therefore did not sell for as much as they ought to have brought in the market. The evidence is sufficient to show what the cattle, if properly handled and promptly carried to market, ought to have weighed; but, when we come to inquire what they did weigh, the evidence, outside the account sales, is very unsatisfactory. Plaintiff himself states that he learned through a telegram that the weight per head was about 180 pounds less than it should have been, but this telegram was itself hearsay and incompetent, and, besides, its contents were not stated. Pfeuffer testified that he saw some of the cattle weighed, and heard the weigher call out some of the weights, but does not state the weights as called out. His testimony, as a whole, leaves it in doubt whether he had independent knowledge of the actual weight of the cattle or not. The meaning of his statements, as they are written in the record, is not clear. The rule of practice assumes that the judge hearing all of the evidence has distinguished between the competent and incompetent, and that, where the former is clearly sufficient to support the judgment, he acted upon it, rather than the latter. But in this case the hearsay evidence furnishes the only definite basis in the record for a judgment, and, as the trial judge ruled that it was admissible, we do not think it a fair presumption that he disregarded it, and based his judgment upon such uncertain evidence as otherwise appears. It was in plaintiff's power to prove the facts stated in the accounts sales by competent evidence, and thus have furnished, as he should have done, definite data by which to estimate his damage.

We are also of the opinion that the court erred in giving judgment against the International & Great Northern Railroad Company for the damage inflicted by the other defendants. Its plea met the allegations of partnership and agency, and they were not sustained by any evidence. It was not, therefore, jointly liable, under a contract like that in evidence, for damages caused by other carriers. The other defendants are not, perhaps, in a situation to complain of this feature of the judgment; but, as the case is reversed upon the ground first noticed, further examination of this is unnecessary. The rules for determining the liabilities of the several carriers are given in former decisions. *G., C. & S. F. Ry. Co. v. Edloff*, 89 Tex. 458, 34 S. W. 414, 35 S. W. 144; *G., C. & S. F. Ry. Co v Cushney*, 95 Tex. 309, 67 S. W. 77.

Reversed and remanded.

CHAMBLESS v. STATE

(Court of Criminal Appeals of Texas. Dec. 2, 1903.)

HOMICIDE—EVIDENCE—SELF-DEFENSE.

1. On a prosecution for homicide the state showed that accused, armed with a gun, started out in the direction where deceased was working, and that several hours later deceased was found there dead; that there were indications of a scuffle, and that there had been ill-feeling between the parties. Defendant's evidence was to the effect that when he approached deceased the latter, drawing an ax on him, forced him to put his gun down, and struck him; that defendant then began to cut at deceased with a knife, and deceased to cut defendant; and that shortly deceased sat down, and defendant left without knowing whether he had killed deceased. When the body was found deceased's knife was in his pocket, defendant had a cut to the bone on two fingers, and a knot of considerable size on his head. *Held*, that the evidence showed self-defense, and a conviction of felonious homicide was unwarranted.

Appeal from District Court, Polk County; L. B. Hightower, Judge.

Lennes Chambless was convicted of murder in the second degree, and he appeals. Reversed.

F. Campbell, for appellant. S. A. McCall, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of five years.

The only question we deem necessary to pass upon is the sufficiency of the evidence to sustain the conviction. The evidence for the state shows antecedent ill will between deceased and appellant. It appears that deceased was clearing some land adjoining the land of appellant's mother, about 250 yards from the home of appellant's mother; that appellant, armed with a gun, about 3 o'clock in the evening started out in the direction of where deceased was working, and late that evening deceased was found dead near where he had been clearing the land. The condition of the ground near where deceased was found dead indicated some kind of scuffle had occurred. In substance, this is the state's case. Defendant proved that he left home about 8 o'clock in the evening to go hunting; that he passed near where deceased was clearing land, and he called appellant to stop. He did so, and when he approached appellant he drew an ax upon him, forcing appellant to put his gun down by the side of a tree, and then deceased ordered appellant to march down the road, which he did, deceased following him close behind, after having laid his ax aside. They proceeded along the road a short distance, and appellant started to take the road leading home. Deceased insisted on his taking the road that led from home. Appellant insists that he wanted to go home to his mother. Appellant was about

15 or 16 years old, and deceased about 18, much larger than appellant, and a well-grown boy. Appellant was barefooted. At this juncture, when appellant refused to go in the direction deceased wanted him to, deceased struck appellant, appellant began to cut at him with a knife, and deceased to cut at appellant. In a few moments deceased desisted from the fight, sat down, and died where he was subsequently found. Appellant returned to the tree, where he had left his gun, and after securing it returned to his home, not knowing whether he had killed deceased. When deceased's body was found the state's witnesses show that his knife was in his pocket and also \$3 in money. The evidence is undisputed that appellant had a cut to the bone on two fingers of one hand; that he had a knot on the side of his head of considerable size. Appellant testified that deceased beat him some time before he cut him. We do not think the above detailed testimony, which is practically the facts in this record, show murder in the second degree, or any grade of felonious homicide. We do not understand the decisions to hold that the bare fact that parties are not friendly, and a subsequent killing occurs, this per se would authorize a conviction for any grade of felonious homicide, when the undisputed evidence, corroborated by the physical facts, shows a perfect case of self-defense. In this case the evidence for the defendant shows a pure case of self-defense, which is clearly and cogently corroborated by the physical facts upon the ground and the cuts upon appellant, and then we are left merely to conjecture to ascertain a basis for the state's theory. We do not understand the law to be that the jury can arbitrarily find a verdict, regardless of the undisputed evidence, and presume, as it were, against defendant in favor of murder in the second degree, when such presumption is clearly refuted by the undisputed facts.

Because the evidence is insufficient, the judgment is reversed and the cause remanded.

WILBURN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

HOMICIDE—EVIDENCE—EX PARTE AFFIDAVITS—CONVERSATIONS—REMOTENESS—WITNESSES—IMPEACHMENT.

1. Where, on trial for murder, a controversy arose over occurrences which took place between the state's attorney and witnesses in the attorney's office, the facts could not be shown by ex parte affidavits, but the witnesses themselves should have been put upon the stand, subject to cross-examination.

2. The state cannot read in evidence defendant's application for a continuance for the purpose of impeaching one of defendant's witnesses.

3. On a trial for murder, testimony of a conversation between witness and deceased, at a time when defendant was not present, to the

effect that defendant cut deceased, was inadmissible.

4. A conversation between defendant and witness relative to transactions between defendant and deceased, which occurred years before the homicide, the parties in the meantime having been friendly, was inadmissible.

Appeal from District Court, Trinity County; J. M. Smither, Judge.

Dick Wilburn was convicted of murder in the second degree, and appeals. Reversed.

Stevenson & Stevenson and Kenley & Stevenson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was given five years in the penitentiary for murder in the second degree. His first application for continuance was for three witnesses, to wit, Mathis, Harvey Day, and Tom Day. The facts expected to be proved by the first two named witnesses were admitted by the state to be true, in order to avoid the continuance. The state filed affidavits of Mrs. C. J. English, W. H. Womack, and F. M. Roach controverting the facts expected to be shown by the absent witness Tom Day. The witness Hutson testified in behalf of defendant practically to the same facts as Day was expected to prove. Attorneys for the prosecution had Hutson and others in their office, discussing the facts expected to be testified by the absent witnesses, and desired Hutson to make an affidavit, which he declined. This discussion in the lawyer's office was injected into the trial, and became a matter of controversy, there being some divergence in the testimony between Hutson and some of those who were present at the time of the discussion. The ex parte affidavits of Mrs. English, Womack, and Roach, over appellant's objections, were introduced, and read to the jury. Bill of exceptions was reserved, and there is some controversy in the bill by the qualification of the court as to what was the real object for the introduction of said affidavits. Without going into the matter in detail, it is sufficient to say that the affidavits of Mrs. English, Roach, and Womack were not admissible, either to avoid the continuance or in explanation of what occurred in the conversation between Hutson and the attorneys for the prosecution, or for the purpose of impeachment of Hutson, or in support of any of the witnesses who testified adversely to Hutson in regard to the conversation in said office. These affidavits were made to controvert the application for continuance as to what Day would testify, and could have no relation to what occurred in the office between the parties, Hutson, and the attorneys. Mrs. English was not present at the conversation between the attorneys and Hutson. As to Womack and Roach, and their presence, if it was necessary to introduce their testimony as to what occurred in the office, they should have been placed on the stand and examined. Their affidavits contesting the application for continuance had

no relation to this matter, and could not be introduced. If the affidavits had been made directly in regard to what occurred in the law office, then they could not be introduced, because they were but *ex parte*, and defendant was entitled to be confronted by these witnesses, and subjected to cross-examination.

The state read in evidence all that portion of the application for continuance which set up facts expected to be proved by the absent witness Tom Day. The bill is in such shape that it is difficult to understand from the face of it, in view of the qualification, what was meant. Appellant contends it was done for the purpose of impeachment of Hutson, and the state that it was explanatory of what occurred between them and Hutson in the lawyer's office. This testimony was clearly inadmissible from either standpoint. They could not impeach Hutson by a statement of appellant in the application for continuance; nor did the statement of appellant in the application tend to throw any light upon what occurred between state's counsel and Hutson. All of these matters were clearly inadmissible. This disposes of the objections to the charge of the court, because they will not arise upon another trial.

On cross-examination of appellant's witness Coleman the state was permitted to prove a conversation purporting to have occurred between himself and deceased, as follows: "I did not cut you, did I, Steve? Dick cut you, didn't he?" Deceased replied, "Yes, Dick cut me." Steve is the given name of deceased, and Dick the name of appellant. The admission of this testimony was error. Appellant was not present, and was not bound by what occurred between deceased and witness Coleman.

Witness Coleman was further permitted to testify, as shown by the bill, that appellant told him that some eight or ten years before the time of the conversation that at Smith's store, in Groveton, deceased had given him (defendant) a rounding up about a debt that he (defendant) owed deceased. The bill is qualified by stating that witness Coleman testified the trouble between deceased and defendant occurred at the store of Smith the last year Smith was in business in Groveton. He did not say it was eight or ten years ago, and it was not proved what year Smith was in business in Groveton. The evidence showed that up to the time of the difficulty the parties were friendly. Appellant asserts in the bill that they were the best of friends. This is qualified by the statement that it was only shown they were on friendly terms. The bill is left in such uncertain condition that it is rather difficult to understand. If, as a matter of fact, this conversation occurred years ago, and the parties in the meantime had been friendly, it could not have been injected into the case. It was too remote.

For the errors indicated, the judgment is reversed, and the cause remanded.

CROCKETT v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1903.)

MURDER—EVIDENCE OF THREATS—ADMISSIBILITY—DYING DECLARATION—PRELIMINARY PROOF—SUFFICIENCY—SELF-DEFENSE—INSTRUCTIONS.

1. On a prosecution for murder, the testimony of a witness that on the night of the homicide, and about 25 minutes before it occurred, he heard some one say that decedent was going to kill defendant; that he did not know the person speaking or the one addressed, but neither of them was decedent; and that he at once communicated this to defendant—was not admissible on the issue of self-defense.

2. The testimony was not admissible for the purpose of reducing the offense to manslaughter.

3. Where, on a prosecution for murder, the wife of the decedent testified that she got to her husband the same night he was shot, and about an hour afterwards; that she nursed him continuously until he died, about a month later; that when she reached him, after the shooting, she found him in a serious condition; that he told her that he would die that night; that he called a lawyer, and made his will and gave her directions as to the management of his business, etc.; that he never afterwards expressed any hope of life, but would say he was bound to die, though she tried to encourage him; that during the second or third week, while in his right mind, he told her the circumstances of the shooting—a sufficient predicate was laid for the admission of his statement as his dying declaration, notwithstanding the testimony of the attending physicians to the effect that on the night decedent was shot, and during the next day, there was great danger of immediate death, but that thereafter his condition improved; that after the third week blood poisoning set in, making his condition serious, which lasted until his death; and that he never expressed any hope for his recovery.

4. Where, on a prosecution for murder, the witnesses for defendant testified on the issue of self-defense that decedent at the time of the killing drew his knife and opened it, and made a demonstration as if to get up from his seat and advance toward defendant with his open knife, an instruction that if the jury believe that defendant believed, and had the right to reasonably believe, from decedent's acts, that decedent was about to assault him with a knife and inflict on him serious bodily injury, then he had the right to kill decedent, was not erroneous, as depriving defendant of the right of relying on apparent danger.

Appeal from District Court, Kaufman County; J. E. Dillard, Judge.

Grat Crockett was convicted of murder, and appeals. **Affirmed.**

Lee R. Stroud, for appellant. J. S. Young, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 15 years; hence this appeal.

Appellant offered to prove by the witness Gus Ward that on the night of the homicide, and about 25 minutes before it occurred, he was passing the depot in the town of Forney, where the homicide was committed, and heard some one in the dark, addressing another, say, "Harrison Lewis is going to

kill Grati Crockett;" that he did not recognize the party speaking or the one addressed, but neither of them was deceased, Harrison Lewis; that said Ward immediately communicated this to appellant. This was objected to on the part of the state. Appellant insisted that said testimony was admissible, notwithstanding it did not show a threat made directly by deceased, Harrison Lewis, against appellant, but it evidenced the fact that the person making the statement must have heard Harrison Lewis make a threat to kill appellant, and that appellant, in this connection, relied on self-defense, both as against real and apparent danger, and that the testimony would tend to show appellant's state of mind (that is, in connection with previous threats which had been communicated to him, this statement rendered him more apprehensive of an attack to be made on him that night by Harrison Lewis), and that subsequently, when he met and shot Harrison Lewis, he was apprehensive of such attack, and, furthermore, if said testimony did not serve to justify him on the ground of self-defense, the evidence would tend to reduce the offense to manslaughter. The court rejected this evidence, and it is assigned as error. It will be borne in mind that the language here used did not even show a threat on the part of deceased, Lewis, against appellant, and, for aught that appears, may have been an idle surmise of some third party. But even concede that it may have operated on appellant's mind to make him apprehensive, still this would not authorize its admission, because many things might have such effect, but it could not be claimed that such matters, on that account, were admissible as evidence. We know of no case in our Reports going to the extent of holding this character of evidence admissible. Our decisions seem to be predicated on the idea, at least as to the admission of threats, that a threat provable in favor of appellant must have been an actual threat made by deceased, or it must have been reported to appellant to have come from deceased as an actual threat. Even a conditional threat or a mere expression of opinion is not introducible in evidence. *Myers v. State*, 33 Tex. 525. And for other authorities see *White's Ann. Pen. Code*, § 1263. *People v. Rector*, 19 Wend. 569, reported in *Har. & Thomp. Self-Defense Cases*, p. 795, carries this character of evidence further than any decision of which we are aware. That was a case where defendant kept a bawdyhouse, and deceased, with two or three others, came there during the night and demanded admission. On their being refused, they used some threats of violence, and manifested determination to enter the premises; and, in the difficulty, defendant slew one of the parties with a piece of timber. Defendant, in this connection, offered to show that about a week before there was a riotous breaking of the prisoner's house, and

that an inmate had been then badly abused, and that the rioters threatened to return another night soon after and break in if they were not admitted. This testimony was offered to establish a reasonable ground for the prisoner's apprehension of the execution of a similar breaking on the night when the homicide occurred. In that case it did not appear that defendant knew deceased and his companions so far as to have distinguished them from the previous rioters, and the names of these were not put forward in the proposition of the prisoner's counsel. The court below excluded this evidence, but the Supreme Court held that it should have been admitted, stating that it was no reason for the exclusion of same that deceased was not known to defendant as one of the previous rioters; that, in the prosecution of a crime so essentially the creature of intent as murder, everything pertinent should be submitted to the jury upon which they may infer the absence of malice. But we think the above case can be differentiated from the one at bar. There it was made certain that a previous attempt had been made on appellant's house by rioters, and that they threatened to come again and enter his premises, and appellant had reason to believe they were the same parties who came the second time. In the present case there had been no assault, and although threats were proven to have been made by deceased against appellant, and communicated to him, there is nothing in the bill of exceptions reserved to show that the excluded testimony was in any wise connected with deceased. Much less did it show any threat attributed to him. As stated above, it may have been a mere idle surmise on the part of the declarant, with which deceased had no connection. Neither under our statute, which appears to predicate this character of testimony upon threats attributed by the evidence to appellant, nor upon general principles governing the introduction of threats, do we think this testimony admissible; and the court did not err in rejecting it.

During the trial the state offered the dying declarations of the deceased, through his wife. Her testimony regarding the predicate showed, substantially, that she got to her husband the same night he was shot, about 10 o'clock, he having been shot an hour or two before; that she nursed him continuously from that time until he died, which was about a month subsequent; that when she reached her husband, immediately after he was shot, she found him very bad off, and he told her that he would die that night; that he called in a lawyer, and had him write his will, making disposition of his property, and told witness what to do about managing the business, etc.; that he never afterwards, up to the time of his death, expressed any hope of life, although she tried to encourage him, but would always say he was bound to die; that during the second or third week

after he was shot, and while in his right mind, he told her the circumstances under which the killing occurred, which was in effect: that deceased was sitting in a chair in the saloon of Perry & McKinney, in the town of Forney, and that Crockett came in the door, spoke to him, and he looked up and saw that Crockett was going to shoot him; that he (Lewis) did not speak a word; that Crockett spoke to him, and shot him twice while he (Lewis) was still sitting in the chair, and shot at him a third time as he was getting up. This was objected to on the part of appellant on the ground that no sufficient predicate was laid. The action of the court admitting the same is assigned as error. It does not occur to us that there was error in this action of the court. Evidently the declarations were made under a consciousness of impending death. *Sims v. State*, 36 Tex. Cr. R. 154, 36 S. W. 256. And the length of time deceased may have lived after making the declaration appears to be immaterial. *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750. And for other authorities see 10 Amer. & Eng. Ency. of Law, p. 369.

In connection with this bill of exceptions, appellant afterwards introduced the testimony of two physicians, who stated that they attended deceased after he was shot, and that on the night of the shooting, and during the next day, there was great danger of immediate dissolution and death, but after a day or so the patient rested better, and for some days there was no immediate danger; that the patient's pulse was better, and he took his meals better, and that he would inquire of them how they thought he was doing, but after the third week blood poisoning set up, and his condition was serious on up until the time he died. He was shot Thursday night, January 16, 1902, and died February 19, 1902. On cross-examination both physicians testified that Harrison Lewis never at any time after he was shot expressed the belief on his part of there being any hope for his recovery. After the introduction of this testimony, appellant moved to exclude the evidence of dying declarations. This the court refused to do, and he assigns this as error. We do not agree with this contention. It does not occur to us that the testimony of the physicians in any wise indicated that the conditions did exist which rendered the testimony inadmissible.

Appellant assigns as error the following portion of the charge of the court: "The jury are instructed, in connection with the two last charges, if they believe and find from the evidence before them that the defendant, Grat Crockett, shot the deceased with a pistol, and thereby killed him, as alleged in the indictment, and further believe from the evidence that at the time he did so, if he did, deceased, Harrison Lewis, was then about to assault defendant with a knife, and if the jury further believe from the evidence that defendant believed, and had the right

reasonably to believe, from the acts of deceased, if any, and from all other circumstances, viewed from defendant's standpoint at the time, that deceased was about to take his life or to inflict upon him some serious bodily injury, and so believing, if he did, he shot deceased one or more times with a pistol, and thereby killed deceased, believing, if he did, that it was a necessary act to prevent deceased from taking his life or from inflicting upon him some serious bodily injury, then it would be the duty of the jury to find defendant not guilty, upon the ground of self-defense." It will be observed in this connection that the court preceded this charge by properly instructing the jury as to the right of a person to defend himself against apparent as well as real danger, and that a person who is attacked or assaulted by another is not bound to retreat, etc. The objection to the court's charge is "because the court instructed the jury, if they believed that, at the time of the alleged homicide, deceased, Harrison Lewis, was then about to assault defendant with a knife, and if the jury believe from the evidence that defendant believed, and had the right reasonably to believe, from the acts of deceased, if any, and from all other circumstances, viewed from his standpoint, that deceased was about to take his life or inflict upon him serious bodily injury, that he had the right to kill him." This charge, as appellant contends, deprived him of the right of relying on apparent danger; and he maintains that the evidence showed a case of apparent danger, and at variance with the charge given. We have examined that portion of the charge critically, in connection with the statement of facts, and, in our opinion, it properly presented the case on the issue made by appellant. All of the state's witnesses either prove that there was no demonstration made by deceased at the time of the homicide, or, if any was made, they did not see it. Those witnesses who testified on behalf of appellant as to the difficulty, with one accord, state that deceased drew his knife and opened it, and made a demonstration as if to get up from his seat, and advanced toward defendant with his open knife; and the court properly predicated the charge in this regard on the testimony of defendant's witnesses. This is not like the case of *Phipps v. State*, 34 Tex. Cr. R. 560, 31 S. W. 397; nor is it like the case of *Graham v. State* (Cr. App.) 61 S. W. 714, 2 Tex. Ct. Rep. 236. In the latter case there was no proof that deceased drew a pistol and presented it at appellant, but the testimony was that he merely made a demonstration as if to draw a pistol; and the error there was that the court predicated his right of self-defense on his actually drawing the pistol, when there was no such evidence. Here the charge was based on appellant's theory of self-defense.

There being no error in the record, the judgment is affirmed.

DRAKE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1903.)

HOMICIDE — ASSAULT — SELF-DEFENSE — INSTRUCTIONS — QUALIFICATION OF RIGHT — PROVOCATION OF DIFFICULTY.

1. In a prosecution for assault with intent to murder, where defendant's evidence was that his opponent was the aggressor from the beginning, and attacked him (defendant) without provocation, it was error for the court to qualify the right of self-defense with a charge on provoking the difficulty, and to give no unequivocal charge on self-defense.

Brooks, J., dissenting.

Appeal from District Court, Eastland County; J. H. Calhoun, Judge.

Uell Drake was convicted of assault with intent to murder, and appeals. Reversed.

D. G. Hunt and J. J. Butts, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for assault with intent to murder, the penalty assessed being two years' confinement in the penitentiary.

From the state's standpoint, the facts disclose that Oscar Dennis, alleged injured party, and appellant were attending a dance; that while the dance was in progress Dennis testified that he heard appellant say, "There is the God damn son of a bitch I've got it in for," and looking around he saw appellant pointing his hand at him (witness); that appellant was then talking to Hambrick. As soon as the set was finished, witness went to appellant, who was talking with Wheeler Dennis, and touched him on the shoulder and requested an interview. They went off some 20 feet, in front of the house in the yard. Upon reaching that point witness turned, and asked appellant what he meant by his remark in the house, and he replied that he meant just what he said; that he was going to kill witness, and at once began cutting him with a knife. He then describes the further progress of the difficulty and the cuts inflicted; that they fell to the ground, he on top of appellant, and "I finally called for some one to part us, when Hamby and Buchanan came up and parted us." There had been no previous difficulty between the parties, according to this witness. Witness weighed 160 pounds, and was 28 years of age, while appellant was 17 years of age, and weighed about 130 pounds. Hamby was at the party, and was in the yard, some 15 steps from the house, talking with Buchanan, when appellant and Dennis came out of the house, and stopped about 10 feet from where witness was standing. Witness heard one of them say something, but did not understand what it was. He immediately heard a blow, and the two men began fighting. They fell to the ground; and witness went up and found Dennis, the injured party, on top of defendant, and he tried to pull him

off, but could not. Witness stepped back, and heard defendant say: "You are too big for me to fight; if you don't quit choking me, I will cut your God damned guts out." That defendant's voice sounded like he was being choked or smothered. "Directly I heard Dennis say, 'Pull him off, boys; he is cutting me all to pieces.'" Buchanan and witness then separated them. When Dennis got up he said: "Where is my pistol? I will kill the son of a bitch." Dennis further remarked when he got in the house, "I had my thumb in the hollow place in Drake's throat, and was trying to choke him to death, but could not do it." Buchanan testified substantially as did the former witness.

Appellant's theory of the difficulty is directly in conflict with the testimony of Dennis. He says that just before the difficulty he was standing at the door talking to Wheeler Dennis. Oscar Dennis came up and touched him with his hand, and said, "Come out, I want to see you." They had gone about 20 feet, when Dennis turned, facing defendant, and said, "You damned son of a bitch, I am going to fix you." "He then struck me on the side of my face with his fist, and grabbed me. He threw me down. He fell on top, and began choking me. I told him if he did not quit I would cut his God damned guts out." Defendant further testified that Dennis continued choking him, and he finally succeeded in getting his knife out and cut him until Dennis was pulled off. He flatly denied making the statement imputed to him in the house.

Charging on self-defense, the court in every instance qualified this issue with a charge on provoking the difficulty. There were five charges on this issue given by the court in the main charge, and each qualified or limited by a charge on provoking the difficulty. Exceptions were reserved to these charges, which we think are well taken. Perhaps the court was justified in charging on the issue of provoking the difficulty, but it is unquestionably correct that appellant had a right under the law to a clear and unequivocal charge on self-defense. Appellant and his witnesses make a clear case of self-defense—one that required a charge untrammelled by any limitations or qualifications. Upon another trial, if the court should charge upon the issue of provoking the difficulty, it should not be so charged as to limit appellant's right of self-defense, because under his view of the case there was absolutely no provocation, but his opponent was in the wrong and the aggressor from the beginning. The remaining errors will not occur upon another trial.

For the errors discussed, the judgment is reversed and the cause remanded.

BROOKS, J. (dissenting). I do not agree with the opinion of the majority. I think the issue of provoking the difficulty is clearly presented by the facts. To give an unqualified charge on self-defense, as suggested by

majority, would be a contradiction of the charge on provoking the difficulty. In every state of facts presenting the issue of provoking the difficulty the injured party is necessarily the aggressor; that is, A. provokes the difficulty, B. makes an overt act or an assault against A., and A. shoots to protect himself against such assault or attempted assault. A. insists under his evidence that he shot in self-defense. Now, an unqualified charge, stating, in substance, that if A. shot in self-defense he would not be guilty, would be a contradiction of the charge on provoking the difficulty, because A. has no right under the law to shoot in self-defense if he has provoked the difficulty; and it is proper and right for the court to tell the jury what the right of self-defense is, and that said right would be perfect unless he provoked the difficulty. As stated above, in every case where a party is killed, and the state's evidence indicates that he provoked the difficulty, then this issue is presented on the theory that he brought about the necessity of shooting the deceased, and that therefore he cannot claim self-defense. Hence an unqualified charge on self-defense would be directly contradictory of the charge on provoking the difficulty. In other words, appellant cannot have an unqualified right of self-defense where the evidence for the state presents the issue of provoking the difficulty. I do not mean to be understood as holding that appellant's evidence presenting the perfect right of self-defense should not be given in charge to the jury, but the court should clearly indicate to the jury that this right only exists where he did not provoke the difficulty. I understand the charges in this case clearly present these issues. As stated by the majority, the evidence for appellant presents the issue of perfect self-defense, and the evidence for the state presents the issue of provoking the difficulty. I think the charge of the court in this case admirably presents all the law of this case so far as the objections of appellant are concerned. For the reasons indicated, I do not agree with the opinion of the majority.

CRAWFORD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1903.)

CRIMINAL LAW—APPEAL—TRANSCRIPT—SUFFICIENCY.

1. A transcript on a criminal appeal that does not contain a recognizance, or any statement that appellant is or has been continuously confined in jail since his conviction, is insufficient.

Appeal from District Court, Shelby County; Tom C. Davis, Judge.

Tom Crawford was convicted of a crime, and appeals. Dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. The Assistant Attorney General has filed a motion to dismiss this appeal on the ground that the transcript does not contain a recognizance, nor does it show that appellant has been confined in jail, or has been so confined since his conviction, in February, 1903. We have examined the record carefully, and it does not purport to contain a recognizance, nor is there any showing that appellant is now in jail, or that he has been continuously in jail since his conviction. This is necessary. *Adler v. State*, 31 Tex. 61; *Foster v. State* (Tex. Cr. App.) 37 S. W. 744; *Buckler's Crim. Dig.* p. 72, § 139. The motion to dismiss is sustained.

The appeal is dismissed.

WALLS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 14, 1903.)

SWINDLING—WHAT CONSTITUTES—STATEMENT OF FACTS—APPROVAL BY JUDGE.

1. Pen. Code 1895, art. 948, making the mere conversion of funds by a guardian swindling, is within the power of the Legislature, though articles 943 and 944, defining swindling, require the property to be acquired in the first instance by some fraudulent pretense.

2. The judge may not approve the statement on appeal before the attorneys agree it is correct.

3. Appellant does not show, as he must, to allow consideration on appeal of the statement of facts not bearing the approval of the judge, that it was forwarded to the judge after being signed by the attorneys, and that he forwarded it to the clerk without placing his approval thereon; there being merely the affidavit of the clerk stating that he received by mail (not stating from whom) the statement of facts accompanied by a letter from the judge instructing him to file the statement when the attorneys signed it, and an affidavit of the judge that he did not remember receiving or sending the statement, but that, if he did, his failure to approve it was his oversight.

Appeal from District Court, Red River County.

W. S. Walls was convicted of swindling, and appeals. Affirmed.

J. C. Hodges and E. N. Hunt, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of swindling, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

What purports to be a statement of facts found in the record does not appear to have been approved by the judge who tried the case. Consequently we cannot consider it.

Appellant made a motion to quash the indictment on the ground that it failed to charge the offense of swindling. He contends that article 948, Pen. Code 1895, under which the indictment is drawn, makes the conversion of property, merely, the offense, when articles 943 and 944, in the same chapter, which define the offense of swindling, require that the property must be acquired in the first instance by some fraudulent pre-

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2772.

tense. We quote said article 948, as follows: "If any executor, administrator, or guardian having charge of any estate, real, personal or mixed, shall unlawfully and with intent to defraud any creditor, heir, legatee, ward or distributee interested in such estate, convert the same or any part thereof to his own use, he shall be deemed guilty of the offense of swindling." It must be conceded that this article eliminates an essential element of the offense of swindling as defined in the preceding articles of said chapter. That is, all of the authorities hold that, in order to constitute the offense of swindling, as defined in said articles, the property must be acquired in the first instance by some fraudulent or deceitful pretense or representation, and that the indictment must set out the false pretenses or representations. *White's Ann. Pen. Code, § 1639, subd. 4; French v. State, 14 Tex. Cr. App. 76; Blum v. State, 20 Tex. Cr. App. 578, 54 Am. Rep. 530.*

Furthermore, appellant contends in this connection that article 3, Pen. Code 1895, requires that every offense must be defined, and that the definition of the offense as constituted under article 948 contravenes the definition of swindling as found in the preceding articles, in that no false pretenses need be resorted to to acquire the property, but that if one of the enumerated trustees shall convert the property of the heir, etc., he shall be guilty; making the guilt of such person depend solely on conversion of property that may have come to his hands. The act as to swindling appears to have been passed in 1858, and article 948 was a part of the original act, and was embodied along with the other articles in the several Codes that have been passed since that time. So that it does not occur to us that it is a matter that can be considered under the caption of the original bill, and is simply a question as to whether or not the Legislature was authorized to make conversion by a guardian of the trust funds of his ward the offense of swindling; having previously defined what constituted swindling, and given it an essential element not contained in said article 948. We know of but one case decided under said article, and that is *Moody v. State, 24 Tex. Cr. App. 458, 6 S. W. 321*. But the question here presented was not raised in that case. We are now asked, for the first time, to pass on the legality of the article with reference to the preceding definition. Undoubtedly, under the definition of swindling as given in articles 943 and 944, the mere conversion of funds by a guardian would not constitute the offense of swindling, but rather, under our view, be embezzlement, yet we know of no authority which would inhibit the Legislature from creating or making the conversion by a guardian of the funds of his ward swindling, and punish it as such, independent of the preceding subdivisions defining swindling, and notwithstanding said article does not embrace an essential ingredient contain-

ed in the preceding definition. It appears that they did make it an offense, and it is so written in plain terms. We hold that the indictment is correctly framed under said article, and charges the offense of swindling named therein. Accordingly the court did not err in refusing to quash the indictment. In the absence of the statement of facts, we cannot review the charge of the court.

There being no errors pointed out by the assignments requiring a reversal, the judgment is affirmed.

On Rehearing.

(Nov. 25, 1903.)

This case was affirmed at a former day of this term, and now comes before us on appellant's motion for rehearing. We held in the original opinion that the statement of facts, not being approved by the judge, could not be considered. Appellant has filed a motion setting up the diligence used by him, or, rather, showing why the statement of facts was not approved by the judge. Appended to the motion is the affidavit of the district clerk, stating that he received the statement of facts by mail, accompanied by letter from Judge Ben H. Denton, who tried the case, instructing him, when the attorneys for defendant had signed the same, to file the statement of facts. The judge, in his affidavit, which is appended, states that he had no recollection whatever of receiving the statement of facts, or sending it to the clerk of Red River county, though he might have done so; that, if such statement was sent to him by the district attorney, and agreed to and signed by him, and he sent the same to the clerk of the district court of Red River county with instructions to file it, then it was an oversight on his part, if not approved by himself. These two affidavits leave the matter in confusion. The clerk does not say that he ever received the statement of facts and letter from the judge, but the affidavit is open to the construction that he must have received the same from the attorneys, because the statement of facts in the record is signed by the attorneys. The judge was not authorized to approve the statement of facts in advance of the agreement of the attorneys representing the state and defendant that it was a correct statement. So we take it that the attorneys must have received a letter from the judge, as stated by the clerk, and that they then—either the district attorney or defendant's attorney—agreed on a statement of facts, and signed the same, and forwarded it with the judge's letter to the clerk, whereas they should then have forwarded said statement to the judge for his approval. The judge himself appears to have no recollection of having seen the statement at all, and if he sent such statement, and his approval was left off, it was by inadvertence or mistake. In accordance with the decisions, the onus was on appellant to show by his supporting affidavits to the motion that the want of dili-

gence was not his, but that of the judge. Appellant or his counsel should have made it appear distinctly in some affidavit that after the district attorney and defendant's counsel had agreed to the statement of facts, and signed the same, it was forwarded to the judge who tried the case, and he forwarded it to the clerk, failing to place his approval thereon. If such had been the showing, it would have come under the case of *Yawn v. State*, 37 Tex. Cr. R. 205, 38 S. W. 785, 39 S. W. 105. The burden being on appellant to show the facts, and the affidavits here presented not showing the failure to use diligence was the fault of the judge, and not that of appellant, we cannot presume in his favor, and supply a statement not contained in the affidavits. We hold, therefore, that the statement of facts cannot be considered as a part of the record. We see no occasion to review the matters heretofore discussed in the original opinion.

The motion for rehearing is overruled.

GAINES v. STATE.*

(Court of Criminal Appeals of Texas. Nov. 4, 1903.)

THEFT FROM THE PERSON—INDICTMENT—DESCRIPTION OF PROPERTY—RAILROAD TIME CHECK—IDENTIFICATION BY WITNESS—ARGUMENT OF COUNSEL—REFERENCE TO FORMER TRIAL—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS—VERDICT—ERRONEOUS ORTHOGRAPHY.

1. An indictment for theft, which described the article stolen as "one International and Great Northern Railroad Company pay check, number 4,892, of October, 1902, for the sum of \$34.25, issued to B. M., the same being of the value of \$34.25," sufficiently describes the property.

2. On a motion for continuance on the ground of an absent witness in a prosecution for theft, defendant's affidavit alleged that the absent witness would give evidence contrary to that given by prosecuting witness, but in answer the state produced the affidavit of this witness, in which he swore substantially as the prosecuting witness had done, and particularly traversed the allegations in the application for continuance. *Held*, that the continuance was properly refused.

3. In a prosecution for theft of a railroad pay check it was proper to permit a witness to identify the check, though he testified that he could not read well, and that all railroad pay checks looked alike and were of the same color.

4. In a prosecution for theft from the person the prosecuting attorney said to the jury that at a recent term of court in another county three persons were tried and convicted for theft from the person, and defendant's counsel ought to go over in that county and see how they treat that kind of fellows. This statement was in reply to argument of defendant's counsel that it was impossible to commit theft from the person, while the party was awake, without his knowledge of the facts, and that he had never known or heard of a case of that character. *Held*, that the argument was not harmful to defendant.

5. In a prosecution for theft from the person the prosecuting attorney stated that at a trial of a case for theft from the person at a former term eleven of the jurors believed that defend-

ant was guilty, and one did not, and that while the jury was out the other jurors took from the one juror his watch, his pocketbook, his keys, etc. The defendant objected on the ground that the argument referred to a former trial of the case, and was a statement of the attitude of the jury therein. It appeared that this argument was an answer to that of counsel for defendant that it was impossible for one person to commit theft from the person without the knowledge of that person. Defendant requested no charge eliminating this matter from the consideration of the jury. *Held* that, in the absence of such request, the argument could not be considered reversible error.

6. The argument did not refer to a former conviction so as to come within the prohibition of Code Cr. Proc. 1895, art. 823, prohibiting any allusion to a former conviction.

7. In a prosecution for crime, a charge on circumstantial evidence to the effect that it must not only conduce to establish defendant's guilt to a moral certainty, but that it must also be strong enough to exclude every other reasonable hypothesis consistent with his innocence, is proper.

8. In a prosecution for crime, the fact that the verdict spells the word "penitentiary" "penitentiary" is not error.

Appeal from District Court, Falls County; Sam R. Scott, Judge.

John Gaines was convicted of theft from the person, and appeals. Affirmed.

Lewellyn & Connallyn and Rice & Bartlett, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft from the person, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant made a motion to quash the indictment on the proposition that the same did not describe the check, and did not show that the same was corporeal personal property. The indictment was certainly good as to other property alleged to have been stolen, to wit, the pocketbook; and we also hold it was good as to the check. The allegation is as follows: "One International and Great Northern Railroad Company pay check, number 4,892, of October, 1902, for the sum of thirty-four dollars and twenty-five cents, issued to Blackmon Mills, the same being of the value of thirty-four dollars and twenty-five cents."

Appellant made a motion for continuance, which was overruled by the court. This question was brought up again in motion for new trial, and the action of the court thereon is assigned as error. The motion was based on the absence of one Joe Battle, by whom it was alleged that appellant expected to prove certain statements of prosecutor Mills, to the effect that he did not know where he lost the purse—whether in Falls county or not; that he did not know whether defendant found the purse or not, and he did not know how it came into his possession. At the most, this would be impeaching testimony if the absent witness would swear to the statements contained in the application. However, in answer to said application, the state has attach-

*Rehearing denied December 2, 1903.

ed the affidavit of said witness, in which he swears substantially as the prosecutor Mills swore on the trial, and he particularly traverses the allegations in the application to the effect that Mills may have told him that he did not know whether he lost his check in Falls county or not. So we take it that the court did not err in overruling the application for continuance both on the ground that the testimony of the absent witness was of an impeaching character, and on the ground that the witness' affidavit showed that the statements in the application were not true.

Appellant objected to the evidence of Blackmon Mills identifying the check offered in evidence. The bill shows that the witness Mills "was permitted to identify a check offered in evidence as the check which he lost, and as his check, when he also testified that he could not read well, and that all railroad pay checks looked alike and were of the same color." The bill does not show what else the witness may have testified in regard to said check; nor does it negative the idea that he may have testified to other facts concerning the identity of said check. In the absence of such statement in the bill, we cannot presume that the witness did not fully identify said check, and show that he was capable of identifying the same. However, we think enough is shown in the bill to authorize the witness to identify the check. The fact that he could not read well, and that all railroad pay checks looked alike and were of the same color, would only go to the probative force of his testimony.

Appellant assigns as error the action of the court permitting the county attorney, in his argument to the jury, to state as follows: "At a recent term of the District court of McLennan county three persons were tried and convicted for theft from the person, and defendant's counsel ought to go over in McLennan county, and see how they treat that kind of fellows." This was objected to on the ground that there was no evidence to warrant the argument, and that the same was denunciatory of defendant, and calculated to injure him before the court. The court explains this bill by stating that it was in reply to the argument of appellant's counsel declaring to the jury that it was impossible for one to commit theft from the person of another while such party was awake and in possession of his faculties, without such party's knowledge of the facts; that he had never known or heard of a case of that character, etc. While we do not believe the court's qualification explains the matter so as to have authorized the argument, still no written motion was presented to the court, and requested to be given, excluding the consideration of the argument from the jury. Nor do we see in the argument itself any injurious consequences likely to result to appellant.

Appellant furthermore questions the ac-

tion of the court permitting said county attorney, in arguing the case to the jury, stating as follows: "At a trial of a case for theft from the person at a former term of this court eleven of the jurors believed that defendant in that case was guilty, and one of the jurors did not believe that defendant had taken the purse from the pocket of prosecuting witness in the case; and while the jury was out the other jurors took from the one juror his watch, his pocketbook, his keys," etc. Appellant insists that this referred to a former trial of this case, and was a statement on the part of the county attorney of the attitude of the jury which tried it. He objected because the same was not warranted by any evidence, and because it was calculated to injure the rights of defendant before the jury, and because the county attorney did in fact refer to a former trial of the case, and the fact that 11 jurors believed defendant guilty, and this was calculated to injure defendant before the court. The court explains this bill by stating "that counsel for defendant had previously, in his argument to the jury, stated and argued very strongly that it was impossible for one person to commit theft by privately stealing from the person of another, without the knowledge of such person; and in all of his experience in the courts of this country he had never seen such a case, and that he did not believe it was possible." The court further says "that it was not stated by the county attorney, nor did the jury know, that the circumstances related by him were connected in any way, directly or indirectly, with the case on trial; and defendant was in no manner injured or affected thereby, and the jury did not know of the objections made by counsel for defendant." Notwithstanding the explanation of the judge, it occurs to us that there is enough shown in the bill to the effect that the county attorney was referring to a former trial of the case, and that it was his purpose to impress upon the jury trying the case then how the jury stood in the former trial. We think this practice exceedingly reprehensible. But no written charge was requested to be given to the jury eliminating this matter from their consideration, and, in accordance with the practice adopted by this court, in the absence of some injurious effect shown or inevitably ensuing from the remarks made, we would not feel authorized to reverse the case on this account. For authorities, see White's Ann. Code Cr. Proc. § 1160. Article 823, Code Cr. Proc. 1895, inhibits the allusion to a former conviction. Here no former conviction was referred to, and accordingly appellant's assignment does not come within the statutory inhibition.

Appellant requested certain special instructions, based on his own evidence, to the effect that he found the pay check in the car on the floor. The court gave this defense in the main charge, so the requested instruction was not necessary.

Appellant also criticises the court's charge on circumstantial evidence on the ground that it was not full enough, and failed to instruct the jury that they must believe that no other person than the accused committed the offense. We have examined the charge of the court on circumstantial evidence, and, in our opinion, it gives both the affirmative and negative elements requisite to a charge on circumstantial evidence; that is, that the evidence must not only conduce to establish appellant's guilt to a moral certainty, but that it must also be strong enough to exclude every other reasonable hypothesis consistent with his innocence. This is the principle enunciated by the authorities as to a charge on circumstantial evidence. *Smith v. State*, 35 Tex. Cr. R. 618, 33 S. W. 339, 34 S. W. 960.

In motion for new trial appellant urges a reversal of the case because the verdict does not properly spell "penitentiary," the word used by the jury being "pentlary." This question has been before the court a number of times, and it seems that our place of imprisonment is susceptible of any mode of spelling. *Stepp v. State*, 31 Tex. Cr. R. 349, 20 S. W. 753; *Hoy v. State*, 11 Tex. App. 32; *McGee v. State*, 39 Tex. Cr. R. 190, 45 S. W. 709.

We have examined the record, and in our opinion, the facts amply support the verdict, and, there being no error apparent, the judgment is affirmed.

BROOKS, J., absent.

BUCK v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1903.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE—RECITALS—SUFFICIENCY.

1. On appeal from a dismissal by the county court of an appeal from a justice's judgment of conviction, the recognizance must state that the appeal is from the dismissal, and a recital that defendant was convicted in the county court is insufficient.

Appeal from Van Zandt County Court; Jno. W. Davidson, Judge.

Emmett Buck was convicted in the justice court of a misdemeanor, and appealed to the county court. From an order of the county court dismissing his appeal, he appeals. Dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted in the justice court, and appealed to the county court, where his appeal was dismissed. He gave notice of appeal, and entered into recognizance, the recitals of which are that "Emmett Buck, who stands charged in this court with the offense of carrying a pis-

tol, and who has been convicted of said offense, a misdemeanor, in this court, and his punishment assessed at a fine of \$25, shall appear before this court," etc. Motion is made by the Assistant Attorney General to dismiss this appeal because the recognizance is insufficient. It has been repeatedly held that in prosecution of an appeal from the justice to the county court, where the case has been dismissed in the county court and appeal taken to this court, the recognizance must distinctly recite that the appeal is prosecuted from such dismissal. It is not sufficient to state that he was convicted in the county court; nor is it true. The appeal in such instances is from the dismissal, and not from a conviction. *Alexander v. State* (Tex. Cr. App.) 32 S. W. 695; *Bennett v. State*, 37 Tex. Cr. R. 244, 39 S. W. 363; *Sturgeon v. State* (Cr. App.) 65 S. W. 1067, 3 Tex. Ct. Rep. 752; *Horton v. State* (Cr. App.) 68 S. W. 172, 4 Tex. Ct. Rep. 895.

The motion is well taken, and the appeal is dismissed.

BROWN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1903.)

INDICTMENT—FORM—SUFFICIENCY.

1. An indictment beginning, "In the name and by authority of the state of Texas," is not insufficient because of the omission of the word "the" between the words "by" and "authority."

Appeal from District Court, Delta County; H. O. Connor, Judge.

Frank Brown was convicted of incest, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of incest, the penalty assessed being 3½ years in the penitentiary. The indictment begins in the following language: "In the name and by authority of the state of Texas." It was contended below, as it is here, that this is not sufficient; that the word "the" should have been placed between the words "by" and "authority"; and this omission is fatal to the indictment. This is the precise question decided in *Joe Weaver v. State* (at the present term) 76 S. W. 564. For a discussion of the matter see that case. The indictment is sufficient.

No error appearing in the record, the judgment is affirmed.

CATER v. STATE.*

(Court of Criminal Appeals of Texas. Nov. 4, 1903.)

APPEAL—MISDEMEANOR—RECOGNIZANCE—SUFFICIENCY.

1. Under Code Cr. Proc. 1895, art. 887, providing that in appeal cases of misdemeanor

*1. See *Bail*, vol. 5, Cent. Dig. § 235.

*Rehearing denied December 2, 1903.

the recognizance shall recite that the party was convicted in the particular case of a misdemeanor, and his punishment assessed, etc., a recognizance which merely recites that appellant stands charged with the offense of swindling, and has been convicted and fined, etc., is insufficient to support an appeal.

Appeal from Harrison County Court; H. T. Lyttleton, Judge.

Tom Cater was convicted of swindling, and appeals. Appeal dismissed.

Y. D. Harrison, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The Assistant Attorney General moves to dismiss this appeal for want of a sufficient recognizance. The recognizance recites that appellant stands charged with the offense of swindling, "and who has been convicted in this court, to wit, January 17, 1903, and fined \$100 and one day in jail." The statute requires that the recognizance should recite that the party was convicted in the particular case, and of a misdemeanor, and his punishment assessed, etc. The recognizance is fatally defective in this respect, and does not substantially comply with article 887, Code Cr. Proc. 1895. The motion is sustained, and the appeal is dismissed.

BROOKS, J., absent.

DUNCAN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1903.)

CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

1. Where, on motion for a new trial on the ground of newly discovered evidence, it appeared that defendant had been under bond for several months between the indictment and the time of trial, that the absent witnesses lived in the vicinity, and their testimony could have been ascertained with the slightest diligence, a new trial was properly refused.

Appeal from District Court, Kaufman County; J. E. Dillard, Judge.

Virgie Duncan was convicted of murder, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at imprisonment in the penitentiary for a term of five years.

Attached to the motion for new trial are some affidavits alleging newly discovered testimony. All of this is cumulative of that produced on the trial. The killing occurred about the 20th day of August, 1900. The indictment was returned on September 10th following, and the trial took place in June, 1903. Appellant had been under bond all of the time, except when under arrest for forfeiting said bond. The absent witnesses

lived in the vicinity of the homicide, and their testimony could have been easily ascertained with the slightest diligence. Under the showing made we are of opinion that appellant has not brought himself within any of the rules in regard to granting new trials for newly discovered evidence.

It is contended the evidence is not sufficient to support the conviction of murder in the second degree. We think it is. Appellant's theory was self-defense and insulting conduct towards his wife. These matters were all clearly submitted to the jury.

The record presents no error, and the judgment is affirmed.

KNOX v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1903.)

KEEPING A SALOON OPEN—EVIDENCE—INSTRUCTION.

1. Evidence that defendant gave one person a drink of whisky, and, though refusing to sell or give whisky to another, pointed to the bar, and said to him, "There is some," is admissible, though the charge is of keeping open his saloon on election day.

2. An instruction on a trial for keeping open saloon on an election day need not state that defendant must have kept it open unlawfully and willfully; Pen. Code 1895, art. 185, not making unlawfully and willfully a part of the definition of the offense.

Appeal from Van Zandt County Court; Jno. W. Davidson, Judge.

H. A. Knox was convicted of keeping open his saloon on election day, and appeals. Affirmed.

T. R. Yantis, Jno. S. Spinks, and Chas. H. Reese, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of keeping open his saloon on an election day. He assigns as error the action of the court permitting the state to prove that appellant gave one of the witnesses a drink of whisky, and in permitting another to swear that appellant refused to sell or give him whisky, but said, waving his hand toward the bar, "There is some;" his contention being that the charge on which appellant was convicted was for opening and keeping open his saloon on election day, etc., and that the proof here was of matters which were other and distinct offenses, not charged in the complaint and information. While this is true, yet the facts here shown were evidence tending to prove that appellant kept his saloon open on said day, and as such were admissible in evidence. The case of *Anthony v. State* (Tex. Cr. App.) 55 S. W. 61, cited by appellant in support of his contention, is not in point here. That case is only authority for the purpose of showing that, where the statute embraces two offenses, proof of one will not sustain conviction in the other; but it is not authority for

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2312.

the proposition that where one transaction, or a part thereof, will tend to prove another, such evidence is not admissible.

Appellant objected to the charge of the court because, in defining the offense, the court did not instruct the jury that appellant must keep his saloon open unlawfully and willfully, but merely charged, if the jury believe that appellant opened or kept open his saloon on election day, etc., he would be guilty of said offense. We have examined the statute under which this offense was charged (see article 185, Pen. Code 1895), and unlawfully and willfully are not a part of the definition of the offense. In *Emerson v. State*, 76 S. W. 936, 8 Tex. Ct. Rep. 327; to which appellant refers, the defense was that he did not keep open his saloon; that he was having it cleaned, and the employé cleaning it opened the door to get water to be used in cleaning the saloon, and parties slipped in. Of course, if appellant opened his saloon for an innocent purpose, it was competent for him to show that as defensive matter. We do not understand that it was necessary for appellant to keep the doors of his saloon open. If even the doors were closed by defendant, as is here shown, and parties passed in and out as they pleased, that would be evidence of the fact that the saloon was open. *Whitcomb v. State*, 30 Tex. App. 269, 17 S. W. 258. And further testimony that he gave away whisky or that he sold whisky would be sufficient to make out the case. The evidence presented in this record shows that he both gave away and sold whisky. If it had been shown that the sale of the whisky to Dr. Robinson was on prescription, and that appellant was a druggist, or kept drugs for sale, this would have afforded a defense to that transaction; but there is no proof that appellant was a druggist, or kept drugs for sale.

We have examined the record carefully, and, in our opinion, the evidence sustains the conviction. The judgment is affirmed.

HOLLOWAY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1903.)

HOMICIDE—THREATS OF DEFENDANT—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.

1. On a prosecution for homicide, the testimony that defendant, on the evening of the homicide, and shortly before it, stated to witness that no man could beat him out of \$50 and live, and that he would kill him before he got home, was not objectionable on the ground that he mentioned no names, when other evidence showed that the statement referred to decedent.

2. Where, on a prosecution for homicide, defendant admitted the killing, the refusal of the court to require the state, after it had rested the case on purely circumstantial evidence, to call an eyewitness to the transaction, was not error; the eyewitness being a brother-in-law of defendant and unfriendly to the state, and having previously testified that he was so drunk

that he knew nothing about the facts in the case.

3. The state, on the cross-examination of witnesses called by defendant, on trial for homicide, to prove that he was a good, quiet, peaceable, and law-abiding citizen, was properly permitted to prove particular acts of misconduct on defendant's part.

4. Where, on a prosecution for homicide, there was evidence that defendant was at the time of the homicide under the influence of liquor, it was not error to charge on temporary insanity caused by the recent use of ardent spirits.

5. An instruction on a prosecution for homicide that the evidence relative to defendant having served in the penitentiary, which evidence was brought out on the cross-examination of defendant's witnesses to prove his good character, could only be considered as affecting his reputation as a good citizen, and for no other purpose whatever, was erroneous, as being on the weight of the evidence, and as calling the attention of the jury to the fact that he had been in the penitentiary.

Appeal from District Court, Falls County: Sam R. Scott, Judge.

W. W. Holloway was convicted of manslaughter, and appeals. Reversed.

Lewellyn & Connolly and J. W. Spivey, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of three years; hence this appeal.

Appellant objected to the testimony of Charley Meyers, to the effect that appellant, on the evening of the homicide, and shortly before the same occurred, stated to him, in the store, that no man could beat him (defendant) out of \$50 and live; that he would kill him before he got home. This testimony was objected to on the ground that defendant mentioned no names in connection with said statement, and that consequently said statement did not relate to deceased, and was irrelevant and immaterial. The bill does not state that these were all the facts attending the introduction of said evidence, so as to show that the court erred in admitting the same. There is other testimony tending to show that appellant alluded to deceased when he made this remark. One witness, to wit, Frank Dunklin, testifies directly that he made the same remark to him concerning a settlement with Goolsby, deceased. Looking at the record, there is no question but that the remark referred distinctly to deceased.

After the state had rested the case on purely circumstantial evidence, appellant requested the court to require the state to put W. M. Harding on the stand, who was an eyewitness to the transaction; insisting that, where there was an eyewitness, the state was required to place such eyewitness on the stand. In this connection, we are referred to *Thompson v. State*, 30 Tex. Cr. App. 325,

¶ 3. See Criminal Law, vol. 14, Cent. Dig. § 845.

17 S. W. 448. The doctrine announced in that case was discussed in *McCandless v. State*, 42 Tex. Cr. R. 655, 62 S. W. 745, and the views therein announced were seriously questioned. However, the court explains the bill of exceptions, showing that appellant confessed the act of killing, which has been held by this court to be positive evidence. Furthermore, the court stated that the eye-witness was a brother-in-law of appellant and was unfriendly to the state, and, besides, had previously testified he was so drunk at the time that he knew nothing about the facts of the case. We do not believe the court erred in this matter.

Appellant put his character in issue, as being a good, quiet, peaceable, and law-abiding citizen. During the cross-examination of appellant's witnesses, the state was permitted to prove by them that they had heard defendant had been sent to the penitentiary for theft of cattle; that it had been discussed in the neighborhood where witnesses and defendant lived, when his reputation was being discussed. This was objected to on the ground that it was immaterial and irrelevant to any issue in the case, and did not tend to prove or disprove whether or not defendant's reputation as a quiet and peaceable citizen was good. Of course, it was not competent for the state originally to put appellant's reputation in issue; but, he having done so, it was proper on cross-examination of his witnesses to prove by them particular acts of misconduct, or, where the proof was of general reputation on the part of appellant, that the witnesses had heard of particular acts of misconduct. *Rice*, Crim. Ev. p. 603, citing *State v. Merriman*, 34 S. C. 16, 12 S. E. 619.

We do not believe the court erred in charging on temporary insanity caused by the recent use of ardent spirits, as there was evidence tending to show that appellant was under the influence of liquor at the time of the homicide.

The following portion of the court's charge is also complained of as erroneous: "The evidence before you relative to defendant having served a term in the penitentiary can only be considered by you as affecting defendant's reputation as a good citizen, and you will consider the same for no other purpose whatsoever." This is objected to on the ground that such testimony could only be considered with reference to the credibility of appellant. The testimony does not appear from the record to have been introduced for this purpose, but merely in cross-examination of appellant's witnesses as to his character, which he placed in issue. However, it was not competent for the court to submit appellant's character as a good citizen to the jury, as was done in the above charge. It was a charge on the weight of the evidence, and was calling the attention of the jury directly to appellant's character as a good citizen, without even undertaking

to tell the jury for what purpose they could consider his character as a good or bad citizen. This testimony, pro and con, was before the jury, and, like other testimony, they could consider it for what it was worth, as shedding light on the transaction, and as indicating whether or not a person of the character appellant was shown to have borne would likely commit the offense charged against him. But it was not proper for the court to call attention to this matter, and thus to emphasize and make prominent the fact that there was evidence showing appellant had been in the penitentiary.

For this reason, the judgment is reversed and the cause remanded.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1903.)

MURDER—PROOF OF CORPUS DELICTI—EVIDENCE—SUFFICIENCY—INSTRUCTIONS.

1. Evidence on the trial of defendant, charged with the murder of her child, held sufficient to establish that the dead body of a child found in a certain place was the body of the child alleged to have been killed.

2. Where, on a prosecution for murder, the evidence showed that defendant was present and participated in the crime, an instruction on the law of accomplices was properly refused.

3. Where, on a prosecution for murder, the evidence showed that defendant came to the house of a witness, carrying a baby in her arms; that a few minutes later she left with the baby, going in the direction of a creek, where the remains of a dead child were later found; that defendant was away about an hour, when she returned to the house; that she stated that she had given the child to its father; that after her arrest she stated that a third person, against her wishes, had killed the child by throwing it into the creek—an instruction on the law of principals was properly refused.

Appeal from District Court, Leon County; J. M. Smither, Judge.

Lula Johnson was convicted of murder, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for the murder of her child, Essie Riggsby, and her punishment assessed at confinement in the penitentiary for life.

The first ground of the motion for new trial is that the evidence fails to clearly establish that the dead body, or portions of the dead body, found in Kechi creek, was the body, or portions of the body, of Essie Riggsby, alias Essie Johnson, the person alleged to have been killed by defendant. The evidence, as contained in the statement of facts, is substantially as follows: The justice of the peace testified that he found the remains of a child that looked like a negro about a year and a half or two years old in the creek. Witness saw parts of the skull and the legs and arms. The skin of the child was a yellow color, as if bleached by lying in the wa-

ter. He could not tell its sex. Mat Brown testified that some time in June, 1899, and prior to the finding of a child in Kechi creek, in Leon county, defendant came to her house, carrying in her arms her baby named Essie Rigby. Defendant reached witness' house about 10 o'clock in the morning. The baby was about two years old. It had a hat on its head. Defendant did not remain at witness' house but a few minutes, and then left, carrying the baby in her arms, going in the direction of said creek, where witness afterwards saw the remains of a dead child. Defendant was gone from the house about an hour or an hour and a half, when she again came to witness' house, but defendant did not then have her baby. Witness asked her what she had done with her baby, and she replied she had given it to its father, Tom Rigby. Witness noticed that defendant had the hat the baby had on when she first came to her house. It was about a mile from witness' house to the creek where the baby was found. It was the next week after defendant was at witness' house that the dead child was found. Witness has not seen the child since defendant was at her house. Defendant's child was a black child. Witness could tell the sex of the baby found. "Have never seen deceased since the day her mother had her at witness' house, unless that was her baby in the creek. Don't know that defendant drowned the child." Eliza Butler testified that she saw defendant on Kechi creek on the day her child was afterwards found in the creek. Saw no one with defendant. She had something in her hand. Never noticed what it was. Witness was working that day in the field near the creek, and walked down to the creek to get a drink of water. Knew defendant's child, but have not seen it since the remains of the child were found in the creek. Charley Dixon testified that, "after it was reported in the neighborhood defendant's child was missing, defendant came in the field where her mother, Fannie Johnson, and I were working, and spoke to us, and said, 'I hear you are all trying to send me to the penitentiary about my child.' I said, 'No, Lula, we are not trying to send you anywhere, but your child is said to be missing, and the people suspect you destroyed it.' She [defendant] said she had not destroyed her child; that she had given it to its father, Tom Rigby. I then told her to go at once and get her child, and prove that she was innocent. Soon after this, defendant was arrested, and the remains of a colored child was found in Kechi creek. I went to the creek, and pulled the child out. It had a piece of plow tied around its neck, and was in water about six inches deep. The child was considerably decomposed, but some of its skin was still on its bone. It was a black child, and the water had turned the skin a lighter color. After defendant was arrested, I assisted in making her bond, and after the same was made she lived with me

awhile, about a year; and defendant told me that Anderson Donaldson killed her child, Essie Rigby. Defendant said she was walking down the banks of Kechi creek, and that Anderson Donaldson was riding on horseback, just a few feet behind her, carrying her baby, Essie Rigby, in his arms; that she looked back, and saw that Donaldson had pulled off the baby's clothes; that suddenly she heard something hit the water, and she turned around and looked, and saw that Anderson Donaldson had thrown her child in the creek. She then began screaming, and Donaldson told her to hush, or she might go the same way, and that, if she said anything about it, he (Donaldson) would kill her. I tried to talk to her several times about it after this, but every time she would go to crying. She said, when she saw Donaldson had pulled her baby's clothes off, she asked what he did it for, and he cursed her and told her to go on ahead. She also said that Donaldson told her to go to Mat Brown's, and he would meet her there; that they came from Thompson's hill up the Guy's store road together, and that Donaldson went on the Guy's store road towards the Hopkin's place, and she went on to Mat Brown's. The day the child was supposed to be drowned, I saw Anderson Donaldson riding Frank Hopkin's horse, with a blind bridle, about 1 or 2 o'clock in the day. He was riding in the direction of the creek where the remains were found." Fannie Johnson, defendant's mother, testified that defendant had a child named Essie Rigby. She seemed to be an affectionate mother. "I asked Lula [defendant] about her child after it was drowned, and she said she had sent it to its father. The child was about two years old, and a girl." Tom Rigby testified that he was the father of the child said to have been drowned. "Defendant never at any time gave me the child. Have not seen Essie Rigby since she is said to have been drowned. At that time she was about a year and seven months old." This is substantially all the evidence adduced on the trial. We think the evidence is sufficient, under *Kugadt v. State*, 38 Tex. Cr. R. 681, 44 S. W. 989.

Appellant's second insistence is that the court erred in failing to charge the law of accomplice, and further erred in failing to charge the jury that if they believed the dead body, or portions of the body, found in Kechi creek was the body, or portions of the dead body, of Essie Rigby, alias Johnson, and if they further believed that said Essie Rigby, alias Johnson, was in fact killed by Anderson Donaldson, and that defendant herein was an accomplice in the commission of said offense, then, in that event, defendant could not be convicted under the indictment herein, charging her as the principal offender, and should be acquitted. Neither of these issues was raised by the evidence. The evidence shows defendant was present and participated in the crime, if she did not in fact

commit it in person. By all the known rules of law, this would constitute appellant a principal.

The third ground of the motion is that the court failed to charge the jury on the law of principals, under the facts of this case. In this there was no error.

No error is made to appear by this record, and the judgment is accordingly affirmed.

KIMBLE v. STATE

(Court of Criminal Appeals of Texas. Nov. 18, 1903.)

CRIMINAL LAW—SUFFICIENCY OF EVIDENCE—RECORD ON APPEAL.

1. Denial of new trial for insufficiency of the evidence cannot be reviewed, the record containing neither statement of facts nor bill of exceptions.

Appeal from District Court, Wise County; J. W. Patterson, Judge.

George Kimble was convicted of theft, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of one horse, and his punishment assessed at confinement in the penitentiary for a term of two years.

The record contains neither statement of facts nor bill of exceptions. The motion for new trial complaining of the insufficiency of the evidence cannot, therefore, be reviewed. The indictment is good, and the charge of the court is applicable to a state of facts provable thereunder. No error being manifest by the record, the judgment is affirmed.

FREEMAN v. STATE

(Court of Criminal Appeals of Texas. Nov. 18, 1903.)

HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE—APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY.

1. A bill of exceptions seeking to review a ruling excluding statements of defendant in a criminal case, as not a part of the *res gestæ*, should show the time elapsing between the difficulty and the statement, or the circumstances from which the time can be inferred.

2. Testimony that, when defendant was ordered to leave the pasture of the man whom he assaulted, he left, but was in the act of returning, when he was intercepted by assaulted, and defendant invited him out into the road, stating that he would like to take a shot at him, and at the distance of 20 or 30 steps fired twice from a shotgun, the second load taking effect between assaulted's waist and knees, and thereupon fled, was sufficient to sustain a conviction of assault with intent to murder.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Ray Freeman was convicted of assault with intent to murder, and appeals. Affirmed.

Don. A. Bliss, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault with intent to murder, the penalty assessed being two years in the penitentiary.

He complains the court erred in not permitting his grandmother to testify to his statements to her upon his reaching her house after the difficulty. The statement was to the effect that he had been struck with a stick by prosecuting witness and assaulted party, Henry Shannon. This was excluded on objection by the state, on the ground that it was hearsay and self-serving. The bill of exceptions fails to show the time elapsing between the difficulty and the statement, and does not state sufficiently the circumstances from which the time can be inferred. If this was sought to be introduced on the theory that it was *res gestæ*, the circumstances attending the statement or condition of appellant's mind and such environment should be shown, so as to bring it within that rule. This was not done in the bill. Nothing is stated in the record to exclude the idea that this was the narration of events uttered for the purpose of exculpation, and the bill rather shows that it was not *res gestæ*.

The contention is made that the evidence is not sufficient to show an assault with intent to murder. The state's testimony is to the effect that, when appellant was ordered by Shannon to leave his pasture, he left, but was in the act of returning, when Shannon again intercepted him, and defendant invited him out in the road, stating he would like to take a shot at him, and at the distance of about 20 or 30 steps fired two shots from a double-barrel shotgun, the second load taking effect from about Shannon's waist, or just below, to below his knees. Appellant immediately fled. We believe this testimony is sufficient. *Wilson v. State*, 37 Tex. Cr. R. 156, 38 S. W. 1013; *Hatton v. State*, 31 Tex. Cr. R. 587, 21 S. W. 679.

No error appearing in the record, the judgment is affirmed.

STANLEY v. EVANS et al.

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

PRINCIPAL AND SURETY—CONSIDERATION FOR CONTRACT—ADMISSION OF EVIDENCE—HARMLESS ERROR—DISCHARGE OF SURETY—EXTENSION OF TIME TO PRINCIPAL—ACQUIESCENCE.

1. Where a written contract signed by a surety recites a consideration, and in a suit thereon no plea of failure of consideration is interposed, the admission of evidence showing the consideration to have been cattle, instead of money, is not ground for reversal, though the evidence was superfluous.

2. The principals in a contract for the sale of cattle having failed to deliver in October,

¶ 2. See *Principal and Surety*, vol. 40, Cent. Dig. § 359.

as agreed, the purchaser notified them and their surety, and demanded performance. The surety replied that he thought the principals would fix it up. The principals offered to deliver other cattle, in March, at a different price, which was declined; the purchaser saying he would accept the same cattle in March at the same price. In March the purchaser, one of the principals, and the surety talked the matter over, and, as the purchaser testified, "they again promised to carry out their contract." Held, that the surety had acquiesced in the forbearance shown to his principals, so that he was not discharged thereby.

Appeal from District Court, San Saba County; Clarence Martin, Judge.

Action by J. T. Evans and another against J. E. Stanley and others. Judgment for plaintiffs, and defendant Stanley appeals. Affirmed.

W. M. Allison and Leigh Burleson, for appellant. Rector & Brown, for appellees.

STREETMAN, J. This suit was brought by appellees, Evans and Kirkpatrick, to recover of Huffstuttler Bros., as principals, and J. E. Stanley, as guarantor, damages for failure to comply with a written contract binding said Huffstuttler Bros. to deliver certain cattle to said appellees. Judgment was rendered against all the defendants, and Stanley alone has appealed.

The first assignment of error complains that the plaintiffs were permitted to prove a consideration for the contract paid in cattle, and not in money. The contract was in writing, and recited a consideration, and there was no plea of failure of consideration. There was nothing in the testimony that was introduced that could have had any prejudicial effect, especially as it was a trial by the court without a jury, and the evidence simply proved a fact which the law would have presumed in the absence of any proof. The evidence was unnecessary, but harmless.

Appellant pleaded that the time of the delivery of the cattle was extended from October, 1901, as provided by the contract, until March 1, 1902, and that this extension was made without his consent, and he was thereby released from his guaranty. The evidence showed that Huffstuttler Bros., the principals in the contract, failed to deliver the cattle in October, as agreed, and that the plaintiffs immediately notified them, as well as appellant, and demanded performance of the contract. Appellant replied, in substance, that he thought Huffstuttler Bros. would fix it up, as they had always performed their contracts with him. Huffstuttler Bros. replied with a proposition to deliver two year old steers in March, 1902, at \$18 per head, in lieu of the yearlings which they had agreed to deliver in October, 1901, at \$14 per head. Plaintiffs declined this, but informed said Huffstuttler Bros. that they would accept the same cattle in March, 1902, at \$14 per head, which they should have delivered in October, 1901. Plaintiffs testified further that they would have accepted them at any

time before March, 1902. The evidence further shows that plaintiff Evans and defendant Stanley and one of the Huffstuttler Bros. met at Ft. Worth in March, 1902. There is some conflict in the evidence, but the plaintiff Evans testifies that Stanley was fully informed of all that had transpired between his firm and Huffstuttler Bros., and they "all talked the matter over, and they again promised to carry out their contract." At this interview only three persons seem to have been present—Evans, Stanley, and A. A. Huffstuttler—and "they" could hardly be understood as not including Stanley. It could certainly, without any strained construction, be held to include him. In order to release Stanley as guarantor, it was necessary that there should have been an agreement, based upon a valuable consideration, and binding both parties to the contract for an extension of the time of delivery. *Benson v. Phipp*, 87 Tex. 578, 29 S. W. 1061, 4 Am. St. Rep. 128. And it would seem that, even after such agreement had been made without the knowledge of the guarantor, he might waive his discharge without any new consideration, and would do so by a new promise to perform the contract. 24 Am. & Eng. Ency. Law (1st Ed.) p. 832, and cases cited in note 1.

The lower court made the following among other findings: "That the time embraced between the maturity of the contract to the date of filing this suit was merely a forbearance of plaintiffs without any consideration, and that they were constantly demanding of defendants the complete performance of the contract in all its terms, and that defendant J. E. Stanley acquiesced therein by writing plaintiffs he had written defendants Huffstuttler Bros. to carry out their said contract with plaintiffs, and again by taking plaintiff Evans to Huffstuttler again in Ft. Worth 'to fix it up,' and that defendant J. E. Stanley by his acts and words ratified all that plaintiffs did in trying to secure their complete performance of the entire contract." We conclude that these findings are sustained by the law as applied to the evidence stated.

There being no error in the judgment, it is therefore affirmed. Affirmed.

GULF, C. & S. F. RY. CO. v. KINNEY.

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

CARRIER—NEGLIGENCE—DELIVERY OF FEED—INJURY TO CATTLE—SPECIAL DAMAGES—CERTIORARI.

1. A petition for certiorari which sets out part of the evidence given on the trial, but does not negative every phase of the evidence and facts which would justify the judgment, is insufficient.

2. In an action against a carrier to recover damages for injury to stock by negligent delay in delivery of feed shipments, where judgment was rendered for plaintiff, a petition for cer-

tiorari, alleging that the evidence failed to show that defendant "at the time that the freight was received" for shipment was notified that it was to be used for any special purpose, is insufficient to prevent the assessment of special damages, in that it did not show that notice was not given when the contract was made, or at some other time before such actual delivery for shipment.

Appeal from Coleman County Court; B. F. Rose, Judge.

Certiorari by the Gulf, Colorado & Santa Fe Railway Company to review a judgment rendered against it by a justice of the peace in favor of R. D. Kinney. From a judgment dismissing the writ, petitioner appeals. Affirmed.

J. W. Terry and Ballinger Mills, for appellant. T. R. Austin, for appellee.

STREETMAN, J. This appeal is from a judgment of the county court of Coleman county dismissing a writ of certiorari which had been issued to a justice's court in said county. The petition for certiorari and the transcript from the justice's court disclose the following facts: Appellee Kinney brought suit in said justice's court for damages against appellant, alleging that he had certain beef cattle at Coleman, Tex., feeding them for market. That he bought feed for them at Temple, and contracted with defendant to ship it to Coleman, and notified it of the purpose for which the feed was to be used, and that defendant agreed to carry it promptly; that said feed was shipped in three separate car loads, delivered on different days to defendant, and that each of the cars was considerably delayed, by which his cattle were damaged. Judgment was rendered for plaintiff in the justice's court. An appeal was not perfected, but appellant filed with the county judge its petition, and a writ of certiorari was issued. When the record was brought up, a motion was made to dismiss the certiorari, which was done.

The petition for certiorari does not purport to set out all of the evidence introduced in the justice's court, but undertakes by its averments to show that the evidence did not sustain the judgment. The allegations are as follows: "That the evidence in said cause showed upon trial thereof that said shipment of feed stuff, from the time it was delivered to the defendant company to the time it was delivered to the plaintiff in said cause, was worth no more in the market than it was at the time of delivery. That there had been no change in the market value from the time of the delivery to defendant company to the time it was delivered to the plaintiff, and that the evidence failed to show that the defendant, at the time that the freight was received for shipment, was notified that said shipment was to be used for any special purpose, or that said freight was to be used for the purpose of feeding plaintiff's cattle, or that any special damage would be suffered by the failure to deliver the said feed stuff,

other than such as would result from a change in the market value of said freight. That the defendant was therefore, under the evidence offered, entitled to judgment in its favor, notwithstanding the further evidence of plaintiff offered and introduced in the case, in substance to the effect that his cattle, which were in a pasture, and to which he intended to feed said freight, suffered damage by reason of his failure to receive said freight at the time he should have received it. That, in truth and in fact, no notice was given to defendant's agent at the time said shipment was received as to the object and purpose of said shipment, or that the same was to be used for the purpose of feeding plaintiff's cattle."

We do not think that it is absolutely necessary that the evidence in the trial court should be set out at length in a petition for certiorari, but, failing to do this, the petition should exclude the idea that there was evidence which might have justified the judgment, or that facts existed, though not proved, which would sustain it. The petition should expressly negative every phase of the evidence and the facts which would justify the judgment. Tried by this rule, we do not think the averments were sufficient. It is true that notice to the railroad company of the purpose of the shipment was necessary, in order to recover special damages. But if they had notice, that was sufficient, whether they received it at the time the property was delivered to them for shipment or prior to that time. The averments are "that the evidence failed to show that the defendant at the time that the freight was received for shipment was notified," etc., and "that, in truth and in fact, no notice was given to defendant's agent at the time said shipment was received," etc. The fact may have been, notwithstanding these allegations, that the contract was made for the shipment at a time prior to the delivery of the shipment, and that notice was given when the contract was made, or at some other time before the actual delivery of the freight for shipment. The petition for certiorari should have negated any theory of this kind which would have authorized a recovery, and, failing to do so, there was no error in dismissing it.

The judgment is therefore affirmed.

HALL v. CARTER.*

(Court of Civil Appeals of Texas. Oct. 21, 1903.)

WATERS AND WATER COURSES—IRRIGATION—WHAT IS ARID LAND—ACQUISITION OF WATER RIGHTS—PRESCRIPTION—EXTENT OF USE—MEASURE.

1. An instruction that by "arid portions of the state" are meant those portions where rainfall is insufficient for agricultural purposes, and irrigation therefore necessary, and that the fact that irrigation would increase the productive-

*Rehearing denied December 2, 1903, and writ of error denied by Supreme Court.

ness of the soil, in a place where the rainfall was sufficient, would not bring that place within the arid regions, was a correct statement of the law.

2. While one may obtain by prescription the right to use the waters of a stream for irrigation purposes, yet the right so obtained will not give the right to use a greater quantity of water than that used in acquiring such prescriptive right.

3. In measuring the extent of the use of water of a creek, so as to determine the extent of the prescriptive right acquired for its use for purposes of irrigation, it was not error to adopt as a measure the distance to which the water flowed on the lands of a lower proprietor during the period of obtaining the right.

4. The established facts that while defendant and his predecessors had for more than 10 years continuously, peaceably, and adversely used a portion of the waters of a creek for irrigation, their use had never been so extensive as to prevent the water from flowing in some quantity down to the south line of plaintiff's land, but that in June, 1902, the water ceased entirely to flow down to plaintiff's land, and that this was due to the use of the water by defendant for irrigation, authorized a finding that defendant's prescriptive right did not go to the extent of the use exercised by him in the year 1902.

Appeal from District Court, San Saba County; John W. Goodwin, Judge.

Action by J. M. Carter against N. J. Hall. From a judgment for plaintiff, defendant appeals. Affirmed.

W. M. Allison and N. A. Rector, for appellant. Rector & Brown and Leigh Burleson, for appellee.

STREETMAN, J. The purpose of this suit was to enjoin the appellant from using for irrigation the waters of a certain creek, known as "Simpson Creek," to such an extent as to prevent said water from flowing down to a 300-acre tract of land belonging to appellee, and situated on said creek. Simpson creek is a tributary of the San Saba river, several miles in length, running from south to north. Above a certain point, it is known as "Dry Simpson Creek," and that part of it does not appear to have been a stream or water course. Appellee's 300-acre tract of land, known as the "Jim Brown Tract," lies at the mouth of this creek, and runs back up the creek on its western side about a mile, and a small part of the tract extends across the San Saba and Red Bluff Road. On this portion of the land, Simpson creek originally received as a tributary, on its eastern side, Fleming Spring branch. Many years ago this branch was diverted, in order to be made serviceable for irrigation, and was made to empty into Simpson creek about 1,000 varas above its original mouth, on lands now owned by Mrs. Carroll. This Fleming branch is about 1,600 varas long from its mouth to its source, which is a spring. This spring is situated on the lands of appellant, which extend some distance on both sides of the Fleming branch towards its mouth. Other persons, not parties to this litigation, own the lands along Fleming creek and Simpson creek, between appel-

lant and appellee. Appellee claimed that Simpson creek, where it passed along by said 300-acre tract of land, was a water course, and that he needed and was entitled to use the waters of said creek for domestic purposes and stock water, and that appellant had in the year 1902 diverted the waters of Fleming branch to such an extent for irrigation on his land as to stop the flow of said water along said 300-acre tract; it being also alleged that the county and the place where these lands were situated was not in an arid portion of the state. Appellant, among other defenses, pleaded a right by prescription to use all the waters of said creek for the purposes of irrigation.

Special issues were submitted to the jury. These issues and the answers thereto being as follows:

"(1) Is that portion of Simpson Creek above the mouth of Fleming Spring branch a water course or stream? Answer. No.

"(2) Is Fleming Spring branch a water course or stream? Answer. Yes.

"(3) Into what creek or channel does Fleming Spring branch discharge its water, if any? Answer. Channel of Dry Simpson.

"(4) State whether or not that portion of Simpson creek between the mouth of Fleming Spring branch and the mouth of Barnett's creek is a water course, or was a water course on or about June 22, 1902? Answer. Yes.

"(5) Where is the mouth of Simpson creek, or that portion of it called 'Dry Simpson'? Answer. On east line of Taylor tract, just south of San Saba and Lometa Road.

"(6) Has that portion of Simpson creek lying between the mouth of Fleming Spring branch, excluding Fleming Spring branch, any definite source? Answer. No.

"(7) State whether or not that portion of Dry Simpson creek lying between its mouth and the mouth of Fleming Spring branch is a water course, or was such on and prior to June 22, 1902? Answer. Yes.

"(8) Is San Saba county situated in the arid portion of the state of Texas? Answer. No.

"(9) Is that portion of San Saba county in which defendant's surveys 595 and 596 lie, situated within the arid portion of the state? Answer. No.

"(10) State whether or not defendant, Hall, and those under whom he claims, and whose estate and title he has to surveys Nos. 595 and 596, have continuously, peaceably, and adversely diverted and used the water from Fleming Spring branch in irrigating the farm on said surveys Nos. 595 and 596 for a period of ten years before the 11th day of July, 1902? Answer. Yes.

"(11) When defendant, or those under whom he claims the McAnelly farm, irrigated the same, and during the time such irrigation was in progress, would the water in Fleming's creek flow in its channel? If so, how far would it flow? With reference to plain-

tiff's 300-acre tract of land, where would the water flow? Answer. Yes; it would flow down Dry Simpson, or its present channel, to the junction of its old channel with its present channel on the Taylor tract of land, south of public road.

"(12) Have the persons under whom defendant claims and holds title to his farm, annually, peaceably and adversely to plaintiff, Carter, for more than ten years prior to July 11, 1902, diverted the water of Fleming branch, and irrigated said farm to the extent that waters of said branch during said time ceased to flow down to or opposite plaintiff's land in question while such irrigation was in progress? Answer. No.

"(13) If you have, in answer to the preceding questions, found that defendant and those under whom he claims have for ten years prior to July 11, 1902, continuously used the waters of Fleming Spring branch for the purpose of irrigating defendant's land, then state whether or not during said period, or any part thereof, the water was used by defendant and his vendors, by or with the permission of plaintiff, or the vendors of plaintiff, or the agents or tenants of the vendors of plaintiff? Answer. No; not by permission of either.

"(14) If you, in answer to the preceding questions, found that defendant and those under whom he claims have for ten years prior to July 11, 1902, continuously, peaceably, and adversely used the waters of Fleming Spring branch, then state whether or not the waters of said creek during each of said ten years, while irrigation was in progress, ceased to flow down to or opposite plaintiff's 300-acre tract of land? Answer. No.

"(15) State whether or not the plaintiff was dependent upon the water of Simpson creek to supply his cattle on the 200-acre pasture with water, and his tenants on said 300-acre tract with water for domestic purposes? Answer. Yes.

"(16) Did the plaintiff and his tenants on said 300-acre tract use the water of Simpson creek for domestic purposes and to water his cattle in his pasture on said 300-acre tract of land? Answer. Yes.

"(17) State whether or not the defendant or his servants on or about June 22, 1902, diverted the water of Fleming Spring branch for the purpose of irrigation to such an extent as to dry up the water on Simpson creek opposite the plaintiff's land, as charged by plaintiff? Answer. Yes.

"(18) What is the reasonable value of plaintiff's time, or that of his servants, in watering his stock situated in the pasture on the 300-acre tract of land, during the time Simpson creek, opposite his pasture on said 300-acre tract, was dry? In answering this amount, you cannot allow for more than 30 days' time. Answer. \$60.

"(19) State the difference in value of defendant's crop raised on the McAnelly farm for the year 1902, and the value of said crop

had the plaintiff not restrained him by injunction from using water after July 11, 1902? Answer. \$225.

"We, the jury, find that plaintiff, Carter, is the owner of the 300-acre tract of land described in his petition, and that said Simpson creek forms the eastern boundary of this tract of land. And we, the jury, find that the defendant, Hall, is the owner of surveys Nos. 595 and 596, and that Fleming Spring branch has its source on survey No. 595, and runs through surveys Nos. 595 and 596."

Upon this verdict the court rendered a judgment perpetually enjoining appellant from diverting the waters of Fleming branch for the purpose of irrigation to such an extent as to prevent the water from flowing in some quantity down to the south line of said 300-acre tract of land.

In the first place, it is contended that there was no evidence to sustain the answers to the 11th, 12th, and 14th issues, to the effect that prior to 1902, while irrigation was in progress on appellant's lands, the water would flow down to or opposite appellee's lands. We have carefully examined the statement of facts, and while no witness testifies precisely to this state of facts, and while it is pointedly denied by some of the witnesses, yet there are facts and circumstances testified to upon which we think the jury might properly base these findings.

It is next insisted that the court misdirected the jury as to what was an arid portion of the state. The jury were instructed that "by 'arid portions of the state' is meant those portions of the state where rainfall is insufficient for agricultural purposes, and irrigation therefore necessary. Where the rainfall is sufficient for agricultural purposes, that portion is not within the arid region, even though irrigation might or would increase the productiveness of the soil there." Appellant claims that an arid portion of the state should have been defined as one "in which, by reason of insufficient rainfall, irrigation is necessary for successful farming for successive years." The question whether this was an arid portion of the state was, of course, an important one in this case. If it was not an arid portion of the state, then the use of water for irrigation was subordinate to the use for domestic purposes. In those portions of the state called "arid," by reason of the necessity for irrigation, this use is put upon an equal footing with such other necessary uses as water for stock and domestic purposes. We realize the difficulty of framing an accurate definition. Irrigation might be necessary for some crops, and not for others. It might be necessary on some character of lands, and not on others. It might be necessary for one year or a number of years, and not for other years. The jury cannot be instructed definitely with reference to all this. The prime question, however, seems to us to be whether the conditions are such that a jury can say that the use of water for ir-

rigation is a necessity. We believe that this question was submitted about as clearly and accurately as possible in the charge given. *Mud Creek Irrigation Company v. Vivian et al.*, 74 Tex. 170, 11 S. W. 1078.

The jury having found that the lands were not situated in an arid portion of the state, appellee was entitled to an injunction, unless appellant had acquired by prescription the right to the use of the water. This brings us to the third contention of appellant, which is that, under the findings of the jury, his prescriptive right was established. It is claimed that the distance to which the water would flow should have no bearing upon the question, and that the finding of the jury that appellant, Hall, and those under whom he claimed, had continuously, peaceably, and adversely diverted and used the water from Fleming Spring branch in irrigating the farm on said surveys for a period of ten years before the institution of the suit entitled them to a judgment. That a prescriptive right to use the waters of a stream may be acquired cannot be questioned, and there are many cases which hold that, whenever an upper proprietor uses so much of the waters of the stream as to create a material diminution of the water, the lower proprietor has a cause of action at once, although he may at the time suffer no actual damage, and that, if he delays long enough, the use of the upper proprietor will ripen into a prescriptive right. There is another principle, however, equally established. "The right acquired by prescription is only commensurate with the right enjoyed. The extent of the enjoyment measures the right." *Black's Pomeroy on Water Rights*, § 132. The use of a given amount, no matter how long continued, would give no right to use a greater quantity. In such cases, therefore, it becomes necessary not only to determine the character and length, but also the extent, of the use. The difficulty of measuring this in a case like the present is apparent. In a large stream, where the flow was reasonably uniform and constant, it would be easier to determine; but in a small branch fed by a single spring, varying in size at various seasons and during different years, the task is more difficult. Several methods suggest themselves, but each is open to objection. Appellant maintains that the fact that his head gates and irrigation ditches were in the same position as before was conclusive, but it is the use of the water, not the preparation to use it, which creates the prescriptive right. The number of acres irrigated suggests itself as a possible measure of the extent of the use, but this must necessarily be inaccurate on account of the varying character of crops and the variation in seasons, requiring more water at one time than another. The number of cubic feet used, or the proportionate part of the water of the stream, might afford a measure of the extent of use, but the evidence does not furnish any accurate information as to

this. We are unable to say that the method adopted by the court was not as accurate and practical a way of measuring the extent of the use by appellant as could have been resorted to under the circumstances of the case. The issues and the answers establish the fact that while appellant and his predecessors in title had for more than 10 years continuously, peaceably, and adversely used a portion of the waters for irrigation, their use had never been so extensive as to prevent the water from flowing in some quantity down to the south line of appellee's land, but that in June, 1902, the water ceased entirely to flow down to appellee's land, and that this was due to the use of the water by appellant for irrigation. We think it clear that these facts authorized the court in finding that appellant's prescriptive right did not go to the extent of the use exercised by him in the year 1902, and that to this extent the appellee was entitled to his injunction.

We have carefully considered all of the assignments of error, but the views expressed virtually dispose of them.

Finding no error in the judgment, it is affirmed. Affirmed.

BRADFORD et al. v. MALONE.*

(Court of Civil Appeals of Texas. Oct. 28, 1903.)

DEEDS — DEED GIVEN AS MORTGAGE — EVIDENCE — INSTRUCTIONS — CONSTRUCTION OF INSTRUMENT BY COURT — ISSUES.

1. Where the issue is whether a certain deed was intended to be a deed absolute or to operate as a mortgage, it is the duty of the court to submit the instrument, with the attending circumstances, to the jury, with such instructions as to the legal effect of the instrument as will meet the phases of the case under the evidence.

2. Where, in a suit for the correction of a deed and for possession, etc., the sole issue on the pleadings and evidence was whether the deed had been intended as a deed absolute or as a mortgage, it was error to submit to the jury the question whether there had been a conditional sale.

Appeal from District Court, Milam County; J. C. Scott, Judge.

Action by Tom Malone against Antony Bradford and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Henderson & Freeman, for appellants. E. A. Wallace and W. A. Morrison, for appellee.

COCHRAN, Special Judge. Appellee brought this suit, alleging that appellants on December 1, 1900, executed and delivered to him a deed intending to convey a tract of 12 acres of land in Milam county, but that a mistake was made in the description of the land. He further alleged that after the execution of the deed he rented the land to appellants for the succeeding year by parol

*Rehearing denied December 2, 1903.

¶ 1. See *Mortgages*, vol. 25, Cent. Dig. § 112.

contract, and that they had repudiated the contract, refusing to pay the rent or surrender the possession. The prayer of the petition was for the correction of the deed, for possession, and for rents. The appellants answered by general denial, by plea of not guilty, and specially that the land sued for was their homestead when the deed was executed. They admitted the execution of the deed, but alleged that it was given to secure a loan of \$107.50, made to the husband by appellee, and was therefore void. Upon the verdict of a jury judgment was rendered for appellee for the land and for the correction of the deed, from which Bradford and wife prosecute this appeal.

We find the facts to be as follows:

(1) Appellants were husband and wife on December 1, 1900, and were residing upon the land sued for, which was then their homestead.

(2) On the day named, appellants in due form executed a deed to appellee, conveying their said homestead; the mistake in the description being admitted.

(3) Appellants never surrendered the actual possession of the land, and have continued to reside upon it, but whether as tenants under appellee or as claimants of title in themselves depends upon the issue made as to the purpose and effect of the deed. On this point the testimony was conflicting, and presents the two issues made by the pleadings.

(4) The appellant husband, being imprisoned because unable to pay a fine and costs adjudged against him amounting to about \$100, offered to make a deed to his homestead to any one who would advance the money necessary for his release. The appellee was approached by the officer having him in charge, and was told of the offer. The wife was not consulted about this offer, but was in town with relatives, trying to arrange to secure a loan sufficient to get her husband out of jail. After appellee went with the officer to see the husband, these three went to the office of an attorney, where the wife and her relatives were, with others, and here the attorney told them that a mortgage could not be placed upon the homestead, and that a deed must be made. At this point the testimony is in hopeless conflict, the appellants and their witnesses testifying that it was the understanding that they were simply "signing away their land until fall, and that appellee was to make them a new deed in the fall upon return of his money"; while the appellee and his witnesses testified that nothing was said about deeding the land away until fall, and that the deed was absolute. As to the rent contract, appellee alone testified that such a contract was made, while appellants denied that any such contract was made. The value of the land was placed by appellants at about \$30 per acre for the land and a like amount for the improvements, and in this they were corroborated

by disinterested witnesses, while appellee testified that the land was not worth more than \$15 per acre, and that the improvements were of little value. There is no dispute as to the fact that before the end of the next year appellee was claiming title to the land, and that the deed was absolute, and that appellants were denying this claim.

(5) The issue of a valid conditional sale giving appellants the right to repurchase their land was not made by the pleadings, nor by the evidence of either side.

Conclusions of Law.

Only two errors are assigned which require consideration. Appellants complain of the action of the court in charging the jury that the deed in controversy was absolute on its face, and vested the legal title to the land in appellee. Had the court given this charge without requiring the jury to consider other parts of the charge in determining whether it was intended between the parties as a sale of the land or as a mortgage to secure the loan of money, the assignment might be sustained. The point that when an instrument is attacked as not expressing the contract between the parties, and parol evidence is introduced to explain an ambiguity, or to show that a part of the contract was not reduced to writing—as that a deed has attached to it a trust or is in fact a mortgage—the court should not construe the writing, and instruct the jury as to its legal effect, is not in accord with the rule of practice in this state. *Miller v. Yturria*, 69 Tex. 554, 7 S. W. 206; *Howard v. Zimpelman* (Tex. Sup.) 14 S. W. 59; *H. & T. C. Ry. Co. v. Shirley*, 89 Tex. 99, 31 S. W. 291. The rule announced in *Taylor v. McNutt*, 58 Tex. 73, followed in *Moss v. Helsley*, 80 Tex. 426, that it is the duty of the court in such cases to submit for the consideration of the jury the instrument with the attending facts and circumstances adduced in evidence, with such instructions upon the legal effect of the instrument as will meet the various phases of the case, does not necessarily conflict with the rule stated in the above cases. The charge in the present case follows the approved practice on this point, and clearly submits to the jury the issue of deed or mortgage as depending on the intent with which the instrument was executed.

Complaint is made of the following charge, as given: "If you believe from the evidence that the defendant signed and acknowledged the deed in evidence before you as provided by law for the conveyance of the homestead, and delivered same to plaintiff for the consideration of \$107.50 paid by Tom Malone in settlement of said fine and costs due by Antony Bradford, but you further believe that it was understood and intended between the parties to said conveyance that title to the land in controversy should vest in plaintiff and that the land should become the absolute property of plaintiff, you will find your

verdict for plaintiff, although you may believe from the evidence that the plaintiff at the time stated to the defendant that he would resell same land to Antony Bradford in the next fall for a sum stipulated at said time." The last clause in this charge we consider erroneous. The issue made by the pleadings and evidence was that of deed absolute or mortgage. The issue of a conditional conveyance was not made, and we think it was error for the court to submit this theory, and in so doing minimize, if it did not destroy, the evidence of appellants given in support of their contention that the deed was only intended to secure appellee in the return of his money, and that he was to execute an instrument in the form of a deed, sufficient to overcome the effect of the deed in controversy. For this error the judgment will be reversed, and the cause remanded.

Reversed and remanded.

CITY OF OAK CLIFF et al. v. STATE ex rel. GILL.*

(Court of Civil Appeals of Texas. Nov. 7, 1903.)

STATUTES—INCORPORATION OF CITIES—SPECIAL LAWS—CONSTITUTIONAL PROVISIONS—CONSTRUCTION—TITLE OF ACTS—SUFFICIENCY—INCONGRUOUS SUBJECTS—AMENDMENT OF ACTS—AMENDMENT BY TITLE—DESCRIPTION OF TERRITORY.

1. Const. art. 3, § 56, forbidding the Legislature, except as otherwise provided in the Constitution, to pass any local or special law incorporating cities, towns, and villages, or changing their charters, does not apply to cities of more than 10,000 inhabitants, the charters of which, by the express provisions of Const. art. 11, § 5, may be granted or amended by special act.

2. Const. art. 3, § 56, forbids the Legislature, except as otherwise provided in the Constitution, to pass any local or special law incorporating cities, towns, or villages, or "changing" their charters. Article 11, § 4, provides that cities and towns of less than 10,000 inhabitants may be "chartered" alone by general law, while article 11, § 5, provides that cities of over 10,000 inhabitants may have their charters "granted or amended" by special act. *Held*, that the Legislature may, by special act, repeal the charter of a city of less than 10,000 inhabitants, and annex it to a city of over 10,000, designating it as a ward of that city, and providing for its representation in the city council thereof.

3. The question whether a general law can be made applicable in any case is a question for the Legislature, with whose determination the courts will not interfere.

4. The question whether a general law can be made applicable in any case is not affected by the fact that a general law has been passed on the same subject.

5. Sp. Laws, 28th Leg. p. 391, the enacting clause of which reads "An act to amend section 2 of the charter of the city of Dallas relative to the boundary lines of said city, and adding thereto section 2a, changing said boundary and limits of the said city of Dallas and thereby including within and attaching to said city of Dallas the corporation and city of Oak Cliff

and certain other adjacent territory and abolishing the corporation of the city of Oak Cliff and declaring an emergency," and which provides for the changing of the boundary lines of the city of Dallas so as to include the city of Oak Cliff, for the issuance of \$50,000 of bonds by the city of Dallas, creating a sinking fund to pay the same, the disposition of the public school properties of Oak Cliff, and for the continuance of local option in the city of Oak Cliff, is not repugnant to Const. art. 3, § 35, providing that no bill shall contain more than one subject, which shall be expressed in its title.

6. Conceding that some of the provisions of the act are void because not included in its title, it would, under the express provisions of Const. art. 3, § 36, only affect the validity of the provisions not so included; and the sections of the act which actually and unequivocally annex all the territory therein described to the city of Dallas, and make the same subject to the charter, ordinances, and lawful regulations of said city, would stand.

7. Const. art. 3, § 36, providing that no law shall be revived or amended by reference to its title, but in such case the act revived or sections amended shall be re-enacted and published at length, does not apply where the sections added to an act are entire and complete in themselves.

8. Sp. Laws 28th Leg. p. 391, providing for the annexation of the city of Oak Cliff to the city of Dallas, calls to begin at low-water mark of the east bank of the T. river, where the south line of C. street intersects the west boundary of the city of Dallas; thence it runs westwardly to the north line of Oak Cliff; thence it runs west, south, and east with the boundaries of Oak Cliff, and again east across the T. river to the corporate line of the city of Dallas, and attaches all the territory within said boundaries to the city of Dallas. It begins on the west boundary of Dallas, and comes back to the west boundary of Dallas, and includes the territory of Oak Cliff and the territory intervening between Oak Cliff and Dallas. *Held*, that the territory annexed is sufficiently described to identify the same.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Information in the nature of quo warranto by the state, on the relation of C. A. Gill, against the city of Oak Cliff and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Etheridge & Baker, R. M. Clark, Geo. A. Titlertington, W. A. Bonner, Wm. Charlton, and M. L. Morris, for appellants. Wm. T. Henry, J. J. Collins, R. C. Porter, W. M. Alexander, Wm. P. Ellison, and Walter S. Lemmon, for appellee.

BOOKHOUT, J. On July 1, 1903, appellee filed in the district court of the Forty-Fourth Judicial District of the state of Texas its information in the nature of a quo warranto, on the relation of C. A. Gill, individually and as acting mayor of the city of Dallas, against the city of Oak Cliff and the various officers thereof, and against the trustees of the independent school district of Oak Cliff, seeking a judicial determination to the effect that the said city of Oak Cliff became disincorporated on July 1, 1903, and that its territory became annexed to the city of Dallas, and that the officials of Oak Cliff and the trustees of the said independent School District,

*Rehearing denied November 28, 1903, and writ of error granted by Supreme Court.

† 3. See Constitutional Law, vol. 10, Cent. Dig. § 130.

in continuing thereafter to perform their respective official duties, became usurpers, and praying judgment of ouster. The petition recites that the city of Dallas was and is a municipal corporation of more than 10,000 inhabitants, duly incorporated as such by a special act of the Legislature of Texas; that, by amendment to the charter of the city of Dallas as then existing, the corporation of the former city of Oak Cliff was abolished, and the corporate limits of the city of Dallas extended by the terms of the said act of the Legislature to include the territory comprised within the limits of the former city of Oak Cliff and some intervening territory; that by virtue of the provision of the said act of the Legislature the public affairs of the city of Oak Cliff under the new arrangement were adjusted, and its corporate property, including the property of the public schools situated in the city of Oak Cliff, disposed of, and the future rights and relations of the two towns after the consolidation determined, as explicitly shown by the allegations of the petition; that the act was duly passed by the Legislature of the state of Texas, and approved by the Governor of Texas, and became effective on the 1st day of July, 1903; that all of the officers of Oak Cliff and the trustees in charge of the public schools refuse to recognize the validity of the said act, or in any respect to yield obedience to the same, but continued to exercise their former prerogatives and authority without regard to the said law. The defendants interposed general and special exceptions challenging the validity of the act amending the charter of Dallas so as to include Oak Cliff. The exceptions were overruled, and exception taken. The cause was submitted to the court on an agreed statement of facts, and from a judgment in favor of plaintiff the defendants appealed.

The first assignment of error reads: "The court erred in not sustaining the general exception of these defendants to the information exhibited herein against them, in that the purported act made the basis of this proceeding is void, in that said act constitutes a special or local law designed to be put in force in Oak Cliff, a city having less than ten thousand inhabitants, and incorporated under the general law, and same is in contravention of the inhibitions contained in section 4 of article 11 and section 56 of article 3 of the Constitution, and the same is not warranted by section 5 of article 11 thereof." Under this assignment five propositions are presented. In the first it is insisted that "the inhibition contained in section 4 of article 11 of the Constitution renders the Legislature powerless to repeal by special act the charter of a city having a population of less than ten thousand inhabitants, and incorporated under general law." In the next three propositions it is asserted that the act in question is void, in that: "(1) It violates that portion of section 56 of arti-

cle 3 of the Constitution which inhibits the Legislature, except as otherwise provided in the Constitution, from passing any local or special law incorporating cities, or changing their charters. (2) It violates that portion of section 56 of article 3 of the Constitution which inhibits the Legislature, except as otherwise provided in the Constitution, from passing any local or special law changing the name of places, in that the purported act attempts to change the name of Oak Cliff to that of the Ninth Ward of the city of Dallas. (3) It is violative of that provision of section 56 of article 3 of the Constitution which provides: 'And in all other cases where a general law can be made applicable, no local or special law shall be enacted,' in that, prior to the passage of the act in question, there existed a general law for the disincorporation of cities incorporated under the general laws." The fifth proposition is: "The act in question is not authorized by section 5 of article 11 of the Constitution, in that the city of Oak Cliff, as affirmatively disclosed by the information, contains a population of less than ten thousand inhabitants, and hence that section is without application."

The provisions of the Constitution, the construction of which is called for by appellants' contentions, are as follows: Article 11, § 4: "Cities and towns having a population of ten thousand inhabitants or less may be chartered alone by general law," etc. Article 11, § 5: "Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the Legislature," etc. Article 3, § 56: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing . . . incorporating cities, towns or villages or changing their charters."

It is held that the limitations and prohibitions contained in section 56, art. 3, of the Constitution, were intended to operate on such subjects as are embraced alone by that section. *City of Dallas v. Western Electric Co.*, 83 Tex. 243, 18 S. W. 552. The subject of incorporating of cities having more than 10,000 inhabitants, and granting and amending their charters, is embraced in section 5, art. 11, of the Constitution, and is excepted from the prohibitions contained in section 56, art. 3. *City of Dallas v. Western Electric Co.*, supra; *Smith v. Grayson Co.*, 18 Tex. Civ. App. 153, 44 S. W. 921. It is clear that by terms of section 5, art. 11, the Legislature has authority to extend the limits of a city of more than 10,000 inhabitants so as to include a city of less than 10,000 inhabitants, unless it is prohibited by section 4, art. 11. Is the power prohibited by this clause of the Constitution? It will be noted that the power conferred by section 5, art. 11, to enact special laws in relation to cities of more than 10,000 inhabitants, not only includes the power to grant charters, but the power by special law to amend them. In section 4 of article

11, which imposes a limitation upon the authority of the Legislature, restricting its power by special law over cities of less than 10,000 inhabitants, only the word "chartered" is used; and in order to extend the limitation so as to include the amendment or repeal of a charter of a city of less than 10,000 inhabitants, and dissolve its corporate existence, the limitation could only arise by implication, it not being expressly stipulated therein. The question arises then, will the express authority contained in section 5, art. 11, be abrogated by the implied limitation contained in section 4, art. 11?

In *Lytle v. Halff*, 75 Tex. 132, 12 S. W. 610, Judge Stayton, speaking for the Supreme Court, uses the following language in relation to an implied constitutional limitation of power: "A prohibition of the exercise of a power cannot be said to be necessarily implied, unless, looking to the language and purpose of the Constitution, it is evident that without such an implication the will of the people, as illustrated by a careful consideration of all its provisions, cannot be given effect. * * * An intention to restrict the power of a state Legislature, and especially in reference to such a matter, further than this is done by express limitations, is not to be presumed; and, when it is claimed that this is done by implication, those so claiming ought to be able to point out the provision or provisions of the Constitution which require such implication to give effect to the will of the people evidenced by the entire instrument." In *Day Land & Cattle Company v. State* (Sup.) 4 S. W. 874, Judge Stayton, again speaking for the court, says: "When it is intended to withhold a power from the Legislature, this is done by some provision of the Constitution clearly expressing such intention." In the case of *City of Cleburne v. Railway Company*, 66 Tex. 461, 1 S. W. 342, Judge Robertson, for the Supreme Court, says: "A power will be implied only when without its exercise an express duty or authority would be nugatory." In the very recent case from the Supreme Court of *Brown v. City of Galveston*, 75 S. W. 488, 7 Tex. Ct. Rep. 763, in which case the Supreme Court cites with approval *Lytle v. Halff*, it is declared: "As we have seen, the power of the Legislature can be limited only by a prohibition contained in the Constitution, either in express terms, or by fair implication arising from the instrument. If the purpose the convention had in adopting the section in question can be effected without the prohibition, none will be implied."

Again, it is to be observed that section 56, art. 3, prohibits, except as otherwise provided in the Constitution, the incorporation of, or changing the charter of, cities by special or local law, while the prohibition in section 4, art. 11, is against the chartering of cities of less than 10,000 inhabitants by special law. It would seem that the omission of the words "changing their charters," as

contained in section 56, art. 3, and the use of the word "chartered" alone in the clause which expressly confers power on the Legislature in reference to cities of less than 10,000 inhabitants, was with the intent that the limitation was not to apply to changing of charters or to the repeal of the charter. In our opinion, the power of the Legislature to repeal the charter of a city of less than 10,000 inhabitants by special law is not prohibited by section 4, art. 11, of the Constitution. We hold that the Legislature has power by special law to repeal the charter of a city of less than 10,000 inhabitants. In *Central Wharf & Warehouse Co. v. City of Corpus Christi*, 57 S. W. 982, decided by the Court of Appeals for the Fourth District, and in which a writ of error was refused by the Supreme Court, it was so held. See, also, *Worthley v. Steen*, 43 N. J. Law, 542; *Tiger v. Morris Common Pleas*, 42 N. J. Law, 631; *Chandler v. Boston*, 112 Mass. 204.

The Legislature had authority, upon the disincorporating of Oak Cliff, and annexing its territory to the city of Dallas, to designate the same as a ward of the city of Dallas, and make provision for its representation in the city council of that city.

The question whether a general law can be made applicable in any case is a question for the determination of the Legislature, and the courts will not interfere with their judgment in this respect. *Smith v. Grayson County* (Tex. Civ. App.) 44 S. W. 921; *City of Dallas v. Western Elec. Co.*, 83 Tex. 244, 18 S. W. 552; *City of Indianapolis v. Navin* (Ind. Sup.) 47 N. E. 525, 41 L. R. A. 337; *Williams v. City of Nashville*, 89 Tenn. 487, 15 S. W. 364; *Ex parte Falk*, 42 Ohio St. 688; *State v. Powers*, 38 Ohio St. 54; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *Clarke v. Jack*, 60 Ala. 278; *People v. McFadden*, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; *Owners of Land v. People*, 113 Ill. 315; *Wichita v. Burleigh*, 36 Kan. 34, 12 Pac. 332; *City of St. Louis v. Shields*, 62 Mo. 247; *Dillon on Mun. Corporations*, § 48. The fact that a general law has been passed by the Legislature on the same subject does not affect the question. In the case of *Smith v. Grayson County* and *City of Dallas v. Western Electric Co.*, above cited, there was a general law in existence covering the subject at the time of the passage of the special law whose existence was being questioned. It was held by the Supreme Court of Indiana in *Indianapolis v. Navin*, above cited, that the fact that a preceding Legislature may have considered that a general law on the subject could be made applicable was not binding upon a succeeding Legislature.

We conclude that the contentions of appellants under their first assignment of error are without merit.

It is contended that the act under consideration contravenes section 35, art. 3, of the Constitution, in that the title of said act expresses two separate, distinct, and incongru-

ous subjects, to wit: First, the changing the boundary limits of the city of Dallas; second, abolishing the distinct corporation of the city of Oak Cliff.

The provision of the Constitution referred to provides that "no bill * * * shall contain more than one subject which shall be expressed in its title." The enacting clause of the act reads: "An act to amend section 2 of the charter of the city of Dallas relative to the boundary lines of said city, and adding thereto section 2a, changing said boundary and limits of the said city of Dallas and thereby including within and attaching to said city of Dallas the corporation and city of Oak Cliff and certain other adjacent territory and abolishing the corporation of the city of Oak Cliff and declaring an emergency." The subject under consideration by the Legislature was the extension of the corporate limits of the city of Dallas so as to annex the city of Oak Cliff. When we look to the general provisions of the act, we think they fairly relate to the objects set forth in the title thereof. The changing of the boundary lines of the city of Dallas so as to include the city of Oak Cliff necessarily includes the disincorporation of Oak Cliff. The provisions of the act which appellants specifically object to as not being sufficiently indicated in the title are those relating to the issuance of \$50,000 of bonds by the city of Dallas, and the creating of a sinking fund to pay the same, the disposition of the public school properties of Oak Cliff, and the provision in regard to saloons, and the maintenance of local option then existing in that territory. It is fair to presume that the members of the Legislature contemplated that, owing to the difference in the character of the two cities, the indebtedness and public improvements of one exceeded that of the other, and hence made provision for the issuance of bonds to equalize those matters. They may have contemplated that a system of public schools was being conducted in Oak Cliff, and that it was necessary before its disincorporation to make provision for the disposition of the school properties. The act does this, and makes the schools a part of the system of the city of Dallas, and provides for their maintenance. Local option was in force in Oak Cliff, and the act declares the territory added to Dallas a residence district, and, in effect, provides for the continuance of local option therein. Those were matters which could be fairly anticipated from the title to the act, and the same does not embrace two separate and distinct subjects, in contemplation of article 3, § 35, of the Constitution. *Peavy v. Goss*, 90 Tex. 89, 37 S. W. 317; *Austin v. G.*, C. & S. F. Ry. Co., 45 Tex. 234; *Flieder v. State* (Tex. Cr. App.) 49 S. W. 376; *Day Land & Cattle Co. v. State* (Sup.) 4 S. W. 872; *H. & T. O. Ry. Co. v. S.* (Tex. Civ. App.) 62 S. W. 114; *H. & T. O. Ry. Co. v. Odum*, 53 Tex. 352; *Dillon on Mun. Cor.* (4th Ed.) § 51;

Cooley on Const. Lim. (2d Ed.) p. 144 et seq. The several provisions of the act which it is contended are not included in the title are germane to the main subject, and appropriate thereto. The title of the act is sufficient to give notice of the subject-matter of the law as enacted. The contention of appellants that the title includes separate and incongruous subjects, of which no notice is given therein, is without merit. *Smith v. Grayson County* (Tex. Civ. App.) 44 S. W. 921; *Thornburgh v. City of Tyler* (Tex. Civ. App.) 43 S. W. 1054; *City of Austin v. McCall* (Tex. Sup.) 68 S. W. 793; *Johnson v. Martin*, 75 Tex. 40, 12 S. W. 321; *Giddings v. San Antonio*, 47 Tex. 548, 26 Am. Rep. 321; *Stone v. Brown*, 54 Tex. 330; *Werner v. City of Galveston*, 72 Tex. 22, 7 S. W. 726, 12 S. W. 159; *Dillon on Mun. Cor.* § 57; *Tiedman on Mun. Cors.* § 28; *Cooley on Const. Lim.* (2d Ed.) p. 151. For the provisions of the act, see *Sp. Laws* 28th Leg. p. 391. If we concede, which we do not, that some of the provisions of the act are not properly included in the title the result would be the same. Sections 2a and 2a1 actually and unequivocally annex all the territory therein described to the city of Dallas, and make the same subject to the charter, ordinances, and all lawful regulations of the city of Dallas. If some of the provisions of the act are void because not included in the title of the act, it would only affect the validity of the provisions not so included. *Const. art. 3, § 35*; *Clark v. Finley* (Tex. Sup.) 54 S. W. 343.

The fourth and fifth assignments are grouped, and the following proposition is presented thereunder: "The act in question expressly purports to amend section 2 of the charter of the city of Dallas, relative to the boundary lines of said city, and adding thereto section 2a, changing said boundary lines and limits of the said city of Dallas, and the amended section was not re-enacted and published at length, and the boundaries of the city of Dallas can be ascertained only by reading both the purported amended section and the original section purporting to be amended; and the act is therefore void, as being repugnant to the requirement of section 36 of article 3 of the Constitution." The evil aimed at by the framers of the Constitution in providing in section 36, art. 3, that "no law shall be revived or amended by reference to its title; but in such case the act revived or the section or sections amended shall be re-enacted and published at length," was to prohibit the amending of a law by the insertion of words therein, and thus changing it. It was not intended to apply when the sections added were entire and complete in themselves. As stated by 23 *American & English Encyclopedia of Law* (1st Ed.) p. 282: "The requirement does not apply to supplemental acts not in any way altering or modifying the original act; to those really adding new

sections to an existing statute without modifying; nor to acts complete and perfect in themselves, and not purported to be amendatory, which by implication amend other legislation on the same subject." The amended law is complete and entirely intelligible, standing alone. *Womack v. Garner* (Tex. Civ. App.) 30 S. W. 590; *Id.* (Sup.) 31 S. W. 358; *Quinlan v. H. & T. C. Ry. Co.*, 89 Tex. 356, 84 S. W. 738; *Clark v. Finley*, 93 Tex. 171, 54 S. W. 344; *Weekes v. City of Galveston* (Tex. Civ. App.) 51 S. W. 544; *Snyder v. Compton* (Tex. Sup.) 28 S. W. 1062; *Johnson v. Martin* (Tex. Sup.) 12 S. W. 324; *Nobles v. State* (Tex. Cr. App.) 42 S. W. 978; *Cooley's Const. Lim.* p. 151.

The act in question calls to begin at low-water mark of the east bank of the Trinity river, where the south line of Commerce street intersects the west boundary of the city of Dallas; thence it runs westwardly to the north line of Oak Cliff; thence it runs west, south, and east with the boundaries of Oak Cliff, and again east across the Trinity river to the corporate line of the city of Dallas, and attaches all the territory within said boundaries to the city of Dallas. It begins on the west boundary of Dallas, and comes back to the west boundary of Dallas. It includes the territory of Oak Cliff and territory intervening between Oak Cliff and the city of Dallas. The territory annexed is sufficiently described to identify the same. *Sanger Bros. v. Roberts*, 92 Tex. 312, 48 S. W. 1; *Mansel v. Castles*, 93 Tex. 414, 55 S. W. 559; *State v. Wofford*, 90 Tex. 514, 39 S. W. 921; *Coffey v. Hendricks*, 66 Tex. 678, 2 S. W. 47.

We conclude that there is no error in the record, and the judgment is affirmed.

LOW v. E. J. BROAD & CO.

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

SALES—SUBSEQUENT PURCHASER—RIGHT TO GOODS AS AGAINST PRIOR PURCHASER.

1. A contract of sale which has not been completely executed will not entitle the purchaser thereunder to retain the goods as against a subsequent purchaser.

Appeal from Brown County Court; *S. E. Coffee*, Judge.

Action by E. J. Broad & Co. against Arthur Low. Judgment for plaintiff, and defendant appeals. Affirmed.

I. J. Rice, for appellant. G. N. Harrison, for appellee.

STREETMAN, J. Appellees brought this action for damages on account of the conversion of two planters. Appellant did not deny that he obtained the planters, but claimed that he had acquired title to them by purchase from Rising Star Hardware & Supply Company before said concern sold them to appellees. We do not deem it necessary to

set out the evidence, but we have concluded that the trial court was correct in assuming that the evidence failed to show an executed contract of sale to appellant prior to the sale of the planters in question to Broad & Co., and that, although the Rising Star Company may have broken its executory contract with appellant, the title to the planters passed by the sale to Broad & Co., and they were entitled to recover of appellant for the conversion.

Finding no error in the judgment, it is affirmed. Affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. SMITH.

(Court of Civil Appeals of Texas. Nov. 14, 1903.)

CARRIERS—NEGLIGENCE—INJURY TO LIVE STOCK—INSTRUCTIONS—OFFER TO COMPROMISE—ADMISSION—EVIDENCE—ERROR.

1. A charge in an action against a carrier for negligent injuries to live stock defined negligence as "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." *Held*, that the use of "reasonable and prudent person," instead of "reasonably prudent person," is harmless error, in view of the entire definition, and the fact that appellant failed to request a more specific instruction.

2. A claim purporting to be the entire amount of damages was made by plaintiff against a carrier for negligent injury to live stock at a time when there had been no negotiations for a settlement. Plaintiff denominated the transaction at the time, and also at the trial, as an offer to compromise. *Held*, that the claim was not an offer to compromise, but was in the nature of an admission of fact, and competent against plaintiff on the question of damages.

3. Where a claim in the nature of an admission of fact is introduced in evidence in an action against a carrier for negligent injury to live stock, though designated by the plaintiff at the time it was made and at the time of the trial as an offer to compromise, when in fact it was not, it is error for the court to charge on the effect of such evidence if the jury should find it was in the nature of a compromise.

4. A charge in an action against a carrier for negligent injury to live stock which authorized the jury to assess damages for injuries necessarily received by the stock in transit, irrespective of the carrier's negligence, is erroneous.

Appeal from Taylor County Court; *D. G. Hill*, Judge.

Action by T. T. Smith against the St. Louis Southwestern Railway Company and another. From a judgment for plaintiff, the above named defendant appeals. Reversed.

J. M. Wagstaff, for appellant. Bowyer & Tillett, for appellee.

SPEER, J. Upon the trial of this cause, which was an action to recover damages for injuries to a car of horses occasioned by the negligence of appellant, the court defined negligence to be "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under

the existing circumstances would not have done." To this charge the first error is assigned. While we are not disposed to sanction the use of the words "a reasonable and prudent person," rather than the often approved expression "a reasonably prudent person," in defining negligence, yet, in view of some of the decisions, we are not prepared to hold the same in this instance to be reversible error, especially when the entire definition is read, and the failure of appellant to request a more specific instruction is considered. See *Houston & T. Ry. Co. v. Oram*, 49 Tex. 341; *Fort Worth & D. C. Ry. Co. v. Partin* (Civ. App.) 76 S. W. 236, 8 Tex. Ct. Rep. 266; *Texas & P. Ry. Co. v. Curlin* (Tex. Civ. App.) 36 S. W. 1003; *San Antonio & A. P. Ry. Co. v. Safford* (Tex. Civ. App.) 48 S. W. 1105; *Texas & N. O. Ry. Co. v. Black* (Tex. Civ. App.) 44 S. W. 673. If the charge was not as clear and explicit as appellant desired, it should have requested a better one.

The judgment must, however, be reversed for errors appearing in other portions of the charge. Upon the effect to be given by the jury to a certain written claim for damages presented by appellee, the court charged as follows: "You are further charged that if you should find from the evidence that the claim put in to the defendants for damages was in the nature of a compromise and settlement of his claim for damages, and not as a true and correct amount of damages for the damages sustained by reason of said shipment, then the plaintiff is not bound by said claim as amount of his damages, and you will not consider it for that purpose." Appellee caused to be made a detailed statement of the injuries inflicted upon his stock, and the amount of his damages in consequence, and presented the same to the Texas & Pacific Railway Company, one of the defendants in this suit. This was done at a time, it seems, when there had been no negotiations pending between the parties looking to a settlement, and the amount then claimed—\$95—purported to be the entire amount of his damages. Although the appellee then and at the time of trial denominated the transaction an offer to compromise, it does not appear to have been such. As said in an Indiana case: "A party cannot render an admission incompetent by testifying that he intended it to bring about a compromise, unless there was in fact an honest controversy between the parties and a treaty, pending or proposed, to settle it without resort to litigation." *Steeg v. Walls*, 30 N. E. 312; *Hood v. Tyner*, 28 N. E. 1033. The evidence was competent as tending to contradict appellee's statements as to the extent of the injuries received, and the amount of damages he had sustained. *Ft. Worth & D. C. Ry. Co. v. Lock* (Tex. Civ. App.) 70 S. W. 456. And being admissible, it was an invasion of the province of the jury for the court to say the evidence should have this or that effect. The

jury, and not the court, should say whether, considering appellee's other testimony explaining that the injuries to his stock had not developed at that time, his admissions were binding upon him, since, as we think, the evidence was more in the nature of an admission of fact than of an offer to compromise. Compromise involves the idea of making a concession for the sake of peace, but rendering a statement of one's injuries, with a demand for the utmost farthing, is quite another thing.

Again, the court used the following language in his charge upon the measure of damages: "(7) You will first determine from the evidence what the reasonable value of said stock were in the market at Dyersburg, Tenn., at the time they would have arrived by the usual and customary time taken to transport said stock from Abilene, Texas, to Dyersburg, Tenn., without reference to the injury or damage sustained by them, if any. (8) You will then find from the evidence the reasonable value of said stock in the market at Dyersburg on the date of their arrival in their injured and damaged condition, if you should find that any of said stock were killed, injured, and damaged in value, caused by the negligence and carelessness as alleged in plaintiff's pleadings; and, if this last amount is less than the value found under the preceding subdivision No. 7 of this charge, such difference, if any, in said amounts, will be the amount of your verdict for the plaintiff, if you should find for the plaintiff." Appellant complains that under this instruction the jury was authorized to allow appellee damages for the injuries necessarily received by his stock in transit, irrespective of the carrier's negligence, and the contention is not without merit. This, of course, was not in the trial court's mind, but the charge was well calculated to mislead the jury. The jury should have been instructed to determine from the evidence in the first place what the reasonable market value of appellee's stock would have been in the market at Dyersburg, Tenn., at the time and in the condition they would have arrived, but for the negligence of the defendant, if any, and then as directed in the eighth subdivision above quoted.

For these errors, the judgment is reversed and the cause remanded.

INTERNATIONAL & G. N. R. CO. v. EARNEST & BOST.

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

CARRIERS—LIVE STOCK—INJURY—CONNECTING CARRIERS—CONTRACT LIMITING LIABILITY.

1. A shipper who places cattle in the pens some hours before the time agreed upon with the carrier for their departure, cannot recover from the carriers for their shrinkage in weight

owing to heat and loss of food and water during that time.

2. Where a contract for the carriage of cattle limited the carrier's liability to damage occurring on its own line, the carrier is not liable for damage resulting from delays on connecting lines, and the jury should be so instructed.

Appeal from Hays County Court; Ed R. Kone, Judge.

Action by Earnest & Bost against the International & Great Northern Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

W. P. Donalson, for appellant. O. T. Brown, for appellees.

FISHER, C. J. Appellees (plaintiffs below) instituted this suit in the justice court of Precinct No. 1, Hays county, Tex., by their statement of cause of action filed on January 9, 1901, against appellant (defendant below), for damages to shipment of stock. Upon a trial of said cause in said justice's court a verdict was rendered in favor of plaintiffs, and defendant appealed to the county court of said Hays county. By a so-called "amended statement of cause of action" filed on April 27, 1903, plaintiffs alleged substantially as follows: That on or about September 20, 1900, plaintiffs had a lot of cattle that they wished to ship from Hunter station, in Comal county, Tex., over defendant's line and those of its connecting carriers, to East St. Louis, Ill., to market; that plaintiff Bost, on said September 20, 1900, applied to defendant's station agent for cars for such shipment, said cars to be furnished for said purpose at Hunter station on September 22, 1900, to all of which defendant agreed with plaintiffs, and it was understood that said shipment should go by through freight, the charges to be paid by plaintiffs, which was afterwards done; that on the morning of September 22, 1900, relying on said agreement, plaintiffs drove the cattle, 177 head, to Hunter, and by direction of defendant's agent put them in its stock pens, and locked same—all before noon; that defendant failed to furnish the cars until the next day, September 23, 1900, and that the cattle were then loaded into them, and started for East St. Louis, Ill.; that by reason of the negligence of defendant in failing to have the cars at said station in time to receive the cattle for such shipment on the morning of the 22d the shipment of said cattle was delayed at that station, and because of which negligent delay said cattle did not reach East St. Louis until the lapse of about 24 hours after the time at which they would have reached there had defendant not been negligent in the particulars aforesaid; that by reason of said delay the cattle, before reaching East St. Louis, shrank in weight and flesh far beyond what they would otherwise have done, and had to be sold when they reached there on a falling market, and at a less price than they would have done but

for said delay and shrinkage and decline in the market. They then pray for damages, including interest, in the sum of \$200.

The defendant pleaded a written contract, in which it was agreed that the railway company should not be liable for damages occurring on other lines of road. It appears from the facts that the agreement was entered into between the agent of appellant's road at Hunter station and the plaintiffs, whereby it was agreed that the railway company should furnish cars at Hunter on the evening of September 22d for the purpose of transporting the cattle in question from Hunter, Tex., to East St. Louis. The time of the evening at which the cars were to be furnished was not agreed upon, but it appears from the evidence that the expectation was that the cars would be there in time so that the cattle could be loaded in order to be carried north by a freight train that left Hunter about 8 o'clock on the evening of September 22d. The cars were not furnished until about 3 o'clock in the morning of September 23d, and it appears from the evidence that there was no delay in loading the cattle upon the cars, and as soon as they were loaded they were promptly started on their journey.

The cattle were placed in the pens at Hunter on the morning of the 22d, and there is evidence tending to show that they were put in the pens and kept there several hours prior to the time that the plaintiffs expected the cars to be furnished. There is also evidence to the effect that keeping them in the pens during the condition of the weather prevailing at that time for the unnecessary length of time that they were there had a tendency to reduce the cattle in weight. After being started, the cattle were promptly and without delay carried to the end of appellant's line at Longview. There they were fed and watered, but the delay for that purpose does not appear to have been unreasonable, as it is practically conceded that they should somewhere on the line between Hunter and East St. Louis be fed and watered.

There is evidence tending to show that part of the 24 hours' delay which was claimed by the plaintiffs that resulted from the failure to furnish the cars promptly at Hunter was attributable to delays occurring north of Longview, and on lines of railway other than that of the appellant. The inference also arises from the facts that the plaintiffs put their cattle in the pens at Hunter and kept them there an unreasonable length of time prior to the time that they could, under the contract, have expected the cars to be furnished at Hunter. The verdict and judgment of the trial court was for \$200, the full amount sued for.

Appellant's ninth assignment of error complains of the refusal of the court to give the following requested instruction: "If you find that a specific time was agreed upon between the parties for the shipment of the cattle in

¶ 2. See Carriers, vol. 9, Cent. Dig. §§ 950, 951.

question, and plaintiffs brought and placed their cattle in the railroad pens sooner than ~~was~~ reasonably necessary to have them in position for loading for such shipment at the appointed hour; and if you so find that so confining them in such pens for such increased time increased the amount of shrinkage of the cattle, then you cannot assess against defendant any damage accruing to plaintiffs by reason of any increased shrinkage occasioned thereby, even though you find that defendant may itself have occasioned shrinkage by its delay." This feature of the case was not covered by the general charge of the court, and we are of the opinion that the facts in the record called for the charge requested and refused, and it was error not to give it. Plaintiffs, in their petition, contend that there was a shrinkage in weight by reason of the unnecessary delay, and that by reason of the delay in furnishing the cars they lost the benefit of a market day, which they could have reached if the cars had been promptly furnished; and they contend that by reason of the delay at Hunter there was a delay of 24 hours. If there is evidence which would authorize the inference that the parties expected that the cattle would go north on the 8 o'clock p. m. train, then there would be a delay of only about 11 hours from the time that they actually started from Hunter; and, if the cattle were put in the pens by plaintiffs at Hunter much sooner than was reasonably necessary to have them in a position for loading, it is clear that what shrinkage occurred during that time should not be charged to the defendant. There is evidence tending to show that the pens at Hunter were in good condition, but that the weather was exceedingly warm, and that they were crowded, and that cattle so confined in such weather without food and water would lose in flesh and weight.

Appellant's sixth assignment of error complains of the refusal of the court to give an instruction to the effect that the appellant would not be liable for delays occurring on other lines. The facts called for this instruction, and it should have been given.

For the refusal of the court to submit the two above issues, the judgment will be reversed, and the cause remanded.

The charge complained of in appellant's eleventh assignment of error upon another trial should be modified in accordance with the following views: This charge makes the appellant liable for the damages in the way alleged by the plaintiffs if the delay at Hunter caused the delay in reaching the market, notwithstanding there might have been other delays on other lines of road. The damages in the way alleged by the plaintiffs embraced not only the loss of the market price of the cattle on the day they should have reached East St. Louis, but also embraces the item of shrinkage and loss in weight. The plaintiffs' cattle might have reached the market at East St. Louis at the time expected but

for the delay at Hunter, but it is clear that the loss in shrinkage, to the extent asserted and claimed by the plaintiffs, was not attributable entirely to the extent of the delay at Hunter for which the appellant could be held accountable; but the jury, under this charge, could have held the defendant responsible for all of the shrinkage that occurred from the time that the cattle were put in the pens up to the time that they reached East St. Louis.

We call the trial court's attention to the points raised by appellant in its thirteenth and fourteenth assignments of error, wherein the charge is criticised. We do not make these objections to the charge reversible error, but merely state that doubtless upon another trial the objectionable features will be eliminated.

We do not make the second assignment of error ground for reversal, but we are of the opinion that the testimony there complained of was not admissible; that it was hearsay.

We find no other reversible errors in the record, and overrule the remaining assignments.

Judgment is reversed, and cause remanded.

KENDALL v. MORRISON et al.*

(Court of Civil Appeals of Texas. Oct. 28, 1903.)

LIFE INSURANCE—ASSIGNMENT BY BENEFICIARY—CONTRACT WITH ASSIGNEE—PART PERFORMANCE—ENFORCEMENT BY ASSIGNEE.

1. The beneficiary in a policy on the life of her son assigned her interest therein to the son, and subsequently, with her approval, he made a will disposing of the policy by making certain specific devises, and directing certain persons to employ the residue in caring for his mother during her life, any residue after her death to become the property of those so caring for her. After the death of insured the mother was cared for as provided for in the will. Held that, irrespective of whether the beneficiary assigned the policy as required by the constitution and by-laws of the insurer, there was a contract binding on her and her representatives; and those claiming under the will were entitled to the policy as provided in the will.

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by C. W. Morrison and others against Ben Kendall, as administrator of the estate of Mrs. Solomon Israld, deceased. From a judgment for plaintiffs, defendant appeals. Affirmed.

Sleeper & Kendall, for appellant. Richard I. Munroe and J. R. Downs, for appellees. .

KEY, J. This is a controversy over the proceeds of a life insurance policy issued by the Sovereign Camp, Woodmen of the World, insuring the life of Thomas G. Nason in the

*Rehearing denied December 2, 1903, and writ of error denied by Supreme Court.

sum of \$3,000, payable to his mother, Mrs. Solomon Isriald. There was a nonjury trial, resulting in a judgment for the plaintiffs, from which the defendants have appealed.

The trial judge filed no conclusions of fact and law, but the testimony in the record is sufficient to show, and we therefore find, as conclusions of fact:

(1) That in September, 1901, Thomas G. Nason and his mother were residing together in Waco, Tex. That both had been sick for some time; had no property of any consequence, except the insurance policy; had applied to another relative, who failed to render any assistance, and were rendered material aid and assistance by the beneficiaries thereafter named in the will of Thomas G. Nason. On the 27th day of September, 1901, Mrs. Solomon Isriald executed a written document, purporting to assign all of her interest in the policy to Thomas G. Nason. On October 1, 1901, Thomas G. Nason, with the knowledge, consent, and approval of his mother, executed a written will, by the terms of which he undertook to dispose of the insurance policy in question, thereby bequeathing it to the plaintiffs, who were not related to him, but were neighbors, and had rendered material aid and assistance to him and his mother. After devising specified sums to other plaintiffs, the will directed C. W. Morrison and his wife to take charge of the residue of the estate as trustees, for the following purposes: First. To purchase a burial lot, and pay all burial expenses of Thomas G. Nason and his mother. Second. To take care of his mother during the remainder of her life, and use the trust fund for that purpose. Third. If any residue remained after the death of the mother, it was to become the property of C. W. Morrison and his wife.

(2) Mrs. Isriald was present when the will was prepared, made suggestions in reference thereto, fully understood its contents, and consented thereto, and immediately after the death of Thomas G. Nason, which occurred shortly after executing the will, she went to the home of Mr. and Mrs. Morrison, and was thereafter taken care of by them until the time of her death, which occurred on the 3d day of November, 1901.

(3) C. W. Morrison and his wife have fully complied with all the requirements placed upon them by the will.

It is urged in appellant's brief that Mrs. Isriald, the beneficiary in the policy, did not assign the same in the manner required by the constitution and by-laws of the insurance company, and therefore at her death the policy belonged to her, and is collectible by her administrator. We find it unnecessary to decide the point referred to. In our opinion, the facts established by the testimony evidence a contract binding upon Mrs. Isriald and the representative of her estate, by the terms of which the plaintiffs were

entitled to collect the policy. *Bryson v. McShane* (W. Va.) 35 S. E. 848, 49 L. R. A. 527.

No error has been shown, and the judgment is affirmed. Affirmed.

LOW v. NE SMITH.

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

ATTACHMENT—VOID PROCESS—DAMAGES—NOMINAL DAMAGES—USE OF PROPERTY.

1. For the attachment of property under void process, where the owner remained in actual possession, he could recover, if at all, but nominal damages, under an allegation of the value of the property as an item of damages.

2. One who refrains from the use of property under instructions from an officer making an attachment levy under void process, and is thereby deprived of its earning capacity, may recover the reasonable value of its use during and up to the time that he was informed that the levy was released.

Appeal from Brown County Court; S. C. Coffee, Judge.

Action by Arthur Low against W. B. Ne Smith. From a judgment for defendant, plaintiff appeals. Reversed.

I. J. Rice, for appellant.

FISHER, C. J. The appellee's answer embraces two items of damages for the alleged conversion of the engine described in the pleadings. One is for its value, and the other is for the value of its use during the time that the appellee, under the instructions of the officer making the levy, was deprived of its use. The evidence as to the first item—that is, as to the value of the property—does not support the verdict of the jury and the judgment of the court. There was no evidence offered by the appellee as to the second item—that is, the value of the use of the property—nor was that issue submitted to the jury. It is clear from the facts that the plaintiff or the officer levying the writ did not take actual possession of the property. Constructively, they might have been in possession under the void process, but it remained in actual possession of the appellee, and as to that item he would only, if at all, be entitled to nominal damages; but as to the other item, although no evidence was introduced—that is, as to the value of the use of the property—there might, on another trial, be some evidence tending to establish that issue. If he refrained from the use of the property under the instructions of the officer who made the levy, and thereby for a time was deprived of its earning capacity, he could, if there is evidence to justify the submission of that issue, recover the reasonable value of its use during and up to the time that he was informed that the levy was released.

The judgment is reversed, and the cause remanded.

CORETH v. McNATT et al.

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

TRESPASS TO TRY TITLE—VOUCHER TO WARRANT—DEFAULT—JUDGMENT—ENTRY ON AMENDED PETITION.

1. Where a petition in trespass to try title required plaintiff's vendor to appear and defend the title, and, if title failed, to respond in damages only on his warranty, and the vendor defaulted, it was error to enter judgment against him in pursuance of allegations in an amended petition, which was not served on such vendor, and which claimed special damages by reason of the loss of water privileges in losing a certain portion of the land.

Error from District Court, San Saba County; Clarence Martin, Judge.

Trespass to try title by J. K. McNatt against D. S. Williams, in which F. Coreth was cited by plaintiff on his covenant of warranty. There was judgment for plaintiff against Coreth, and he brings error. Reversed.

Rector & Brown, F. J. Maier, and H. G. Henne, for plaintiff in error. G. A. & G. W. Walters, for defendant in error.

STREETMAN, J. Defendant in error, McNatt, brought this suit to the April term, 1903, of the district court of San Saba county. His original petition contained a plea in the ordinary form of trespass to try title against D. S. Williams for 200 acres of land. This was followed by allegations, in substance, that he (McNatt) had bought this 200 acres of land from plaintiff in error, Coreth, and had received a warranty deed, and that, if the defendant, Williams, should recover any of said land, he was entitled to recover on his covenant of warranty. The only relief sought against Coreth was to require him to appear and defend the title and respond in damages on his warranty in case McNatt lost all or any of the land. Citation was issued, and, together with a certified copy of this petition, was served upon plaintiff in error, who resided in Comal county, Tex. At the April term of said court the defendant Williams answered, and disclaimed title to all the 200 acres sued for, except 12½ acres, as to which he pleaded limitation. The plaintiff, McNatt, then in term time filed an amended petition, and in this he made the following allegations as against plaintiff in error, Coreth (after setting out the conveyance by Coreth of the 200 acres, the consideration therefor, and the covenant of warranty): "That the defendant D. S. Williams is now claiming the title and possession of about 12½ acres off the east side of said tract of land conveyed by said F. Coreth to plaintiff on said 1st day of December, 1902, as aforesaid, and that said defendant is in actual possession of said 12½ acres, bounded and described as follows: * * *. And the plaintiff would show to the court that the claim or title of said defendant Williams to said 12½ acres of land, if

any he has, which plaintiff denies, was acquired by him before the 1st day of December, 1902, and was actual and subsisting at the time said Coreth executed and delivered his deed of conveyance as aforesaid to plaintiff, and that it is by reason of such claim or title then existing, if any title did so exist, which is denied, that said defendant, Williams, now claims title and possession of said 12½ acres of land adverse to plaintiff's title thereto. Plaintiff would further show to the court that said 12½ acres of land claimed as aforesaid and in possession by said defendant Williams, is an improved farm, is in good state of cultivation, and is improved with valuable improvements, to wit, with fences, corrals, etc., and is decidedly the most valuable portion of said 200-acre tract of land; that it is in fact the only agricultural land and improved land belonging to said 200-acre tract, and that where said 12½ acre parcel fronts on the Colorado river there is the only accessible watering place on said river front to the entire 200-acre survey as aforesaid; that the remainder of the said 200-acre tract is dry grazing land only, and is very rough and broken land, totally unfit for agricultural purposes, or for other purposes than grazing, and very inferior land for grazing purposes; that, should the defendant Williams recover of this plaintiff said 12½-acre tract claimed by him as aforesaid in this suit, the remainder of said survey of land will be almost entirely valueless to this plaintiff; that said 12½-acre parcel of land claimed by defendant Williams is of the reasonable value of \$15 per acre, or of the total value of \$187.50, while the remainder of said survey alone, and valued independent of said 12½ acre portion, is not worth more than \$1 per acre; that, while this plaintiff paid and agreed to pay to defendant Coreth the sum of \$600 for said 200 acres of land, that the inducement that moved him thereto was the advantage to him of acquiring the said 12½ acres out of the eastern portion of the survey, with the improvements and river front affording the watering place for plaintiff's stock of cattle and horses; that plaintiff also owned a section of land used by him as a pasture for his stock as aforesaid, the northwest corner of which section of land being the southeast corner of the 200-acre survey sued for herein, and that said section of land so owned by defendant is a dry section of land, and does not afford permanent water for his said stock, and that he purchased the 200 acres of land from said Coreth for the purpose of connecting his said section or pasture of land as aforesaid with the Colorado river, in order that his said stock might be afforded permanent and accessible water; that the only way that his stock could pass from his pasture, as aforesaid, to the watering place, as aforesaid, on said river, was and is over the 12½-acre strip claimed by defendant Williams, because there is a public road and lane

that separates said 12½-acre strip of land from the remainder of said survey; that plaintiff advised said defendant Coreth of the relative situation of said two surveys of land and of said roadway and lane and of said watering place being the only accessible water to said 200-acre tract, and of the inducement as aforesaid to plaintiff to purchase said 200-acre tract in order to connect his other lands with the watering place on the river as aforesaid, and plaintiff furnished said Coreth with a plat or diagram showing correctly the lay of the different surveys as aforesaid, and the way they connected together, and with the watering place on the river, and thus explained fully the inducements moving plaintiff to pay the large price of \$600 for said 200 acres of land as aforesaid; and all this before said Coreth executed and delivered his said deed conveying said land to plaintiff with his covenant of warranty as aforesaid. Wherefore, premises considered, plaintiff prays that, should the defendant D. S. Williams recover judgment herein against plaintiff for said 12½ acres of land, or any part thereof, that said plaintiff have and recover judgment over against said defendant F. Coreth on his said warranty for the sum of \$187.50, the reasonable value of said 12½ acres of land, and for the additional sum of \$112.50 as his actual and special damage sustained by him in the depreciated value of the remainder of said 200-acre survey by virtue of being deprived of the use and benefit of said water privileges to the remainder of said survey of land, all on account of the breach of said Coreth's warranty; or for such sum of money as plaintiff may show himself entitled to recover on account of breach of said warranty, and for interest on such sum as plaintiff may recover at the rate of 8 per cent. per annum, as in the opinion of the court may seem just and equitable; for damages," etc.

Plaintiff in error did not appear or answer, and no notice of said amendment was served upon him; but at the same term of court at which said amendment was filed judgment was rendered in favor of said McNatt for all of said 200 acres except the 12½ acres described, which was adjudged to the defendant Williams. Judgment was further rendered by default against plaintiff in error, and the judgment contains the following recitals: "It appearing to the court that the value of the 12½ acres, and loss to plaintiff by the loss of said 12½ acres of said lands he lost in this suit, is of the value and amount of \$187.50." Judgment was accordingly rendered for said sum.

It is now well settled that, if a defendant does not appear or answer, judgment cannot be rendered against him on a new cause of action set up in an amended petition of which he had no notice. *Morrison v. Walker*, 22 Tex. 19; *Cowan v. Williams*, 49 Tex. 396; *Stewart v. Anderson* (Tex. Sup.) 8 S. W. 295, and cases cited. The original petition in

this case only authorized such damages as are customary on breach of a covenant of warranty. The amended petition, however, went much further than this, and sought to recover special damages, which could not have been recovered under the original pleading, and it is evident that these additional items were considered by the court in its judgment. It was error to render judgment on the amended pleading without notice to the plaintiff in error. The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

MANN v. GREER.

(Court of Civil Appeals of Texas. Nov. 14, 1903.)

PUBLIC LANDS—BONA FIDE SETTLEMENT—EVIDENCE.

1. Evidence held sufficient to sustain a finding that a purchaser of school land was not an actual settler in good faith for the purpose of a home, as required by Sayles' Ann. Civ. St. 1897, art. 4218f, relating to the sale of school and public lands, though his absence may not have amounted to an abandonment under the homestead exemption law.

Appeal from District Court, Floyd County; J. M. Morgan, Judge.

Action by S. A. Greer against J. F. Mann. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. B. Bartley and B. E. Green, for appellant. J. W. Pruitt and Kinder & Dalton, for appellee.

SPEER, J. By agreement of the parties the sole question presented for our decision is whether or not there is sufficient evidence in the record to sustain the trial court's finding that appellant was not an actual settler in good faith for the purpose of a home on the N. W. ¼ of the N. W. ¼ of section 14, block G, in Floyd county, at the time (October 16, 1899) he made his application to purchase the land in controversy. We give below the evidence in full:

S. A. Greer, plaintiff, testified as follows: "I was living on N. ½ of section No. 90 at the time I made application to purchase the land in controversy, and have lived there ever since, with my family. I knew the place that defendant claimed as his home from May, 1899, to the present time. Mann's family left the place in March, 1899, and were not back there until in the year 1901. The defendant himself was not on the land during this time, nor any of his family. At the time, in October, 1899, when defendant filed on the land, he was not on the land, nor was his family."

J. C. Cooper testified for the plaintiff as follows: "I remember the time when defendant's family sold out and left the plains. I was at defendant's place the day before they left, and was there a day or so after

they were gone. They took their wagons and teams and all their household goods. This was in March, 1899. When they left, defendant himself was not on the land, and the last time I saw him on the land was in 1897. I did not see the defendant or any of his family on the land again until August, 1901. During this time no one was living on the land except Elmer Reeves, who lived on the place during a part of the year 1899 and 1900. I knew the place in October, 1899, and was there frequently during that month, and defendant nor his family was living there during that month."

J. F. Mann, defendant, testified as follows: "I first came to the plains in the year 1891, and settled upon the section in controversy, on the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of same, which I still claim as my home now, and have had no other, and never at any time claimed any other place as my home. The last time, before filing on the land in controversy, I was on the land, was August, 1897, but my family continued at all times to reside on said 40 acres until March, 1899. At this time I was working in the shops at Thurber Junction, in Palo Pinto county, when my wife came to me about the 1st of April, 1899. None of us were on the 40 acres home place nor on the land in controversy after April, 1899, till August 1901. We were not on there when I filed on the land in controversy, but was at Thurber Junction. My 40 acres was never at no time clear of part of my household effects, farming implements, and horses, and cattle part of the time. There was no crop raised on the place until the year 1902, when I had about 12 acres of sod broken. We left in the house a stove, cooking utensils, bedstead and bedding, wearing apparel, the house cat, and chickens. My wife took what was necessary for us to use in camp. We lived in a rented house while away at Thurber Junction. I have rendered and paid my poll tax in Floyd county every year since 1891. I never at any time paid a poll tax nor did I vote in any county than in Floyd county. I never at no time abandoned my home, nor have I claimed to have abandoned it, and never had any thought of doing so. I have never owned any other home. I made application for the land in controversy for a home addition. I was not at home when my wife left there in March, 1899. We left the place and things in charge of Elmer Reeves, who stayed on the place for us till the spring of 1900. I was away from my home at work to earn money to live on and improve the place. All the money I made after paying living expenses went on the land, except what I have paid to my lawyers. I was paid wages by the month, and intended to return home when out of a job."

John Cravette testified for defendant as follows: "I was about the Mann place while Elmer Reeves was there for Mann. I saw a stove, bedstead and bedding, farming im-

plements, wagon, and two horses. They were the effects of Mann, as I understood it from Elmer Reeves. When Reeves left there he left these effects. I do not remember the dates I saw these effects there."

The judgment of the court finds ample support in the testimony. Actual settlers only are authorized to become the owners of additional lands under our school-land laws. Sayles' Ann. Civ. St. 1897, art. 4218f. An actual settler is one whose occupancy is actual, rather than constructive. Baker v. Millman, 77 Tex. 46, 13 S. W. 618; Schwarz v. McCall (Tex. Sup.) 57 S. W. 31. So that if, as found by the trial court, appellant was not an actual settler upon his home tract at the time of his application to purchase as additional land the tract in controversy, then he would not be eligible to make such purchase, notwithstanding his absence may not have amounted to an abandonment of his home tract if the question of abandonment were to be determined by our homestead exemption laws; for one may have a homestead upon land under our exemption laws which may be actually occupied by a tenant or not occupied at all. But we apprehend that the rule applicable to the homestead exemption generally is not to govern in cases like this, for the Legislature has seen proper to require actual occupancy by the settler save only a permitted absence, not exceeding six months in any one year, for certain named purposes; thus impliedly, at least, forbidding any other absence as being inconsistent with the character of settlement required. Sayles' Ann. Civ. St. 1897, arts. 4318j, 4218i; Singleton v. Wright (Tex. Civ. App.) 54 S. W. 249; Willoughby v. Townsend (Tex. Civ. App.) 51 S. W. 335. It is undisputed that appellant's actual residence was at Thurber Junction, in Palo Pinto county, for more than six months next preceding his application to purchase the additional lands. This may not be inconsistent with his right to claim a homestead elsewhere, but it is inconsistent with his claim that he was an actual settler at the time on his home section in Floyd county.

Judgment affirmed.

ROMINE v. SAN ANTONIO TRACTION CO.*

(Court of Civil Appeals of Texas. Nov. 4, 1903.)

STREET RAILWAYS—NEGLIGENCE—INSTRUCTIONS—EVIDENCE—PREJUDICIAL ERROR.

1. Where in an action against a street railway for injuries sustained by plaintiff owing to his horse having been frightened by a car which ran upon a bridge at an unlawful speed, there was no evidence, except the fright of the horse on the occasion of the accident, which tended to show that the horse was fractious, an instruction that if plaintiff was driving a fractious horse he was guilty of negligence was prejudicial error.

*Rehearing denied December 2, 1903.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by J. Romine against the San Antonio Traction Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Bell & McAskill, for appellant. Houston Bros. and R. J. Boyle, for appellee.

NEILL, J. This suit was brought by appellant against the traction company to recover damages for personal injuries alleged to have been caused by the negligence of the company. The negligence charged as the cause of the injury was that appellee ran one of its cars, in violation of an ordinance of the city of San Antonio, at a greater rate of speed than three miles an hour around a curve and across a bridge which appellant was crossing in a horse cart, and that by reason of the car, propelled at such speed, coming suddenly around the curve and on the bridge, the horse, drawing the cart in which appellant was riding, became frightened and unmanageable, and backed the cart upon appellee's road track in front of the moving car, and, as the car struck the cart, appellant, to avoid being mangled beneath the car, caught its guard rail, when the motorman reversed and suddenly started the car backwards, jerking appellant from his cart, and throwing him on the bridge floor, whereby he was injured. The appellee answered by a general denial and a plea of contributory negligence, in which it was charged that appellant was guilty of negligence in driving a fractious horse, and that such negligence proximately contributed to his injury. The case was tried before a jury, and the trial resulted in a verdict and judgment in favor of the company.

The appellee maintains a street railway in the city of San Antonio, over which it operates its cars by electricity. Its road extends over a bridge that spans the San Antonio river on Navarro street. Near the south end of the bridge, Crockett street crosses Navarro. In going north, before reaching the bridge, along Navarro, there is a curve in the railroad track, commencing at or near the south side of Crockett street. The record does not disclose the width of this street, but the length of the bridge is about 75 feet. At the time of the alleged accident there was in force a city ordinance restricting the speed of electric cars while running around curves and across bridges to three miles per hour. On the 19th day of July, 1901, appellant, while going south along Navarro street, drove his mare, attached to a cart in which he was riding, on the north end of Navarro Street Bridge; and at the same time one of appellee's cars, propelled by electricity, was approaching the bridge from the opposite direction. There is testimony tending to prove that, in rounding the curve at the intersection of Crockett and Navarro streets, the speed of the car greatly exceeded the limit

fixed by the city ordinance, and that appellant's mare became frightened at the approaching car, and backed the cart on the railway track, and that it was struck by the car, and that appellant, by reason of the action of the frightened animal, fell or was thrown from the cart and injured. There is not a particle of evidence in the record, barring the fright and action of the animal on the occasion of the accident, tending in the least to show the mare was fractious. The appellant testified that she was gentle, and remarked to his companion in the cart as the car approached them, "The mare is not scary." His wife testified: "The horse was gentle. I had drove her a great deal, and she did not scare at street cars previous to the time he was hurt."

The court, in its charge, submitted as an issue contributory negligence, in the following language: "If you find that plaintiff was driving a fractious horse, that became frightened upon the approach of said street car, and that in driving said fractious horse, if you find he was a fractious horse, under all the circumstances, he was guilty of negligence, and that if such negligence, if any, proximately contributed to the accident and injury, if any, to plaintiff, then plaintiff cannot recover, and you will so find." The submission in the charge of the issue of contributory negligence is assigned as error, upon the ground that there is no evidence tending to support such defense. The mere fact that a horse took fright at an approaching street car negligently operated cannot, alone, be taken as evidence that the animal was fractious, for, if it were, then the very evidence required to make out a case of damages resulting from negligence in frightening a horse could of itself alone be taken as sufficient to defeat the action. This demonstrates the error in the part of the charge quoted, for it is axiomatic that a charge which submits as an issue a matter of defense, without evidence tending to support it, is erroneous. It cannot in this case be said the error is harmless, for the jury may have found from the evidence that every essential allegation to plaintiff's cause of action was established, yet non constat that the jury did not take the mere fright of the animal as evidence that she was fractious, and therefore found that appellant was guilty of contributory negligence.

For reason of the error indicated, the judgment is reversed and the cause remanded.

JOHNSTON v. KLEINSMITH et al.*

(Court of Civil Appeals of Texas. Oct. 14, 1903.)

LANDLORD AND TENANT—LANDLORD'S LIEN
—WAIVER—APPEAL—VERDICT CONTRARY
TO ERRONEOUS INSTRUCTION.

1. Because the verdict is contrary to an erroneous instruction, it does not follow that the case should be reversed.

*Rehearing denied December 2, 1903.

2. A landlord who permitted a tenant to apply to his own use a part of the crop produced without notice of a third person's claims against the tenant, did not thereby waive his statutory lien on the rest of the crop.

Appeal from Caldwell County Court; Geo. W. Kyser, Judge.

Action by H. Kleinsmith for the recovery of rent and to foreclose a lien on property, in which Margaret A. Johnston, a third person, became a defendant. From a judgment for plaintiff, defendant Johnston appeals. Affirmed.

A. B. Storey and P. J. Greenwood, for appellant. E. B. Coopwood, for appellees.

KEY, J. This was a suit by a landlord to recover rent and advances to his tenant and to foreclose a statutory lien on eight bales of cotton. The tenant made no defense, but Mrs. Margaret A. Johnston, asserting title to the cotton, became a party to the suit, and resisted the plaintiff's right to foreclose his lien. The trial resulted in favor of the plaintiff, and Mrs. Johnston has appealed.

The case is submitted in this court on two assignments of error. The first asserts that the verdict is contrary to the evidence and the law, as announced in the twelfth paragraph of the court's charge. The charge referred to does not state the law correctly, and, if the jury disregarded it, it does not follow that the case should be reversed.

It is also contended that the landlord waived his lien on the cotton in question, because he could have enforced it against other cotton, which he permitted the tenant to dispose of. We rule against appellant on this point. The plaintiff testified that at the time he permitted the tenant to apply to his own use part of the proceeds of other cotton he had no notice of Mrs. Johnston's claim against the tenant. Taking that statement to be true, we do not think the plaintiff should be held to have waived his lien against the rest of the crop produced by the tenant, nor estopped from asserting it as against Mrs. Johnston.

No reversible error is shown, and the judgment will be affirmed. Affirmed.

GADDIS v. WESTERN UNION TELEGRAPH CO.*

(Court of Civil Appeals of Texas. Nov. 4, 1903.)

TELEGRAPH'S DELIVERY OF MESSAGE—NEGLECT—MENTAL ANGUISH—PROXIMATE CAUSE—COMPLAINT—DISMISSAL.

1. A message to a husband, relative to an injury to his wife, M., in a storm, stated: "Storm over; all safe; M. hurt, but not dangerous," which was intended to relieve anxiety on his learning of suffering and loss of life occasioned by the storm. Held, that the telegraph company was not liable for the language of the message, nor the effect produced on plaintiff's

mind different from its purpose, in an action to recover damages for mental anguish caused by negligence in the delivery of the message.

2. Plaintiff resided in C. His wife, M., was injured in a storm while on a visit in G. on May 18th. She had a message sent that day from G. to plaintiff, stating: "Storm over; all safe; M. hurt, but not dangerous." The message, by the exercise of due diligence, could have been delivered to plaintiff before 8 p. m. on same day, which would have enabled plaintiff to reach G. not later than 10 p. m. on May 19th. The message was not delivered until 10 a. m. on May 19th. Plaintiff knew nothing of the storm until he received the message. He was prevented from taking the first train out of C. after he should have received the message, and from leaving there until the morning of the 19th, because of the delay in its delivery, and did not reach his wife until 14 hours later than he would had it not been for defendant's negligence. He did not know of the havoc caused by the storm until he learned it from the daily papers some hours after receipt of the message. Held, that the negligence of the telegraph company was not the proximate cause of plaintiff's mental anguish from the time the message was received by him until he reached the bedside of his wife.

3. Where the only damage recoverable under the allegations of a petition is a sum insufficient to give the court jurisdiction of the cause, there is no error in sustaining demurrer thereto.

4. Where, after demurrer has been sustained to a petition, plaintiff does not ask leave to amend, it is not error for the court to dismiss the suit.

Appeal from District Court, La Salle County; E. A. Stevens, Judge.

Action by L. W. Gaddis against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Affirmed.

C. C. Thomas, for appellant. Webb & Goeth, for appellee.

NEILL, J. Appellant sued appellee to recover \$1,994.60 damages alleged to have been occasioned by the latter's negligence in delaying the delivery of a telegram, and for the further sum of 40 cents paid the company for its transmission and delivery. A general demurrer was sustained to appellant's petition, and judgment was entered dismissing his suit.

As the assignments of error bring in question the action of the court in sustaining the demurrer, we will state substantially the allegations in appellant's petition. It alleges: That on May 18, 1902, plaintiff resided in Cotulla, Tex., and his wife, Mamie, was then on a visit in Goliad, Tex. On that day plaintiff's wife was seriously and dangerously injured in a storm, and caused her brother, H. J. Passmore, to send from there to plaintiff the following telegram: "Goliad, May 18, 1903. L. W. Gaddis, Cotulla, Texas. Storm over; all safe; Mamie hurt, but not dangerous. H. J. Passmore." That Wayne Davis, who carried the message to defendant's agent for transmission, paid him 40 cents therefor; and that by the exercise of due diligence the telegram could have been delivered to plaintiff before 8 p. m. on the same day, which would have enabled plaintiff

*Rehearing denied December 2, 1903.

to reach Goliad not later than 10 p. m. on the next. That by reason of the negligence of defendant the message was not delivered until 10 a. m. on May 19, 1902, which prevented plaintiff from taking the first train out of Cotulla, and from leaving there until the morning on which the telegram was delivered, and reaching his wife until 12 m. on the next day, 14 hours later than he would had it not been for defendant's negligence. That upon the receipt of the message plaintiff was greatly disturbed, and suffered great anxiety, because of his wife's injuries. That at 12:30 p. m. on May 19th he learned from the daily papers of the storm at Goliad, and the great loss of life and injury in consequence to the inhabitants of said city. That defendant's agent at Cotulla knew the relationship existing between plaintiff and his wife, Mamie, mentioned in the message. That plaintiff was very fond of his wife, and, not knowing the extent of her injuries, desired to be with her as quickly as possible to give her comfort in her distress. That, after suffering several hours of misery and mental anguish, he succeeded in leaving Cotulla for San Antonio on a freight train, which did not reach the last-named city until late that night, and, there being no passenger train going from there towards Goliad for six or eight hours, plaintiff, being refused passage on a freight train, hid himself in a close and stifling box on top of a car in a cattle train going towards Goliad, by which he reached Yorktown at 8 a. m. on May 20th, where, as quickly as possible, he procured a team and drove to Goliad, arriving there at 12 m. on that day, where he found his wife dangerously wounded, and a cripple for life. That from the time said message was delivered to him until he reached the bedside of his wife plaintiff suffered greatly, both mentally and physically and impairment of health, which suffering and impairment were caused by the negligence of defendant in failing to properly transmit and deliver said message, to his damages, etc. The questions presented for our decision under the assignments are: (1) Did the court err in sustaining the demurrers to plaintiff's petition? (2) If this should be answered in the negative, then did the court err in dismissing the suit?

Taking all of the allegations in plaintiff's petition to be admitted as true, can it be said that defendant's negligence in delaying the delivery of the message was the proximate cause of plaintiff's mental suffering and impairment of health? If his suffering and impaired health were not produced, in a natural and continuous sequence, unbroken by any new independent cause, by such negligence, it cannot be deemed the proximate cause of plaintiff's injuries. In order to hold a telegraph company liable for its negligent delay in delivering a message, such damages must be shown to be consequences which one of ordinary prudence and experience, engaged in the business of transmitting and de-

livering telegraphic messages, fully acquainted with all the existing facts and circumstances, would, at the time of the negligent act, have thought reasonably possible to follow if they had occurred to his mind. Shear. & Redf. Neg. § 28. When such consequences are shown, the "natural and continuous sequence," as the phrase is understood in the definition of "proximate cause," is established; and, if the other constituents of the definition are shown, "proximate cause" is proven. Now, let us take the allegations in plaintiff's petition as facts established, and determine whether they tend to show that defendant's negligence in delaying delivery of the message was the proximate cause of his mental suffering and impaired health. We will at once lay aside any discomfort, inconvenience, suffering, or injury that may have been caused plaintiff while riding on top of the car of a cattle train, hid in a close and stifling box, for it is too plain for argument that such discomfort, etc., could not have been proximately caused by the negligence complained of. This leaves only to be considered the question of the proximate cause of his mental anguish. Plaintiff knew nothing of the storm until he received the message, which informed him that it was "over; all safe; his wife hurt, but not dangerous." He never knew of the havoc, death, and suffering caused by the Goliad storm until some hours after he received the message. He then knew, if the information it conveyed him were true, that his wife was not dangerously hurt. The natural consequence of this information was to relieve him of great anxiety when he learned of the suffering and loss of life occasioned by the storm. Such relief was evidently intended by sending the telegram. If its purpose was not accomplished, it is because of man's nature, under such circumstances, to apprehend a more serious injury to a loved one than the news conveyed by a message warrants. If for this natural disposition of man the defendant could be held responsible, no liability could attach on that account in this case, for it is not responsible for the language of the message, or the effect produced by it upon plaintiff's mind. Until the telegram was received, plaintiff's mind was at ease in regard to his wife. From the time the message should have been delivered until it was actually received his peace of mind continued, and was first disturbed by defendant's doing what it should have done sooner. Had it done its duty, the same anxiety of mind would have been produced, and it was simply postponed by the negligence complained of. In other words, had it not been for such negligence, the message would have been delivered at 8 p. m. on May the 18th, and then his mental anxiety would have commenced and have continued until 10 p. m. on the next day, when he would have reached his wife. On account of the negligence it was not delivered until 10 a. m. on May 19th, when his

mental anguish commenced, and continued until 12 m. the next day, when he reached his wife's bedside. So it is shown that he only suffered the same mental anguish the same number of hours from the same cause that he would have suffered had defendant been guilty of no negligence in the transmission and delivery of the message. This demonstrates to a moral certainty that the negligence was not the proximate, or even the remote, cause of plaintiff's mental anguish (*W. U. Tel. Co. v. McFaddin*, 75 S. W. 352, 7 Tex. Ct. Rep. 793; *Tel. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549), but that its sole cause was the information imparted by the dispatch itself. As the only damage recoverable under the petition was the 40 cents toll, of which the court had no jurisdiction (*Rowell v. Tel. Co.*, 75 Tex. 26, 12 S. W. 543; *Tel. Co. v. Arnold*, 77 S. W. 249, 8 Tex. Ct. Rep. 284), the demurrer was properly sustained.

After sustaining the demurrer, it does not appear that the plaintiff asked leave or desired to amend his petition. If he had manifested a desire to amend, no doubt the right would have been accorded him. But, standing mute when the demurrer was sustained, the court could not but dismiss his suit.

The judgment is affirmed.

INTERNATIONAL & G. N. R. CO. v. CAPERS et al.*

(Court of Civil Appeals of Texas. Oct. 21, 1903.)

RAILROADS—OBSTRUCTING ENTRANCE TO PLACE OF BUSINESS—MEASURE OF DAMAGES—RIGHT OF LESSEE.

1. Where one occupied premises during the time for which he sought to recover damages from a railroad company occasioned by its unnecessarily and negligently obstructing for several months the only entrance to his yard by the construction and operation of its track in the street in front of his premises, the question whether he was a lessee for a year or from month to month was immaterial.

2. Where a railroad company wrongfully obstructed the entrance to one's place of business, thereby preventing the patrons of the business from entering the premises, the measure of damages was the loss of profits thereby occasioned, and not the difference in the rental value of the premises.

3. Where a railroad company wrongfully obstructed the entrance to a tenant's place of business by the construction and operation of tracks in the street in front of his premises, the tenant was entitled to recover the damages sustained, though he might have declined to rent the premises, as he knew that the tracks were to be built, and though he could have terminated his lease at any time.

Appeal from Falls County Court; W. E. Hunnicutt, Judge.

Action by C. G. Capers and others against the International & Great Northern Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

N. A. Stedman, Martin & Eddins, and Waller S. Baker, for appellant. Nat Lewellyn, for appellees.

STREETMAN, J. Appellee Capera, for some time prior to October 26, 1900, was engaged in running a wagon yard on the east side of the public square in Marlin, Tex. At that time the Calvert, Waco & Brazos Valley Railway Company (to whose rights and liabilities appellant has succeeded), having obtained authority from the city council of said city, constructed its railroad through said city, and along the street in front of said wagon yard. The verdict of the jury implies a finding that in constructing said road in front of appellee's premises they unnecessarily and negligently obstructed the only entrance to his wagon yard with tools and embankments and the cut in which the track was laid, and that afterwards the entrance was obstructed by cars being left in front of said entrance, and by engines and trains switching along said street. This continued for several months, and resulted in rendering it very inconvenient, and at times impossible, for the customers of appellee to get into his wagon yard with their vehicles, and in consequence his trade was diminished, and he lost the profits of his business to the amount found by the jury. There is some conflict in the evidence as to whether appellee's lease was for a year or by the month, but we regard this as immaterial; the fact being that he continued to occupy the premises during the time for which a recovery was sought.

The principal contention is that the measure of damages pleaded and submitted by the court—that is, the loss of profits in his business—was not the proper measure, it being insisted by appellant that the correct measure is the difference in the rental value of the premises. The measure submitted by the court, in our opinion, was correct. While profits in a business are not ordinarily recoverable as damages, yet we believe that in this case they were not only not remote, but constituted the only adequate measure. When the only entrance to a place of business is wrongfully closed up, and the patrons of the business are prevented from entering the premises, the natural and inevitable result must be a loss of profits in the business; and when, in such case, the evidence affords a basis for estimating the amount of loss, damages should be awarded accordingly. *Ry. Co. v. Lackey* (Tex. Civ. App.) 33 S. W. 768.

It is also contended that because appellee knew the road was to be built, and might have declined to rent the premises, and also because he could have terminated his lease at any time, he should not have recovered. The verdict, however, is predicated upon the finding that the obstructions were not necessary or proper in the construction and operation of the road, but, on the other hand,

*Rehearing denied December 2, 1903.

were unnecessary and negligent. Appellee had the right to assume that the road would be constructed in a lawful and proper manner, and after his premises had been obstructed he had the right to proceed on the assumption that they would not continue, but would abandon their wrongful obstruction. *G. H. & S. A. Ry. Co. v. Baudat* (Tex. Civ. App.) 51 S. W. 541.

Under the pleadings there was no issue as to the value of the leasehold, and it was proper to exclude all evidence upon this subject.

We have found no error in the judgment, and it is accordingly affirmed. Affirmed

FT. WORTH & D. C. RY. CO. v. LINTHICUM et al.*

(Court of Civil Appeals of Texas. Oct. 31, 1903.)

DAMAGES—INSTRUCTIONS—NEW TRIAL—CONDITIONS OF REFUSAL—REMISSION OF EXCESSIVE RECOVERY.

1. An instruction, in an action for negligent killing, to return a verdict for such a sum "as is of the value at the present time sufficient to reasonably and fairly compensate plaintiffs for such pecuniary benefits as you may believe plaintiffs had a reasonable expectation of receiving," is not objectionable as calling for a verdict which might be more than enough to compensate them for the pecuniary loss sustained.

2. Where there is neither exception to the petition, nor objection to the testimony, a charge on negligence, enumerating acts embraced in the general language of the petition, is not erroneous, though the language of the petition is more general than that of the charge.

3. Under the direct provisions of Sayles' Civ. St. 1897, art. 1029a, it is proper for the trial court to require a remittitur of excessive damages as a condition to his overruling a motion for a new trial.

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by Mary E. Linthicum and another against the Ft. Worth & Denver City Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Stanley, Spoons & Thompson, for appellant. Ben. M. Terrell, for appellees.

SPEER, J. This is an action for damages growing out of personal injuries resulting in the death of Martin Linthicum. On the measure of damage the court charged: " * * * Then you will return a verdict in favor of plaintiffs for such a sum of money as damages as is of a value at the present time sufficient to reasonably and fairly compensate plaintiffs for such pecuniary benefits as you may believe from the evidence plaintiffs had a reasonable expectation of receiving from said Martin Linthicum, if any, from and after the date of his death, if his death had not been so occasioned. * * * " The plaintiffs were the surviving wife and

mother of the deceased. Appellant objects to this charge, and points out that appellees, if entitled to recover, should receive that which would fairly compensate them for the pecuniary loss sustained, and that the charge in effect takes from the jury the question of what would be fair compensation, and furthermore insists that "a sum of money which at present value would be sufficient to compensate the plaintiffs for such pecuniary benefits as the plaintiffs had a reasonable expectation of receiving might be much greater than enough to compensate the plaintiffs for the pecuniary loss sustained." Undoubtedly the rule is, as contended by appellant, that appellees can recover only such sum as will compensate them for the pecuniary loss sustained, and we do not understand the charge to authorize a greater recovery. If it is subject to criticism at all in this respect it is because of its limiting appellees' right to a recovery of the lost pecuniary benefits only. See *Ft. W. & D. C. Ry. Co. v. Morrison* (Tex. Civ. App.) 53 S. W. 981. But obviously, to this extent (i. e., for the pecuniary benefits the appellees had a reasonable expectation of receiving from the deceased, but for his death), the charge properly allowed a recovery, and submitted to the jury the determination of what would be reasonable compensation. We cannot see how the pecuniary benefits could exceed the pecuniary loss, but we can understand how the pecuniary expectancy may be less than appellees' loss. So that, if there is error in the charge, it is in appellant's favor. Of course, the appellees can recover only the present worth of the anticipated pecuniary benefits; and this we understand to be the measure announced by the charge, although the language employed is not the most apt.

There was neither exception to the petition, nor objection to the testimony; and, in this state of the case, we hold there was no error in the court's charge on the issue of negligence, although the language of the petition is somewhat more general than that of the charge. They are substantially the same. The acts enumerated in the charge were embraced in the general language of the petition.

Appellant's defense that deceased's death was caused by consumption, and not by the injuries received, was properly submitted in almost the exact language of the plea. We therefore overrule the third and fourth assignments.

It has been held not to be reversible error for the trial court to require a remittitur of excessive damages as a condition to his overruling a motion for new trial. Such was not formerly the law, but the change has been wrought by the enactment of article 1029a, Sayles' Civ. St. 1897. See *G., H. & S. A. Ry. Co. v. Johnson* (Tex. Civ. App.) 58 S. W. 622; *H. E. & W. T. Ry. Co. v. Jackson* (Tex. Civ. App.) 61 S. W. 440.

*Rehearing denied November 28, 1903, and writ of error denied by Supreme Court.

† 3. See New Trial, vol. 37, Cent. Dig. § 324.

We have carefully examined the evidence, and, while there is much conflict among the witnesses, we nevertheless feel no hesitancy in holding that there is ample testimony which supports the verdict of the jury to the effect that the death of Linthicum was caused by injuries negligently inflicted by appellant, and that the amount of the judgment is not excessive.

All assignments are overruled, and the judgment is affirmed.

SANDERS v. RAWLINGS.*

(Court of Civil Appeals of Texas. Oct. 17, 1903.)

VENDOR'S LIEN—ENFORCEMENT AFTER BARRING OF NOTE—TRESPASS TO TRY TITLE—PETITION—ALLEGATIONS—SUFFICIENCY—FINDINGS—CONFLICTING EVIDENCE.

1. Where there is evidence sufficient to support the findings of the court, the court on appeal will not disturb them simply because there is evidence to justify a different conclusion.

2. A petition alleging that the note sued on and described was given for a part of the purchase money of certain land, that a vendor's lien was retained in the note and in the deed conveying the land to defendant to secure the payment of the same, that defendant failed to pay the note though past due, and praying for a writ of possession and for a quieting of his title to the land, was sufficient in trespass to try title.

3. Where a vendor of land sued to recover on the note for the purchase price and to foreclose the vendor's lien retained, and defendant pleaded the statute of limitations, the vendor could elect to sue for the land, and his right of a recovery could only be defeated by the purchaser paying or tendering the balance of the purchase money represented by the note.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by H. H. Rawlings against F. W. Sanders. From a judgment for plaintiff, defendant appeals. Affirmed.

Thompson & Thompson, for appellant. A. I. Hudson, for appellee.

TALBOT, J. In August, 1886, appellee, Rawlings, purchased the property in controversy for \$1,200, and on the same day sold it to the appellant, F. W. Sanders, for the sum of \$2,000. The property consisted of two acres of land a part of the Thos. Lago league survey, situated in Dallas county, a millhouse, a little cottage, and a lot of mill machinery, and was known as the "White Rock Mill Tract." At the time of the sale by Rawlings to Sanders no deed was made, but Sanders went into possession, and added to the mill other machinery at a cost of about \$1,000. On the 12th day of April, 1889, defendant, Sanders, sold a one-half interest in the mill machinery to A. Dysterbach and Caroline Dysterbach for the sum of \$917. At this time there was a balance due plaintiff, Rawlings, on his sale of the land and property to Sanders amounting to the sum

of \$1,834, and he then took the note of Sanders and A. and Caroline Dysterbach for said amount, and deeded the land to Sanders. This note was payable on or before the 12th day of April, 1892, to H. H. Rawlings or order, and recited that it was given in part payment for the land sold Sanders, known as the "White Rock Mill Property," and that a lien was retained on said land and the improvements thereon to secure the payment of said note. Said note further recited: "And the privilege having been granted by said Rawlings to said Sanders to remove the machinery from said land to the premises of Caroline Dysterbach and A. Dysterbach, her husband, on Elm street, in the city of East Dallas, Texas, the said Caroline Dysterbach, joined by her husband A. Dysterbach, have this day executed a chattel mortgage to said H. H. Rawlings on said machinery." The deed made by Rawlings was a conveyance of the two acres of land to Sanders alone, and also recited that the vendor's lien was retained on the land, premises, and improvements to secure the payment of said note. The consideration expressed in said deed is \$600 cash and the said note of \$1,834. From the date of the sale of said property to Sanders in 1886 up to the time of the execution of said note Sanders paid on his purchase various sums of money, but no payment was ever made on said note, except the sum of \$50 credited thereon, which was not paid by Sanders. Rawlings instituted this suit on the 25th day of August, 1897, against F. W. Sanders and A. and Caroline Dysterbach, praying judgment on said note, with a foreclosure of the vendor's lien on the land and premises sold to Sanders. Defendants A. Dysterbach and Caroline Dysterbach appeared, and on the 4th day of October filed answer, among other things pleading the statute of limitation, whereupon plaintiff filed an amended original petition, dismissing his suit against the defendants Caroline and A. Dysterbach for the reasons stated that they were wholly insolvent, and that the said Caroline was a married woman, and not personally bound on said note. By this amendment plaintiff sought a recovery on said note against defendant Sanders, with a foreclosure of said vendor's lien, and prayed that in the event the court should find that said note is barred by the statute of limitation, and that he was not entitled to recover thereon, that said sale to Sanders be rescinded, said note canceled, writ of possession awarded him, and that he be quieted in his title to said property. On the 4th day of January, 1901, defendant Sanders filed his second amended original answer, setting up various defenses, among which is the plea of the statute of limitation to said note. The trial of said cause resulted in a judgment for plaintiff for said land, and that he have his writ of possession. The defendant Sanders pleaded that he had paid the purchase money for said land and improvements be-

*Rehearing denied November 23, 1903, and writ of error denied by Supreme Court.

fore the execution of the note sued on and the deed by Rawlings to him; that the cash consideration expressed in the deed, \$600, was paid by him and accepted by Rawlings in full of said purchase money, and that the note sued on was given exclusively for the mill machinery; that at the time of the execution of said note Rawlings agreed to release him from payment of same, and to look to Caroline and A. Dysterbach and said chattel mortgage on the machinery for the collection of said note. He further alleged that when said note became due he urged Rawlings to proceed to collect the same by suit against the Dysterbachs, with foreclosure of his mortgage lien; that Rawlings refused to do so, and suffered said mortgaged property to be dissipated and lost, or had received and converted it to his own use.

Suffice it to say that the evidence on the trial was conflicting on all the matters of defense and issues set up and presented by defendant's answer. The court found against defendant on them. There is evidence sufficient to support the court's findings, and its judgment will not be disturbed because there was evidence to justify a different conclusion, even if it be admitted that the matters set up and the relief sought were proper matters of defense and consideration in a suit like this. While the plaintiff's petition wherein he seeks to recover said land is not as full as the usual and ordinary pleading in trespass to try title, yet we believe the same sufficient. Plaintiff alleged that the note sued on and described in his petition was given for a part of the purchase money of said land; that the vendor's lien was retained in said note and in his deed conveying the land to Sanders to secure the payment of same; that Sanders had failed and refused to pay said note, though past due, and he (Rawlings) asked for a writ of possession, and that he be quieted in his title to said land. It will be observed that this suit was filed on the 25th day of August, 1897, and the note made payable on or before the 12th day of April, 1892, and hence barred by the statute of limitation. It appears that the note sued on was given for the purchase money of the land described in plaintiff's petition. The vendor's lien was retained in both the note and the deed conveying the land to Sanders. The plea of limitation was pleaded and urged by the defendant, Sanders, below. The lapse of time did not extinguish the debt, but afforded the appellant the right in law to exercise the privilege of pleading the statute of limitation in bar of appellee's right to recover on the note and foreclose the vendor's lien. This was only a privilege to be exercised at the option of the appellant. The appellee was not compelled to assume that the appellant would avail himself of this privilege, and thereby repudiate his contract, and hence elect in the first instance to sue for the land. The plea of limitation having been filed and urged after suit

was brought on the note, the appellee was then confronted with an insuperable objection or obstacle to a recovery thereon and to a foreclosure of his lien. In this attitude his right of election was revived. The superior title to the land remained in him, and his only recourse was to assert it, and ask for a recovery of the land. This he did, and appellant could only defeat such recovery by paying or tendering the balance of the purchase money represented by said note. This he failed to do. The exhaustive discussions of the questions arising upon this phase of the case in the following authorities renders further discussion by us unnecessary: *White v. Cole* (Tex. Civ. App.) 29 S. W. 1148; *Id.* (Tex. Sup.) 29 S. W. 759; *Harris v. Catlin*, 53 Tex. 8; *Hamblen v. Folts*, 70 Tex. 137, 7 S. W. 834; *Gardener v. Griffith*, 93 Tex. 355, 55 S. W. 314.

We find no reversible error in the judgment of the district court, and it is affirmed.

TEXAS CENT. RY. CO. v. PARKER.

(Court of Civil Appeals of Texas. Nov. 14, 1903.)

TRIAL—ARGUMENT OF COUNSEL—INSTRUCTIONS.

1. In an action against a railroad company for damages to household goods and wearing apparel by an overflow, the attorney for plaintiff, in his argument, said: "When the railroad kills one of your animals that is worth \$65, they will offer you \$8 for it, and, if you don't take it, they will force you to sue and pay out \$200 to get the \$65; and I intend to tell the juries of this country about the railroad's conduct in these matters." *Held*, that it was error to refuse to instruct the jury not to consider such argument.

Appeal from Erath County Court; L. N. Frank, Judge.

Action by O. D. Parker against the Texas Central Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Martin & George, for appellant. Parker, Carlton & McCarty and Daniel & Keith, for appellee.

STEPHENS, J. This was a damage suit brought against appellant, and resulted in a verdict and judgment in appellee's favor. The items of damage claimed were numerous, covering various articles of household goods and wearing apparel injured by an overflow, and also the loss of several game chickens. The evidence showed quite a difference of opinion as to the extent of the damage.

In his closing argument to the jury, the attorney for appellee used this language: "When the railroad company kills one of your animals that is worth \$65, they will offer you \$8 for it, and, if you don't take it, they will force you to bring suit and to pay out \$200 to get the \$65; and I intend to tell the juries of this country about the railroad's conduct in these matters." The at-

torney for appellant then and there excepted to this language, and asked the court to instruct the jury not to consider it, "because there was no evidence before the jury to authorize counsel to use such language, and because such language was inflammatory and was calculated to arouse the prejudices and inflame the minds of the jury against the defendant." The court overruled this motion and refused to so instruct the jury, and to this proceeding error is assigned. The case in this respect is not to be distinguished from that of *Railway Co. v. Langston*, 92 Tex. 709, 50 S. W. 574, 51 S. W. 331, and the still more recent case of *Railway Co. v. Musick*, 76 S. W. 219, 8 Tex. Ct. Rep. 262, to which cases reference is made for discussion of the question.

The judgment is therefore reversed, and the cause remanded for a new trial.

THREADGILL v. BUTLER.*

(Court of Civil Appeals of Texas. Oct. 23, 1903.)

SCHOOL LANDS—SALE—CHANGE OF PRICE—PRIOR APPLICATION—SUBSEQUENT AWARD.

1. Where an application to purchase school land at \$1 per acre is made while the land is appraised at a higher value, which is subsequently reduced to \$1 per acre, and the land is then awarded to the applicant at the reduced price on his application, the award is valid.

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Trespass to try title by W. A. Threadgill against N. Butler. From a judgment for defendant, plaintiff appeals. Affirmed.

Dubois & Allen, for appellant. Hill & Lee and A. B. Burges, for appellee.

FISHER, C. J. On the 8th day of April, 1902, the appellant instituted this suit in trespass to try title against Butler to recover school section 6, certificate No. 807, A. B. & M., containing 640 acres of land, situated in Tom Green county. The defendant answered by plea of not guilty and res adjudicata, claiming that the issues involved in this suit had been settled and determined by a former judgment rendered in a case between the same parties. The trial court instructed a verdict in favor of the defendant.

We find the following facts: On the 19th day of March, 1896, and prior thereto, school section 208, in the name of the Southern Pacific Railroad Company, situated in Tom Green county, was classified as dry grazing land, and appraised at \$1 per acre, and placed on the market for sale on the 19th day of March, 1896. On the 19th of November, 1898, the appellee applied to purchase this section as an actual settler, and the same was duly awarded to him by the Commissioner of the Land Office. He made the

payments due, and has subsequently paid all amounts due upon this section, and has occupied the land as his home since his purchase for three consecutive years, and has filed his proof of occupancy in the land office as required by law. Section 6, the land in controversy, is a school section, located by virtue of certificate No. 807 in the name of Adams, Beatty & Moulton, and is classified as dry grazing land, in Tom Green county, situated within five miles of the home section of the appellee, as above described. On the 1st day of November, 1899, the appellee applied to purchase the land in controversy, and filed his application in the land office on the 3d of November, 1899, as additional lands to his home section. His bid was \$1.55 per acre, which application was by the Commissioner of the Land Office received, approved, and filed, and the following January the land was awarded to the appellee on this application. This land had been previously classified as dry grazing land at \$2 per acre, the figure 2 in the column having been written over the figure 1, and these facts were shown by the records of Tom Green county. On the 6th day of November, 1899, the commissioner appraised and valued the section in controversy at \$1 per acre, which valuation and appraisal was filed in the office of the county clerk of Tom Green county on November 8, 1899. Another classification and valuation were made by the commissioner of date November 8, 1899, at \$2 an acre, which valuation and classification were afterwards filed in the office of the county clerk of Tom Green county. The appellee, at the time of his purchase of the land in controversy, executed his obligations as required by law, and has since that time made the payments as required, and during this time the appellee was an actual settler in good faith, making his home of section No. 208, and he has continuously resided upon that section, and purchased the land in question as additional lands within five miles of his home section, and at the date of his application he owned school land other than that in controversy, his home section No. 208, and section No. 2, B. S. & F., and section No. 150, Southern Pacific Railway, and no other. On the 20th day of November, 1901, the appellant applied to purchase the land in controversy, and at that time the records of Tom Green county showed that the lands had been sold to the appellee, Butler, on his application filed in the land office November 3, 1899. The plaintiff applied to purchase the land at \$2 per acre, and at the time executed his obligation in the manner and form as required by law, and filed his application with the clerk of the county court of Tom Green county, and made his first payment to the state treasurer, as required.

It is unnecessary for us to state the facts bearing on the issue of res adjudicata, as we rest our decision on the facts as before

*Rehearing denied December 2, 1903.

stated. It is apparent from the evidence that, before any right was attempted to be acquired by the appellant, the Commissioner of the Land Office awarded the land in controversy to the appellee, and that at the time of the award he acted upon the appraisal and valuation of \$1 an acre. According to the doctrine announced in *Steward v. Wagley* (Tex. Civ. App.) 68 S. W. 297, the change in valuation by the Commissioner of the Land Office to \$1 an acre a few days after the appellee applied to purchase the same entitled the commissioner to accept this as the standard of value in awarding the land to appellee, and the appellant is not in a position to question the action of the commissioner in this respect.

We have examined all the questions raised by the assignments of errors, and think that none are well taken. The facts as found and the conclusion reached justified the peremptory instruction of the trial court to return a verdict for appellee, Butler.

Judgment affirmed.

INTERSTATE NAT. BANK v. CLAXTON.*

(Court of Civil Appeals of Texas. Oct. 24, 1903.)

BANKS—DEPOSIT—TRUST FUND—LIABILITY TO TRUE OWNER—JUDGMENT AS BAR—SPECIAL PLEADING.

1. Where a person sells cattle through factors, who receive the proceeds of the sale, and pay the seller but part thereof, holding the balance with direction from the seller to apply on a note of his, and remit the balance to him, the sum retained by the factors constitutes a trust fund, the character of which is not altered by the fact that it is deposited in bank to the individual credit of the factors.

2. Evidence considered, and *held* to show that at the time a bank accepted the deposit of funds by certain factors the bank's officers knew the factors were insolvent.

3. Evidence considered, and *held* sufficient to put a bank on inquiry at the time it accepted a deposit of certain factors whether the fund in fact belonged to the factors, or to their principals.

4. Where a bank accepts a deposit from a patron known by it to be insolvent at the time, with knowledge sufficient to put it on inquiry whether the fund belonged to the depositors, it is liable to the true owner of the fund for the amount of loss sustained by him, where the bank permits the fund to be diverted to other uses than the payment of the owner.

5. The judgment of a court, relied on as a bar to an action, cannot be availed of unless pleaded in bar.

Appeal from District Court, Potter County; Ira Webster, Judge.

Action by the Interstate National Bank against W. N. Claxton. From a judgment for defendant, plaintiff appeals. Affirmed.

Browning, Madden & Truelove, for appellant. Turner & Boyce, for appellee.

CONNER, C. J. This suit was instituted in the district court of Potter county, Tex.,

by the appellant banking corporation, doing business in Kansas City, Mo., upon a note of \$520.83 made by appellee, W. N. Claxton, to the cattle commission firm of Tamblin & Tamblin, at the time also doing business in Kansas City, and by said firm indorsed and assigned to appellant before maturity as security for certain advances. Appellee answered, admitting appellant's cause of action upon the note, but sought to recover a balance of \$1,375.38, as the net proceeds of certain cattle shipped by appellee to Tamblin & Tamblin, and by them sold, and the proceeds, with other money, deposited in the appellant bank to their credit. Appellee alleged, in substance, that at the time of such deposit, October 28, 1901, Tamblin & Tamblin were insolvent; that appellant knew that the funds deposited belonged to others, and, by the exercise of due care, could have known the persons to whom the same did belong, notwithstanding which, and notwithstanding appellant's knowledge of their insolvency, it allowed said moneys to be deposited to the individual credit of Tamblin & Tamblin, and applied the same to the payment of pre-existing indebtedness due from them to the bank, and in payment of checks of Tamblin & Tamblin to persons other than appellee. A jury trial resulted in a verdict in favor of appellee for a balance of \$835. The record is voluminous, and the assignments of error numerous, but it is believed that our view of the most material questions presented may be indicated in a general way.

In various forms, appellant insists that the verdict and judgment are erroneous, in that the evidence shows that appellee's money was unidentified and deposited with other moneys by Tamblin & Tamblin to their individual credit pursuant to a long-continued course of business known to appellee, and that it was neither alleged nor shown that, before the application and withdrawals charged, appellee made demand or gave notice of his ownership. The evidence shows that appellee was present at the sale of his cattle, which took place on October 28, 1901; that, of the proceeds (\$1,604.40), Tamblin & Tamblin then paid appellee \$50; and that appellee then instructed them to apply enough of the net remainder to pay off the note sued on in this case, and to remit the balance to him in Texas. The note, by its terms, matured November 1, 1901, and while it had theretofore been assigned to appellant, as stated, appellee was without knowledge thereof; he, upon inquiry, being assured by Tamblin & Tamblin at the time of the instructions mentioned that they yet held the note. Tamblin & Tamblin at the time of the sale of appellee's cattle also sold other cattle, and received from the Cudahy Packing Company a check payable to them in the sum of \$4,528.65, as the aggregate amount of the Tamblin & Tamblin sales to that company of that day. Late upon the same day, October 28, 1901, Tamblin & Tamblin deposited said \$4,528.65

*Rehearing denied November 28, 1903.

check, together with some 11 other checks, with appellant; the whole deposit amounting to \$6,025.80, which appellant received and credited to the individual account of Tamblin & Tamblin. Two days prior to said deposit, Saturday, October 26th, an accounting between appellant and Tamblin & Tamblin had taken place; and in settlement of numerous advances and overdrafts, occurring from time to time during the year preceding, and aggregating \$35,289.65, appellant took certain paper, and left Tamblin & Tamblin's account, showing a credit at the close of business on that day of \$9.46. On the day of said deposit, but prior thereto, appellant received information to the effect that the Pumphrey herd of cattle, in the Indian Territory, upon which the bank held a mortgage to secure indebtedness of Tamblin & Tamblin to it, were 1,200 short. It appeared that that number of the Pumphrey herd had been shipped to and sold by Tamblin & Tamblin, and the proceeds thereof, without appellant's knowledge, applied by Tamblin & Tamblin otherwise than, as they should have done, upon the Pumphrey mortgage, at the time held by appellant. In settlement of such discovered shortage, and prior to said deposit as stated, appellant demanded and received further security in the form of a note for \$30,000, secured by a mortgage upon the individual real property of George S. Tamblin, of the firm of Tamblin & Tamblin; it not appearing that Tamblin & Tamblin, or any member of the firm then, had any property not in possession of, or incumbered by or for the benefit of, appellant.

It seems clear that, as between appellee and Tamblin & Tamblin, the proceeds of the sale of appellee's cattle constituted a fund in the nature of a trust fund, and that its deposit to the individual credit of Tamblin & Tamblin did not alter its character as such. For, as said in the opinion of the Supreme Court of the United States in the case of *National Bank v. Life Ins. Co.*, 104 U. S. 66, 26 L. Ed. 699, in speaking of the character of the fund composed of insurance premiums deposited to the general credit of the collecting agent, " * * * although the relation between the bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, to whom, in equity, does it beneficially belong? If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account." Other cases are cited in the opinion from which we quote, supporting the undoubted doctrine that as between the cestui que trust and trustee, and all parties claiming under the trustee, otherwise than as a purchaser or lienholder for a valuable consideration, without notice, all property belonging to a trust, however much it may be changed, continues subject to the trust. See, also, *Cady v. Bank*

(Neb.) 65 N. W. 906. Nor will the right of the beneficiary in the trust fund be altered by the fact that the trustee has mixed the trust funds with his own, or that the depository may also be holding for the trustee funds belonging to such trustee individually. See the cases of *Pennell v. Deffell*, 4 De G., M. & G. 372, and *Frith v. Cortland*, 2 Hem. & M. 420, cited with approval in the opinion from which we have quoted. See, also, *Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Van Alen v. Bank*, 52 N. Y. 1; et *Dillon v. Ins. Co.*, 44 Md. 386.

So that the real character of the fund in the appellant bank to the credit of Tamblin & Tamblin on Monday, October 28, 1901, must be accepted as that of a trust fund in which appellee had the right to participate, unless precluded from the circumstances attending the deposit. Of the \$6,035.26 to the credit of Tamblin & Tamblin on the 28th, appellant on that day paid their check in favor of one other than appellee for \$275.75; on the 29th, paid like check for \$4,614.98; on the 30th, like check for \$700; and on the 31st, like check for \$15; and also applied \$60.94 in payment of interest due from Tamblin & Tamblin, and the further sum of \$100 in correction of an error to that extent in Tamblin & Tamblin's favor in credits previously allowed them on the bank books. The remainder of the fund was paid to the referee in the bankrupt proceedings of Tamblin & Tamblin, hereinafter more particularly mentioned. Said checks were all paid in the manner of the payment of such checks by Tamblin & Tamblin as the business had been conducted for many years, and without actual knowledge on appellant's part of appellee's interest in the fund.

In the absence of any proof of any credit extended or of anything of value surrendered on the faith of the deposit, it seems clear that appellant is liable, as appellee seeks to establish, to the extent, at least, of the items of \$60.94 for interest, and of \$100 in fact applied in payment of pre-existing indebtedness of Tamblin & Tamblin, for which credit had erroneously been given. See *Bank v. Jones*, 18 Tex. 811; *Bank v. Weiss*, 67 Tex. 331, 3 S. W. 299; *Bank v. Machinery Co.*, 15 Tex. Civ. App. 159, 39 S. W. 217; *Davis v. Bank* (Tex. Civ. App.) 29 S. W. 926; *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142; *Bank v. Life Ins. Co.*, *supra*; et *Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724.

Our principal difficulty has been to determine whether the appellant is also liable to the extent sought in this suit for the sums paid out on checks of Tamblin & Tamblin. We have finally concluded that, under the circumstances of this case, appellant is so liable; and in support of this conclusion we add that, in addition to the facts heretofore recited, the evidence tends to show that Tamblin & Tamblin were but commission dealers or factors; that they did not engage

in the purchase and sale of cattle on their own account, save, perhaps, to a very limited extent; that, while the proceeds of cattle sold by them had been uniformly deposited with appellant in their own name, Tamblin & Tamblin had no real right thereto, beyond their commissions and other usual charges, all of which was well known to appellant's officers. The evidence also shows that the Cudahy check for \$4,528.65, hereinbefore mentioned, and which included the proceeds of appellee's cattle, bore upon its face the words, "Good only in payment for live stock and when drawn in favor of a Kansas City live stock commission office;" that all Cudahy checks were usually so indorsed, within the knowledge of appellant's officers. There is evidence also tending to show that, had said officers so desired, they could, by inquiry of Tamblin & Tamblin, or their employes, or of employes of the Cudahy Company, or by inspection of weighing slips used in the regular course of such sales, have easily learned of the fact and extent of appellee's real right in said check of \$4,528.65. It appears, also, without dispute, that on October 30, 1901, the managing officers of appellant refused to receive and credit deposits by Tamblin & Tamblin in their individual character, but formed what is termed by said officers a "trust fund" for Tamblin & Tamblin; such fund, less commission and yardage, being credited on the bank books to the respective owners. A number of such "trust" deposits were thereafter made by Tamblin & Tamblin, including one item of \$396 and one of \$21.80 on the 30th, and one of \$130.90 on October 31, 1901, all in favor of, and subsequently paid to, the appellee in this case. It is also undisputed that on or about the 18th day of November, 1901, a petition in involuntary bankruptcy was filed against Tamblin & Tamblin, alleging that the act of giving the \$80,000 mortgage to appellant was an act of bankruptcy. On November 29th thereafter, Tamblin & Tamblin answered, admitting the act as well as the insolvency charged, and were duly adjudged bankrupts.

We feel no hesitation in concluding that this, as well, perhaps, as other evidence that might be adverted to, tends to show that Tamblin & Tamblin were in fact insolvent on October 28, 1901, when appellee's money was deposited with appellant, as heretofore stated, and that appellant, through its managing officers, knew this fact. If so, and if appellant in the same manner also knew that the fund deposited did not belong to Tamblin & Tamblin, why should it not be liable for appellee's subsequent loss?

The general rule undoubtedly is that knowledge will be imputed to one who has the means of knowing. Wade on Law of Notice, §§ 11, 22. This doctrine of imputed knowledge has been frequently applied in cases in some respects similar to the one before us, as will be seen by an examination of the following authorities, where notice or

knowledge was treated as material, viz.: *Wolffe v. State*, 79 Ala. 206, 58 Am. Rep. 590, where a draft signed by one as trustee was held to put the receiving bank on inquiry as to the trust character of the deposit. A like conclusion was reached in *Gerard v. McCormick*, 130 N. Y. 266, 29 N. E. 115, 14 L. R. A. 237, in case of a check signed as agent. In *Shaw v. Spencer*, 100 Mass. 389, 97 Am. Dec. 107, 1 Am. Rep. 115, it was held that a certificate of stock in the name of one as trustee put the receiving bank on inquiry as to who was the beneficial owner, though not known in fact. This last case is cited with approval in *Duncan et Bank v. Jaudon*, 15 Wall. 175, 21 L. Ed. 145. In *Bank v. Ins. Co.*, 104 U. S. 54, 23 L. Ed. 693, hereinbefore cited, it is said that the bank must be affected with knowledge of the trust character of the fund, if it had notice, either actual or constructive. So, also, in *Union Stockyards National Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724, knowledge of the trust character of deposited proceeds of cattle sold by a factor was imputed to the bank. In the case of *Davis v. Bank*, 20 S. W. 926, by this court, the bank was held liable for trust funds applied in payment of the indebtedness of the depositing factor, and, in passing on the further question of the bank's liability for the payment of the factor's checks to others than the cestui que trust, it was said: "As to whether the bank should be protected in the amount it allowed Hancock [the depositing trustee] to check out, will depend on the question of notice. If it had notice of the real ownership of the funds, and that Hancock was not authorized to use them at the time it honored its checks, it is liable."

Let us apply the principle of the above and other cases to the facts of this case. As mere factors, which they undoubtedly were, Tamblin & Tamblin's general authority to act for appellee ceased upon their insolvency. *Mechem on Agency*, § 267, et *Audenried et al. v. Betteley et al.*, 8 Allen, 302. If it be conceded that, notwithstanding such insolvency, Tamblin & Tamblin would have been authorized to draw a check in appellee's favor for the part of the fund on deposit due him, yet authority to draw checks on such fund in favor of others cannot be presumed, and the evidence shows that the checks actually paid gave notice on their face that they were to others than appellee; and, as we have seen, appellant was possessed of the means of knowing that Tamblin & Tamblin were in fact performing unauthorized acts, and wrongfully diverting and appropriating appellee's money. We think the circumstances such as to put appellant upon inquiry, and that, if not actually known, knowledge of the trust character of the fund, of the fact and extent of appellee's interest therein, of Tamblin & Tamblin's insolvency, and of their wrongful appropriation of appellee's money, must all be imputed to ap-

pellant; and, if so, regardless of the want of other notice or of demand previous to appellee's answer, appellant is liable as having, at its own peril, entered the deposit of appellee's money to the credit of Tamblin & Tamblin, and of having thereafter not only participated in its unauthorized appropriation to the extent of the items heretofore noticed, but also of having permitted and enabled Tamblin & Tamblin to wrongfully divert or appropriate the remainder to appellee's entire loss. See *Bank v. Moore*, 79 Fed. 705, 25 C. C. A. 150; *Pearce v. Dill* (Ind. Sup.) 48 N. E. 788; 5 *Ency. Law & Procedure*, p. 530, par. "e"; *Evans v. Evans* (Iowa) 48 N. W. 929; et authorities heretofore cited.

We conclude, therefore, that no reversible error is shown in the court's rulings on demurrer, or upon the introduction of evidence, or in the charges given, or in the refusal of special instructions presenting different theories.

Some emphasis is given in the briefs to the fact that appellee appeared in the court having jurisdiction of the bankruptcy case of Tamblin & Tamblin, and there set up the matter he presents in this suit, notwithstanding which, it is insisted, said court decreed contrary to appellee's contention. As to this, we think it sufficient to say that, exclusive of the amount appellant was required to pay into the registry of the bankrupt court, the trust fund in appellant's possession, and to which appellee had right to resort, is perhaps sufficient to support appellee's recovery herein. Besides, if the evidence could be construed as supporting such plea, appellant has not pleaded the judgment referred to in bar, which would be necessary in order to give appellant the benefit suggested.

Believing that the evidence supports the material allegations of appellee's special answer or cross-action, and that no reversible error has been shown, it is ordered that all assignments of error be overruled, and that the judgment of the district court be affirmed.

AVOCATO et al. v. DELL' ARA et ux.*

(Court of Civil Appeals of Texas. Nov. 4, 1903.)

PARTNERSHIP — IMPLIED CONTRACT — EVIDENCE — INSTRUCTIONS — APPEAL — ABSENCE OF STATEMENT OF FACTS.

1. Where on appeal there is no statement of facts, alleged error in refusing to charge that there was no evidence of an implied contract of partnership is not reviewable.

2. Defendant denied that there had been a partnership between the parties, and the court instructed that if a partnership was formed in Italy, and thereafter dissolved, and at a later date the parties performed acts from which an implied agreement of partnership might be drawn, then a partnership existed;

but in the next paragraph instructed that no verdict could be found in favor of plaintiffs unless there was an express agreement to form a partnership. *Held*, that defendant could not complain of the charge, the latter portion being in his favor, and the fact of a prior partnership being a circumstance from which, with other facts, a partnership might be implied.

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by Eugene Dell' Ara and wife against Leonardo Avocato and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

J. M. Dean and R. V. Bowden, for appellants. Patterson & Wallace, for appellees.

FLY, J. This is an action instituted by Antonia Dell' Ara and her husband, Eugene Dell' Ara, against Leonardo Avocato, E. P. Avocato, and H. W. Austin, for the dissolution of a partnership alleged to exist between Antonia Dell' Ara, formerly Antonia Avocato, and the two Avocatos, and to compel an accounting and division of the partnership effects. The partnership was denied by appellants. The cause was tried by jury, and resulted in a verdict and judgment for appellees for one-third of the partnership property, after deducting therefrom certain sums paid out by appellants. Austin was brought into the suit because of a vendor's lien held by him against certain real estate belonging to the partnership, and Antonia Dell' Ara recovered her portion of such real estate subject to said lien. This appeal was perfected by Leonardo Avocato and E. P. Avocato. During the last term of this court the statement of facts was stricken from the record because not filed within 10 days after adjournment of the term of the trial court at which the cause was tried. This is a second appeal of this case, the decision on the former appeal being found in 57 S. W. 296.

The first assignment of error complains of the action of the court in refusing to charge the jury that there was no evidence of an implied contract of partnership, and they would therefore consider only whether an express contract of partnership was established. There being no statement of facts, the assignment of error is without any basis, and must necessarily fail.

The same rule will apply to the second assignment of error. It is not possible to ascertain that the charge as to the purpose for which certain testimony was admitted was injurious to appellants. There are instances where it is not only proper, but essential, to restrict the purpose and effect of certain testimony that is allowed to go before a jury.

In the sixth paragraph of the charge the court instructed the jury that if a partnership was formed in Italy between the parties, and thereafter the partnership was dissolved, and at a later date they did and performed acts from which an implied agreement of partnership might be drawn, then a partnership existed. In the following para-

*Rehearing denied December 2, 1903, and writ of error denied by Supreme Court.

graph the jury was instructed that no verdict could be found in favor of appellees unless an express agreement to form a partnership was proved. An implied partnership between the parties did not depend upon the existence of a prior express contract of partnership, although the fact of the existence of the latter might be a circumstance from which, in conjunction with other facts, a partnership might be implied. Surely appellants have no ground to complain of the charge. We cannot pass upon the assignment intelligently without a statement of facts.

All the remaining assignments of error depend for their vitality upon a statement of facts, and, there being none, cannot be sustained.

The judgment is affirmed.

SLOAN v. KING.

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

BOUNDARIES—ACTION TO ESTABLISH—LIMITATIONS—BURDEN OF PROOF—STIPULATION—DEFENSE OF INNOCENT PURCHASER—CALL IN DEED—PAROL EVIDENCE—ADMISSIBILITY.

1. In an action to establish a boundary, the burden of establishing the defense of limitations is on the defendant.

2. In an action to establish a boundary, the parties admitted that they had title to their respective lands as described in their deeds, except in so far as the same might be defeated by the agreed boundary line alleged by plaintiff, and in so far as the land in controversy might be recovered under pleas of limitations. *Held*, that this agreement eliminated the defense of innocent purchaser.

3. The agreement did not preclude the parties from showing the real boundaries of the lands conveyed by their common source of title.

4. Where the uncertainty in the calls in a deed does not arise on the face of the instrument, but only when the effort is made to apply them to the land, parol evidence is admissible to dispel the uncertainty.

5. An ambiguity in the description in a deed, arising when it is sought to apply the description to the property, may be corrected in an action to establish a boundary, and a resort to equity is unnecessary.

Appeal from District Court, San Saba County; Clarence Martin, Judge.

Action by J. L. King against J. A. Sloan. Judgment for plaintiff, and defendant appeals. Affirmed.

See 69 S. W. 541.

Rector & Brown, for appellant. P. M. Faver and W. M. Allison, for appellee.

FISHER, C. J. This is a suit brought by the appellee, King, against the appellant, Sloan, to establish the boundary line between them of the lands respectively owned by each of the parties. Verdict and judgment below were rendered in favor of the plaintiff, establishing the line in controversy in accord with his theory, as set out and described in his petition.

Plaintiff, in his petition, alleges that prior to the year 1862 Wm. Thaxton was the own-

er in fee simple of a tract of land situated on the south bank of the San Saba river, known as survey No. 64, patented to the heirs of F. Eggers; that in said year of 1862 Thaxton conveyed 45 acres, including other lands, off of the north end of said F. Eggers survey, 64, to J. W. King, the father of this plaintiff, which 45 acres was subsequently conveyed by J. W. King to plaintiff; that afterwards Wm. Thaxton conveyed the residue of the Eggers tract to Banty and Hoover, being the south part of the Eggers survey, 64; that the boundary lines of these divisions begin at a stone mound on the bank of the San Saba river, from which a live oak bears thence south, 77 east, 200 varas, to a stone mound, from which a mesquite bears north, 11 west, 7 varas, and thence north, 57 east, 975 varas, to a stake in the east line of survey 64, from which a mesquite bears north, 11 west, 7 varas; that this line has well-defined bearings, and is marked and identified on the ground; that there are some discrepancies in the matter of description in the deeds from Thaxton to King and to Banty and Hoover, and that while the land was owned by King, Banty, and Hoover, the line as above described was agreed upon by said parties as the boundary line between their several tracts; that said agreed line was thereafter acted upon and recognized by the parties as the dividing line of the land that each respectively bought from Thaxton. It appears that, after the line was agreed upon, Hoover and Banty conveyed to one Flemming, who thereafter conveyed to the appellant, Sloan. Sloan, in his answer, pleaded "Not guilty," and denied the agreed boundary, and alleged that he was a purchaser in good faith, without notice of such agreed line, and that he claimed the land in controversy by virtue of the three, five, and ten years' statutes of limitations, and, in effect, claimed that the true line between his land and King's should commence at the stone mound 200 varas from the river, and from thence run north, 40 east, to the northeast corner of survey 64, instead of north, 57 east, to a stake in the east line of survey 64, as claimed by the plaintiff.

On the question of boundary, the real controversy between the parties is whether the evidence shows an agreed boundary, or whether the dividing line between them should be established from the stone mound corner, 200 varas from the river, on a course north, 57 east, to a stake in the east line of survey 64, from which a mesquite bears north, 11 west, 7 varas, as contended by plaintiff, or, as contended by the defendant, the line should run from the 200-vara stone mound corner from the river, north, 40 east, to the northwest corner of survey 64.

The facts show that Wm. Thaxton was common source. The field notes of the deed from Thaxton to King, so far as relate to the line in controversy, call to run north, 57 east, from the 200-vara stone mound cor-

ner from the river, 957 varas, to a stake in the south line of survey No. 65, set for the northeast corner of No. 64, from which a mesquite bears south, 60 east, 6 varas. The deed from King to Hoover calls to run from the corner 200 varas from the river, north, 57 east, to the place of beginning. The beginning call in the deed to Hoover calls to commence at the northeast corner of survey 64, at a stone mound, from which a mesquite bears north 11 varas. There is evidence to the effect that, when Thaxton sold to King, he went upon the ground and surveyed the line, and, to some extent, marked the same on the course running north, 57 east, from the corner 200 varas from the river to a point on the east line of survey 64; and there is some evidence in the record indicating that he there established the stone mound identified by the mesquite bearing tree, which is called for as north, 11 west, 7 varas. The evidence in the record tends to show that he did not run the line on the course contended for by the defendant, and did not establish the corner of the land conveyed to King and Hoover at the northeast corner of survey 64. The evidence warrants the conclusion by the jury that he never ran that line, nor established that corner, but that he did in fact run and establish the dividing lines between him and King on the course north, 57 east; and there is evidence of his footsteps found upon the ground, tending to show that there was where he actually established the line. Evidently the confusion in the call in the field notes in the conveyance from Thaxton to King and from Thaxton to Hoover suggested to these parties the propriety of establishing by agreement the line between them. And we find as a fact that, while King and Hoover were the owners of the land, they did agree upon the line as claimed by the plaintiff, and that such agreement was acted upon. The line so agreed upon is practically and almost identically the same line that was established by Thaxton, running on the course north, 57 east, from the corner 200 varas from the river.

The court, in its charge, submitted to the jury the question as to the existence of the agreed line, and authorized them to determine the boundary line in question, independent of the agreement, submitting to them the usual rules for the ascertainment and establishment of boundaries, and submitted the defense of limitation and innocent purchaser.

It is contended by appellant that the court's charge was not full enough upon the subject of limitation; that the jury should have been directed, in so many words, to return a verdict in favor of the defendant, if they found for him on the issue of limitation. The charge of the court upon this subject did practically present this issue to the jury, and, if the charge was not as full as wished by the appellant, an additional in-

struction should have been asked, which was not done.

It is also contended by the appellant that the defense of limitation was established. There is some evidence in the record tending to establish this issue in favor of the defendant, but we cannot say, from an inspection of the testimony bearing upon this subject, that it was sufficient to satisfy the jury and court that the defendant or his vendor, Flemming, was in actual possession of the land in controversy. There is a confusion and uncertainty in the evidence upon this subject, and we are inclined to the opinion that the jury had the right to reach the conclusion that the defendant had not, by satisfactory evidence, established the fact that he and his vendor, Flemming, were in possession of the land in controversy for the length of time required by law. The burden was upon the defendant to establish this issue, and, in the confused condition of the testimony upon the subject, the jury were well authorized to reach the conclusion that the evidence of possession was not satisfactory.

It is next contended by the appellant that he was entitled to a verdict and judgment on the issue of purchaser in good faith; it being contended that, when he purchased the land, he did so without notice of the agreed boundary. The record contains this admission: "It was admitted by each party hereto that the parties have title to their respective lands, as described in their deeds, respectively, except in so far as the same may be defeated by the agreed boundary line alleged by plaintiff to have been established and agreed on by and between plaintiff's father and vendor, J. W. King, and defendant's remote vendor, G. W. Hoover, and except in so far as the land in controversy, up to the line described in defendant's title deeds, may be recovered under the three or five or ten years' plea of limitation." According to our view, this agreement eliminates the defense of innocent purchaser. But if we are mistaken in our construction of this agreement as to the issues involved in the case, then we are clearly of the opinion that the evidence did not authorize a verdict in favor of the appellant upon this issue. It does not appear from the evidence, independent of the recitals contained in appellant's deed, that he paid a valuable consideration for the land; but, if it could be conceded that he did, it is clear from the facts that he is chargeable with notice of the existence of the line contended for by appellee. The agreed line which is contended for by appellee is practically located along the same line, running north, 57 east, which line was marked and identified, according to the evidence in the case. This agreed line is consistent with the established line called for in the field notes. If the testimony of the plaintiff's witnesses is to be believed, the evidences of identity of the existence of this line are so well fixed

that the subsequent purchaser from one of the parties would be charged with notice of its existence, or, in other words, the jury were authorized to reach the conclusion, in passing upon the issue of innocent purchaser, that the line called for was so prominent that Sloan, the subsequent purchaser, must have known of its existence, or could have ascertained it by the exercise of a reasonable effort to do so. As said before, the court did submit the issue to the jury of innocent purchaser, and we are of the opinion that the evidence was sufficient to authorize the verdict of the jury against appellant upon this question.

It is contended by appellant that the question of boundary (that is, as to the existence of the true dividing line between King and Hoover, as established by the calls in the field notes) was eliminated by virtue of the agreement, and that therefore the court should not have instructed on the subject of boundary. It is also contended that, according to the previous decision of this court on the former appeal of this case, the court erred in submitting the plaintiff's theory as to the boundary and dividing line between him and defendant, because the line should be established, running from the 200-varas corner from the river, north, 40 east, to the northeast corner of survey No. 64. Doubtless, when the case was here before, and when we applied the doctrine announced in *Anderson v. Stamps*, 19 Tex. 460, we were laboring under the impression that the northeast corner of 64 was indubitably established, and that the evidence of the footsteps of the surveyor did not indicate that he went to a different place, such as is shown to be the case in the evidence before us in this record. In our opinion, the evidence does not clearly establish the existence of the northeast corner of survey 64; but there is no dispute or controversy about the existence of the corner 200 varas from the river, and from that corner there is a call in the deed to King running north, 57 east, which is corroborated and identified to some extent by a marked line made by Thaxton on that course when that call was made. We do not place the same construction upon the agreement which has just been stated, limiting the issues to be submitted by the trial court, as contended for by the appellant. In our opinion, the question of boundary, under that agreement, was still in the case, and it was a proper issue for the court to submit to the jury. The agreement states that "It is admitted that the parties have title to their respective lands described in their deeds, except in so far as the same may be defeated by agreed boundary," etc. We do not understand this to mean that either party would be precluded from offering testimony tending to show the real boundaries of the lands conveyed by Thaxton. Therefore we are of the opinion that it was proper for the trial court to submit the question of boundary to the jury.

Anderson v. Stamps, 19 Tex. 464; *Reast v. Donald*, 84 Tex. 653, 19 S. W. 795, and *Coleman County v. Stewart* (Tex. Civ. App.) 65 S. W. 385, and like cases, announce the correct doctrine, that the calls in the field notes of a survey cannot be controlled by parol evidence of the existence of objects which are not called for; that the boundaries are to be determined and ascertained from some of the calls of the grant; and that parol evidence, except in actions to correct mistake, is not admissible to correct a call. But this rule does not apply when the evidence of extraneous facts and surrounding circumstances is simply in aid of a call found in the field notes, when the purpose is by such evidence to remove an ambiguity, and to determine which of two or more conflicting calls shall prevail. This is made apparent in the cases of *Booth v. Upshur*, 26 Tex. 71, and *Duren v. Presberry*, 25 Tex. 517, where in each case *Anderson v. Stamps* is explained. The uncertainty or ambiguity in the calls of the deed from Thaxton to King and from Thaxton to Hoover did not arise upon the face of these instruments, but arises when the effort is made to apply them to the land intended to be conveyed. In applying the calls contained in these deeds, it is found that the call for the northeast corner of survey 64 conflicts with the call for course and distance 975 varas north, 57 east, from the known corner, 200 varas from the river. The jury adopted the last call as the correct and controlling one, acting evidently upon the theory that the call for the northeast corner of survey 64 was a mistake, and we have no doubt as to the correctness of this conclusion.

There is no evidence, as said before, that Thaxton, in locating and surveying the land intended to be conveyed, ever ran the line from the corner 200 varas from the river on the course north, 40 east, to the northeast corner of survey 64, and there established a corner, as contended for by appellant. But there is evidence to the effect that, from the corner 200 varas from the river, he ran a line, and marked the same on the course north, 57 east, and established a corner on the east line of survey 64; and, such being the case, we have evidence of his footsteps which is consistent with the call in the grant, and which may be considered as evidence identifying this call, and giving to it a superiority over the call for the northeast corner of survey 64. *Oliver v. Mahoney*, 61 Tex. 612.

In the case of *Johnson v. Archibald*, 78 Tex. 102, 14 S. W. 287, 22 Am. St. Rep. 27, the present Chief Justice of the Supreme Court uses this language: "If the calls in a grant, when applied to the land, correspond with each other, parol evidence is not admissible to vary them by showing that in point of fact they are not the calls of the survey as actually made, but if, when so applied, they disclose a latent ambiguity (that

is to say, if they conflict with each other), then extrinsic evidence may be resorted to, in order to determine the conflict, and show the land actually intended to be embraced by the calls of the survey. Certain calls, such as for natural objects, marked lines, and corners, being less likely the result of mistake, in the absence of other evidence, prevail over calls for course and distance. But the survey actually made is, in legal contemplation, the true survey, and it is always competent to show by any legal evidence where the lines were in fact found upon the ground. It follows, therefore, that whenever the evidence is sufficient to induce the belief that the mistake is in the call for the natural or artificial objects, and not in the call for course and distance, the latter will prevail, and the former will be disregarded." This doctrine is recognized in *Gregg v. Hill*, 82 Tex. 409, 17 S. W. 838; *Boon v. Hunter*, 62 Tex. 588; *Booth v. Upshur*, 26 Tex. 65; *Duff v. Moore*, 68 Tex. 271, 4 S. W. 530; *Lilly v. Blum*, 70 Tex. 710, 6 S. W. 279; *Oliver v. Mahoney*, 61 Tex. 612; *Jones v. Andrews*, 62 Tex. 660; *Jones v. Burgett*, 46 Tex. 291; *Shelton v. Bone* (Tex. Civ. App.) 26 S. W. 225; *Busk v. Manghum* (Tex. Civ. App.) 37 S. W. 459; *Robinson v. Doss*, 53 Tex. 506; *Castleman v. Pouton*, 51 Tex. 87; *Hubert v. Bartlett's Heirs*, 9 Tex. 103; *Bigham v. McDowell*, 69 Tex. 106, 7 S. W. 315; *Aransas Pass Colonization Co. v. Flippen* (Tex. Civ. App.) 29 S. W. 813; *Arambula v. Sullivan*, 80 Tex. 618, 16 S. W. 436; and *Green v. Burns* (Tex. Civ. App.) 29 S. W. 547. In many of the cases cited, course and distance were made to prevail over objects found upon the ground, as called for in the field notes. This upon the theory, as so frequently stated in some of the cases, that when the facts and surrounding circumstances indicate that course and distance is the most reliable of the two calls, and that the call for the object was by a mistake, the latter will be made to yield to the former.

The suggestion is made by the appellant that in an action merely to establish boundary, or in trespass to try title, an uncertainty or ambiguity cannot be removed, or the fact of a mistake corrected; that an equitable action to correct the mistake is necessary in order for the court to inquire into it. This position is not tenable. Nearly all of the cases cited were actions of trespass to try title, in which no element of mistake was pleaded, and there the correction was permitted, or, in other words, the jury were authorized, from the facts proven, to reach the conclusion that a mistake was made in one of the calls. But we regard the question as definitely settled in this state. In *Coffey v. Hendricks*, 66 Tex. 677, 2 S. W. 47, which was an action of trespass to try title, the court, on the last page of the opinion, says: "The admission of the testimony of the surveyor is complained of in the seventh as-

ignment of error. This testimony was merely to the fact that the field notes in the deed from Davis to Roberts, if corrected so as to read north, 4 west, instead of north, 40 west, would embrace the land in controversy. With that deed in evidence, the testimony, we think, was admissible." It was also held in *Williamson v. Simpson's Ex'rs*, 16 Tex. 442; *Berry v. Wright*, 14 Tex. 273; *Loving v. Corcoran*, 26 Tex. 93; *Urquhart v. Burleson*, 6 Tex. 513; *Hughes v. Sandal*, 25 Tex. 164—which were actions of trespass to try title, that mistakes in the calls could be corrected. In the case of *Arambula v. Sullivan*, supra, which was an action of trespass to try title, evidence was offered for the purpose of showing that there was a mistake in the deed in the call for certain lots and their width. The court held the evidence admissible, and said: "The evidence was intended, we presume, not to reform or correct the deed, but to aid in rightly interpreting the descriptions. The object was, or should have been, to ascertain the intention or understanding of the parties at the time of the execution of the deed, as well as the true meaning of the description of the premises therein read in the light of the surrounding circumstances, as they really existed at the time. Any facts consistent with either of the descriptions contained in the deed that would show or tend to show that intention, or what land or how much was intended to be conveyed, would seem to be relevant to the issue in case of a latent ambiguity like the present, where the descriptions, though not uncertain on the face of the deeds, became so when attempted to be applied to the land conveyed, as it really existed at the time. *Sikes v. Shows*, 74 Ala. 382; *Truett v. Adams*, 66 Cal. 218 [5 Pac. 96]." This court, in the case of *Green v. Burns*, 29 S. W. 548, which was an action of trespass to try title, and where it was expressly contended that in such an action the mistake or error could not be shown, said: "An ambiguity such as this may be explained or removed in actions of trespass to try title without being pleaded, or without the aid of a court of equity, based upon pleading raising the issue;" and, in addition to the authorities already noticed, we cited *Kingston v. Pickins*, 46 Tex. 101, where the rule is clearly stated, and *Cox v. Hart*, 145 U. S. 377, 12 Sup. Ct. 962, 36 L. Ed. 741.

The verdict of the jury and the judgment of the court established the line running on the course north, 57 east, to the northwest corner of the J. W. Flemming pre-emption; and the judgment is to the effect that the appellee, King, recover all of the Eggers survey 64 lying north and west of the line as above described. In view of the line asserted by the plaintiff in his petition, and the verdict of the jury, and the judgment of the court in describing the land which the plaintiff should recover, we do not consider that it is necessary that we should express our

views as to what rule should govern, in order to close the survey; but, if it were necessary to pass upon this subject, we think the rule furnished in the case of *George v. Thomas*, 16 Tex. 88, 67 Am. Dec. 612, would authorize the marked line to be prolonged on a course and distance running from the northeast corner established by the verdict of the jury to the northeast corner of survey No. 64, in order to close the survey.

We have considered all the questions raised in appellant's assignments, and think that none are well taken. Judgment affirmed.

McGUIGAN v. GAINES et al.

(Supreme Court of Arkansas. Nov. 14, 1903.)

REFORMATION OF INSTRUMENTS—MISTAKE—QUANTUM OF EVIDENCE—SUFFICIENCY—MARRIED WOMEN—CONVEYANCES BY—LIABILITY ON COVENANTS.

1. In a suit to reform a written instrument against the will of one of the parties thereto, though reformation may be decreed where the mistake is shown by parol evidence alone and on conflicting testimony, yet it should not be done in such cases except where the evidence shows clearly and conclusively that justice requires it.

2. To entitle the parties to a deed to a reformation thereof on the ground of mistake, it must be clearly shown that the mistake was common to both parties, and that the deed, as executed, expressed the contract as understood by neither.

3. On the issue of mistake in the description of a deed, evidence examined, and held insufficient to so conclusively establish the fact of mistake as to justify a reformation.

4. A married woman, being given by statute full power to sell, convey, and contract in reference to her separate property, is bound by the covenants in her deeds to such property.

Appeal from Garland Chancery Court; A. Curl, Special Chancellor.

Action by William McGuigan against W. H. Gaines and others, which was transferred to the chancery court. From a decree for defendant, plaintiff appeals. Reversed.

On the 9th day of February, 1891, W. H. Gaines and others executed and delivered to Wm. McGuigan a deed conveying to him certain land in Garland county, for which land McGuigan paid the sum of \$4,600. The land conveyed is described in the deed as follows, to wit: "The southwest quarter of the northwest quarter, the southwest fractional quarter, the south half of the southeast quarter, and the northwest quarter of the southeast quarter, all of section 18 in township three (3) south, range eighteen west, containing three hundred and seventeen and forty-one hundredths acres, more or less, except, however, the right of way of the Hot Springs Railroad and the following described parcel of land in the said northeast quarter of the southeast quarter of said section eighteen, used as a graveyard,

to wit." Then follows a particular description of the graveyard tract, which it is unnecessary to set out here. The land, as described in the deed, was divided by Gulpha creek. From 8 to 14 acres of the land lay west of the creek, while the remainder lay east of it. But this land west of the creek did not belong to the parties who conveyed to McGuigan, for it had been sold to one Nickles some 20 or 30 years before the deed to McGuigan was executed. In 1894 McGuigan brought this action in the circuit court to recover damages for a breach of the covenants contained in his deed on account of the fact that plaintiffs did not own the land described in the deed which lay west of Gulpha creek. To this complaint the defendants filed an answer and cross-complaint, in which they alleged that they informed plaintiff at the time of the purchase and before the delivery of the deed that they did not own the land west of Gulpha creek; that the same had been sold and conveyed to Nickles by their ancestor many years before; and that they did not intend to sell or convey that land, and that the plaintiff well knew that this was so, and that it was included in the deed by mistake of the draftsman who drew the deed. There does not appear to have been any reply filed to this cross-complaint, but the allegations thereof were treated as denied, and the case was transferred to the chancery court, and heard and decided on those issues. The special chancellor who decided the case found that the land west of Gulpha creek was included in the deed by mistake, and that the deed in this respect did not express the intention of the parties. He thereupon rendered a decree reforming the deed, from which decree plaintiff appealed.

Wood & Henderson, for appellant. Greaves & Martin, for appellees.

RIDDICK, J. (after stating the facts). This action was brought by the plaintiff to recover damages for breach of the covenants contained in his deed executed to him by the defendants. The defendants admit the execution of the deed, but allege that by the mistake of the attorney who drew the deed he failed to except from the conveyance certain land west of Gulpha creek, mentioned in the statement of facts, which defendants did not own, and for the loss of which plaintiff now asks damages. They allege that plaintiff well knew that defendants did not intend to convey this land west of the creek, and they therefore ask that the deed be reformed so as to conform to the intention of the parties thereto.

The question involved in the case is not so much one of law as it is one of fact. The party alleging the mistake has undertaken to prove it by parol evidence only. The law bearing on that point is well settled. There is no doubt that a court of equity may re-

¶ 2. See *Reformation of Instruments*, vol. 42, Cent. Cent. § 74.

form a written instrument where, on account of mutual mistake, the instrument does not reflect the intention of the parties thereto, and it may do so although the mistake be proved by parol evidence only. But in such cases, where the court is asked to reform a written contract against the will of one of the parties thereto, a court must, as a matter of common prudence, proceed with caution, and will decree a reformation only where the evidence shows clearly and conclusively that justice requires it. "In no case," says Mr. Bishop, "will a court decree an alteration in the terms of a duly executed written contract, unless the proofs are full, clear, and decisive. Mere preponderance of evidence is not enough. The mistake must appear beyond reasonable controversy." Bishop on Contracts, § 708. These words of the author are well supported by the adjudged cases. But, though the mistake must be clearly proved, it does not follow that the courts must refuse relief in all cases where there is conflict in the testimony or evidence, for it often happens that, notwithstanding such conflict, the facts of a case may be clearly and decisively proved. A recent decision by the Court of Appeals of New York has gone even further, and holds that relief may be granted even though the facts be not established beyond a reasonable doubt. *Southard v. Curley*, 134 N. Y. 148, 31 N. E. 330, 16 L. R. A. 561, 30 Am. St. Rep. 642. But this case seems to be opposed at least to the reasoning of many other cases, and there is room for doubt as to whether it is a sound exposition of the law outside of the state of New York. Take, for instance, the statement of Judge Story in *United States v. Munroe*, 5 Masson, 577, Fed. Cas. No. 15,835. "In cases," he said, "of asserted mistakes in written instruments, it is not denied that a court of equity may reform the instrument; but such a court is very slow to exercise such an authority, and it requires the clearest and strongest evidence to establish the mistake. It is not sufficient that there be some reason to presume a mistake; the evidence must be clear, unequivocal, and decisive." This statement of the law by Judge Story has been frequently quoted and approved by the courts. It has been twice approved by this court. Now, while Judge Story does not expressly state that the mistake must be established beyond a reasonable doubt, he uses language which carries the same idea. He says that a court of equity in such cases requires "the clearest and strongest evidence" to establish the mistake; that the evidence must be "clear, unequivocal, and decisive." But how can this be so if the evidence is such as to leave on the mind of the chancellor a reasonable doubt as to whether a mistake is proved or not? But, waiving that point, the decisions are quite unanimous in requiring that the mistake should be clearly established. The

reason that underlies these decisions is a very plain one, for, if written contracts could be overturned by a mere preponderance of parol evidence, then they would be of little more value than a parol contract. There is a further reason in cases affecting deeds and other contracts concerning conveyances of land. The law, to obviate the confusion and uncertainty arising from trusting such matters entirely to the memory of witnesses, requires that such contracts shall be put in writing in order to be binding. But the beneficial effect of these statutes would be to a large extent nullified if, when such contracts are reduced to writing, they could be easily set aside on parol evidence. The reasons that forbid that a written contract should be overturned by a mere preponderance of parol evidence are so clear and convincing that there is on that point no conflict in the decisions. *Rector v. Collins*, 46 Ark. 167, 55 Am. Rep. 571; *Carnall v. Wilson*, 14 Ark. 482; *Northwestern Ins. Co. v. Nelson*, 103 U. S. 549, 26 L. Ed. 436; 2 Pomeroy, *Equity Jurisprudence*, § 859; 2 *Warville on Vendors* (2d Ed.) §§ 779-781.

In order to prove their allegation that there was a mistake in the deed delivered by them to the plaintiff, the defendants have introduced the testimony of four witnesses. Two of these witnesses—Mr. Williamson and his wife—are interested, and parties to the suit; and two of them are not interested in the action. Opposed to the testimony of these witnesses is the testimony of the plaintiff, his wife, and his two daughters. The wife was competent as a witness to some of the facts, she having acted to some extent as an agent of her husband in making the purchase. All of these four persons testify to facts which tend to show that, so far as plaintiff was concerned, there was no mistake, and that the deed reflects the contract as plaintiff understood it. The testimony of the witnesses for plaintiff are supported by the testimony of his attorney, who, being called to the stand by the defendants, testified that the deed was drawn in accordance with the agreement between the parties as he understood it; that he knew nothing about the contention of defendants that the land west of the creek should have been excluded until this controversy arose. The deed appears to have been executed with some care, and it expressly excepts from the conveyance a graveyard containing about an acre of land, and also the right of way of a railroad which had been built across the land. Now, the question occurs, why, if these parties deemed it necessary to make an express exception in the deed on account of the graveyard and the right of way, they should deem it unnecessary to do so in the case of the land west of the creek, a tract many times larger than the graveyard tract. One of the defendants has undertaken to answer this by saying that he did not know that the southwest quarter of section 18, in

which the land west of the creek was located, was a fractional quarter, as shown by the government survey, and that he supposed that the word "fractional" that appeared in the deed descriptive of that quarter section referred to the exclusion of this tract which he intended to except from the conveyance. As these parties were probably not learned in the law, this statement may be true; but the explanation is not altogether satisfactory, for he says that he informed plaintiff of the fact that the tract beyond the creek must be excepted, and that he did this in the office of the attorney who drew the deed. Now, this attorney testified that he knew nothing of the intended exception, nor does the defendant, or either of them, assert that he was informed of the fact that this land was to be excepted. It is plain that defendants, or some one for them, informed the draftsman that the graveyard tract and the right of way were to be excepted, but it seems that they made no mention to him about the exception of the much larger tract beyond the creek. The fact that his attention was not called to it tends to contradict the testimony of the defendants that this matter was discussed in his office about the time the deed was being prepared.

We have not undertaken to set out all the testimony, for it is unnecessary to do so. Some of it goes strongly to support the contention of defendants. Indeed, we are inclined to believe that the weight of evidence lies on that side, but, as before stated, that is not sufficient.

It is not claimed that any fraud was perpetrated in this case, and to entitle the parties to reform a deed on the ground of mistake merely it must be clearly shown that the mistake was common to both parties, and that the deed as executed expresses the contract as understood by neither. 18 Ency. Plead. & Prac. 781. We are not fully convinced that this is true in this case. The state of the evidence is such as to leave us in grave doubt about it, and after a consideration of it we are of the opinion that the reformation asked by defendants should be denied.

Some of the defendants are married women, and the further contention is made for them that a married woman is not bound by the covenants in her deed. This was the rule at common law, and may still apply where the land conveyed belongs to the husband, and the wife joins in the deed merely for the purpose of barring dower and homestead rights. But under our statute the wife has now full power to sell, convey, and contract in reference to her separate property, and we see no reason why an exception should be made in respect to covenants in her deeds. To hold that she could not make covenants in respect to the title of real estate sold by her would to some extent embarrass her in selling it. We find in the statute nothing that justifies such an exception, and we are there-

fore of the opinion that this contention is not well taken. *Sidway v. Nichol*, 62 Ark. 146, 34 S. W. 529; 8 A. & E. Ency. Law, 163.

This action was transferred to the chancery court on motion of the defendants, without objection from plaintiff, and there is now no reason why it should not be finally disposed of in that court. The value of the land for the loss of which plaintiff asks damages is small, and, in our opinion, does not exceed \$100. The decree will be reversed, and the cause remanded, with an order that a decree be rendered in favor of plaintiffs for that amount.

REEVES et al. v. SLADE.

(Supreme Court of Arkansas. Nov. 14, 1903.)
FRAUDULENT CONVEYANCE—HUSBAND AND WIFE—CREDITORS.

1. A husband cannot defeat his creditors by the purchase of land in the name of his wife, on the ground that he owed her, where she is unable to remember any agreement to repay, and neither can fix any day on which she loaned him the money or on which he was to return it, and it appears that neither contemplated its repayment until he had become insolvent, and had more real estate than he was entitled to hold exempt from sale under execution.

2. Creditors of a husband cannot be defeated in an action to set aside a fraudulent conveyance of land by him to his wife on the ground that part of the purchase price of the land was the proceeds of a sale of the homestead, it appearing that the property claimed to have been a homestead was a town lot never occupied as or claimed to be a homestead prior to its sale.

Appeal from Faulkner Chancery Court; Thomas B. Martin, Chancellor.

Suit by J. D. Slade against H. M. Reeves and others to set aside a conveyance of land. From a decree for plaintiff, Reeves and another appeal. Affirmed.

G. W. Rice, for appellants. G. W. Bruce, for appellee.

BATTLE, J. On the 25th day of November, 1892, G. W. Bruce and others recovered a judgment before a justice of the peace of Faulkner county against H. M. Reeves for \$96.68 and all costs, and in 1896 they sold and transferred the judgment to J. D. Slade. On 11th of December, 1899, Slade recovered a judgment before a justice of the peace of the same county against Reeves, in a suit upon the judgment transferred to him, for the sum of \$102.96 and costs. Execution was issued on the latter judgment by the justice of the peace on the 21st of December, 1899, and a return of nulla bona was made. The justice of the peace then, at the instance of plaintiff, Slade, filed on the 24th of January, 1900, a certified copy of the judgment in the office of the clerk of the Faulkner circuit court; and the clerk on the same day entered the judgment in the docket for judgments and decrees of that court, and issued an execution thereon,

which was on the next day returned by the sheriff, "Unsatisfied, not finding any property to levy on."

On the 26th of January, 1900, J. D. Slade commenced a suit in the Faulkner chancery court against H. M. Reeves, Dora Reeves, his wife, George Doneghey, D. O. Horton, and A. J. Witt, alleging in his complaint, in addition to the facts already stated, that H. M. Reeves had purchased certain 177 acres of land in Faulkner county, and caused his vendors to convey the same to his wife, Dora Reeves, for the purpose of defrauding his creditors, and especially the plaintiff, and asking that the deed to Mrs. Reeves be set aside, and that the lands thereby conveyed be sold to satisfy his judgment. Reeves and his wife filed separate answers, in which they deny fraud, and allege that Reeves was indebted to his wife in the sum of \$385, and owned in the town of Conway a certain town lot, which was his homestead; that he conveyed this lot to Mrs. Malinda King and her adult children in part payment of the purchase money for the lands in controversy, valuing the lot at \$500 and the lands at \$800; that, Reeves having paid the taxes then due upon the lands, amounting to \$11.76, this sum was deducted from \$300, the balance of the purchase money, and Mrs. Reeves executed her note for \$288.24, the remainder; and that thereupon, on the 13th day of January, 1896, he caused the Kings to convey the lands to Mrs. Reeves for the purpose of paying his indebtedness to her. "Upon the maturity of the note given by Mrs. Reeves, suit was instituted on it by the Kings; they" seeking a judgment in personam, and the foreclosure of a vendor's lien upon the lands. "This action progressed to a decree," which Reeves paid with money borrowed from the Bank of Conway on his note, upon which D. O. Horton and W. W. Martin were sureties. When the last-mentioned note became due, Reeves paid it, using his money and \$250 borrowed from defendant Doneghey on a note executed by him as principal, and D. O. Horton and A. J. Witt, as sureties, to whom (Horton and Witt) he and Mrs. Reeves executed a mortgage on the 177 acres of land to secure them against loss on account of their suretyship. The note to Doneghey is due and unpaid.

After hearing the evidence adduced by all of the parties, the chancery court ordered and decreed that the 177 acres conveyed by the Kings be sold to satisfy the indebtedness of Reeves to the plaintiff, subject to the mortgage in favor of the defendant Doneghey; and Reeves and his wife appealed.

The lands in controversy were purchased and paid for with the property of H. M. Reeves. No other property except his was

used in paying for them. But it is said that he caused the lands to be conveyed to his wife in payment of \$385 that he owed her for money which she had permitted him to use for several years as his own, without any agreement to repay it. She says that she does not remember of any agreement to repay. Neither she nor Reeves undertakes to fix any day on which she loaned him the money, or on which he was to return it. In fact, neither of them seems to have contemplated its repayment until after G. W. Bruce and others had recovered a judgment against him, and until he had become insolvent, and had acquired more real estate than he was entitled to hold exempt from sale under execution, when he sought to place all his property in the name of his wife for the express purpose of repaying money long used, as before stated. Without a further statement of facts, it is sufficient to say that the chancery court, in our opinion, did not err in finding that the conveyance of the lands in controversy to Mrs. Reeves was fraudulent.

But appellants contend that the town lot conveyed by Reeves to the Kings in exchange was his homestead, he being at the time a married man and a resident of this state; that it was not subject to the lien of any judgment or decree of any court, or to sale under execution, or other process thereon, except those mentioned in the Constitution; and that no conveyance thereof by him can be legally set aside because it was fraudulent as to creditors. Be this as it may, he has never occupied the lands in controversy. They have never been his homestead. But on the contrary he was, before and at the time the Kings conveyed to Mrs. Reeves, and thereafter has been, residing on a town lot which he purchased and paid for with a horse and wagon, and caused to be conveyed to his wife, subject to a certain mortgage. The facts show that he never intended to hold the lands as a homestead, nor does he claim to have held them as such. The question is not whether he could convey his former homestead to the Kings, but, could he convey, or cause to be conveyed, in fraud of his creditors, the 177 acres of land which he purchased from the Kings? When he purchased them, they became as his other real estate, subject to sale under execution against him so long as they do not constitute his homestead; and, the title to the same being taken in the name of his wife for the purpose of defrauding creditors, they are subject, in equity, to the same burdens in favor of creditors which they would have borne if they had been conveyed to Reeves himself. Bennett v. Hutson, 33 Ark. 762, 768.

Decree affirmed.

RANDALL v. SANDERS.

(Supreme Court of Arkansas. Nov. 14, 1903.)
TRESPASS—PLEADING—DESCRIPTION OF PROPERTY—SUFFICIENCY—JUDGMENT—DEFECTS CURED—WANT OF VERIFICATION.

1. In trespass to real property it is not necessary that the complaint contain a particular description of the close on which the trespass was committed, in the absence of any statute requiring such a description.

2. Under the express provisions of Sand. & H. Dig. § 5776, an objection to a complaint for want of verification cannot be taken after judgment.

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by George W. Sanders against G. L. Randall. From a judgment for plaintiff, defendant appeals. Affirmed.

W. F. Coleman, for appellant.

BATTLE, J. G. L. Randall appealed from a judgment by default rendered by the Jefferson circuit court in an action against him by George W. Sanders, upon the following complaint (omitting caption):

"Comes the plaintiff, Geo. W. Sanders, and for cause of complaint states: That he is now, and was on the 19th day of July, 1899, the owner and in actual possession of the following land and dwelling houses situated thereon, to wit: The fractional east half of lot three in block thirty-nine, Tannehill and Owens Addition to the city of Pine Bluff, Ark., commencing at a point one hundred feet from the northwest corner of said lot three; thence running south one hundred and fifty-four feet; thence northeast along with side of right of way of St. Louis Southwestern Railroad to a point due east from beginning; thence west to the point of beginning. The said dwelling house was worth one hundred and fifty dollars. That on said 29th day of July, 1899, said defendant willfully and without the consent or knowledge of the plaintiff, but under some fictitious or pretended claim, entered upon said premises, and caused said dwelling house to be torn down, cut and destroyed the lumber to said house, thereby rendering it entirely worthless. That said defendant committed the further trespass upon said premises by cutting and destroying the fence inclosing the same, and destroying all of the fruit trees growing and belonging to said plaintiff upon said premises. Plaintiff states that said defendant tore down and destroyed said house while he was away at work, leaving his household furniture and all of his clothes and provisions exposed to the weather, and otherwise damaging the same. Plaintiff further states that defendant, by his wrongful tearing down and destroying said house and fruit trees and fence inclosing said premises, and leaving his furniture and other household goods out in the weather as aforesaid, has

damaged him in the sum of five hundred dollars. Wherefore he prays judgment," etc.

Appellant says the complaint was insufficient to sustain the judgment, because the description of the land upon which the trespass was committed is too vague and uncertain. The sufficiency of the description may depend upon the size and shape of the lot and the location of the railroad upon it. But this is not an action for the recovery of land, but for damages caused by trespasses. It would be better pleading to give a particular description of the close on which the trespasses were committed, but, there being no statute requiring such description, it may be omitted. The complaint is sufficient without it. *Swerdferger v. Hopkins*, 67 Vt. 136, 31 Atl. 153; *Whitaker v. Forbes*, 68 N. C. 228; *Larkin v. Taylor*, 5 Kan. 434; *Sullivan v. Clements*, 1 Colo. 281; *Metzger v. Post*, 44 N. J. Law, 74, 43 Am. Rep. 341; *Osgood v. Green*, 30 N. H. 215.

The complaint in question, if true, shows that the appellee had a cause of action. The appellant, by his failure to plead, admitted it to be true. It is sufficient to sustain the judgment by default. *Hallock v. Jaudin*, 34 Cal. 167, 174.

The complaint was not verified. But the statute provides that "no objection shall be taken after judgment to any pleading for the want, or defect in, the verification." Sand. & H. Dig. § 5776.

Judgment affirmed.

GREER v. FONTAINE et al.

(Supreme Court of Arkansas. Nov. 14, 1903.)
EJECTMENT—COLOR OF TITLE—IMPROVEMENTS—COMPENSATION—APPEAL—CHANCELLOR'S FINDINGS—REVIEW.

1. Though a chancellor's findings are not conclusive, they will not be disturbed on appeal unless they appear to be clearly against the evidence.

2. The improvements for which Sand. & H. Dig. § 2590, authorizes compensation to one holding under color of title before causing possession to be transferred to the real owner after judgment in ejectment, are measured by the increase in the value of the land, and not their cost.

Appeal from Howard Chancery Court; James D. Shaver, Chancellor.

Action by Elmira Fontaine and others against Joseph Greer. From the portion of the judgment adverse to him, defendant appeals. Affirmed.

W. C. Rodgers and D. B. Sain, for appellant. W. D. Lee, for appellees.

BUNN, C. J. This is an action, originally in ejectment, in the Howard circuit court, by the heirs at law of Jack Sims Fontaine, deceased, against the appellant, Joseph Greer, for the recovery of an undivided half interest in 120 acres of land lying and being

¶ 2. See Pleading, vol. 39, Cent. Dig. §§ 1416, 1450.

¶ 2. See Ejectment, vol. 17, Cent. Dig. § 478.

situate in Howard county, and described in the complaint. The defendant made his answer a cross-bill, and moved the court to transfer the cause to the equity docket, which was accordingly done, and the plaintiffs answered the cross-bill.

J. D. Fontaine was the owner and died seised in fee and possessed of the tract of land in controversy, having made a will, in which he devised the same in equal parts to his wife, Irene Fontaine, and his infant son, Jack Sims Fontaine, and died on the 12th day of February, 1894. On the 31st day of July, 1898, Jack Sims Fontaine died without issue and intestate. Irene, the widow of J. D. Fontaine, married the appellant, Joseph Greer, on the 11th day of September, 1898. On the 2d day of March, 1899, the said Irene sold the land in controversy to her said husband, Joseph Greer, for the sum of \$550, and delivered to him her warranty deed therefor, which was duly recorded on the 8th April, 1899. At first, both parties appear to have regarded the deed from Irene Greer to her husband as conveying the fee in the whole tract, and not a half interest only, or at least did not understand what was really thereby conveyed. There seems, however, to have been no controversy finally over the fact that Joseph Greer took from his wife only her half interest. The whole litigation was then resolved into a contention over the amount and value of improvements put on the place by Joseph Greer from the time he took possession, in 1898, until the institution of this suit.

The principal difficulty in determining the value of improvements is in selecting such items testified to by witnesses as are to be considered improvements in the sense of what is known as the "Betterment Act," approved March 8, 1883 (Laws 1883, p. 106). The defendant (appellant here) contends that he is entitled to credit for every item set forth in the deposition of W. F. Hill, a witness for defendant. These items consist of work done upon the land, both of a permanent and temporary character; of original construction and repairs, amounting to \$1,000 and more. The plaintiffs contend that the defendant is entitled to credit for such items as are named in statement and list attached to the deposition of W. E. Tiffen, a witness for plaintiffs, fixing the value of improvements at \$325.41. The first section of the act referred to, being section 2590 of the digest (Sand. & H. Dig.), reads, as follows, to wit: "If any person, believing himself to be the owner, either in law or equity, under color of title, has peaceably improved, or shall peaceably improve, any land which upon judicial investigation shall be decided to belong to another, the value of the improvements made as aforesaid and the amount of all taxes paid on said land by such person, and those under whom he claims, shall be paid by the successful party to such occupant, or other person under whom or from whom he entered

and holds, before the court rendering judgment in such proceeding shall cause possession to be delivered to such successful party." The chancellor found that more than half the items of charge in the list attached to W. F. Hill's deposition were items not embraced within the meaning of the said betterment act, were not, in fact, improvements contemplated in that act, and the aggregate amount of the legal charges under the testimony to be \$500, the half of which owing by plaintiffs as tenants in common with the defendant. This is in excess of the amount admitted to be the true amount of the value of the improvements, and this excess is \$174.59. We find the items of changing and construction of road, not mentioned in the court's findings, but the excess referred to substantially covers the value of changing and constructing the road. There are various items about which we have grave doubts, especially as to whether they come under the meaning of improvements or not. The chancellor makes his findings in round numbers, rather than in detail. We could wish that he had adopted the latter method, as it would have been fairer to the appellate court, and more satisfactory to all parties concerned had he done so. A chancellor's findings are not conclusive, it is true, but we will not disturb them unless they appear to be clearly against the evidence. It is impossible to reach a very accurate conclusion on the subject from the evidence adduced, but the chancellor has done substantial justice, and we find no error in that regard. Moreover, in addition to the determination of what items were within the purview of the law, he had also the discretion to determine the real value of each item claimed upon sharply conflicting testimony. In this matter the burden was on the defendant to make out his case. If he has failed to do so, in a manner to be fully understood, the fault is his. The improvements, within the meaning of the law, are technically and commonly denominated "betterments," and the definition of the term "betterments" to be found in the books is "improvements made to an estate. It signifies such improvements as have been made to the estate which render it better than mere repairs. * * * The term is also applied to denote the additional value which an estate acquires in consequence of some public improvement, as laying out or widening a street, etc. To entitle one to betterments depends upon his bona fide supposition that he bought the title in fee." "The measure of the value of betterments is not their actual cost, but the enhanced value they impart to the land, without reference to the fact that they were desired by the true owner, or could not be profitably used by him." Bouvier's Law Dictionary. This definition is that given substantially in all jurisdictions having statutes like ours. Sometimes we say the improvements must be permanent, and not merely temporary. The idea seems to pertain that

the improvements are such as will add to the value of the land as it shall come into the occupancy and use of the true owner, for he is the person required to pay for them, although they have been made without his consent. Were any other rule sought to be enforced, betterment acts would or might give rise to constitutional questions.

Upon the whole case, we can point out no error in the chancellor's findings. The decree is therefore affirmed.

MEEKER et al. v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

STREET RAILROADS—INJURIES TO PERSON ON TRACK—NEGLIGENCE—INSTRUCTIONS—EVIDENCE—HARMLESS ERROR.

1. In an action against a street railway company for the killing of a child on its track, evidence examined, and *held* that the question of the company's negligence in failing to stop the car in time to have averted the injury after discovering the child's peril, or which, by the exercise of ordinary care, could have been discovered, was for the jury.

2. Where the petition in an action against a street railway company for killing a child on its track alleged that the company's servants saw the child on the track and approaching thereto in time to have avoided the accident by stopping the car, an instruction that the company's servants were not required to stop the car until they saw, or might have seen by the exercise of reasonable care, that the child was or about to be placed in a position of peril, was not outside of the issues.

3. The servants of a street railway company in charge of a car are required to stop the car when they see, or may see by the exercise of reasonable care, that a child is in a position of peril by being on the track, or is about to be placed in such peril.

4. The error, if any, in excluding evidence, is cured by its subsequent admission.

5. The error in excluding from a hypothetical question asked as an expert as to the space within which a street car could be stopped the element whether the car was empty was harmless where on cross-examination the witness testified that it would make no difference whether the car was empty or filled with passengers.

Appeal from Circuit Court, Jackson County; Jas. H. Slover, Judge.

Action by Charles J. Meeker and another against the Metropolitan Street Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jno. H. Lucas, for appellant. Scarritt, Griffith & Jones, for respondents.

MARSHALL, J. This is an action, under the statute, by the parents, to recover \$5,000 damages for the death of their four year old daughter, Herietta, caused by being run over by one of the defendant's cable cars at the corner of Summitt avenue and Twenty-Third street, in Kansas City, on July 9, 1900, at about 9 o'clock a. m. There was a judgment below for the plaintiffs for the amount claimed, and the defendant appealed.

The negligence charged in the petition is that the defendant's servants "saw the child upon the tracks of said defendant and approaching there at said crossing of said Summitt and Twenty-Third streets in a position of imminent peril, or when, by the exercise of ordinary care, they might have seen said child upon said tracks and approaching thereto in such position of imminent peril, in time to have stopped said train of cars and avoided the injury complained of"; and, further, that the operatives of the cars failed to ring the bell, or to give any notice or warning to the plaintiff's daughter of the approach of the car. The trial developed the facts to be as follows: Summitt avenue runs north and south. Twenty-Third street runs east and west, and is 60 feet wide. Summitt avenue slopes downward from the north towards Twenty-Third street on a two per cent. grade, and is level where it intersects Twenty-Third street. Beginning at the south line of Twenty-Third street, Summitt avenue again slopes towards the south on a grade of 6.4 feet to the 100. The defendant has a double, standard gauge cable road on Summitt avenue. The south-bound cars run on the west side of Summitt avenue. The train consisted of two cars—a grip car and a trailer—and together the train was 46 feet long. From the curb line on the west side of Summitt avenue at the south side of Twenty-Third street it is 14 feet to the east rail of the south-bound track. The curb is six inches thick. In the sidewalk there is a water plug, which stands 10½ feet west of the curb. So that from the water plug to the east rail of the south-bound track it is 25 feet. The cars run at the rate of 9 miles an hour, or 13½ feet a second. The day was clear, and the tracks and street were dry. The locality is near the southwest terminus of the defendant's road. The plaintiffs lived on Twenty-Third street, 2½ blocks west of Summitt avenue. The father is a barber, and was agent for a laundry, and his place of business was on the west side of Summitt avenue about a block south of Twenty-Third street. About 9 o'clock on July 9, 1900, the mother started with her little daughter to go down town. When she reached the southwest corner of Summitt avenue and Twenty-Third street, she sent the child along the west side of Summitt avenue to take a bundle of laundry to her father's shop, and told her when she returned to wait on that corner for her, and she went across Summitt avenue and a half a block east thereof, on the north side of Twenty-Third street, to a grocery store, to make some purchases. The child took the bundle to her father, and returned in safety to the southwest corner of Summitt avenue and Twenty-Third street, and stood or was "lifting her little skirts and dancing" at or near the water plug above described. The mother completed her purchases at the grocery store, and proceeded to return for the

child. She walked westwardly along the north side of Twenty-Third street, and when she reached the car tracks on Summitt avenue, on the north line of Twenty-Third street she saw her child dancing on the sidewalk at the southwest corner as aforesaid. At that time a train of cars came along, and she had to stop east of the track to let it pass. It ran across Twenty-Third street, and the next thing she knew the car had run over her child and killed her. She did not see her child leave the sidewalk and go into the street, for the train of cars was then between her and the child, so she could not see her. She says that no bell was rung or warning given when the car approached Twenty-Third street, and that the gripman was sitting on the rail on the left hand side of his box in the grip car, with one hand resting on the rail on each side of him, and his back towards the east, and was looking towards the rear of the car, and talking to some one who was back there. All the witnesses for both the plaintiffs and the defendant who saw the child say she was on the southwest corner of said streets, and all who saw her move say she walked from the water plug across the sidewalk, and stepped from the curb into the street, and walked directly eastwardly across Summitt avenue on a line with the south line of Twenty-Third street. The gripman says he rang his bell when he was opposite the Chadwick Flats, which was north of Twenty-Third street, and where Twenty-Second street would intersect Summitt avenue if it was cut through, and that he did not ring it any more.

The gripman then testified as follows: "I was going south, and just as I entered the street I saw a little girl standing on the corner of the curbing about five or six feet south of the street line running east and west. She was standing on the curb on the west side of the street running south, and a little south of the curb that went east and west. She was standing there just apparently quiet, and, as I approached, my car got very near opposite, and she gave a jump and started all at once, and I pulled my brakes as suddenly as possible, and brought my car to a stop as quick as I could make it. I had my car very nearly opposite her—well, it lacked probably five or six feet of being opposite—when she made the jump and started across the track, so I stopped my car as quick as possible. I think I stopped my car within twelve or fifteen feet." He further said he hollered to her just as she was running across the street, and could not remember what he said. He further testified: "Q. You anticipated that she would go in front of the car? A. That she would go in front of the car. I knew the way she started she was going in front of the car the way it was going. She had a very short distance to go, and I had a very short distance to go, and it was impossible to stop before I hit her; and the way she was going

the car would about meet her—hit her—right in the center of the track. I know I made a quick stop. I think I never made a quicker stop than there. With the pitch of the hill the rule is 20 to 25 feet in stopping these cars, and I know I didn't go over half the space, and it was right on the pitch of the viaduct where I went down and stopped my car." He further testified that it was not over 10 feet after he struck the child before he stopped the car. The other testimony in the case, however, showed that the child was taken out from under the rear wheel on the east side of the grip car at a point 50 to 60 feet south of the south line of Twenty-Third street, and all the testimony is to the effect that her body lay across the east rail of the south-bound track.

The conductor testified: "We were going south on Summitt avenue just at Twenty-Third street, and we were almost or just at Twenty-Third street, at the north side, when I noticed a little girl standing on the sidewalk. I can't say just exactly where we were, but I noticed her standing there, and we were almost to her, when I saw her make a bound across the street east, and I saw Mr. Wyatt [the gripman] throw his brake, and I grabbed my brake, but he had the car stopped before I had more than time to get my brakes tight."

H. E. Brown, a passenger, was called as a witness for the defendant, and testified that he was seated in the next to the last seat from the rear of the grip car, and on the west side thereof, and that he was looking at his collection book, and did not look up until the car was very nearly across Twenty-Third street; that the front end of the grip car was then about across Twenty-Third street; that he saw the child about half way between the curb and the west rail of the south-bound track and six or eight feet in front of the car; that she was going diagonally across the street; that the gripman may have seen the child leave the sidewalk, but he did not do so (he was looking down at his book); that the ringing of the bell attracted his attention (the gripman said he did not ring the bell, and that the last time he had rung it was when the car was at the Chadwick Flats, which was a block north of the place of the accident); that he did not hear any cries or screams before the accident; that the body was found under the grip car, resting on the east rail of the south-bound track, and her head towards the east and beyond the rail, and the wheel resting on the abdomen.

Judith Davis testified on behalf of the plaintiffs that she was back of the grocery store which stood on the northwest corner of Summitt avenue and Twenty-Third street; that just before the accident she went to the cistern in the yard, and, looking towards the southeast, she saw the child standing on the southwest corner of the streets; that when she first saw her she was standing on the corner; that the child then started to walk

directly east across Summitt avenue towards the south-bound track; that at that time, from her position, she could not see the car approaching from the north; that then she saw the first end of the car coming south; that it looked to her that when the child reached the track the child and the car came together.

The plaintiffs' evidence tended to show that the car, when running 9 miles an hour, could have been stopped in 6 to 10 feet in an emergency, and this was true whether it was on a level or on a down grade of 6.04 per cent., and whether the car was empty or loaded with passengers.

Frank Vaughan, a witness for the defendant, testified that he was on the northwest corner of the streets, and saw the child on the southwest corner by the water plug, and that she stepped off the sidewalk onto the street, and started to walk east across the street, and when she got on the track the car hit her. The street was entirely free and clear of all obstructions that could interfere with the vision at the time of the accident. Other witnesses testified, but their testimony was not materially different from that herein referred to. It appeared that the grip car was equipped with two brakes—an automatic brake, and a hand brake—and the trailer had a hand brake.

At the close of the plaintiffs' case the defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted. The case was sent to the jury upon the theory that the servants saw the child in a position of peril, or by the exercise of ordinary care could have seen her in such a position, or about to be placed in such a position, in time to have averted the injury, and failed to do so. The defendant asked the court to instruct the jury that the defendant could only be held liable if the child was actually on the track and actually in a position of peril, and that it could not be held liable if the child was only approaching the track and about to be placed in a position of peril; but the court refused to so instruct, and the defendant assigns this as error, together with other rulings to be noted later in the opinion.

1. The principal contention of the defendant is that the demurrer to the evidence should have been sustained. The physical conditions present in this case are: First, a four year old girl on the southwest corner of the street at a point 25 feet west of the east rail of the south-bound track; second, a train of cable cars on Summitt avenue at the north side of Twenty-Third street, running at the rate of 9 miles an hour, or $13\frac{1}{2}$ feet a second, with only one passenger on the grip car, as far as the evidence shows, and distant 60 feet from the place of the accident; third, the child knocked down and run over by the train at or about the south line of Twenty-Third street; fourth, the body of the child taken out from beneath the grip car at a point 50 or 60 feet south of the south line of Twenty-Third

street, and the rear wheels of the grip car resting on the abdomen of the child, and her head towards the east, and extending beyond the east rail of the south-bound track; fifth, a two per cent. slope of Summitt avenue north of Twenty-Third street, a level space the width of Twenty-Third street (60 feet) and a 6.4 slope towards the south beginning at the south line of Twenty-Third street; sixth, the grip car, equipped with an automatic brake and a hand brake; seventh, an unobstructed view of the whole street at the time of the accident.

The testimony for the plaintiffs showed that the car could have been stopped in an emergency in from 6 to 10 feet, and this, too, whether it was on the level or on the grade south of Twenty-Third street. The testimony of the gripman was that from 20 to 35 feet was allowed in which to stop on that grade, but that he stopped within 10 feet after the car struck the child; and the testimony was practically all to the effect that the child was dragged by the grip car, and was taken out from under the grip car, at a point from 50 to 60 feet south of the south line of Twenty-Third street. The testimony is also undisputed that at some time after the train passed the north line of Twenty-Third street the child left the southwest corner of the streets, and started east across Summitt avenue—directly across, the most of the witnesses say, and diagonally across, the others say—and that she had traveled the space of $10\frac{1}{4}$ feet from the water plug to the curb line, stepped from the curb to the street, and traveled 14 feet further eastwardly, and had nearly crossed the south-bound track, when she was struck by the car. In other words, that a child four years old traveled 25 feet towards and upon the track while the car was traveling 60 feet. And that the gripman saw the child on the corner when he was 60 feet north of the corner, and that thereafter the child had time to leave the corner and travel 25 feet towards and nearly across the track while the car was running 60 feet, but that the gripman did not see, and could not have seen, the child approaching the track until the car was within 6 or 8 feet of her, and could not have stopped the car in time to have avoided the accident, although the street was perfectly clear and there was nothing to obstruct the vision. Or, otherwise stated, that a four year old girl can walk or run 25 feet while a train traveling at the rate of 9 miles an hour travels 60 feet. At such a rate of speed the train would travel the 60 feet in about $4\frac{1}{2}$ seconds. If the child traveled 25 feet in $4\frac{1}{2}$ seconds, it would be 5.5 feet a second, or 19,800 feet an hour, or a little less than 4 miles an hour; that is, that the cable car ran only about twice and two-fifths times as fast as the child.

But, if all this be conceded, the fact would still remain that there was nothing to prevent the gripman from seeing the child at

any time after she started towards the track. He admits he saw the child when she was within six or eight feet of the track, and says it was too late then to stop the car in time to avoid the injury, and he and the conductor both say she just jumped in front of the car. But this in no wise explains or satisfies the mind as to why the gripman did not see the child after she started towards the car and while she was traversing the 17 to 19 foot interval before she reached the point 6 to 8 feet from the track where the gripman and conductor saw her. No reason is given why they did not see the child approaching the track before she got so close to the car, and none can be given except that the gripman did not look, but, as the mother testified was the fact, was looking towards the rear of the car, talking to some one back there. The testimony all shows that the gripman could and would have seen the child in time to have averted the injury if he had been attending to his duty. The plaintiffs' testimony is that he could have stopped the car in 6 to 10 feet, and the gripman says he did stop the car in 10 feet after the car struck her. The fact that she was dragged after being struck, and that her body was taken out from under the car at a point 50 to 60 feet south of the south crossing on Twenty-Third street, over which the child was attempting to pass when she was struck, proves that the gripman did not commence to stop his car until he had at least reached the south crossing on Twenty-Third street, and also proves that, if he had been doing his duty, he could have stopped the car on the 60-foot level of Twenty-Third street, and before it reached the south crossing, and could thereby have averted the injury. Whether, therefore, the case be viewed solely in the light of the physical facts and the testimony adduced by the plaintiffs, or upon the whole case made, the conclusion is irresistible that the plaintiffs made out a proper case for the jury, and that upon the whole case the verdict of the jury is for the right party.

2. The defendant assigns as error the modification of its eighth instruction, which was as follows, the modification being the words embraced in brackets: "Even if the jury find from the evidence that the employés of defendant in charge of the train in question saw the child approaching in the direction of the street car tracks, still you are instructed that the law did not require them to stop the train until they saw, or might have seen by the exercise of reasonable care, that the child was [or about to be placed] in a position of peril. And if you find from the evidence that as soon as the child was [or about to be placed] in such position of peril they used reasonable care to prevent the injury complained of, but were unable to do so, then plaintiffs cannot recover, and your verdict must be for defendant." The defendant claims that the modification enlarged the

issues, and, without this, that it misstates the law, in that it makes the defendant liable if the child was in a position of peril as well as if it was "about to be placed" in such a position, and it claims that the latter is not the law. The modification did not enlarge the issues, for the petition, charged the negligence to be that the servants of the defendant "saw the child upon the tracks of the said defendant and approaching thereto," etc. This is tantamount to the same thing as expressed in the instruction that the child was in a position of peril, or about to be placed in such position.

The defendant is also in error upon the proposition of law. In *Bunyan v. Railroad*, 127 Mo. 13, 29 S. W. 842, the charge of negligence was that the servants failed to see the deceased approaching the tracks and being on or near the tracks in a place of danger, or, as stated by Macfarlane, J., speaking for the court: "The action is grounded upon the negligence of the gripman in failing in his duties after deceased had placed, or was about placing, himself in a dangerous position;" and the learned judge disposed of the matter by saying: "The testimony of the gripman shows that he discovered the deceased was staggering, and did not know what he was doing, when at least five or six feet from the track. It was his duty, under these circumstances, to have at once taken precautions to prevent the collision. He should not have deferred action until the deceased had placed himself in a dangerous position, when it was manifest to him that he was heedlessly staggering into it. This principle, dictated as it is by common humanity, was recognized by the gripman. for he says that on seeing that deceased was paying no attention, and did not seem to know what he was doing, he immediately warned him of the danger, and used all possible efforts to avoid injuring him. Now, it will be seen that the instruction, which only required the gripman to attempt to avoid injuring deceased 'after he had put himself in danger,' fell short of declaring the whole duty required of him in the circumstances. The primary object of this instruction was, evidently, to inform the jury as to the care required by deceased himself. So far as the instruction was confined to this purpose, the law was correctly given, but it did not declare the duty of the gripman as hereinbefore announced. The jury could have drawn no other conclusion from the instructions than that the gripman, though seeing that deceased was staggering, was paying no attention, and was not going to stop, was still under no obligation to avoid striking him until 'after he had put himself in danger.'" In *Baird v. Railroad*, 146 Mo. 265, 48 S. W. 78, one of the acts of negligence charged was a failure to keep a proper lookout for the child as he was approaching the track, and Burgess, J., said: "It was the duty of defendant's employés in charge of the cars to

keep a lookout along its track where persons were likely to be found; and if the motor-man might, by having his attention on the street in front of the cars, have discovered, in time to stop the car, that the child was about to cross the track, or if, after discovering his danger, he failed to give the usual signals to warn him of the car's approach, he was guilty of negligence." In *Livingston v. Railroad*, 170 Mo. 452, 71 S. W. 136, the plaintiffs' instructions authorized a recovery if the defendant's engineer "saw the perilous position of the child upon the track, or about to place itself in a perilous position upon the track." The defendant's instructions, on the other hand, told the jury that the defendant was not liable unless the child was upon the track and in a position of peril, and omitted the other hypothesis of the child being about to be placed in a position of danger; and it was argued there, as it is here, that the defendant was not liable unless it was guilty of negligence after the child was actually on the track, and not if it was only about to be placed in a position of peril; and counsel there argued that "the child was in no danger at all until it got upon our track." There was a verdict for defendant in the lower court, and this court reversed that judgment because the defendant's instructions were erroneous, saying that they were predicated upon rules applicable to persons of mature years, but were wholly inapplicable to a child of 3½ years. The gripman in this case saw, or could have seen, this child approaching the track, and about to be placed in a position of danger, or, more properly speaking, running into inevitable danger and death, in ample time to have stopped the car and have averted the injury, and it was negligence for him not to do so.

3. The plaintiffs next assign as error the exclusion of a question asked the plaintiffs' witness Hite. The witness Hite was an ex-gripman, who had worked on the defendant's road, knew its cars, and the locality where the accident occurred. In response to questions by plaintiffs' counsel he had stated that the car could have been stopped on the level of Twenty-Third street in 6 to 10 feet in an emergency. The defendant's counsel then asked whether it would make any difference if the attempt to stop the car was on the downgrade of 6.4 per cent. south of Twenty-Third street. Plaintiffs' counsel objected to the question on the ground that his position is that the stop should have been made before the front of the car reached the downgrade, and while the car was still on the level ground; that is, before the car reached the south crossing on Twenty-Third street. The court sustained the objection, and the defendant excepted, and now assigns this ruling as error. Counsel for the defendant overlook the fact that on the next day of the trial the court permitted them to fully examine this same witness touching this same matter, and that the witness testified that it

would make no difference that the stop was to be made on that slope, nor would it make any difference whether the car was empty or loaded. This cured the error, if any, in the ruling complained of.

Counsel for defendant also assign as error the hypothetical question put to the plaintiffs' expert as to the space within which the car could be stopped, and argue that it did not embrace the conditions as to whether the car was empty or loaded, nor did it take into account the safety of the other passengers on the car. The witness was afterwards interrogated by the defendant as to whether the car being empty or loaded would make any difference, and he said it would not. So that, even if that was a proper element to be embraced by the hypothetical question, it is harmless error in this case. The record shows only one passenger on the car, and his safety does not appear to have been seriously jeopardized, for he appeared as a witness for the defendant. If there were other passengers on the cars, that fact does not appear. Neither was there anything in the manner adopted or provided for the running or stopping of this car, which suggests to the ordinary mind the possibility of danger to the other passengers, however quickly it was possible to stop this cable car. Such cars are unlike electric cars, where the current can be reversed and the stop effected so suddenly as to cause danger to other passengers; and they are also unlike steam cars, where the engine can be reversed and the air brakes applied so vigorously as to cause like danger. There was no reversible error in these rulings, nor have any been pointed out or discovered in the record.

The judgment is clearly for the right party, and it is affirmed. All concur.

OTTOMEYER et al. v. PRITCHETT et al.
(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

DEEDS—MISTAKE—EVIDENCE—SUFFICIENCY—NEW TRIAL—DISCRETION OF COURT—REVIEW ON APPEAL—TRUSTS—SUBSEQUENT CONTROL BY SETTLOR—DRY TRUST—EXECUTION.

1. In ejectment, where the defense was a mistake of the scrivener in the deed under which plaintiff claimed, where the only oral testimony as to the mistake was by the wife of the scrivener, and was to the effect that there was no such mistake, it was error to grant a new trial on the ground that the verdict for plaintiff was against the evidence.

2. Where a father executed a deed to his son and wife in trust for the benefit of their children, he could not, by any act of his, affect the estates vested in the children, either by ascribing a mistake to the scrivener or otherwise; and a subsequent "deed of correction" from him, given 26 years later, could have no such effect.

3. The discretion of the trial court in granting a new trial on the ground that the judgment was against the evidence will be over-

¶ 3. See Appeal and Error, vol. 2, Cant. Dig. § 2871.

ruled on appeal, where there was not a scintilla of evidence to support any other verdict than that rendered.

4. A trust for the sole benefit of the trustees' children, under which the trustees were charged with no functions except to hold the property for the children, became, at the maturity of the children, a dry trust, executed by the statute of uses, and the legal title was vested in the beneficiaries.

Appeal from Circuit Court, Jefferson County; Frank R. Dearing, Judge.

Action by William S. Ottomeyer and others against William F. Pritchett and others. Judgment for plaintiffs, and the trial court ordered a new trial. From a judgment granting a new trial, plaintiffs appeal. Reversed.

Kleinschmidt & Reppy, for appellants. Sam Byrns, for respondents.

MARSHALL, J. This is an appeal from an order granting a new trial. The suit is ejectment for 120 acres of land in Jefferson county. The petition is in the usual form. Zebulon Pritchett is the common source of title. The answer of all the defendants except Sarah Jane is a general denial and a plea of mistake of the scrivener, which the defendant William F. Pritchett asks to have corrected. Sarah Jane answered separately, and admitted the allegations of the petition.

The case made is this: By a deed dated December 4, 1874, and acknowledged February 6, 1875, Zebulon Pritchett and Asenath, his wife, conveyed the land to their son, the defendant William F. Pritchett, and Sarah Jane, his wife, "in trust for the sole use and benefit of their children, Louis Sherman, John Marshall, Asenath Catherine, and any other children that may be born to them in future." Thereafter two other children were born to them, Elizabeth and Callie Jane. At the time of the trial they were all of age, the youngest being 18 or 19 years old. But one witness testified upon the subject of this conveyance, and that was Mrs. Ella Craig, the widow of the justice of the peace who prepared and acknowledged the deed, and she said she was present when the deed was drawn, and the grantor, Zebulon Pritchett, said he wanted it fixed so that his son could not squander the land, and so "he would keep it to raise his children." The plaintiff then proved that William F. Pritchett gave the defendant Charles Waldron a mortgage on the land to secure him for the taxes he agreed to pay on the land, but that the plaintiff William S. Ottomeyer paid the taxes, so that there was no consideration for the mortgage. The plaintiff proved the rental value of the land. It was agreed that the defendant William F. Pritchett was in possession of the land. The plaintiff also introduced a warranty deed from Louis Sherman Pritchett and wife, John Marshall Pritchett and wife, Elizabeth Gully (née Pritchett) and husband, and Callie Jane Pritchett, to the plaintiff William

S. Ottomeyer, conveying their four-fifths interest in the land, and showed that the other one-fifth was owned by the plaintiff Asenath Catherine Ottomeyer (née Pritchett). The defendant then introduced, over plaintiff's objection, a conveyance called a "deed of correction," from Zebulon Pritchett, widower, to William F. Pritchett and Sarah Jane, his wife, dated January 11, 1900, wherein it is recited that it was the intention of the grantor by the deed of December 4, 1874, to convey a life estate in the land to William F. Pritchett and his wife, Sarah Jane, and the remainder in fee to their children, and that the scrivener made a mistake in not so drawing the deed, and therefore this deed is made so as to correct the mistake, and to vest the property in that way. The case was tried without a jury, and the court entered judgment for the plaintiffs for possession, \$60 damages, and fixed the monthly rents and profits at \$5. In due time the defendants filed a motion for a new trial. The court sustained the motion, assigning as reasons for doing so that the judgment was against the evidence, that the court erred in excluding competent testimony offered by the defendants, and that the judgment was for the plaintiffs when it should have been for the defendants. From this order the plaintiffs appealed.

1. The record fails to show that the court excluded any evidence that was offered by the defendants. The only evidence the defendants offered was the deed of correction and by recalling Mrs. Craig for further cross-examination, and she answered every question that was propounded to her without any objection from any one, and repeated her statements previously made as to the purpose expressed by Zebulon Pritchett at the time he made the original deed. The reason given for granting a new trial because the court had excluded competent testimony offered by the defendants was therefore a clear misapprehension of the court.

2. The other reasons given for granting a new trial were that the judgment was against the evidence, and that it was for the plaintiffs when it should have been for the defendants. There is only one possible theory upon which this conclusion of the court could be based, and that is that the evidence of Mrs. Craig showed that Zebulon Pritchett had intended by the original deed to create a life estate in William F. and Sarah Jane Pritchett, and that the scrivener made a mistake in not so vesting the title; or else that the deed of correction itself was evidence of such intention, and that the children of William F. and Sarah Jane, living at the time and thereafter born, could be divested of their estates in the land without their consent, by their grandfather, over 15 years after their interests became vested under the original conveyance. In either

view the trial court was clearly in error. There is no conflict in the oral testimony, as all of it upon the principal matter in controversy was given by Mrs. Craig, and it was all to the effect that there had been no mistake of the scrivener in drawing the deed. Therefore there was no room to say that the judgment in favor of the plaintiffs was against the evidence. It could not be that any one would think that after Zebulon Pritchett had made the original deed conveying the land to his son William and his daughter-in-law, Sarah Jane, in trust for their living and to be born children, he could by any act of his change or impair or defeat the estates vested in them, either by any act or by any declaration of his, whether ascribing a mistake to the scrivener or otherwise. Such a change could only be made by a court with all the parties before it, or by the consent of the beneficiaries in the deed. This rule is so elementary that it needs no citation of authority to support it. And justice to the learned trial judge excludes the hypothesis that his action was based upon such being the effect of the deed of correction, or of it being in the power of the grantor to so change the estates of the beneficiaries in the original deed. The rule has heretofore been announced by this court that a trial judge has a discretion to grant one new trial, and that, where there is any substantial evidence in the case upon which to base such a ruling, this court will not interfere, unless the case is such that no verdict in favor of the party to whom the new trial was granted could ever be allowed to stand. *Hoepper v. Hotel Co.*, 142 Mo. loc. cit. 387, 44 S. W. 257; *Haven v. Railroad*, 155 Mo. 216, 55 S. W. 1035; *Herndon v. Lewis* (Mo. Sup.) 74 S. W. 976. This is a case that falls within the exception to the rule thus stated. There is no substantial evidence—in fact not a scintilla of evidence—in the case that any mistake was made by the scrivener in drawing the original deed, but the evidence is all exactly to the contrary. And if a judgment was ever entered in favor of the defendants in a case where the facts are as here developed, this court would be compelled, under its superintending control over all inferior tribunals, to set such a judgment aside. Under the facts stated the plaintiffs made out a complete case, and the defendants showed no defense whatever. The judgment was for the right party, and the motion for a new trial should have been overruled. Counsel for appellants states in his brief that the court granted a new trial on the faith of *Baker v. Nall*, 59 Mo. 205. That case is not decisive of the case at bar. There the conveyance was to the husband in trust for his wife for life and thereafter for her children. The wife died, and all of the children had attained their majority except one. The husband leased the property. It was properly held that the trust had not

ceased, because one of the children was still a minor. It is not necessary now to further comment on that case. In this case there was no special function that the trustee was charged with except to hold the property for his children. When the children became of age, the trust became a dry trust, and the statute of uses executed it, and vested the legal title in the beneficiaries.

For these reasons the judgment of the circuit court awarding the defendants a new trial is reversed, and the cause is remanded to that court, with directions to set aside its order sustaining the motion for a new trial, and to enter an order overruling the motion for a new trial, and to enter judgment as originally decreed in favor of the plaintiffs. All concur.

O'NEILL v. KANSAS CITY.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

MUNICIPALITIES—DEFECTIVE STREETS—INJURY TO PEDESTRIAN—EVIDENCE—EXPERT WITNESSES—HYPOTHETICAL QUESTIONS—SUFFICIENCY—OBJECTIONS—EXCESSIVE DAMAGES.

1. In an action for personal injuries, plaintiff testified that one end of a loose board of a sidewalk flew up and struck her over the right ovary, the blow throwing her down; that when she reached home, immediately thereafter, there was a dark spot over the ovary, where the board struck her, which by the next morning became large and black. The physician who treated her testified "that there was contused wound in the right abdominal region, immediately over the right ovary." Held to warrant the assumption in a hypothetical question that the blow caused a part of the right side to swell, and left the ovary bruised and contused.

2. An objection to a hypothetical question asked an expert, that the facts assumed were not to be found in the evidence, did not raise the objection that the question left out facts shown in the evidence.

3. Where, in an action for personal injuries, a physician testified that plaintiff was suffering from ovaritis, a hypothetical question asked him for the purpose of obtaining his opinion as to whether the diseased condition was the result of the blow received in the accident, which assumed that plaintiff had been, prior to the accident, in good health; that at the time of the accident she received a blow over the right ovary; that the blow caused a part of the right side to swell, and left the ovary bruised and contused; that immediately thereafter she suffered acute pain in the region of the right ovary; that ever since that time she has suffered pain in that organ; that since the accident she has suffered with nervousness—was sufficient.

4. Where a person not employed by a city testified in an action against a city for personal injuries sustained by reason of a defective sidewalk that he found the planks in the sidewalk loose at both ends, and the stringer at one end very much decayed, his evidence as to his making repairs of the sidewalk, volunteered in response to a question as to the condition in which he found the sidewalk, was not prejudicial to the city, especially where the defect in the walk was proven beyond controversy by several witnesses, and there was almost no testimony to the contrary.

5. Plaintiff (39 years of age), before the injury, was strong and active, and had never

known diseases peculiar to women, while after the accident she suffered much pain and was frequently ill. At the time of the trial, four years after the injury, she suffered from chronic inflammation of the ovary, with serious consequences to her whole system. Her physician and those appointed by the court to examine her before the trial were of the opinion that she would never recover. *Held*, that a verdict of \$7,500 would not be set aside as excessive.

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Mary O'Neill against Kansas City. From a judgment for plaintiff, defendant appeals. Affirmed.

L. E. Durham and R. J. Ingraham, for appellant. F. F. Rozzelle, Frank P. Walsh, and John G. Park, for respondent.

VALLIANT, J. Plaintiff recovered a judgment for \$7,500 against the defendant city as damages for personal injuries sustained by her in consequence of the defective condition of a wooden cross-walk in one of the public streets. The plaintiff's evidence tended to prove as follows: The earth had washed away from the cross-walk on both sides to a depth of about three feet. The boards of which the walk was constructed had become loose, and the stringers on which the boards were laid were rotten. The cross-walk had been in this condition two or three months. The plaintiff, in company with another woman, was crossing the street on that cross-walk, her companion going first and the plaintiff following. Her companion, who was a large woman, weighing 200 pounds, stepped on one end of one of the loose boards, and caused the other end to fly up and strike the plaintiff. The board which struck her was a foot wide, 2 inches thick, and 15 feet long. It struck her just over the right ovary, and she was thrown down by the blow. When she got home her knee was bleeding, and there was a dark spot over the ovary, where the board struck her, which by the next morning had become large and black. She was a married woman, had had several children, and was 39 years old. The testimony tended to show that her injuries were very serious and painful, and her suffering was still enduring at the time of the trial.

As grounds for reversal of the judgment, appellant presents three propositions: (1) The court erred in permitting an expert witness to answer a certain hypothetical question; (2) the court erred in allowing a witness who was not in the employ of the city to testify that he made repairs on the cross-walk shortly after the accident; (3) the amount awarded as damages is excessive, evincing prejudice or passion.

1. The hypothetical question to which objection is made was propounded to a physician who had examined her just before the trial, which was four years after the accident, and who had testified that he found her suffering with ovaritis. The question, the objections, and the rulings thereon are

as follows: "Doctor, suppose that on the 9th day of June, 1896, this lady you have examined, Mrs. O'Neill, was 39 years of age, and up to that time she had not been sick, was in good health, her last sickness being an attack of bilious malaria along in the year 1888 or 1889; that intervening between that time she was able to perform her household duties, and was in good health, and had not any pains in her body, and on the 10th day of June, 1896, she met with an accident in which she received a blow over the ilium, on the right side, over the organ of the right ovary; that this blow caused a part of the right side to swell, and left the ovary bruised and contused; that immediately thereafter she suffered acute pain in the region of the organ of the right ovary, and ever since that time has suffered pain in that organ, and not upon the left side; that prior to that time she did not suffer from nervousness, but since that time she has suffered with nervousness; that her nervousness has continued, and has become very serious; that she has become so nervous at times that it has resulted in nervous prostration; that it has come on in periodic times; that she was confined to her bed for four months; that she still suffers pain in the region of this bruised place that I have detailed to you—was that ovaritis the result of the blow I have indicated? (Mr. Hadley, counsel for the defendant, objects to the question, as no such facts are found in the evidence.) Court: Objections are overruled. Mr. Frank P. Walsh, counsel for the plaintiff: If Mr. Hadley, counsel for the defendant, will suggest any evidence that has not been covered by the question, or any evidence submitted by hypothesis that had not been given in the evidence, I will amend my question to conform thereto. Court: Mr. Hadley, if you have any amendments to offer, you will please make them. Mr. Hadley: I do not desire to do so at this time. (To which action of the court in overruling said objection the defendant then and there excepted.) A. Well, assuming these to be the facts, I would say the blow was what produced the ovaritis. Q. Assuming these facts to be true, I will ask you whether or not, as I have detailed them to you—whether or not that condition of the lady is reasonably certain to be permanent and lasting? (Mr. Hadley, counsel for the defendant, objects to the question, as no such facts have been shown in evidence.) By Mr. Walsh: If counsel for defendant will suggest any evidence that has not been covered by the question, or any evidence submitted by hypothesis not given in evidence, I will amend my question to conform thereto. By the Court: Mr. Hadley, if you have any amendments to offer, please make them. By Mr. Hadley: I do not desire to do so at this time. By the Court: The objection is overruled. (To which ruling of the court, the defendant, by its counsel, at the time, duly excepted thereto.)" The objection to

the question was based on the ground that "no such facts are found in the evidence." There was evidence of every fact assumed in the question, unless it was in relation to the one fact which we will presently mention; and as that is the only fact assumed in the question which the counsel for appellant, in their brief, contend was not supported by any evidence, we deem it unnecessary to set out the evidence relating to the other facts. The part of the question which the learned counsel think assumes a fact with no evidence to support it is "that this blow caused a part of the right side to swell, and left the ovary bruised and contused." The plaintiff testified that when she reached her home, immediately after the accident, her knee was bleeding, and there was a dark spot over the ovary, where the board had struck her, and by the next morning it had become large and black. The physician who came that next morning to see her testified "that there was contused wound in the right abdominal region, immediately over the right ovary." The tendency of all the testimony relating to her affliction was to locate the pain, injury, and disease in the right ovary. Although it does not appear that an operation was performed which would have exposed the ovary to the eye of the surgeon, and thus have enabled him to say that he saw its contused condition, and in that sense there was no evidence of the contusion, yet, in so far as we are enabled to judge of the scientific subject in the light of such evidence as we have, we are not prepared to say that the appearance of the injury, as shown in evidence, obtained from the outside examination by the attending physician, and the testimony of the patient herself, did not justify the counsel framing his question in assuming that there was evidence tending to show a bruised condition of the ovary. But it is argued that the question left out certain facts which were shown in the evidence in relation to her condition, and for that reason the question was improper. There was no objection made to the question on that ground. The only ground of the objection made was that no such facts as those assumed in the question were to be found in the evidence. Whether the facts which appellant now contends ought to have been included in the hypothetical case propounded were essential to a proper understanding of the case by the learned witness is itself a scientific question, and, whilst it is incumbent on the court to decide questions of science, yet, in matters of obtruse science, the court looks for enlightenment to the counsel in the case. If there is any reason in science why the physician to whom this question was propounded could not intelligently answer it without the addition of the facts now suggested, or why his answer to a question embracing the additional facts might have been different, or why, as a scientific proposition, those additional facts

should influence the witness' opinion on the case, we feel sure the learned counsel for the appellant would have given us that scientific reason, and have made it clear to us. But they suggest no such reason, and we perceive none. The physician had testified, from his own examination of her, that the woman was suffering with ovaritis; that is, inflammation of the ovary. The object of the hypothetical question was to learn whether or not, in his opinion, the blow she had received was the cause of the diseased condition in which he found her. We think the facts assumed in the question are sufficient for that purpose, and that the other facts suggested would have thrown no additional light on the subject. When an objection is made to a question propounded to a witness, it should be sufficiently specific to inform the court and opposing counsel of the real point in the objection. In this respect there is no difference between an objection made to a hypothetical question and one made to any other question. Rogers on Expert Testimony (2d Ed.) p. 67; Stearns v. Field, 90 N. Y. 640. In this case the objection was so general that it did not give the trial court any opportunity to know what, in the opinion of the counsel making it, was the vice of the hypothetical question—either in what it contained or what it omitted—and, when invited to specify his objection, he declined to do so. Even if we were satisfied that the hypothetical question was defective in the particulars now urged, we would not be authorized to adjudge that the trial court had committed error in allowing it, since no opportunity was afforded the trial court to pass on the objection.

2. A witness who had made some repairs on this cross-walk was called by the plaintiff to testify in regard to its condition at the time of the accident. He was not in the service of the city, but was a friend and neighbor of the plaintiff, lived near the scene of the accident, and, after she was hurt, took it upon himself to repair the cross-walk. In answer to a question as to the condition of the cross-walk, he mentioned the repairs that he had made. Defendant moved to strike out that part of his answer. The motion was overruled, and exception taken. That ruling is now assigned for error. The witness had stated that he was familiar with the crossing, and had been so for months, and went there very shortly after the accident to repair it. He was asked: "Q. In what condition did you find it when you went there? (Objected to as incompetent, irrelevant, and immaterial. Overruled, and exception.) A. I found the planks loose at both ends—the east and the west ends. I found the stringers at the east end very much decayed; and I sent the boy back to the house, and made him bring two pieces, and we substituted those pieces of stringers for the rotten stringers at the east end. What we did at the west end, I can't recollect so well, but I remember the east

end of the stringers was rotten and decayed." Testimony tending to show that an unauthorized person made repairs is not competent to prove that repairs were needed. But the object of this witness' testimony was not to prove that he made repairs. No such question was asked him, and his reference to the repairs was merely incidental to the main fact to which he was testifying; that is, that the cross-walk was in bad condition. What he said about the repairs added nothing to the force of what he said about the condition. If the mere fact that repairs had been made was shown for the purpose of drawing therefrom the inference that the cross-walk was in bad condition, the testimony would present a different question. But no such inference could be drawn from this testimony, for the reason that nothing was left for inference. The same witness who testified to the repairs left nothing to be inferred therefrom, but testified expressly to the condition. What he said in reference to the repairs could add nothing to what he said in reference to the condition. He said it was in bad condition, and in the same breath that he repaired it. It was a mere voluntary injection by the witness of a statement not called for by the question, which, in the connection in which it was used, could add no probative force to what he said on the real point to which his testimony was addressed. It was but an incidental statement of an immaterial fact. It cannot be said that the defendant was prejudiced by the witness' statement of a fact from which an inference of another fact might be drawn, when in the same breath the same witness expressly states the ultimate fact, not as a matter of inference, but as of his personal knowledge. But the fact that this cross-walk was badly out of repair was proven beyond controversy by several witnesses, and there was almost no testimony to the contrary. Even if the testimony relating to the repairs should be adjudged incompetent, we could not say it was such error to have received it as would justify the reversal of the judgment, because it could not possibly have "materially affected the merits of the action." Section 865, Rev. St. 1899.

3. The remaining assignment of appellant relates to the amount of damages assessed by the jury. The testimony showed that until the accident the plaintiff had always enjoyed the best of health. She was a strong, active woman, 39 years old, and the mother of two daughters; had never known diseases peculiar to women; had never experienced "that she had nerves." She engaged every day in the active duties of her household, and of the duties and pleasures appertaining to her as the mother of daughters under her care. But since the accident that has all been changed. Her strength and activity are gone, even her disposition has changed, and she is often "cross and cranky." She is nervous, and suffers at times from nervous

exhaustion. Pending the suit, at the request of the defendant, she went before an officer to give her deposition, and gave it; but the strain on her proved greater than her strength could endure, and on her way home she fell ill, was taken into the house of a stranger, and a physician was called. She was ill for a week from that cause. In July, two years after the accident, she had a spell of unconsciousness which lasted from 9 o'clock in the morning until 5 in the afternoon. Her life since the accident has been one of disease and suffering. At the time of the trial, which was four years after the injury, she was still suffering from chronic inflammation of the ovary, with serious resulting consequences to her whole system. Her physician and the physicians who were appointed by the court to examine her just before the trial were of the opinion that she would never recover. The jury saw the woman and heard the evidence. They were of the opinion that \$7,500 was reasonable compensation for that which she had suffered, and for the loss of her health and strength. There is nothing in the record to show that that was not the dispassionate judgment of the jury. The award does not seem to us to be so excessive as to justify us in invading the jury's peculiar province, and we will not disturb it.

The judgment is affirmed. All concur.

WARNER v. ST. LOUIS & M. R. R. CO.
(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

**STREET RAILROAD—INJURY ON TRACK—NEG-
LIGENCE—EVIDENCE.**

1. That a street car company ran its car at the same rate as usual at the place where an injury occurred, though faster than was usual in other parts of the city, was not negligence.

2. Where the motoneer of a street car sounded the gong a thousand feet from the place of accident, and again sharply three times about 160 feet from the place, there was no negligence in this respect.

3. Evidence held insufficient to show that the motoneer of a street car could have seen the person injured in danger soon enough to have checked the car and permitted an escape from the peril.

4. Evidence in an action against a street railway company for death held insufficient to show it guilty of any negligence.

5. The burden is on plaintiff in an action for negligent killing, not only to prove the negligence and injury complained of, but also a causal connection between them.

Appeal from Circuit Court, St. Louis County; Jno. W. McElhinney, Judge.

Action by Bertha Warner against the St. Louis & Meramec River Railroad Company. From a judgment sustaining a motion to set aside a nonsuit, defendant appeals. Reversed.

McKeighan & Watts and Robert A. Holland, Jr., for appellant. R. L. & John Johnston, for respondent.

MARSHALL, J. This is an action under the statute to recover \$5,000 damages for the death of the plaintiff's husband, Ira B. Warner, on January 22, 1900, on Lockwood avenue, between Gore and Grey avenues, in the town of Webster, alleged to have been caused by being struck and mortally injured by one of defendant's cars, then being run on the defendant's street railroad tracks upon said street. The accident occurred between 7 and 8 o'clock at night, and the petition charges that the night was "quite dark," and the tracks at the point of the accident were "dimly lighted," and the accident is alleged to have occurred about 70 feet east of Grey avenue. The negligence charged in the petition is that "the said car was then and there running east on a down grade at a rapid and dangerous rate of speed, and no bell was sounded nor warning given by said defendant, its agent and employes in charge of said car, until too late to enable said deceased to avoid said collision and escape from his perilous position; that defendant's motoneer in charge of and running said car saw, or by the exercise of ordinary care would have seen, the said peril of plaintiff's said husband at said time and place in time to have stopped said car and avoided said collision, or so checked the speed and delayed said car as would have given said deceased sufficient time to escape from his position of peril upon said tracks, but defendant's said motoneer then and there carelessly, negligently, and recklessly failed so to do." The answer is a general denial and a plea of contributory negligence. At the close of the plaintiff's case the defendant demurred to the evidence. The court sustained the demurrer, and the plaintiff took a nonsuit with leave. The plaintiff moved to set aside the nonsuit. The court sustained the motion on the ground that it had erred in sustaining the demurrer to the evidence, and the defendant appealed from that ruling of the court. As the only question in the case that is open to review in this state of the record is whether the plaintiff made out a case for the jury, the evidence will be stated and considered in the course of the opinion, rather than stating it separately.

1. The error assigned is that the trial court erred in setting aside the nonsuit, because the plaintiff made out no case that entitled her to go to the jury. In cases of this character this court has always refused to interfere with the discretion of the trial court in granting one new trial to a party litigant, unless the case was such that under no circumstances whatever could a verdict in favor of the plaintiff be allowed to stand. *Hoepfer v. Southern Hotel Co.*, 142 Mo., loc. cit. 387, 44 S. W. 257; *Haven v. Railroad*, 155 Mo., loc. cit. 229, 55 S. W. 1035, and cases cited. The facts disclosed by the evidence are that the defendant is an electric street railroad, and has a line of double tracks on Lockwood avenue, in the town of Webster. The

poles that carry the trolley wire are located between the tracks. Between Gore avenue and Jefferson Barracks Road—a distance of over 1,000 feet—the track is straight. Between Grey avenue and Silent avenue there is a depression in the street, so that looking westwardly from a point at any place between Gore and Grey avenues only the top of the car can be seen, but the noise made by the running of the car can be easily heard. Between Gore and Grey avenues there were three trolley poles—one about 70 feet east of the east line of Grey avenue, one 113.5 feet east thereof, and the third 114 feet east of the second. It was customary for vehicles traveling west on the north side of Lockwood avenue, and desiring to go south to Grey avenue, to cross the defendant's tracks between the first and second or between the second and third of these trolley poles, instead of waiting until they reached Grey avenue. On the night in question a car of the defendant was going eastwardly on Lockwood avenue. It was running at the usual rate of speed, which is shown to be faster than cars usually run in the city of St. Louis, but no faster than the defendant's cars usually run at that place. The gong was sounded at Rock Hill Road, which was about 1,000 feet west of Grey avenue. The gong was also sounded sharply three times when the car approached Grey avenue, and which was about 160 feet west of the first trolley pole above described. The car ran on eastwardly until it neared Gore avenue, which is 350 feet east of Grey avenue, when it was stopped, and the motorman said he had hit "some one" or "something," and had to go back to find out what it was. He and the passengers on the car then went back towards Grey avenue. When they reached the first trolley pole east of Grey avenue they found a two-wheel cart, with the left wheel fastened around the trolley pole, and the ends of the shaft resting on the north rail of the east-bound track, and such ends were crushed, showing they had been run over by the car. They also found the body of the deceased lying between the east and west bound tracks, with his head towards the east-bound track, and about 10 feet east of the trolley pole, to which the cart was fastened as aforesaid. He had been hit on the head, and was unconscious. He was taken on the car to the Baptist Sanitarium in St. Louis, where he lingered until February 9th, when he died without regaining consciousness. No horse was found at or near the place of the accident. It appeared that the deceased lived about three miles south of Webster, and that he had business at Webster and Clayton every few weeks, and that it was his habit, when returning from Clayton, to drive south on Gore avenue to Lockwood avenue, thence west on the north side of Lockwood avenue until he reached the place between the first and second or second and third poles, where vehicles going

south usually crossed the defendant's tracks, and thence along the south side of Lockwood avenue until he reached Grey avenue, and to proceed southwardly on Grey avenue to his home. On the day of the accident he went alone to Clayton in his cart. It appeared that the car had a headlight on it that threw the light for a distance of about 125 feet ahead of it, and that the car was about 10 feet in height, and was lighted by electricity. No one saw the car strike the deceased. No one saw the deceased upon the track, or so near to it as to be in danger of being struck by the car. The physical facts show that the deceased had been hit on the head, but no one knew whether the car hit him or what hit him, and the physical facts would not tell the tale. The physical facts simply showed the left wheel of the cart fastened around the trolley pole, the ends of the shaft extending towards the south and resting on the north rail of the east-bound track, and that such ends had been crushed by the car running over them, and the body of the deceased lying between the tracks, but entirely outside of the tracks on which the car was running. This was the case made by the plaintiff, and upon this showing the court took the case away from the jury.

The first act of negligence charged against the defendant is that it ran the car at a rapid and dangerous rate of speed. The only evidence adduced in the case is that offered by the plaintiff, and, instead of even tending to support this charge, it is all to the effect that the car was running at the usual rate of speed. None of the witnesses were able to state the exact speed, but they all agreed that it was the usual rate at which the cars ran over that part of the road. This charge of negligence was therefore expressly disproved by the plaintiff, and need not be further considered.

The second act of negligence charged against the defendant is that no bell was sounded or warning given by the servants in charge of the car until it was too late to avoid collision and to enable the deceased to escape from his perilous position. The evidence not only wholly failed to support this charge, but, on the contrary, it expressly disproves it, for it shows that the gong was sounded when the car was about 1,000 feet from the place of accident, and that it was further sounded sharply three times as the car neared Grey avenue, and at a point about 160 feet distant from the place of accident. This charge of negligence was therefore disproved.

The third act of negligence charged is that the motoneer in charge of the car saw, or by the exercise of ordinary care could have seen, the peril of the deceased in time to have stopped the car and to have avoided the accident, or to have so checked the speed of the car as to have afforded the deceased time to escape from his position of peril,

and carelessly, negligently, and recklessly failed so to do. There is not a scintilla of evidence to support this charge. There is absolutely no evidence whatever that the deceased was on the track when the car approached, nor that the motorman saw him in peril, or at all, in time to avoid the accident, nor that there was any collision between the car and the deceased, nor that the injuries of the deceased were inflicted by the car. Neither do the physical facts afford any ground whatever for drawing such an inference of fact. The only thing the physical facts show is that the wheel of the cart was fastened around the trolley pole, that the ends of the shaft rested on the north rail of the east-bound track, and were crushed by the car running over them. There was no horse there or about there. These physical facts show that, if the deceased had been sitting in the cart when the car passed, he could not possibly have been hurt, for only the ends of the shaft were on the track. From the fact that there was no horse there, and from the fact that the ends of the shaft were resting on the track, and were crushed by the car, the conclusion is inevitable that the wheel of the cart had become fastened around the trolley pole, and the horse had broken loose from the cart and run away, and the ends of the shaft had fallen onto the track before the car reached that point. And the only reasonable and fair inference that can be drawn from all the physical facts is that in some way the cart was run upon and became entangled with the trolley pole, and the deceased was thrown out of the cart by the collision of the cart with the trolley pole, and was injured by striking on his head when he fell, and that the horse broke loose and ran off, and that the cart was in that condition and the deceased was already hurt before the car reached the spot. What was the cause of all this is a mere matter of guess or conjecture, but there is nothing in the facts shown or the physics of the case that has even a reasonable tendency to support the negligence charged in the petition.

The burden of proof is primarily upon a plaintiff to prove the negligence charged. It is not enough to show an accident and an injury. A causal connection must be established between the accident and the negligence charged in order to make out a case for the jury. Falling in this, as this plaintiff did, the court should take the case from the jury, because, if it was submitted to the jury, and if a verdict was returned for the plaintiff, it could not stand, for the reason that it would have no foundation in law or in fact to rest upon. *Holman v. Railroad*, 62 Mo. 562; *Sorenson v. Paper Co.*, 56 Wis. 338, 14 N. W. 446. In other words, the mere concurrence of negligence and injury does not make the defendant liable. There must be a direct connection between the negligent act and the injury, and the negligence

must be the proximate cause of the injury. *Reed v. Railroad*, 50 Mo. App. 504; *Stepp v. Railroad*, 85 Mo. 229; *Moberly v. Railroad*, 17 Mo. App. 518; *Stoneman v. Railroad*, 58 Mo. 503; *Harlan v. Railroad*, 65 Mo. 22; *Nolan v. Shickle*, 3 Mo. App. 300; *Id.*, 69 Mo. 336; *Settle v. Railroad*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; *Kenayde v. Railroad*, 45 Mo. 255; *Stanley v. Railroad*, 114 Mo. 606, 21 S. W. 832. If the injury may have resulted from one of two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result; and, if the evidence leaves it to conjecture, the plaintiff must fail in his action. *Smart v. Kansas City*, 91 Mo. App. 586; *Epperson v. Telegraph Co.*, 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; *Smith v. Bank*, 99 Mass. 605, 97 Am. Dec. 59; *Searles v. Railroad*, 101 N. Y. 661, 5 N. E. 63; *Pelce v. Kile*, 80 Fed. 865, 26 O. C. A. 201. In addition, therefore, to the fact that the evidence wholly fails to support the acts of negligence charged in the petition, the proofs and physics of the case wholly fail to show any causal connection between the negligence charged and the injury, and the facts disclose that the injuries may have occurred from other causes than the negligence of the defendant charged. The plaintiff, therefore, was properly nonsuited, and the court erred in granting a new trial.

The judgment of the circuit court sustaining the motion to set aside the nonsuit is therefore reversed, and the cause remanded to that court, with directions to vacate its order setting aside the nonsuit, and to enter judgment upon the nonsuit theretofore ordered. All concur.

PARKS v. ST. LOUIS & S. RY. CO. et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

STREET RAILROADS — INJURY TO PASSENGER — NEGLIGENCE — INSTRUCTIONS — PLEADINGS — ASSUMPTION OF RISK — DAMAGES.

1. A street railway company assuming to carry a passenger standing on the steps of the platform of the car, outside of the gate, and on the side next to the other track, on which cars run in the opposite direction, is chargeable with the duty of carrying him safely in that position, if it can be done by that high degree of care which the law requires the company to observe towards its passengers.

2. A street car passenger taking a dangerous position by standing on the car steps, outside of the gate, and on the side of the adjacent track, on which cars run in the opposite direction, is required to exercise that degree of care for his own safety which prudent persons under like circumstances would observe.

3. A street car passenger, because of the crowded condition of the car, stood on the step of the front platform of the car, outside of the gate inclosing the platform, and on the side next to the track on which cars were operated in the opposite direction. The motorman saw him, and warned him that it was a position of

danger. The conductor saw him, and, without warning, collected his fare. It was feasible to carry a passenger safely in that position. The company carried men safely in that position, and carried this passenger for about two miles, when he was injured by the car and a car traveling on the other track coming nearly in contact with each other at a curve in the road, because of a violation of the rules of the companies operating cars on the tracks, governing the passing of cars at curves. There was nothing to show that the passenger was guilty of negligence after taking his position on the step. *Held*, that the question of defendants' negligence was for the jury.

4. Though the act of the passenger in taking the position on the step was an act of negligence, which contributed to his injury, the question of the negligence of the motorman, knowing the position of the passenger, running his car into the curve in plain view of the car on the other track, was for the jury.

5. The petition in an action by a street car passenger for injuries alleged negligence of defendants in bringing their cars in close proximity while meeting on a curve. The answer consisted of a general denial and a plea of contributory negligence, in taking a dangerous position on the step of the platform of the car, outside of the gate, and on the side next to the other track. *Held*, that an additional plea alleging that the passenger knew, or by ordinary care might have known, the situation of the tracks, and that the danger of riding on the step was known, or by ordinary care might have been known, to the passenger, and that he assumed the risk, if intended to charge that his injuries resulted solely from his voluntary act of riding on the step, was covered by the plea of general denial.

6. If the pleader intended to allege that the position was so dangerous that injury to the passenger could not have been avoided by the exercise of the care incumbent on the carrier, and that the danger was obvious or known to the passenger, the plea was defective for failing to so allege.

7. If the plea intended to allege that the passenger's negligent act of riding on the step contributed to his injury, it was covered by the plea of contributory negligence.

8. A street railway passenger never assumes the risk of the company's negligence.

9. A fact about which there is no dispute, and which is conceded to be true notwithstanding the allegations in the pleadings, may be assumed in an instruction to be true.

10. Where there was some evidence that the car of the other company stopped after entering the curve at a point where the danger was greatest, an instruction that such company was not liable, if at the moment of the accident its car was not passing through the curve, was properly refused, because authorizing a verdict for it if its car had stopped after entering the curve.

11. Where there was nothing to indicate that the verdict in a personal injury action was not the result of calm judgment, the court on appeal will not disturb it as excessive.

Appeal from Circuit Court, St. Louis County; Jno. W. McElhinney, Judge.

Action by James J. Parks against the St. Louis & Suburban Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

McKeighan & Watts and Robt. A. Holland, Jr., for appellants. Wm. R. Gentry, for respondent.

VALLIANT, J. Defendants, two street railway companies, appeal from a judgment

for \$5,000 recovered against them in the circuit court of St. Louis county by the plaintiff on account of personal injuries alleged to have been received by him through their negligence. There is not much dispute as to the governing facts of the case. In June, 1900, there was a strike among the employes of all the other street railroad companies in the city of St. Louis, and the only street cars running were those operated by the defendant companies. The consequence was the cars of these two companies were crowded with passengers beyond their normal carrying capacity. People crowded in, filling the bodies of the cars, the platforms, and every part where a seat or foothold could be obtained. Plaintiff on June 14, 1900, boarded a west-bound car of the St. Louis & Suburban Railway Company, which we will call the Suburban car, at the crossing of Fourteenth street and Franklin avenue. The car was crowded with passengers to such an extent that the only space plaintiff could obtain on it was standing room on the step of the front platform, outside of the gate that inclosed the platform. There was another man and a boy standing on the step in the same attitude plaintiff took. During the period of this strike, it was not unusual for men to ride on the steps of the platform, outside the gates, as those men were doing. At the point where plaintiff boarded the car the defendant's railway runs north and south, but a short distance after passing Franklin avenue it turns west, which is its main course. It is a double-track road, and the cars of both defendant companies run over it. The step on which the plaintiff took his position was on the west side of the car going north, which would become the south side after it turned west, and was the inside; that is, the side next to the other track, over which the east-bound cars came. The outside line of the step on which the plaintiff stood was on a line with the outside of the car, but the plaintiff's body projected beyond that line. He could not press himself closer in. The motorman saw the men and the boy on the step, and told them it was dangerous to ride there, and that they ought to try to get on the other side, but they did not change their position. The conductor also saw the plaintiff there, and asked him for his fare while he was in that position, and received it. The plaintiff rode standing on the step, outside the gate, from Fourteenth street to a point just beyond Vandeventer avenue, a distance of probably two miles or more, where the accident occurred. In going that distance the car passed around two or three curves, and met several cars east-bound on the other track. Just west of Vandeventer avenue the tracks of the defendant companies curve to the north, and then turn again to the west. Cars going in opposite directions, meeting in this curve, were brought more or less nearly in contact, according to the point in the curve

at which they passed each other. The space between cars thus passing was variously estimated by different witnesses, but the testimony of all of them showed that at some point in the curve the meeting cars would come so close to each other that extra care was to be observed to avoid contact, and it was made the subject of especial regulation. The printed rules of the companies gave the east-bound cars the right of way in the forenoon, and the west-bound in the afternoon. Plaintiff was on a west-bound car, and it was about 5 or 6 o'clock in the afternoon, so that this car had the right of way. The rules also required the car that did not have the right of way to come to a stop 40 feet before entering the curve, to allow a car coming in the opposite direction to pass through the curve without danger of contact. On this occasion, as the Suburban car going west approached this curve, a car of the St. Louis & Meramec River Railroad Company, which we will call the Meramec car, approached it from the opposite direction. Each of these cars was in plain view of the motorman in charge of the other. There is some conflict in the evidence as to whether the east-bound car stopped at all before the accident, but, if it stopped at all, it did so very close to or just at the entrance of the curve. There is also some conflict as to the speed at which the Suburban car entered the curve and was going when the accident occurred. But whatever the truth about those disputed points may be, the fact is that the position of the Meramec car in reference to the curve was such, and the movement of the Suburban car into and around the curve was such, as that the plaintiff's body was brought into violent contact with the Meramec car, and he was rolled between the two cars until the space between them became wider, and he was dropped to the ground, having received serious injuries.

1. Appellants' first proposition is that the court erred in refusing the instruction in the nature of a demurrer to the evidence which defendants asked. The substance of the proposition is that the position taken by the plaintiff on the step of the platform was so obviously dangerous, and it so obviously contributed to the accident, that the court should have adjudged the plaintiff, on his own evidence, guilty of contributory negligence. There are two standpoints from which this proposition is to be considered:

(a) That the plaintiff's position was one of danger, and that he would not have been injured if he had not been where he was, are facts indisputable. But was he guilty of negligence in being there? We need not dwell on the fact that the car was so crowded he could not get on it in any other position, because he was not compelled to get on it at all. His taking passage on the car was a voluntary act. Traveling on a street car in a great city is always attended with danger, whatsoever position in or on the car

the passenger may assume. But if it is a position that the carrier offers to the passenger, or a position which the carrier assents to his taking, and knowingly assumes to carry him in that position, then it becomes the duty of the carrier to carry him safely in that position, if it can be done by the exercise of that high degree of care which the law requires the carrier to observe for the safety of its passengers. The degree of care to be observed by the carrier in such case must be in proportion to the danger which the passenger's position entails. The more dangerous the position, the greater the care the carrier is bound to observe. And at the same time the law imposes on the passenger in like case the duty of observing for his own safety the care that a man of ordinary prudence under like circumstances would observe, and that care, too, must be in proportion to the apparent danger. The more dangerous the position, the more care a prudent man would be expected to observe. It is the duty of a carrier who has undertaken to carry a passenger in such a position to carry him safely, if it can be done by the exercise of the degree of care above mentioned; and it is correspondingly the duty of the passenger, after he has taken that position, to observe such care for his own protection as an ordinarily prudent man in a like position and under like conditions would naturally be expected to observe. Under those circumstances, if the passenger is injured from a cause arising out of or incident to the position itself, without failure of duty on the carrier's part, the carrier is not liable. And though in such case the carrier fail to perform its duty, and that failure results in the accident, still, if the passenger fails also in his duty as above defined, and his failure contributes to bring about the result, he cannot recover. But in judging the conduct of both carrier and passenger we must look only to conduct after the passenger has assumed the position, not charging the position itself to either as an act of negligence, but requiring both to keep in mind the peril incident to the position, and regulate their conduct in reference thereto. In this case the carrier knew the position the passenger had taken, and assented thereto, and undertook to carry him in that position. We say this because the motorman saw him there, and warned him that it was a position of danger, and the conductor saw him there, and, without warning and without remonstrance, asked him for his fare, and received it. If that had been a position of such danger that the carrier was unwilling to assume the duty of carrying the plaintiff therein, the carrier had the right to require the plaintiff to leave the car. It was an unusual position—one involving more than usual risk—and the carrier had the right to refuse to carry him in that position. But unless some other circumstance or condition arose to increase the hazard, it was feasible to carry

a passenger safely in that position. This is shown by the fact that during this period of overcrowded cars the defendants did carry men safely in that position, and especially by the fact that this plaintiff was carried safely from Fourteenth street to Vandeventer avenue, passing en route many cars on the other track, and passing through two or three other curves. There is no act of the plaintiff after taking his position on the step that is complained of as negligence. The foregoing views accord with former decisions of this court. *Huelsenkamp v. Ry. Co.*, 37 Mo. 537, 90 Am. Dec. 399; *Willmott v. Ry. Co.*, 106 Mo. 535, 17 S. W. 490; *Seymour v. Ry. Co.*, 114 Mo. 266, 21 S. W. 739.

(b) But assuming that taking the position on the step of the platform was itself an act of negligence, and that it contributed to the occurring of the accident, still there was a question for the jury. The motorman and conductor both knew the man was there, and knew the peril of his position. They also knew that he could not jump from the car while it was passing through the curve without the risk of falling and being run over by the approaching east-bound car, or of being run over if he did not fall. Yet, in plain view of the other car, and seeing that it had not stopped as the rules of the company required, and as common sense dictated, the motorman of the Suburban car ran his car into the curve and on until he had crushed the plaintiff's body against the Meramec car. The facts of this case make a strong example of the wisdom of the rule which allows a plaintiff in exceptional cases to recover, notwithstanding his own contributory negligence, when the defendant sees the plaintiff's peril, and, although able by ordinary care to avoid it, yet recklessly or wantonly inflicts the injury. *Keilny v. Ry.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; *Morgan v. Wabash R. Co.*, 159 Mo. 262, 60 S. W. 195.

The court did not err in refusing an instruction looking to a nonsuit.

2. The plaintiff's petition stated his cause of action based on alleged negligence of the defendants in bringing their cars into collision, or such close proximity as to cause the plaintiff's injuries. The answer of the defendants consisted of a general denial, a plea of contributory negligence based on the act of the plaintiff in taking the dangerous position on the step of the platform, and then followed what in their brief the learned counsel for appellants call a plea of assumption of risk, which is as follows: "And for a further defense defendants state that all the details of defendants' tracks, and the manner of operating cars thereon, were known to plaintiff, or by the exercise of ordinary care might have been known to plaintiff, and that the danger of riding upon the southern steps of the front platform of the west-bound car was known to plaintiff, or by the exercise of ordinary care might have been known to

plaintiff, and that plaintiff assumed the risk of riding upon said part of said car on said occasion." Appellants now complain that the instruction given at the request of the plaintiff ignored the defense set up in that plea. That is not a good plea. The fact that the plaintiff had negligently taken a position on the platform step, outside the gate, was a fact already properly pleaded as an act of contributory negligence. To the plea of contributory negligence the plaintiff replied, and the issue was properly joined. But the part of the answer above quoted, and which appellants call their plea of assumption of risk, presents no affirmative defense. If it is intended by that plea to say that the plaintiff's injuries were the result solely of his voluntary act of riding on the step of the platform, then it means that the injuries were not the result of the defendants' negligence, which defense was already covered by the plea of general denial. The petition having charged that the plaintiff's injuries were caused by the defendants' negligence, and the defendants having denied that charge, they were at liberty, under their general denial, to prove anything to show that the plaintiff's injuries did not result from their negligence. That which can be proven under the general denial already pleaded is improper to be specially pleaded. If the pleader intended to say that to ride in that position was so dangerous that injury to the plaintiff could not have been avoided by the exercise of the care incumbent on the carrier, and that the fact that it was so dangerous was obvious or known to the plaintiff, then the fault of the plea is that it does not say that; and, in the light of the evidence, if it had said so, the court would not have committed error in ignoring it in the instructions, because there was no evidence to support it. All the evidence shows that the accident would not have occurred if the motorman had used even ordinary care. If by that plea it was intended to say that the plaintiff's negligent act of riding on the step, joined with the defendants' negligent act of attempting to pass two cars in a space that was not wide enough for them to pass in safety, and that thus the plaintiff contributed to cause his own injury, that defense was already covered by the plea of contributory negligence. But if it was intended by the plea to say that the plaintiff, by voluntarily taking that position, released the defendants from their duty to exercise the degree of care due from the carrier to the passenger, or if it was intended to say that by taking that position the plaintiff assumed not only the risk incident to it, but assumed also the risk of the defendants' negligence, then it was not a good plea. The passenger never assumes the risk of the carrier's negligence. There is always a risk of personal injury to a person traveling, even if there be no negligence either on his own part or on the part of the carrier. That risk is incident to the act of traveling, and is greater or less ac-

cording to the circumstances and conditions. That risk the passenger assumes. But if to the danger incident to the act of traveling under the circumstances and conditions of the particular case is added a danger caused by the negligence of the carrier, the passenger does not assume the risk of those combined dangers. If the catastrophe in question did not result alone from the danger incident to the act of traveling under the given circumstances and conditions, but resulted because to that danger was added the consequence of the negligent act of the carrier, there was no such assumption of risk as would relieve the carrier from liability. Assumption of risk is one thing, and contributory negligence is another. *Curtis v. McNair* (Mo. Sup.) 73 S. W. 167. The court did not err in ignoring that plea in its instructions.

Instruction No. 3 given for the plaintiff begins as follows: "The jury are instructed that if you believe and find from the evidence in this case that the servants of defendant St. Louis & Meramec River Railroad Company, who were in charge of its said east-bound car on the occasion mentioned in the evidence, prior to and at the time of the alleged injury to plaintiff, were not exercising ordinary care to avoid said collision," etc. Appellants complain of this instruction because they say that by the use of the words "said collision" it assumes that there was a collision, instead of submitting the question to the jury. There was no dispute on that point. The evidence of defendants showed that there was a collision, as well as that of the plaintiff. Although the general denial met every fact stated in the petition in issue, yet a fact about which there was no real dispute, and that was conceded at the trial, may be assumed in an instruction.

The defendants asked five instructions, marked B, C, D, E, and F, the effect of which were that the plaintiff, by taking the position of obvious danger on the step of the platform, was not entitled to recover. From what we have above said, it will appear that there was no error in refusing those instructions.

Instruction G asked by defendant was to the effect that, if the Meramec car at the moment of the accident was not passing through the curve, the verdict should be in favor of the Meramec Company. That instruction called for a verdict for that defendant, even though the Meramec car had stopped after it had entered the curve, as some of the evidence tended to show, at a point where the danger was greatest. It was not error to refuse that instruction.

3. It is earnestly argued that the damages awarded by the jury are excessive. We do not deem it necessary in this opinion to discuss the evidence bearing on this point. It is sufficient to say that the assessment by the jury is not so much out of the way as to justify us in invading their peculiar province. There is nothing to indicate that it is not the

result of calm judgment, and we will not disturb it.

We find no error in the record, and therefore the judgment is affirmed. All concur.

LILLARD et ux. v. WILSON et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

IMPLIED CONTRACT—MEMBERS OF HOUSEHOLD—JOINDER OF PARTIES—EVIDENCE.

1. Whether services rendered by a son and daughter-in-law in nursing parents, who lived in the same house under a business arrangement, whereunder the son paid rent for the farm, were intended as a gratuity, or under an implied contract for pay, is a question for the jury.

2. A writing signed by a father, in the presence of witnesses, expressing a wish that his son and daughter-in-law be paid from his estate for their care of him and his wife for several years preceding, is admissible in an action after his death against his administrator by the son and daughter-in-law for remuneration for nursing the parents, as showing, not an express contract, but the father's intention, and whether the services were rendered gratuitously, or under an implied promise.

3. An action for services rendered substantially all by the wife should be brought by her alone, without her husband joining, under Rev. St. 1889, § 6869, giving the wife the wages of her separate labor, and section 6864, making it competent for her to sue separately.

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Edward W. Lillard and wife against M. D. Wilson, as administrator, and another. From a judgment sustaining a demurrer to their evidence, plaintiffs appeal. Reversed.

John Welborn and Charles Lyons, for appellants. S. N. Wilson, for respondents.

MARSHALL, J. The plaintiffs are husband and wife. Edward Lillard was the son of W. C. Lillard and Sarah J., his wife. W. C. Lillard died January 13, 1899; and the plaintiffs exhibited this claim against his estate for services, as nurse, rendered him and his wife at his request. The claim is for \$60 a month from June 2, 1888, to January 13, 1899, aggregating \$7,200, for nursing the deceased, and for \$40 a month from January 4, 1893, to January 13, 1899, aggregating \$1,920, for nursing his wife. The answer denies all liability; denies that the liability, if any, is to the plaintiffs jointly, and therefore pleads a misjoinder of parties; and avers that on March 1, 1888, the deceased rented his farm, near Concordia, Mo., to his son Edward, the plaintiff, for \$300 a year, and upon the agreement that the two families were to occupy the house jointly, each furnishing one-half of the provisions for family use; avers that such rental was renewed from year to year up to the death of the father, at which time it is alleged that Edward owed his father \$1,225 on account

of rent, and \$300 on account of a note dated January, 1895, and asks judgment for those amounts. The answer also pleads the five-year statute of limitations as to all the claim prior to June 1, 1894. The case made by the plaintiffs was this: The father rented his farm to his son Edward on March 1, 1888, for \$300 a year, and upon the further agreement that the two families should live together in the father's house, but each was to furnish one-half of the necessary provisions. It also appeared that the son paid all the rent that became due. It does not appear whether there was any such note given as is described in the answer, nor, if given, whether it was paid or not. On the 2d of June, 1888, the father was thrown from a horse, and his hip was broken near the socket, and he was thereafter a cripple. Thereafter he suffered also with his kidneys and bowels to such a degree that he lost control over them, and they acted without his knowledge or intention. This trouble was so great at times that the witnesses say he had to be attended to like a child. He also suffered with an eczema on his leg, which had to be cleansed, treated, and bandaged often as much as twice a day. He required constant attention in these respects for the balance of his life, running 11¼ years. He was about 82 or 83 years old when he died. His wife was also old and weak, and suffered with asthma, and was at times otherwise sick, and required a good deal of waiting on. When she was able so to do, she assisted in housework to the best of her ability, and looked somewhat after her grandchildren, but she was unable to nurse the deceased. Substantially all the nursing of both the old people was done by the plaintiff Bettie Lillard, as was also all the housework and cooking for both families, and for the boarders and the farm hands. It was shown that the deceased many times expressed to his friends and acquaintances, and to all with whom he came in contact, his realization of his condition, his appreciation of the invaluable services that his daughter-in-law rendered to him, and his desire that she should be well paid therefor; and on one occasion he asked the doctor who had arranged the affairs of a neighbor of his, and, upon being informed, requested the doctor to send the same notary to him, saying he wanted to give some or all—the doctor was not clear which—of his land to his son and his daughter-in-law, in compensation for the services they had rendered him in nursing him; but it does not appear that the notary ever came to him, and so no provision was thus made by him in discharge of his obligation. It does appear, however, that on the 8th of December, 1898, the deceased executed the following written instrument: "I hereby certify and state that I will and wish my son, E. W. Lillard and wife, Bettie Lillard to be paid a reasonable sum of money from my estate; first for their kind and

¶ 1. See Husband and Wife, vol. 26, Cent. Dig. § 762.

considerate care and attention to me during my last years of life, and also the care and attention of my beloved wife, Sarah Jane Lillard. Witness my hand. W. C. Lillard. Signed this 8th day of December, 1898. Witness: Wm. Borgstadt. W. B. Strader." The attesting witnesses said that they were called by the son to witness the instrument, and that the son produced it and showed his father where to sign it, and he did so, without reading it. The court excluded the paper, and the plaintiffs assign that ruling as part of the error complained of. There was an abundance of testimony adduced by the plaintiffs to support their claim, including the testimony of the widow, of the doctors, the friends of the deceased, the former boarders, and farm hands. At the close of the plaintiffs' case the defendant demurred to the evidence, the court sustained the demurrer, and the plaintiffs appealed.

1. The position taken by the defendant is that there was no express contract by the deceased to pay the plaintiffs, either jointly or separately, anything for the services, and that the circumstances and facts shown in evidence are not sufficient to warrant an implied contract therefor, but that, by reason of the relationship of the parties, those services were intended to be, and must be held to be, merely gratuitous, and that so far as the paper of December 8, 1898, is concerned, it was properly excluded, because it was executed by the deceased, at the direction of his son, without reading it or knowing what it was, and because it is a mere expression of a desire on his part that the plaintiffs should be paid a reasonable sum for their services, expressed after the bulk of the services had been rendered, and therefore does not show that at the time the services were being rendered either party expected the services to be paid for. Implied contracts are either implied in fact or in law. The first class arises in cases where, according to the ordinary course of business and the common understanding of men, a mutual intent to contract is implied. The second class are mere fictions of law, and arise in cases where there is no evidence of intention to contract, but where, in the light of the circumstances of the case, the acts and conduct and verbal statements of the parties, the law implies a duty to pay for a benefit conferred. In such case "the intention is disregarded." 15 Am. & Eng. Enc. Law (2d Ed.) p. 1078. Of course, there can be no recovery for services voluntarily rendered, without expectation at the time of rendition of compensation therefor, or with the hope of being rewarded by will or otherwise, as a matter of generosity, for under such circumstances no legal or moral obligation arises. Id. p. 1079. But "it is well settled that where one performs services for another at his request, but without any agreement or understanding as to wages or remuneration, the law implies a promise on

the part of the party requesting the services to pay a just and reasonable compensation, unless there is a family relation existing between the parties, and this remuneration is recoverable on a quantum meruit." Id. p. 1081. So, "where services are performed by one for another either with or without the latter's consent or knowledge, and he knowingly accepts and avails himself of those services, the general rule is that the law will imply a promise to pay a fair and reasonable compensation therefor." Id. p. 1083. Touching the subject of services rendered by members of one family to each other, the same valuable work, at page 1083, says: "Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise on the part of the recipient to pay for them; but, where the services are rendered to each other by members of a family living as one household, there will be no such implication from the mere rendition and acceptance of the services. On the contrary, the presumption is that the services are intended to be gratuitous, and, in order to recover therefor, the plaintiff must affirmatively show either that an express contract for remuneration existed, or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation. The reason for this is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to mutual comfort and convenience of the family; and the rule stated applies not only to members of a family who are related by blood, but to those distantly related, and to those who are in fact not related at all, provided they live together as members of one family." But while this is the general rule, the same work, at page 1084, says: "The presumption that the services rendered by one member of a family to another is gratuitous is not a conclusive one. It may be overcome by showing an express agreement for payment, or by showing circumstances which will support the implication that the services were to be paid for. The burden is, of course, on the person rendering the services to overcome the presumption which the law raises that such services were rendered gratuitously."

The cases that have undergone adjudication in this state illustrate the rules thus generally stated. In *Whaley, etc., v. Peak*, 49 Mo. 80, the deceased executor sued defendant for board because he lived at the house of the deceased. The jury found for the defendant, and the plaintiff appealed. It appeared that the defendant was the husband of the stepdaughter of the deceased, and it was contended that the deceased had invited the defendant and his family to come and live with him. This court said: "In cases of this kind no absolute rule of law can be laid down. Whether there was an implied contract for compensation, or wheth-

er it was a mere gratuity, are questions to be determined by the jury upon the evidence, after taking into consideration the circumstances in life of the parties, the degree of relationship, and all other facts which may affect the case." In *Smith v. Myers*, 19 Mo. 433, it was held that, "where a mother-in-law performs menial services in the family of her son-in-law, it is for the jury to determine from all the circumstances whether it was under an implied contract for wages, or not." This court said: "The general rule is that, whenever service is rendered and received, a contract of hiring or an obligation to pay will be presumed. This is an undoubted rule between strangers. But a relationship between the parties may exist, such as will cause the presumption that the services are acts of kindness and affection. In all such cases it will be a question for the jury, taking into consideration the relationship, the circumstances in life of the parties, and other matters which may affect it, whether there was an implied contract for compensation." In *Guenther v. Birkicht's Adm'r*, 22 Mo. 489, a stepson continued to reside in the family of his stepfather after attaining his majority, and, after the latter's death, exhibited a claim against his estate for labor and work. It appeared that the plaintiff had lived with his mother and his stepfather ever since their marriage, and was treated and cared for like one of the family. This court held that the presumption that he was to be paid for his services, implied by law under other circumstances, was repelled, and it devolved upon the plaintiff to show affirmatively that it was the intention of the parties that the services were to be paid for, and were not gratuitous. Accordingly a judgment for the plaintiff was reversed, and the cause remanded for trial anew. In *Hart v. Hess*, 41 Mo. 441, a son exhibited a claim against his mother's estate for labor, etc. He recovered judgment below, and the judgment was affirmed. This court said: "The theory of the appellant is that where a son continues to reside with his parent after he arrives at the age of twenty-one, and performs work and labor, and renders service, he cannot recover, unless he shows a special or express contract entered into with his parent for wages or compensation. This is certainly the settled rule of law in England, and in some of the states of this Union. As between strangers, the general rule undoubtedly is, where nothing is shown to the contrary, that, whenever services are rendered and received, a contract of hiring or an obligation to pay will be implied. The mere fact, disconnected and alone, that a child resides with his parents after it has attained its majority, and performs service, will not raise an implied assumpsit. The parent is not legally entitled to the earnings of his children after they arrive at the age of twenty-one, nor is he legally bound to support

them; yet, if they live with him as members of his family, without any contract or understanding that he shall pay for their services, or receive pay for their maintenance, the law will not imply a promise to pay on either side. *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301. But our court has held—and we consider the doctrine more in consonance with justice—that in all such cases it is a matter for the jury to determine from all the circumstances whether the services were rendered under an implied contract for wages or not. This position is also supported by many respectable authorities in other states." In *Cowell v. Robert's Ex'r*, 79 Mo. 218, the claimant was a relative of the decedent's wife, and had been raised and cared for by him and his wife as a member of his family. After his death she exhibited a claim against his estate for services as nurse, servant, and housekeeper. The lower court decided in favor of the defendant, and she appealed to this court, where the judgment was affirmed. This court said: "The doctrine that, after the attainment of majority, the promise, to support the obligation to pay must be an express one, has not been accepted in this state. Notwithstanding the fact that family relationship in itself implies that the services are gratuitous and without the expectation of pecuniary reward, the promise to pay may be implied from any facts or circumstances which in their nature justify the inference of an actual contract of hire, or an actual understanding between the parties to that effect." Citing *Guenther v. Birkicht's Adm'r*, *supra*. *Hart v. Hess*, *supra*, and *Smith v. Myers*, *supra*. In *Sprague v. Sea*, 152 Mo. 327, 53 S. W. 1074, the plaintiff presented a claim against the estate of one Vaile for services as housekeeper. Among other things, the defendant contended that the plaintiff was a relative of the deceased, and did not expect any compensation, and did not intend to make any charge for her services. The court instructed the jury that they were to determine whether her services were rendered gratuitously and without expectation of reward, or under an understanding and implied contract that she should receive what her services merited. In short, whether, under circumstances of this character, the services were intended as a gratuity, or under an implied contract for pay, is a question for the jury, upon a proper showing, in this state. *Kerr v. Cusenbary*, 60 Mo. App., loc. cit. 563; *Voerster v. Kunkel*, 86 Mo. App., loc. cit. 197.

The testimony adduced in this case abundantly shows that the deceased said many times to many disinterested persons during the years when the services were being rendered to him by his daughter-in-law that she ought to be well paid for all the drudgery she had gone through for him. His wife was old and not able to wait on him, but, on the contrary, needed waiting on at times

herself. He was crippled and sorely afflicted, and needed constant attention during the day and night. His daughter-in-law rendered him efficient and faithful service. He wanted and expected her to be paid, for he said so, and tried to get some one to fix up the papers for him so he could give her and his son some or all of his lands. The widow expected her to be paid, and still expresses the hope that she may be paid. There is one circumstance in this case that tends strongly to take the case out of the rule that services rendered by a child to a parent while living in the house of the parent are presumed to have been gratuitously rendered, and that is that though the plaintiff Edward was the son of the deceased, and the plaintiff Bettie was his daughter-in-law, and though they lived with their family in a house belonging to the deceased, and though the deceased and his wife also lived in the same house, it is not true that the plaintiffs were living in the family of the deceased. On the contrary, though the relation of parent and child existed between the deceased and the plaintiffs, and though both families lived in the same house, it was not as a child lives with a parent as a member of his family, but was the result of a business arrangement whereby the son paid the father rent for the farm, and, as a part of the arrangement, their two families lived together in the same house, each furnishing one-half of the family supplies. This very arrangement excludes *prima facie* any idea that either expected the other to give him "something for nothing," or as a result of relationship, but that it was a matter of business between them. In no true sense, therefore, can it be said in this case that the plaintiffs lived in the family of the deceased. Under such a state of facts, the question was clearly one for the jury, whether the services were intended to be gratuitous, or under an implied promise of remuneration, and the trial court erred in taking the case from the jury.

2. The written statement of December 8, 1898, was admissible in evidence, not as showing an express contract, but as bearing upon the intention of the deceased, and upon the question of whether the services were rendered gratuitously or under an implied promise. The fact that it was executed after the bulk of the services had been rendered does not render it incompetent, for it is merely expressive of the understanding of the deceased as to whether or not the services rendered had been rendered as a gratuity. Statements by the deceased of intention or desire to pay for services rendered by a nurse were held admissible in the recent case of *Ryans v. Hospes*, 167 Mo. 342, 67 S. W. 235. There was no issue or substantial proof that this paper was procured by fraud.

3. The evidence shows that Bettie Lillard rendered substantially all the services that were rendered, and that Edward rendered no services of any particular value. It does not

appear that there was any interest in common between Edward and his wife as to the services rendered. She was entitled to the amount claimed as the wages of her separate labor (Rev. St. 1899, § 6869), and was competent to sue for them separately (Rev. St. 1899, § 6864). If, upon a trial anew, the facts appear as they now appear, the plaintiffs, if so advised, should be permitted to amend, without costs, by striking out the name of Edward W. Lillard, and proceeding in the name of Bettie Lillard alone.

For these reasons, the judgment is reversed, and the cause remanded, to be proceeded with in accordance herewith. All concur.

LONG v. HAWKINS et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

NEW TRIAL—TIME FOR MOTION—APPEAL— FAILURE TO PERFECT.

1. The four days after the trial in which Rev. St. 1899, § 803, requires motion for new trial to be filed, that matters of exception may be reviewed on appeal, are calendar days, not court days.

2. By express provision of Rev. St. 1899, § 812, failure to perfect the appeal in the prescribed time is cause for affirmance, unless good cause to the contrary be shown.

Appeal from Circuit Court, Phelps County;
L. B. Woodside, Judge.

Action by A. S. Long against Jacob M. Hawkins and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Crites & Garrison and Arthur Corse, for appellant. Thos. M. & Cyrus H. Jones, for respondents.

MARSHALL, J. This is a bill in equity by the plaintiff, as assignee of one William Kinnard, to redeem a certain tract of 110 acres of land in Phelps county. The petition charges that Kinnard was indebted to the Rolla National Bank in the sum of \$500, which was represented by a note, on which the defendant Hawkins was security and indorser, and that, to protect Hawkins, Kinnard, in 1892, executed a quitclaim deed to the land to Hawkins, upon the agreement that the land should be held as such security, and should be reconveyed upon Kinnard paying the debt to the bank—that is, that though in form the conveyance was a deed, in reality it was only a mortgage; that on June 5, 1897, Hawkins conveyed the land to the defendants Ballance and Walker, and they conveyed a life estate therein to Martha Ballance, but that they all took with notice that the conveyance from Kinnard to Hawkins was only a mortgage; that in September, 1897, Kinnard conveyed the land to the plaintiff; that on June 5, 1897, Hawkins paid the debt of Kinnard, for which he was security, to the bank, amounting to \$500; and

¶ 1. See New Trial, vol. 37, Cent. Dig. § 232.

the bill tenders that sum, with interest, to the defendants, and asks leave to redeem, and that the deeds aforesaid be canceled, and the title be adjudged to the plaintiff. The answer admits the several conveyances, but denies that the deed from Kinnard to Hawkins was in reality a mortgage, and alleges that it was a conveyance in consideration of \$825 paid by Hawkins to Kinnard, sets up a misdescription in the deed as to 30 acres, asks a reformation of the deed, and for possession of the land, damages, rents, and profits. The replication reaffirms the statements of the petition.

It appears that the defendants had a suit in ejectment for the land pending against the plaintiff and Kinnard, and that by consent the two cases were consolidated and tried together. The trial court entered judgment on March 31, 1898, which was at the March term, 1898, for the defendants Murphy, Ballance, and Walker, corrected the error in the deed as to the 30 acres, awarded the possession to the defendants, and fixed the rents and profits at \$6.50 a month. The record shows that the next entry was on April 2, 1898, which was of the filing of an agreement that, if an appeal should be taken, the bond should be for costs only, and that a writ of restitution should issue at once. The record shows the next entry to be on June 21, 1898, and which was at the March term, 1898, and was of the filing of a motion for a new trial. Afterwards, on June 22, 1898, the motion for a new trial was overruled, an affidavit for an appeal to the Supreme Court was filed, an appeal was granted as prayed, an appeal bond was filed and approved, and 110 days allowed to file a bill of exceptions. No further entries of record appear until March 27, 1900, when the following entry was made: "Affidavit to supply bill of exceptions filed, and it is ordered that same be supplied and filed as on the 10th day of September, 1898." The clerk's certificate shows that these are all the entries that appear of record in the case. This certificate of the record entries, together with what purports to be a bill of exceptions, fastened thereto as a sort of prefix, was filed in this court on April 18, 1901. The abstract of the record filed by appellant covers one page. It does not set out the testimony, either in whole or in substance, nor does it contain so much thereof as is sufficient to enable the court to understand the same.

Upon this state of the record the defendants ask to have the judgment affirmed, or, at any rate, the appeal dismissed. The judgment was entered on March 31, 1898. The motion for new trial was filed on June 21, 1898, and overruled on June 22, 1898. An appeal was granted on June 22, 1898, and no perfect transcript or certified copy of the judgment was filed in this court until April 18, 1901, and there has been a failure to file such an abstract of the record as is required by the rules of this court. The motion for

a new trial was not filed within four days after the trial, as required by section 803, Rev. St. 1899, and therefore no matters of exception are open to review in this court. *State v. Marshall*, 36 Mo. 400; *Moran v. January*, 52 Mo. 523; *Welsh v. St. Louis*, 73 Mo. 71; *State v. Brooks*, 92 Mo., loc. cit. 591, 5 S. W. 257, 330; *Maloney v. Railroad*, 122 Mo. 114, 26 S. W. 702. The four days contemplated by the statute are calender days (Sunday excepted), and not days on which the court is in session, or court days, as they are commonly called. The appeal was granted on June 22, 1898. It was therefore returnable to the October term, 1898, of this court. No perfect transcript or certified copy of the judgment—in fact, nothing—was filed in this court until April, 1901; that is, until nearly three years after the appeal was taken. No cause is attempted to be shown for this failure. This is cause for affirmance under section 812, Rev. St. 1899. Under these conditions it is unnecessary to refer to the claimed failure to comply with the rules.

The judgment of the circuit court is affirmed. All concur.

BREEN v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

CARRIERS—EJECTION OF PASSENGER—REFUSING MONEY AS COUNTERFEIT—DAMAGES—EVIDENCE OF CHARACTER.

1. In estimating damages for the wrongful and forcible ejection of a passenger, his physical pain, though slight, and his mental suffering naturally resulting, may be considered.

2. The honest expression of opinion by a conductor that money offered to him for fare is counterfeit, and his refusal to accept it on that account, he not charging that the passenger knew it was counterfeit, is not a tort, or an element of damages for the wrongful ejection of the passenger.

3. A passenger, in an action against a carrier for a wrongful ejection, may not give evidence as to his character, it not being attacked.

4. Where a passenger is rightfully on a car, and tenders and continues to tender lawful money for his fare, which is refused on the claim that it is counterfeit, he is not required to leave the car, but may make protest against and reasonably resist ejection.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Louis D. Breen against the St. Louis Transit Company. Judgment for plaintiff. Defendant appeals. Reversed.

George W. Easley and Boyle, Priest & Lehmann, for appellant. Jos. A. Wright, for respondent.

BLAND, P. J. Omitting caption, the petition is as follows: "That at about 2 o'clock in the afternoon of the 23d day of March, 1902, the plaintiff, at the corner of said Delmar and Taylor avenues, entered one of defendant's east-bound cars, then being oper-

¶ 1. See *Carriers*, vol. 2, Cent. Dig. §§ 1432, 1435, 1437.

ated on said Olive street line, with the intent and for the purpose of being carried on said car as a passenger. That, after entering said car, the conductor thereof, appointed by and in the employ of defendant, asked the plaintiff for payment of his fare; and thereupon plaintiff tendered said conductor a certain one-dollar bill, lawful money of the United States, and requested said conductor to take plaintiff's fare, amounting to five cents, out of said dollar bill. That said conductor refused to accept said dollar bill, and to take plaintiff's fare therefrom, though plaintiff repeatedly tendered the same to said conductor for said purpose. That said conductor, in the presence of numerous passengers on said car, falsely and maliciously charged plaintiff, whenever he presented said dollar bill in payment of his fare, with attempting to pass counterfeit money. That, though plaintiff offered to pay his fare in manner aforesaid, the said conductor, as the agent of defendant, refused to carry plaintiff, and at the corner of Olive street and Grand avenue, in said city, forcibly expelled him from said car. That, in so doing, the defendant, through its conductor, committed an assault and battery of a high and aggravated nature upon the plaintiff, by forcibly pulling him from his seat to the back platform of said car, and then pushing him off said platform into the street, in the presence of numerous passengers, and injured the reputation of the plaintiff by representing to them that he was trying to cheat the defendant company by attempting to pass counterfeit money in the payment of his fare; thereby charging plaintiff with attempting to perpetrate a fraud upon defendant, and imputing to him the crime of attempting to pass counterfeit money. Plaintiff therefore says he has been injured and damaged by the defendant by the aforesaid acts to the amount of \$1,000, for which sum he asks judgment. Plaintiff also asks judgment for exemplary or punitive damages against defendant in the sum of \$3,000, in addition to the actual damages prayed for." The answer of the defendant was a general denial, with the following special defense: "And for a further answer and defense, defendant says that said plaintiff tendered in payment of his fare what purported to be a one-dollar bill, and the conductor, believing said bill to be counterfeit and spurious, refused to take the same, and in good faith demanded of plaintiff payment of his fare in other money, which said plaintiff then and there refused to pay; and said defendant's conductor then and there demanded that said plaintiff should quit the car, which said plaintiff then and there refused to do, and required and compelled said conductor, for the sole purpose of laying a seeming foundation for this suit, to make a show of force in putting said plaintiff off said car, which said conductor then and there did, using, however, no unnecessary

force, and doing no injury to the plaintiff whatever. And having fully answered, defendant asks to be discharged, with its costs." Plaintiff's reply was a general denial.

Plaintiff, in his own behalf, testified substantially as follows: "That he was an employé of the Post Office Department. That on Sunday, the 23d day of March, 1902, at about 2 o'clock p. m., he went to Delmar and Taylor avenues for the purpose of taking an Olive street car. His intention was to walk to where he was going.' He was going to Twenty-Ninth and Pine streets, to a rehearsal for a concert to be given for the benefit of the Letter Carriers' Band. At Delmar and Taylor avenues he boarded an Olive street car. The conductor came for his fare. Plaintiff offered him a one-dollar bill. Q. What did the conductor say to you when you presented this dollar bill? A. He looked at the bill, and turned it over two or three times, and handed it back, and he said, 'I can't use that;' and I said, 'Why?' He said, 'It is a counterfeit,' and I said, 'I think you are mistaken.' He said, 'No; I know I ain't.' He said, 'It is a counterfeit,' and I said, 'No; it is not.' He said, 'It is a counterfeit, and I won't take it.' So he went up through the car and collected a few more fares, and he came back to me again and requested my fare. I offered him the same dollar bill; and he said, 'No; I can't take that. That is a counterfeit.' I said, 'No, sir; it is not.' He said, 'I know it is.' I said, 'If you are so positive of its being counterfeit, why don't you have me arrested for trying to pass it?' He said, 'No; I won't do that.' I said, 'That is all I have got, and I want to pay my fare with it,' and he said, 'Well, I can't take that—it is a counterfeit—and you will have to get off.' I took the bill and put it in my pocket again, and he went out on the back platform, and he was talking to several men on the back platform. I heard somebody remark, 'Take the number of the bill.' After talking with the passengers on the back platform, the conductor came back again and said to the plaintiff, 'Let me look at that bill again.' Plaintiff handed him the bill, and he went out on the back platform with it, and brought it back, and said, 'I can't use that. That is a counterfeit.' He said, 'I know good money when I see it.' He said, 'On the back, that what is supposed to be silk threads in it, that is done with pen and ink.' The plaintiff insisted that the money was good, and the conductor that it was bad, and finally the conductor said, 'Well, I won't take it. You will have to get off;' and the plaintiff said, 'No, sir; I will not get off, because I am willing to pay, and I don't see why I should get off;' and the conductor then said, 'Well, then, I will put you off;' and the plaintiff turned to the gentleman who was sitting in the seat with him, and said, 'Will you kindly let me have your

name?" The gentleman's name was Mr. Melville, who made a memorandum of the number of the bill, after which the conductor said, 'Well, come on and get off;' and the plaintiff said, 'No, sir; I am not going to get off, because I am willing to pay.' The conductor then said he would put plaintiff off, and the plaintiff says that he grabbed him by the arm and pulled him out of the seat, and pushed him out on the back platform, and he said, 'Get off;' and the plaintiff said, 'No, sir; I am willing to pay, and I don't see why I should get off;' and with that the conductor shoved the plaintiff off the car, and said, 'The next time you get on these cars, have United States money with you.' He stated that he felt some pain from the grip of the conductor when he took hold of his arm. He further testified that he was an employé of the United States Postal Department; that the bill he tendered the conductor was paid to him by the department, and that, in his judgment, it was a genuine bill; that it was all the money he had about his person on the occasion; and that he told the conductor that it was all the money he had. He further testified that he had never been arrested or accused of crime; that no profane or loud language was used by the conductor, and that there was no quarrel; that he had no previous acquaintance with the conductor. The one-dollar bill was produced, identified, and proved to be genuine. A. B. Melville, who was in the car with plaintiff, corroborated plaintiff's evidence in regard to what took place in the car between plaintiff and the conductor, and stated that the conductor took plaintiff by the arm, pulled him from the seat, led him to the rear platform, and pushed him off the car, but that he used no more force than was necessary to eject plaintiff from the car, and that plaintiff used no more resistance than was necessary to show his unwillingness to leave the car. Over the objection of the defendant, plaintiff was permitted to prove that he was a man of good character. On the part of the defendant, the evidence was that the one-dollar bill in question was old and worn; that bills of its kind were no longer issued, and there were but few of them in circulation, and that one who was not an expert might be honestly mistaken as to the genuineness of the bill; that the conductor examined the bill closely, took it out to the rear platform of the car, where the light was better, examined it there, and submitted it to W. J. Hagenbush, a passenger, for examination, who advised him not to take it. The conductor testified that when he asked plaintiff to get off the car he merely took him by the sleeve of his coat; that he did not grip his arm at all; that, when he took hold of plaintiff's sleeve, plaintiff got up and followed him to the rear platform, and there got off; that he did not shove or push him off, and said nothing to him when he got off; that he honestly believed the one-dollar bill

was a counterfeit, and refused to take it for that reason. W. J. Hagenbush testified that plaintiff was not shoved or pushed off the car, and that the conductor said nothing to him when he got off.

For plaintiff, the court instructed the jury as follows:

"(1) The court instructs the jury that if the jury believe from the evidence that the plaintiff on or about the 23d day of March, 1902, entered one of defendant's eastbound cars, then being operated on the Olive street line of the defendant, with the intent and for the purpose of being carried on said car as a passenger, and that after entering said car the conductor thereof, and appointed by and in the employ of defendant, asked the plaintiff for payment of his fare, and thereupon plaintiff tendered said conductor a certain one-dollar bill, introduced in evidence, and that the same is and was lawful money of the United States, and that plaintiff requested said conductor to take his fare, amounting to five cents, out of said dollar bill, and that said conductor refused to accept said dollar bill, and to take plaintiff's fare therefrom, and that plaintiff repeatedly tendered said dollar bill to said conductor in payment of his fare, and that said conductor, in the presence of numerous passengers on said car, falsely and maliciously charged plaintiff, whenever he presented said dollar bill in payment of his fare, with attempting to pass counterfeit money, and that though plaintiff offered to pay his fare in said manner, and said conductor refused to carry plaintiff on said car, and at the corner of Olive street and Grand avenue, in said city, forcibly expelled plaintiff from said car, and that in expelling plaintiff from said car the said conductor assaulted plaintiff, by forcibly pulling him from his seat to the back platform of said car, and then pushing him off said car into the street in the presence of numerous passengers, and that said conductor meant and intended, in charging plaintiff with attempting to pass counterfeit money, to thereby charge plaintiff with attempting to defraud the defendant, and to impute to plaintiff the crime of attempting to pass counterfeit money, and that thereby, and as the direct result of said alleged acts of said conductor, the plaintiff suffered shame and mortification, pain and injury to his body and feelings, and mental anguish, and injury to his reputation, then you will find your verdict in favor of the plaintiff and against the defendant company, and assess his actual damage in such sum as you believe, from the evidence, will fairly and reasonably compensate him for any damages he sustained thereby, not exceeding the sum of \$1,000; and, if the jury further believe from the evidence that the said alleged acts of the conductor referred to in this instruction were done by him in malice toward the plaintiff, then the jury may add to such actual damages, if any, so found

in favor of plaintiff, an additional sum, not exceeding \$3,000, as punitive damages, if they think, under all the circumstances of the case, punitive damages ought to be so found by them, and by 'punitive damages' is meant such sum as will justly punish the defendant for the said wrongful acts of its said conductor, if you find he did said wrongful acts, and as will be an example to deter others from committing such an act; and, if the jury find in favor of the plaintiff as to punitive damages, they will so find, and assess the amount thereof separately, and separately so state in their verdict.

"(2) The court instructs the jury that by the use of the word 'malice' in these instructions is meant ill will, or a desire to be avenged; and, in passing upon the question of malice and the other matters referred to in the instructions, the jury should take into consideration all the facts and circumstances in evidence, and all the evidence as detailed by the witnesses.

"(3) You are further instructed that if you find and believe from the evidence that the conductor in the charge of defendant's car, when plaintiff presented the one-dollar bill introduced in evidence in payment of his fare, falsely charged plaintiff with attempting to pass counterfeit money, then the law will imply that said conductor maliciously charged the plaintiff with the crime of attempting to pass counterfeit money."

The following instruction asked by defendant was refused by the court:

"(2) Even if the jury do find from the evidence, under the instructions of the court, that the plaintiff tendered good money in payment of his fare, and that the conductor had no legal right to refuse the same, still those facts would only authorize the plaintiff to pay his fare in other money, or quit the car, and sue for and recover fair compensation for the damages actually sustained by him from the wrong of the conductor; and if you believe from the evidence that by such course the plaintiff could have avoided the alleged shame and mortification of a public expulsion, but chose, rather than to take that course, to resist the demands of the conductor, to the extent of requiring the use or show of force for his removal from the car, then he subjected himself to whatever mortification he suffered from being publicly removed from the car; and that is a matter not to be considered by you in estimating his damages for such expulsion."

Ten of the jurymen agreed to and returned the following verdict:

"We, the jury, in the above-entitled cause, find for plaintiff in the sum of two hundred and fifty dollars actual damages, and in the sum of no dollars punitive or exemplary damages."

Timely motions for new trial and in arrest of judgment were filed by defendant, which were by the court overruled. Plaintiff appealed.

1. The questions of malice and oppression were eliminated from the case by the refusal of the jury to assess any punitive damages. Viewing the evidence in its most favorable aspect for the plaintiff, we have for consideration simply a case of unjustifiable assault and battery, without express malice, or any actual intention to commit a legal wrong—the wrongful and forcible ejection of a passenger from a street car by the conductor in the mistaken, but honest, belief that he was doing his duty. The bodily pain caused by the battery, according to plaintiff's own evidence, was slight; but it was appreciable, and sufficient to constitute an element in the estimation of the damages, and was properly submitted to the jury as an element of the damages. Having adduced evidence of the assault and battery, and thus proven the tort, all the circumstances attending the assault and battery were proper for the consideration of the jury; and, in estimating plaintiff's damages, they were authorized to take into account not only his physical pain, but also such mental suffering as they were satisfied must have been the natural result of the injury inflicted. *West v. Forrest*, 22 Mo. 344; *Porter v. Railroad*, 71 Mo. 66, 36 Am. Rep. 454; *Brown v. Railroad*, 99 Mo. 310, 12 S. W. 655; *Cook v. Railroad*, 19 Mo. App. 329; *Deming v. Railroad*, 80 Mo. App. 152; *Railroad Co. v. Barron*, 72 U. S. 90, 18 L. Ed. 591; *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110; *Smith v. Holcomb*, 99 Mass. 552; *Ferguson v. Davis County*, 57 Iowa, 601, 10 N. W. 906; *South & North Alabama R. Co. v. McLendon*, 63 Ala. 266; *Pennsylvania & Ohio Canal Co. v. Graham*, 63 Pa. 290, 3 Am. Rep. 549. Instruction No. 1 given for plaintiff went further than to tell the jury that they should take into consideration the facts and circumstances attending the assault and expulsion of plaintiff, in estimating the damages. It detailed these circumstances, and then instructed that if "said conductor meant and intended, in charging plaintiff with attempting to pass counterfeit money, to thereby charge plaintiff with attempting to defraud the defendant, and to impute to plaintiff the crime of attempting to pass counterfeit money, and that thereby, and as the direct result of said alleged acts of said conductor, the plaintiff suffered shame and mortification," etc. This was not only a comment on the evidence, but had the effect to inject into the case an element of damages in actions for verbal slander. The slander attempted to be alleged, and which is carried into the instruction, is the crime of an attempt to pass counterfeit money. The allegations of the petition are insufficient to charge that offense, for the reason that the offense cannot be committed unless the person who makes the attempt knows at the time he makes the offer that the money he offers to pass as genuine is in fact counterfeit. Scientist must be both alleged and proved. It is not alleged in the petition, nor is there a

word in the evidence, that the conductor charged the plaintiff with an attempt to pass upon him a counterfeit one-dollar bill, knowing it to be counterfeit. All it does show is that the conductor insisted that the bill was counterfeit, while plaintiff maintained it was genuine, and neither would yield his opinion. There is not a word of evidence that the conductor accused the defendant of trying to pass the bill, knowing it to be counterfeit, or that he accused the plaintiff with any bad motive in offering to pass the bill, nor do the words spoken by the conductor to the plaintiff impute to the latter a crime or a dishonest motive; yet the jury was authorized to mulct the defendant in damages because the conductor, as plaintiff's own evidence shows, refused to receive in payment of plaintiff's fare money that he honestly believed to be spurious. The defendant company is liable to answer in damages for the willful and malicious torts of its agents committed within the scope and course of their employment, but the honest expression of the opinion of a conductor of a car, or train of cars, that money offered to him in payment of a fare is counterfeit, and his refusal to accept it for that reason, is not a tort, though he be mistaken in his judgment of the money; and the question of whether or not the company would be liable, had verbal slander been charged and proven, is not in the case.

2. The plaintiff's character was not attacked, was not put in issue by the pleadings, and it was not essential that he should prove it to entitle him to recover, nor was it an element in the estimation of his damages, for the measure of damages for a wrongful and unjustifiable assault and battery upon a man of good character is the same as for a like assault upon a man of bad character; and defendant's objection to the evidence of plaintiff's good character should have been sustained.

3. In respect to defendant's refused instruction, we do not think it properly declared the law. It is not the law that it was plaintiff's duty to leave the car when he was told to do so by the conductor, in the circumstances proven in this case. Defendant was a public carrier of passengers for hire. Plaintiff was rightfully aboard its car, and had tendered and continued to tender lawful money to pay his fare, and he was at no time in the wrong, and unquestionably had the right to remain upon the car until he should arrive at his destination. Being in the right, and the conductor in error, he had a right to object, protest, and to reasonably resist his expulsion from the car, and forfeited none of his rights to recover damages by resisting, within lawful bounds, the wrong and indignity perpetrated upon him by the conductor in ejecting him from the car. It is not the law that one must submit to wrong, for fear that he will lose some of his rights. On the contrary, he may manfully assert his rights, and make all lawful efforts to maintain them.

The cases of *Logan v. Railroad*, 77 Mo., loc. cit. 669, and *C., B. & Q. R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562, cited and relied upon by defendant as supporting its refused instruction, have no application to the facts in this case. In those cases the complainants were wrongfully on the cars of the railroad company. Had they been rightfully there, quite another proposition would have been before the courts, and we think a very different conclusion would have been reached.

For the errors above noted, the judgment is reversed, and the cause remanded.

REYBURN and GOODE, JJ., concur.

CHILES v. SCHOOL DIST. OF BUCKNER.*

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

ACTION ON JUDGMENT—STATUTORY PRESUMPTION OF PAYMENT—ACKNOWLEDGMENT OF INDEBTEDNESS—SUBSEQUENT LEGISLATION.

1. Under Rev. St. 1879, § 3251, providing that judgments "should be presumed to be paid and satisfied after the expiration of twenty years, * * * but in any suit in which the party against whom such judgment was rendered shall be a party such presumption may be repelled by proof of payment or written acknowledgment of indebtedness made within twenty years," a mere written acknowledgment that the judgment is unpaid, though unaccompanied by any promise to pay, is sufficient to rebut the presumption thereby created; as the statute is not one of limitations, but merely prescribes a rule of evidence.

2. Laws 1895, p. 221, amending Rev. St. 1889, § 6796 (now Rev. St. 1899, § 4297), provides that every judgment shall be presumed to be paid after 10 years, or, if it has been revived, then after 10 years from such revival, etc. Rev. St. 1889, § 6797 (now Rev. St. 1899, § 4298), provided that the provisions of the chapter should not apply to rights of action accruing before it took effect. *Held*, that a judgment obtained before the act of 1895 was governed by the law previously in force, and was not affected by that act.

3. A statute providing the period within which a judgment shall be presumed to have been paid confers a vested right, which the Legislature cannot disturb by subsequent legislation.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Joel F. Chiles against the School District of Buckner. Judgment for defendant, and plaintiff appeals. Reversed.

Peak & Strother, Yeager & Yeager, and John A. Sea, for appellant. Paxton & Rose, for respondent.

SMITH, P. J. On July 19, 1880, a judgment was given in favor of plaintiff and against defendant for \$163.75. On June 20, 1890, a writ of *scire facias* was sued out, and said judgment revived April 10, 1891. On September 27, 1901, this action was brought. The petition is in two counts, the first of which seeks to recover upon the judgment

*Opinion delivered February 16, 1902. Motion for rehearing granted May 22, 1903.

and the revivor of it. The second alleges the rendition and revivor of it, and to repel the presumption or payment arising from the lapse of time sets out certain acknowledgments of indebtedness in writing, made in 1897 by defendant in its answer in an action against it in the nature of a creditors' bill, and also in its return made to the writ in a proceeding against it by mandamus. The defendant's answer to the creditors' bill, as set forth in the petition herein, admitted the recovery of the judgment against it on July 19, 1880, on a certain school warrant, and alleged that the money then in the county treasury was not levied and collected for the payment of plaintiff's judgment, but was collected for teachers' salaries and the incidental expenses of said school, and "that plaintiff has allowed interest to accumulate on his judgment for many years, so that, if it were now paid by said district, there could be no school in said district for next winter; that the law is especially solicitous for the welfare of the children of the district, and the directors thereof do not feel that they are justified in paying out the money of the district for purposes other than that for which it was collected." And the return to the writ of mandamus in effect admitted the rendition of the original judgment of 1880, its revival in 1891, and that, as revived, it was still in force, and that no part of it had been paid, though due and owing relator, etc. The defendant's answer pleaded the lapse of 20 years since the rendition of the judgment and the statute of limitations in bar. The cause was tried before the court, a jury being dispensed with. At the conclusion of all the evidence the defendant requested an instruction in the nature of a demurrer, which was by the court given, and judgment entered accordingly for defendant, and the plaintiff appealed.

The statute in force at the time of the rendition of the judgment in 1880 provided that every judgment of any court of record of this state should be presumed to be paid and satisfied after the expiration of 20 years from the day of such judgment; but in any suit in which the party against whom such judgment was rendered shall be a party such presumption may be repelled by proof of payment or written acknowledgment of indebtedness made within 20 years of some part of the amount recovered by such judgment, and in all other cases it shall be conclusive. Rev. St. 1879, § 3251. This section was carried forward into the Revision of 1889 as section 6796. It is thus seen that this section of the statute prescribes no limit for instituting an action on a judgment of a court of record, but merely declares that the legal presumption of payment of such judgment shall arise after the expiration of 20 years. *Knight v. Macomber*, 55 Me. 132. In *Cape Girardeau County v. Harbison*, 58 Mo. 90, the distinction was clearly pointed out between the statute of limitations and the rules in

regard to the presumption of payment arising from lapse of time. It was a suit to foreclose a mortgage given by one Harbison to the plaintiff in 1849. The mortgagor died afterwards, and in 1864 the land was sold for the payment of his debts, the defendant Harbison being the purchaser. The bond secured by the mortgage had a number of payments indorsed upon it, the last of which was May 2, 1858. Defendant pleaded the statute of limitations in ordinary form. Plaintiff replied, alleging two several acknowledgments in writing within 10 years before the commencement of suit, one by the administrator of the deceased, Harbison, and the other by the defendant. The one by the defendant was contained in a deed of trust executed by him in 1866 to one English, in which it was stated that the land in question was mortgaged by the deceased, Harbison, to the county of Cape Girardeau "for the sum expressed in said mortgage, and which yet remains unsatisfied." The court held that the statute of limitations did not apply, because there was shown no adverse possession by the mortgagor, or any one claiming under him, as against the mortgagee. It also held that by analogy to the statute of limitations they would presume that the debt which the mortgage was given to secure was paid 10 years after the last payment, in the absence of an acknowledgment to the contrary. In pointing out the distinction between the statute of limitations and the presumption of payment, the court said: "There is no sort of propriety in confounding the statute of limitations with the presumption of payment arising from the lapse of time. As defenses the two are wholly distinct in their applications and incidents. When the statute affects a right of action, it operates simply a blight, as it were, upon its recoverable energy. It matters not in the least whether the demand has been previously paid or not. The statute destroys forever, upon the last day of the allotted period, its vitality in a court of justice. Hence, if there be not a new contract in the promise of acknowledgment upon which the creditor relies, he has still nothing to stand upon. But in the other defense the fact of payment, real or supposed, is the only matter to be considered. The law first presumes payment. An acknowledgment by the debtor merely removes this presumption by furnishing evidence to prove that the debt has not been paid. There is no new contract, express or implied. The recovery must be upon the original demand or nothing." In *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466, the Supreme Court of the United States, in referring to the act of 1835 (Rev. St. 1835, p. 396, art. 4, §§ 1, 2)—carried forward into the revision of 1845 (Rev. St. 1845, p. 721, c. 109, art. 4, §§ 1, 2), section 1 of which was carried into the revision of 1855 (2 Rev. St. 1855, p. 1053, c. 103, § 16), and into the General Statutes of 1865 (Gen. St.

1865, p. 749, c. 191, § 81), and into the revisions of 1879 and 1889, as already stated—say that as to judgments rendered prior to the act of 1835 the presumption of payment after 20 years raised by the common law continues unaffected by that act, which, as to such judgments, is only cumulative. This presumption is a rule of evidence, and not a limitation, and is not subject to the exceptions and incidents of an act of limitation.

And so it is made clear from the foregoing authorities, with the others cited in plaintiff's brief, that the judgment here sued on must be conclusively presumed to be paid and satisfied, unless this presumption is repelled by proof of a written acknowledgment of the indebtedness, made within the 20 years, of some part of the amount recovered by the judgment. The "acknowledgment" required by the statute need be no more than an admission in writing within 20 years from the time the suit was brought on the judgment that such judgment has not been paid. In order to remove the bar of the statute of limitations, the admission must be of such a character that it not only acknowledges the justice of the debt and its nonpayment, but indicates a willingness to pay, so that the ground of distinction between the two statutes becomes at once quite obvious. Now, turning to the answer and return heretofore referred to, and it will be seen that these solemn pleadings of the defendant contain an "acknowledgment" within the 20 years from the time the action was brought, in which it is admitted that the judgment had not then been paid. The conclusiveness of the presumption of payment of the judgment is, by these solemn admissions of the defendant, rebutted and overthrown.

But it is contended by the defendant that the statute in force when the judgment was rendered in 1890 was repealed by the adoption in 1895 (Laws 1895, p. 221) of what is now known as section 4297, Rev. St. 1899. The judgment in question, which is plaintiff's cause of action, was in existence when the act of 1895 was passed, and comes within the expressed exception of section 4298, Rev. St. 1899, and it is therefore governed by section 3251, Rev. St. 1879, and section 6796, Rev. St. 1889. When the judgment was rendered, the plaintiff became clothed and vested with certain rights in respect to it, and amongst which was that conferred by section 3251, Rev. St. 1879, to rebut the presumption of payment arising from lapse of time by proof of part payment or written acknowledgment of indebtedness made at any time within 20 years. This right was one which the Legislature could not and did not undertake by the act of 1895 to in any way disturb or impair. *Cranor v. School Dist.*, 151 Mo. 119, 52 S. W. 232; *Livingston v. Livingston* (N. Y.) 66 N. E. 123.

The judgment of the trial court will be re-

versed, and cause remanded, with directions to give judgment for plaintiff as prayed in his petition. All concur.

HUDNALL v. MODERN WOODMEN OF AMERICA.*

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

BENEFICIAL ASSOCIATIONS — FOREIGN ASSOCIATION—STATUTES — GENERAL INSURANCE LAW—LAW GOVERNING ASSOCIATION.

1. Rev. St. 1899, c. 12, art. 11, entitled "Beneficial * * * Associations," section 1408, defines what constitutes a fraternal beneficial association, and provides that the same shall be exempt from provisions of the general insurance law. Sections 1409 and 1410 authorize all such, whether foreign or domestic, to do business in the state, provided they comply with the statute. Section 1396 provides the method by which any associations incorporated under the laws of the state may avail themselves of section 1408. Section 1396 was substituted for sections 2823 and 2824 in the Revised Statutes of 1889, the first of which enabled beneficial societies to provide for families of the decedents, etc., and exempted them from the general insurance law, and the second enabled domestic associations to avail themselves of the former section. *Held*, that while, under sections 2823 and 2824 in the Revised Statutes of 1889 a foreign beneficial association was not exempt from the provision of the general insurance laws, and while section 1396 was, in effect, the same as section 2824 of 1889, by the express provisions of Rev. St. 1899, §§ 1408-1410, a foreign beneficial association which has complied with the statutes relative to beneficial associations is not subject to the provision of the general insurance law.

Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by Sarah F. Hudnall against the Modern Woodmen of America. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. K. Amick, for appellant. Allen & Mayer, for respondent.

BROADDUS, J. This is an action on a life insurance policy numbered 524,567, issued June 29, 1899, by the Modern Woodmen of America, for \$2,000, to Claude W. Hudnall, benefits payable at his death to his wife, Sarah F. Hudnall. The defendant was a foreign fraternal beneficiary society under the laws of the state of Illinois. On the 22d day of May, 1901, Claude W. Hudnall died at Buchanan county. Defendant alleges in its answer that he committed suicide, but does not allege that he contemplated suicide at the time he made application for the policy. The policy contained the following clause: " * * * Or if he [Hudnall] shall within three years after becoming a beneficial member of this society die by his own hand, sane or insane, * * * then this certificate shall be null and void and of no effect." The by-laws of the defendant corporation contained the same clause. The defendant, in its answer, admitted execution of

*Rehearing denied December 7, 1903.

the policy, payment of dues, proof of loss, and everything to make plaintiff's case and entitle her to a judgment, but sought to avoid payment on the policy by alleging that Claude Hudnall died by his own hand. At the trial of the cause the court held that suicide was no defense in this suit, because the defendant was a foreign society, and that defendant did not allege in its answer that Hudnall contemplated suicide at the time he made application for the policy. The court refused to permit defendant, under its answer, to offer any evidence of suicide. Under the instructions the jury found a verdict for plaintiff for the face of the policy (\$2,000) and \$160 interest; making in all \$2,160. After verdict, and in due time, defendant filed its motion for a new trial. In passing on this motion the court held that it had erred in refusing to allow defendant to avail itself of the defense of suicide as pleaded in its answer, and granted a new trial. From this action and order of the court in granting a new trial plaintiff prosecutes this appeal.

But one question is presented by the record, and that is, was the defendant as a foreign beneficial society authorized to do business as such in this state under exemption from the provisions of the general insurance laws? It is agreed that from the date of the revision of the laws of Missouri in 1889 until the act of March 6, 1897, foreign fraternal beneficial societies were not authorized to do business as such in this state, but were governed by the provisions of the general insurance laws. It is plaintiff's contention that the later act did not change the status of such societies, and that they continued subject to said general insurance laws, under which suicide is no defense on an insurance policy unless it be shown that the insured contemplated suicide at the time he obtained his policy. Article 11, c. 12, Rev. St. 1899, entitled "Benevolent, Religious, Scientific, Fraternal-Beneficial, Educational and Miscellaneous Associations," provides how these different kinds of organizations may be incorporated under section 1408 thereof, and defines what shall constitute a fraternal beneficiary association. Section 1396 provides the method by which the foregoing associations so organized under said article may avail themselves of the benefit of section 1408 and become also fraternal beneficiary associations. The language of said section is as follows: "Any such society, order or association heretofore or hereafter incorporated under the provisions of the laws of this state may avail itself of the benefits of the foregoing section (1408) by amending its constitution or articles of association or reincorporating thereunder, or by an amended constitution or amended articles of association in the manner prescribed by this act." Plaintiff contends, and justly, that said section refers alone to domestic institutions. There seems to be no ambiguity in its language. Seemingly, it should have follow-

ed in order next after section 1408, instead of section 1395. This section was substituted for sections 2823, 2824, Rev. St. 1889. The object of the first was to enable fraternal beneficiary societies to provide for the families of deceased persons, etc., and to exempt them from the provisions of the general insurance laws of the state; the second, to enable domestic associations to avail themselves of the provisions of the former section. It was held that under said revision foreign fraternal beneficiary associations were not exempt from the provisions of the general insurance laws. *Kern v. Legion of Honor*, 167 Mo. 471, 67 S. W. 252. The argument of the plaintiff that, as section 1396 of the revision of 1899 (Laws 1897, p. 132) is, in effect, the same as section 2824, Rev. St. 1889, foreign beneficial associations remain subject to the general insurance laws, would be good if the question depended alone upon a construction of said section. In the revision of 1889 foreign fraternal beneficiary associations are not included in said act, and the section in that revision and section 1396 in the revision of 1899 refer solely to domestic societies. But under section 1408, Rev. St. 1899, all fraternal beneficiary associations, whether foreign or domestic, are placed upon the same footing, and are exempted from the provisions of the general insurance laws. And section 1409 authorizes all such, whether foreign or domestic institutions, heretofore doing business in this state, to so continue, provided they comply with the provisions of said section; and section 1410 authorizes such foreign associations not then doing business in this state to do so by complying with the regulations of said section. The question has been passed upon recently by the St. Louis Court of Appeals, in which the same view is entertained. *McDermott v. M. W. of A.*, 97 Mo. App. 636, 71 S. W. 883; *Shottliff v. M. W. of A.*, 73 S. W. 326.

The cause is affirmed. All concur.

BUCK et al. v. ENDICOTT.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

FORCIBLE ENTRY—EVIDENCE—SUFFICIENCY—APPEAL—MATTERS REVIEWABLE.

1. Where there were no objections to evidence, and no instructions asked, the only question that can be reviewed on appeal is the sufficiency of the evidence to support the finding.

2. The fact that plaintiff's possession was not taken in good faith for the purpose of occupation, but was a mere sham and pretense, will defeat an action of forcible entry.

3. That defendant and his predecessors had had possession of premises for more than three years bars an action for forcible entry, under the express provisions of Rev. St. 1899, § 3344.

Appeal from Circuit Court, Holt County; Gallatin Craig, Judge.

Action by John A. Buck and others against Jesse Endicott. From a judgment for defendant, plaintiffs appeal. Affirmed.

G. W. Murphy and J. W. Stokes, for appellants.

Nichols & Pistole, for respondent, cited the following authorities: *Dyer v. Reitz*, 14 Mo. App. 45; *Willis v. Stevens*, 24 Mo. App. 500; *School Dist. v. Holmes*, 53 Mo. App. 487; *Crispen v. Hannavan et al.*, 50 Mo. 536; *Scott v. Allenbaugh*, 50 Mo. App. 130; *Hininger v. Trax*, 67 Mo. App. 521; *Hoffstetter v. Blattner*, 8 Mo. 276; *McCartney v. Alderson*, 45 Mo. 35; *Powell v. Davis*, 54 Mo. 315.

ELLISON, J. This action is forcible entry and detainer. The judgment in the trial court was for defendant, and plaintiffs appealed.

An examination of the record discloses that there is nothing before this court which it can properly review. The cause was submitted to the trial court without a jury. There were no objections to evidence, and no instructions asked. This condition of the record only leaves the question whether there was any evidence to sustain the court in its finding. There was evidence from which the court could well find that the alleged possession taken by plaintiffs was not in good faith for the purpose of occupation, but, on the contrary, was a sham and pretense. Furthermore, there was evidence tending to show that defendant and his predecessors had had the possession now complained of for more than three years. Either of these conditions, if believed by the court, would prevent a finding for plaintiffs. Section 3344, Rev. St. 1899, and authorities in defendant's brief. The question in cases like this is not what we would have found to be the fact, had we tried the case in the first instance, but is confined to the one point, viz., whether there is any substantial evidence, direct or circumstantial, which tends to support the view taken by the trial court.

The judgment must be affirmed. All concur.

AKINS et al. v. HICKS et al.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

APPEAL—JUDGMENT ON DEMURRER—FINAL JUDGMENT.

1. A judgment sustaining a demurrer to the petition which does not order "that the plaintiffs take nothing by this writ," and that the "defendants go thereof without day," is not a final judgment, from which an appeal will lie.

Appeal from Circuit Court, Polk County; Argus Cox, Judge.

Action by T. J. Akins and another against W. E. Hicks and another. From a judgment sustaining a demurrer to the petition, plaintiffs appeal. Dismissed.

O. J. McLane and Rechow & Pufahl, for appellants. C. H. Skinker, for respondents.

PER CURIAM. This is an action wherein defendants filed a demurrer to the plaintiffs' petition, which was by the court sustained. The judgment on the demurrer does not conform to the requirements of the established precedents, in that it does not order "that the plaintiffs take nothing by this writ," etc., and that the "defendants go thereof without day," etc.; and it is not, therefore, a complete and final judgment. *Palmer v. Crane*, 8 Mo. 619; *Kautsch v. Droste*, 82 Mo. App. 412. And consequently an appeal will not lie therefrom, as it only lies from a final judgment. Rev. St. 1889, § 2246; *Holloway v. Holloway*, 97 Mo. 639, 11 S. W. 233, 10 Am. St. Rep. 339; *Spears v. Bond*, 79 Mo. 467; *Mills v. McDaniels*, 59 Mo. App. 331.

It results that the appeal should be dismissed, which is ordered accordingly.

ZENTZ v. CHAPPELL et al.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

MASTER—SERVANT'S INJURIES—OBEDIENCE TO FOREMAN—ACTIONS—PLEADING—VARIANCE.

1. A servant cannot recover for an injury caused by following a pair of wheels and axle weighing 1,500 pounds up an incline, instead of walking by the side, as was the usual method, although he was ordered to do so by the foreman in charge of the work, as such requirement was so unreasonable as not to justify obedience.

2. A verdict based on evidence disclosing that plaintiff's injuries were caused by following a pair of car wheels up an incline is not responsive to a petition alleging as negligence defendant's failure to furnish a sufficient force of employees to do the work safely, and a failure to furnish sticks to assist the workmen.

Appeal from Circuit Court, Sullivan County; P. C. Stepp, Judge.

Action by John B. Zentz against Charles Chappell, receiver, and others, and the Quincy, Omaha & Kansas City Railroad Company. From a judgment for plaintiff, defendants appeal. Reversed.

Hall & Hall and J. G. Trimble, for appellants. Harber & Knight, for respondent.

BROADDUS, J. For convenience, we adopt the following undisputed part of defendants' statement of facts in the case: "This is an action for damages brought by plaintiff against this appellant and Chas. Chappell, receiver of the Omaha, Kansas City & Eastern Railroad, and the Chicago, Burlington & Quincy Railroad Company, for injuries alleged to have been received on August 23, 1902, at Milan, Mo., while in the employ of defendants as a car repairer, and while assisting in loading car wheels onto a flat car by means of a runway or skids. The car was about 4 feet high, and the skids were made of timbers 34 feet long and 10 inches wide, fastened together, and extended from the railroad track to the top of the car. They were connected with the car and track,

and were blocked in the middle to keep them from sagging. The wheels and axle weighed about 1,500 pounds per pair, and were 33 inches in diameter at the tread, which was 4 inches wide. The journal is the part of the axle extending beyond the wheel on the outside, and was $10\frac{1}{2}$ inches long and $3\frac{3}{4}$ inches in diameter. The shoulder between the journal and the wheel was about 2 inches. The center of the journal was $16\frac{1}{2}$ inches from the rim of the wheel. The wheels were being loaded on the repair track, which was sunken so that the ground on the outside of the track was level with the top of the rails, and which was a down grade to the car. The wheels were placed about 100 feet up the track, and were released one pair at a time by two men, whose duty it was to start them down the track on a run towards the car. By the time the wheels reached the skids, they gained sufficient speed to carry them part of the way up the skids. At the foot of the skids, plaintiff and another man were stationed, whose duty it was to follow the wheels as they ran up the skids, and push them up onto the car, where two men were stationed to receive the wheels and place them. Just before the alleged injury, plaintiff and his mate had been using boards about six feet long, about six inches wide, and one inch thick, with notches sawed in the ends, with which to push the wheels up onto the car; the notched end being placed on the outside of the wheel, against the journal, and the other end being held by the men who walked along on the ground on the outside of the skids and track." There was evidence tending to show that these boards or sticks were at the beginning provided by the defendant. While engaged in loading a pair of wheels in the manner above set out, plaintiff and another laborer broke one of the sticks so used by them in the manner aforesaid, and the wheel fell through the skids. There was something said about getting another stick, but it was not got. Whereupon Carothers, foreman of the work, having reached the spot as the wheels came down, told them to let the sticks go, and push the wheels up by hand; adding, as testified to by plaintiff, "Drop your stick, and take in after them." On this point, plaintiff further testified that "by that time the wheels was up on me, and I dropped my stick, and, of course, by command—by him telling me to take in after them—why, of course, I took in after them up the skids." He also stated that the wheels made good speed until they got within a certain distance of the car, where the skid sagged, at which point he reached down to get hold of them, in order to keep them going, when a wheel caught him in the breast, turned him over, and threw him on a pile of scrap material, bruising him and dislocating his arm at the elbow. It was shown that it was not customary or necessary for the laborer to follow the wheels when load-

ing them up the skid, but to walk on the outside on the ground. There was evidence tending to show that the loading of wheels by hand and by stick were both practiced by railroads; some using one way, and others using the other way. The method was not, therefore, uniform. It was not shown that either was unsafe or dangerous. The plaintiff sought to recover on the ground that defendant did not have a sufficient force of employes to do the work safely, and that it did not furnish sticks for the workmen, and that the injury resulted to plaintiff by reason thereof. The answer was a general denial and contributory negligence on the part of plaintiff.

The defendants' principal contention is that, under the pleadings and evidence, plaintiff was not entitled to recover. It does not appear that either of the methods in use to push the wheels up the skid—by the use of sticks or by the hands—was dangerous. By either the workman guarded himself from danger by walking on the outside of the skid, at no time following the wheels up the skid itself, as did plaintiff at the time of the latter's injury. But plaintiff claims that he did so because he was so commanded by defendant's foreman. If such was the case, he then did not receive his injury by reason of want of sufficient force of laborers to do the work, or from want of the stick described, but by reason of a command of defendant's agent to perform a dangerous undertaking. To the ordinary mind, plaintiff's attempt to follow the car wheels in question—weighing 1,500 pounds—up the incline of the skids appears to have been accompanied with much hazard. And in our view his undertaking to do so was the proximate cause of his injury. The fact that he was following the wheels in motion up the incline; and stooping at the same time, while bending over them to catch hold and assist their motion, was a duty that no reasonable master would require of his servant; and, if he should, then the servant would not be justified in obeying such requirement. In *Stephens v. Ry. Co.*, 96 Mo. 217, 9 S. W. 590, 9 Am. St. Rep. 336, the court said: "There may be cases where the servant is ordered to do a particular act, and the order is so unreasonable, and the act so manifestly dangerous to life and limb, that the court, on the evidence, should declare the servant guilty of negligence in obeying the order of the master, and should direct a nonsuit. The general rule, however, is that the question is one for the jury." The verdict, also, was not responsive to the petition. As before stated, the petition bases plaintiff's right to recover upon defendant's failure to provide said sticks for the laborers, and failure to provide a sufficient force of laborers to properly load said wheels upon the car, whereas, as we have seen, neither was the cause of plaintiff's injury; he being injured by reason of his undertaking to obey an order of de-

defendant's foreman to get upon the skid and push up the wheels with his hands. Neither method of loading the wheels—whether with the stick or with the hands—required the laborer to get upon the skid, but both required him to walk beside it on the ground while loading the wheels. In this view of the case, there was an entire failure of proof to sustain the petition.

Appellants have raised other questions on their appeal, but, as the plaintiff was not entitled to recover on his case as made, they become immaterial, and will not be considered. For the reasons given, the cause is reversed. All concur.

DICKINSON v. WABASH R. CO.*

(Court of Appeals at Kansas City, Mo. Nov. 9, 1903.)

RAILROADS—KILLING STOCK ON RIGHT OF WAY—FAILURE TO SHUT GATE.

1. Plaintiff, driving a team and leading a mare followed by two colts, drove across defendant railway company's right of way, leaving a gate in the fence open; and, after going some 50 yards from the track, the horses were frightened by a passing train, and in consequence the halter was slipped from the mare's head, and she, followed by the colts, ran back through the gate, and onto the track, where all the animals were killed. *Held*, that though the gate was not hung on hinges and secured with a latch, as required by statute, and was open when plaintiff passed through, and was left open the greater part of the time, and the fence near to it was broken down, nevertheless the accident was caused by plaintiff's failure to shut the gate, and he was not entitled to recover.

Appeal from Circuit Court, Daviess County; J. W. Alexander, Judge.

Action by J. W. Dickinson against the Wabash Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Geo. S. Grover, for appellant. H. A. Kerr, for respondent.

ELLISON, J. This is an action for damages resulting from the killing of two colts and injuring a mare, the property of plaintiff. The killing and injury was caused by one of defendant's freight trains. The judgment was for plaintiff, and included an attorney's fee of \$50. In view of the conclusion we have reached, it will not be necessary to enter into an examination of defendant's attack on the sufficiency of the statement, or the allowance of an attorney's fee, further than to say plaintiff should not, under the ruling of the Supreme Court, have asked such fee. *Paddock v. Ry. Co.*, 155 Mo. 524, 56 S. W. 453.

It appears that B. F. Grimer owned a farm of 240 acres, which was divided in half by defendant's railway, which runs through the place somewhat diagonally; but, for prac-

tical purposes, may be said to pass through from east to west. On the south side of the track was Grimer's wheat field and his pasture, which were divided by a fence, with a gate for convenient passing from one to the other. This gate was near to a farm crossing over the defendant's railway, with a gate on each side. Plaintiff had arranged with Grimer to pasture the animals in question, and on the day of the injury he entered the farm on the north and drove over, perhaps a quarter of a mile, to the railway crossing. He was in a buggy, driving two rather spirited horses, and leading the mare, the colts following. At the crossing he met with two boys (Grimer's grandsons), and they were with him thence on. One of them opened the north gate, and plaintiff drove over the railway track, and out of the south gate into the wheat field. This south gate was open, and plaintiff left it open. He passed out of the wheat field into the pasture by going through the gate between them, and proceeded into the pasture. As he was crossing the railway tracks, he saw in the distance an approaching freight train. It was running at such slow speed that it did not get opposite him until he had got about 50 yards into the pasture. His team and the mare became frightened, and one of the boys turned her loose by stripping off the halter. She then ran back, followed by the colts, through the gate between the pasture and wheat field; thence through the open south gate at the farm crossing onto the right of way, and up the track to the point where the injuries were inflicted.

It is well-settled law that the liability of a railway company is determined by a consideration of the point where the animal gets upon the track, and not where it is killed or injured. *Cecil v. Ry. Co.*, 47 Mo. 246; *Nance v. Ry. Co.*, 79 Mo. 196; *Jones v. Ry. Co.*, 44 Mo. App. 16. The fence north of the south gate was old, broken, and out of repair, with the exception that the first panel immediately joining on the north was new. From the foregoing, it appears that plaintiff himself failed to shut the gate through which his animals escaped from the field onto the right of way. It is therefore evident that he was the immediate cause of his misfortune, and that he cannot recover damages from defendant which were occasioned by his own omission. He, however, seeks to avoid his neglect to close the gate by reason of the fact that it was not hung on hinges and secured with a latch, as required by the statute, but, on the contrary, was a panel and sliding gate, which was opened by sliding back on slats nailed across a double post, and for the further reason that it was open when he passed through, and was left open a great part of the time, and, next, that it was not worth while to shut it, as the railroad fence running north of the gate was old, down, and out of repair, as alleged in his statement. Neither of these reasons is

*Rehearing denied December 7, 1903.

sound. In the first place, the gate was the gate permitted and accepted by Grimer, the owner and occupier of the land. The latches and hinges named by the statute were so specified for the convenience of the owner in opening and closing the gate. A panel or sliding gate will as readily turn horses as one hung with hinges. The animals passed through this gate by reason of its being open, and not by its lack of hinges or a latch. In such condition, Grimer had accepted it without complaint. The case, in this respect, cannot be distinguished from *Harrington v. Ry. Co.*, 71 Mo. 384. The gate's being open was the proximate cause of the injury, and not its mode of construction. *A., T. & S. Ry. v. Kavanaugh*, 163 Mo. 54, 63 S. W. 374. That the gate was open a great part of the time is true. The crossing was used by many of the neighbors in passing through the farm, and they would sometimes close the gate, and sometimes not. Grimer himself stated that he was indifferent whether it was open or shut, since he had the adjoining field on that side in wheat, and did not use it for stock. But the fact that others left it open did not excuse plaintiff, and did not confer upon him a cause of action for an injury which followed his own neglect. The third excuse for not shutting the gate, viz., that, as alleged in plaintiff's statement, the fence north was out of repair and down, will not suffice. The proximate and known cause of the animals going upon the track was the open gate. Plaintiff cannot be allowed to conjecture that if the gate had been shut the animals would still have got on the track, by running up the line of fence and passing through where it was down. Would they not more naturally, when they found the roadway blocked over which they came in, have turned out into the field, thus running away from the frightening train?

There was a charge that the killing was caused by the negligent management of the train. But that was seemingly abandoned, and it was not submitted to the jury in the instructions.

The judgment is reversed. All concur.

COLUMBIA & CEDAR CREEK TURNPIKE CO. v. VIVION.*

(Court of Appeals at Kansas City, Mo. Nov. 9, 1903.)

TURNPIKES—CONDITION OF ROAD—EVIDENCE—MUNICIPAL CORPORATIONS.

1. In an action by a turnpike company to recover tolls, evidence considered, and held to show that plaintiff did not keep the road in good repair, as required by Rev. St. 1899, § 1234.

2. Under Rev. St. 1899, §§ 1234, 1235, providing that a turnpike company must maintain the road in good condition, as a condition precedent to the right to charge tolls, the fact that a

turnpike company keeps a portion of its road in good repair does not entitle it to charge tolls if another portion is out of repair.

3. The extension of the territorial limits of a city by an act of the Legislature so as to include a portion of a turnpike does not deprive the turnpike of its character, nor the owner of the turnpike of its right of property therein.

4. Where a portion of a turnpike is included in city limits, it is not the duty of the city to keep the turnpike in repair.

Appeal from Circuit Court, Boone County; Jno. A. Hockaday, Judge.

Action by the Columbia & Cedar Creek Turnpike Company against Irvin C. Vivion. From a judgment for plaintiff, defendant appeals. Reversed.

W. M. Williams and C. B. Sebastian, for appellant. N. T. Gentry, for respondent.

SMITH, P. J. The plaintiff is a turnpike road company which was incorporated under the provisions of chapter 71 of the act of March 19, 1866 (Sess. Acts 1865-66, p. 40). Its line of road, according to its articles of association, extended from the town of Columbia to the bridge on Cedar creek, in Boone county. The plaintiff was authorized by its charter—the statute—to charge and collect toll from persons traveling over its road. It is conceded that defendant traveled over its road at divers times, and that for each trip he was charged on its books of account the rates fixed by plaintiff for such travel thereon, not in excess of those allowed by law, and that the aggregate amount of such charges was that sued for. The defense relied on to defeat the action was that the plaintiff had not performed the duties required of it by the statute (section 1234, Rev. St. 1899), in that it did not at all times maintain a smooth and permanent road, so as to form a hard and even surface, and maintain and keep in good repair all necessary bridges, culverts, ditches, dikes, etc. There was a trial, and at the conclusion of the evidence the court, sitting as a jury, at the request of defendant gave the following instruction: "The court, sitting as a jury, declares the law to be that it is the duty of the Columbia & Cedar Creek Turnpike Company, its owners, directors, and managers, to maintain at all times a smooth and permanent road from its point of beginning, at Ripley street, in the city of Columbia, Mo., to its terminal point, at Cedar creek, not less than 20 feet wide, so as to form a hard and even surface, and maintain and keep in good repair all necessary bridges, culverts, ditches, and dikes, and, upon a failure to do so, neither they nor their agents shall charge or exact any toll from any person or persons traveling over or on such road; and, if it appear from the evidence that the road of the Columbia & Cedar Creek Turnpike Company has not been so kept and maintained during the time for which the defendant has been sued for toll, then the

*Rehearing denied December 7, 1903.

plaintiff is not entitled to collect the toll sued for, and the finding and verdict must be for the defendant." But notwithstanding this, the court found for plaintiff, and entered judgment accordingly, from which defendant appealed.

If it was the duty of the plaintiff, as the court, by its instruction, declared, to keep its roadway in good repair from its initial point, at Ripley street, in the city of Columbia, to its terminal point, at Cedar creek, then it is inconceivable how the finding could have been for plaintiff, since it stood admitted on the record by the plaintiff that that part of its roadway between Ripley and Moss streets was in bad condition, and that it was almost impossible for vehicles to travel over it, and that it had been in that condition for a long time. And not a witness, either for plaintiff or defendant, testified that the plaintiff at all times maintained a smooth and permanent road, so as to form a hard and even surface, or that it kept in good repair all necessary bridges, culverts, ditches, and dikes on that part of the roadway extending from Moss street to Cedar creek; but, on the contrary, all the witnesses testified that the opposite was true. By the section of its charter (the statute) it was required that its graded road should not be less than 20 feet wide. It appears that the road was graded to the width of 20 feet, and that one-half of that width was graveled, and the other half was but a dirt road. The road as thus constructed originally had an even surface, or nearly so; but in the course of time the dirt part of it wore down below that of the surface of the gravel part, varying at places from three inches to four feet. The witnesses all agreed that the plaintiff did not maintain a permanent and smooth roadway, so as to form a hard and even surface, and that it did not keep in good repair its bridges, dikes, and ditches; but they differed as to how far the condition of the plaintiff's roadway departed from that required by the statute. It is therefore obvious that the essential facts hypothesized in the said instruction were all one way. There was no conflict in the testimony in the respect just referred to. If the uncontradicted evidence be given the effect required by the instruction, the finding could not have been otherwise than for the defendant. There can be no other logical result, and for this reason the finding cannot be upheld.

It can make no difference what the condition of the road was between Ripley and Moss streets, since the remaining part of it, extending from the latter street to the Cedar Creek bridge, did not fully meet the statutory requirement. The plaintiff was required to keep its entire roadway in good repair, and in this it failed. 1 Rev. St. 1899, §§ 1234, 1235; *Aurora Turnpike v. Niebrugge* (Ind. App.) 58 N. E. 864; *Elliott on Roads & Streets* (2d Ed.) 97-105. Even if so

much of the roadway as is situate between such streets was no longer the private property of the plaintiff, and if the city of Columbia was exercising the exclusive control over it, and had for any reason assumed the burden of keeping it in good repair, yet the result would be the same. The evidence respecting the condition of the roadway outside of the limits of the city is, as has been seen, such as to preclude a recovery. The extension of the territorial limits of the city by an act of the Legislature did not have the effect to deprive the roadway of its character, nor the plaintiff of its right of property therein. *Elliott on Roads & Streets* (2d Ed.) § 31; *Wilson v. Allegheny City*, 79 Pa. 272. The city, by the exercise of the right of eminent domain, or by purchase, or in some other way, might have acquired the absolute control of this part of the plaintiff's roadway; but this, it clearly appears, it did not do. And in the exercise of its police powers it could have compelled the plaintiff to do that in respect to its roadway which the safety of the public demanded. But it was not a duty of the city to keep any part of plaintiff's roadway in repair. *Elliott on Roads & Streets*, §§ 73-76. That duty, for aught that appears in this case, still devolved on the plaintiff.

The plaintiff contends that the evidence, when viewed in the light of the authorities cited by it, clearly shows that the city, by dedication, acquired that part of said roadway located within the new city limits; but a discussion of the question involved in this contention can serve no useful purpose, since, for the reasons already indicated, the plaintiff's case must fail, and, too, without reference to whether or not it has abdicated its rights, and absolved itself from its obligations as to that part of said roadway in said city. The authorities cited by the plaintiff, which decide that the fact that a turnpike road is in bad condition constitutes no defense in actions to collect toll, can have no application in this state, where we have a statute which expressly declares that the owners of any such road, failing to keep the same in good repair, shall not exact any toll from any person or persons traveling thereon. Section 1234, Rev. St. 1899. This is a disabling statute, and was enacted for the purpose of compelling these corporate entities to perform the duties therein required, or, in other words, to compel them at all times to keep their roads in good repair. By its enactment the Legislature in no way abridged the right of the state, by appropriate judicial proceedings, to cause their charter powers to be recalled. An incorporated turnpike company may, by its failure to keep its road in good repair, as required by section 1234, supra, not only disable itself to collect toll, but thereby subject itself to a forfeiture of its charter powers.

The default, in which all the evidence

showed the plaintiff to have been, clearly disintitled it to recover, and accordingly the judgment must be reversed. All concur.

HARRISON v. SELF et al.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1908.)

PLEADING — SUFFICIENCY OF PETITION — VAGUENESS AND UNCERTAINTY — TIME FOR OBJECTION.

1. The objection that a petition is too vague, indefinite, and uncertain to state a cause of action cannot be taken after commencement of the trial, by way of a request for a peremptory instruction at the close of plaintiff's evidence, as it is only where there is an entire absence of material facts that the objection may be taken at any time.

Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by E. J. Harrison against James Self, H. A. Groat, and Dr. Chas. Pague, copartners as the Anti-Bacilli Remedy Association. Judgment for defendants, and plaintiff appeals. Reversed.

Jno. C. Landis, Jr., and R. L. Spencer, for appellant. Crandall & Strop, for respondents.

BROADDUS, J. The law of the case arises principally upon the question as to the sufficiency of the petition, which is as follows: Plaintiff, for his cause of action, states that defendants were at all times hereinafter mentioned a copartnership formed for the purpose of manufacturing and selling a medicinal preparation for the use of persons suffering from consumption and all tuberculous diseases, with the head office located at Chicago, Ill.; that said partnership was formed by and between the above-named defendants during the month of May, 1900; that on the 1st day of June, 1900, plaintiff was employed by James Self, one of the above-named defendants, to act as office physician, and have charge of the office of said copartnership; that afterwards, on or about the middle of June, 1900, defendants not having in their possession the formula for the manufacture of the remedy to be sold by them, they employed this plaintiff, as manufacturing chemist, to make said remedy from a formula to be evolved by him; that plaintiff was so employed and filled the duties of office physician and chemist from the 9th day of June to the 13th day of April, 1901; that it was agreed by and between plaintiff and defendants that his salary should be \$15 per week; that from the 9th day of June to the 14th day of July, 1900, he received his salary in full; that from the 14th day of July, 1900, to the 13th day of April, 1901, he earned a salary amounting to \$585; that between the last above mentioned dates he received at various dates, on account of salary, sums amounting to

\$324.09, leaving a balance due on salary account of \$260.91, for which sum he asks judgment, together with interest from the 13th day of April, 1901, at 6 per cent. per annum, together with costs in this cause expended. Plaintiff, for second and further cause of action, states that the defendants were a copartnership, as alleged in the first count of this petition, which allegations are made part of this second count, and that during his employment, as alleged in the first count, expenses were paid by him amounting to \$625.48; that he received from all sources on his expense account from the 12th day of June, 1900, to the 13th day of April, 1901, the sum of \$602.88, leaving a balance due on the expense accounts amounting to \$22.60, for which further sum plaintiff prays judgment.

Analyzed, it means that defendants employed plaintiff in their business at an agreed salary of \$15 per week; that from the 9th of June to the 14th day of July, 1900, he received his salary in full; that from the 14th day of July, 1900, to the 13th day of April, 1901, he earned a salary amounting to \$585; that for the latter part of his salary he has received \$324.09, which leaves a balance due of \$260.91, for which he asks judgment. Plaintiff's second cause of action is for money paid out in the way of expense for the defendants.

After hearing plaintiff's evidence, the court instructed the jury as follows: "The court instructs the jury that, under the evidence in this case, the plaintiff is not entitled to recover." As there was evidence that defendants employed plaintiff at a salary of \$15 per week, and that he performed the services, we are led to believe that said instruction was given on the theory that plaintiff's petition did not state a cause of action. This petition is somewhat vague and uncertain, and certainly most awkwardly drawn, yet we think it was sufficient to sustain a verdict. It is the law that, where the objection rests upon the ground that the petition is vague, indefinite, and uncertain, and fails to state a cause of action, it should not be sustained. "If the petition states a cause of action, though defectively, the objection should not prevail. It should be stated before trial." *Spurlock v. Ry. Co.*, 93 Mo. 530, 6 S. W. 349. It is only when the petition fails to state facts sufficient to constitute a cause of action that the objection may be taken at any time, even after verdict and judgment. The petition here alleges employment at a salary of \$15 a week, and that plaintiff earned his salary, a part of which is due and unpaid, for which he asks judgment. As the case is to be retried, the plaintiff should amend both counts of his petition so as to make them more definite and certain.

Cause reversed and remanded. All concur.

COPE v. COPE.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

DIVORCE—TEMPORARY ALIMONY—PROOF OF MARRIAGE—ALLEGATIONS OF PETITION—SUFFICIENCY—DECREE—VALIDITY.

1. On a motion for temporary alimony in an action for divorce, the testimony of plaintiff that the name of her husband was Robert F. Cope, the name of defendant, the allegations of her petition for divorce averring the marriage of the parties, the birth of two children, etc., and the failure of defendant, who had not then answered, to testify, sufficiently proved the marriage of the parties to authorize the decreeing of alimony, assuming that proof of the marriage was a necessary prerequisite.

2. The petition in an action for divorce, which averred the marriage of the parties, the birth of two children, and their residence; that defendant, by fraud, induced plaintiff to join in a conveyance of defendant's land as a means of compelling the separation of the parties; that defendant's sister was permitted to assume the control of one of the children of the parties; that the sister at one time forcibly took the child from plaintiff's possession; that the sister annoyed plaintiff, but defendant, when appealed to for protection, refused protection; that during the first year of the marriage defendant was an habitual drunkard; that he subsequently took the Keeley cure, since which time he had begun to drink regularly again, and to become intoxicated at frequent intervals—sufficiently showed a ground for divorce to authorize the court to award to plaintiff temporary alimony, though the allegations of drunkenness subsequent to the taking of the cure did not charge habitual drunkenness, and though it failed to show that plaintiff did not condone the charge of habitual drunkenness during the first year of the marriage.

3. The part of a decree for temporary alimony which adjudges that defendant should pay \$50 "on demand, if necessary," for plaintiff's benefit, is void, because the judge alone can determine the question when such payment will become necessary.

Appeal from Circuit Court, De Kalb County; A. D. Burnes, Judge.

Action for divorce by Ina M. Cope against Robert F. Cope. From a judgment awarding alimony pendente lite, defendant appeals. Modified.

Hewitt & Blair, for appellant. Kendall B. Randolph and Frank Costello, for respondent.

BROADBUSH, J. This appeal is from a judgment allowing the plaintiff alimony pendente lite. The objections against the decree for alimony are that it was not shown that the parties were married, that the petition did not show probable cause for divorce, and that the same does not state a cause of action. The plaintiff, before answer of defendant admitting the marriage, filed her motion for alimony. Upon this motion the court heard the testimony of plaintiff and another witness. The plaintiff was asked, "What is your husband's name?" and she answered, "Robert F. Cope." The defendant did not testify. Admitting that it was necessary to prove the marriage, we think the testimony of the wife, the allegations of the petition, and the silence of the husband when called

upon for alimony, were sufficient to justify the court in rendering the decree.

The last two objections are to the sufficiency of the petition. The petition, after stating the marriage of plaintiff and defendant on the 25th day of September, 1899, the birth of two children, and their residence upon a farm, the common property of defendant and a maiden sister, Mary Cope, alleges many indignities, some of which are inconsequential. However, she alleges that in July, 1900, defendant, being the owner of an undivided half of the farm upon which they resided, by representation, falsely made, that he had sold his half interest therein to his said sister, Mary Cope, induced her to join in a conveyance to said Mary, when in fact no money was paid to him for his interest in said land, but that the conveyance was so made by agreement between defendant and his sister for the purpose of defrauding plaintiff, and as a means of compelling a separation between plaintiff and defendant; that defendant has allowed said Mary Cope to assume control of her eldest child, Helen, against her consent, and at one time to take said child by force from plaintiff's possession; and that said Mary Cope constantly, by words and actions, annoyed plaintiff, and at all times sought to drive her from her home, and that defendant, when appealed to for protection, has refused her such protection, and has refused her a separate room in their common home, so that she might be free from annoyance by said Mary Cope. Furthermore, she alleges that during the first year of their married life defendant was a habitual drunkard; that in November, 1900, he took the Keeley cure for drunkenness, since which time, however, "he has begun to drink regularly again, and has continued to be intoxicated at frequent intervals for more than one year before the separation." But it is insisted by defendant that the charge of habitual drunkenness for one year, as it occurred during the first year of the marriage, was condoned by plaintiff, as she lived with him as his wife for two years thereafter, before the separation. "If the offense of habitual drunkenness become once distinct and complete, though it then ceased, the wife could maintain her action for divorce; but, if she voluntarily continued the marital relation after the offense was thus complete, she would thereby condone it and nullify her right to divorce. If the husband continues to be a habitual drunkard, the offense is continuous, and the wife may break off at any time and establish her right to divorce." *Moore v. Moore*, 41 Mo. App. 176. If the husband, after having been a habitual drunkard for a year, had continued as such, there would have been no condonation. *Moore v. Moore*, supra. But it is not alleged in this case that defendant afterwards became a habitual drunkard, but that he became intoxicated only at frequent intervals. But the case is

not here for final determination. The plaintiff in the course of the trial may be permitted to amend her petition and show that she did not condone the offense, and we are not authorized beforehand to anticipate her rights as a litigant, and by strict construction of her petition deprive her of the benefit of a hearing.

That part of the decree which adjudges that defendant pay \$50 "on demand, if necessary," for plaintiff's benefit, is void, because no one is authorized to say when such payment will become necessary. The judge alone could have determined that question when the judgment was rendered. It was incomplete and binds nobody. Otherwise the judgment is affirmed. All concur.

ILGES v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

STREET RAILWAYS—INJURY TO PASSENGER—DUTY OF CARRIER—DAMAGES—INSTRUCTIONS.

1. Evidence of a passenger on a street car that she was thrown from the body of the car into the street by a sudden lurch thereof is sufficient to authorize a finding that there was such an unusual and severe lurching thereof as to constitute negligence.

2. An instruction in an action for injury to a passenger on a street car that a common carrier is bound to use the highest degree of care for the safety of its passengers, followed by an instruction that if the motorman was negligent, and his negligence caused the car to lurch, throwing plaintiff into the street, plaintiff could recover, unless she was not exercising ordinary care, is not erroneous because the term "highest degree of care" is not defined.

3. An instruction that, if the jury find for plaintiff, they should assess her such damages as they think, under the evidence, would compensate her, etc., is not erroneous because using the word "think" instead of "believe" or "find."

Appeal from St. Louis Circuit Court; J. A. Blevins, Judge.

Action by Margaret Ilges against the St. Louis Transit Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Boyle, Priest & Lehman, for appellant. E. E. Wood, for respondent.

BLAND, P. J. On the 15th day of August, 1902, the plaintiff was a passenger on one of defendant's street cars running south on Grand avenue, in the city of St. Louis. She was either thrown from the car into the street by a sudden jerk or lurch of the car forward, or stepped off the car while it was in motion, and fell into the street. The fall, however occasioned, injured her. For these injuries she recovered a judgment for \$2,833 in the circuit court. From this judgment the defendant duly appealed.

The petition counts upon six distinct acts

of negligence on the part of defendant, but the court confined the attention of the jury to but one, comprehended in the following instruction given for the plaintiff, to wit: "If the jury believe from the evidence that the motorman in charge of defendant's car was negligent, and that his negligence caused the car to lurch, and that said lurch threw plaintiff into the street, causing injuries to her, then they should find in favor of the plaintiff and against the defendant, unless they find from the evidence that the plaintiff was not at the time exercising ordinary care for her own safety." All the other allegations of negligence were taken from the jury by instructions given for the defendant. The answer was a general denial, and an allegation that plaintiff's injuries were occasioned by her own negligence in stepping off of a moving car.

The evidence is that the car on which plaintiff was a passenger was a four-wheel summer car, the trucks being in the center, and that the car rocked when running on an uneven track. Plaintiff got on the car at Florissant avenue to go south to where Olive street crosses Grand avenue. When she boarded the car there were only a few passengers on it, but, before reaching her place of destination, the car, which was open on both sides and at each end, with running boards on either side, became very crowded with passengers. The seats were all full, and the end platforms, and some passengers were standing in between the seats inside the car, and the running boards were crowded with as many as could hang on. When the car reached Washington avenue, one block north of Olive street, it slowed up, and two or three young men stepped from the running board into the street. At this juncture plaintiff testified that she arose from her seat near the west side of the car to press the button to signal the motorman to stop the car at the Olive street crossing, that she might alight; that when she arose she found the car so crowded that she could not reach the button in the stanchion at the end of the seat where she had been seated, and so she reached around and over some one to touch the button in the stanchion in front of her, and while she was in the act the car gave a sudden lurch, and threw her into the street, severely injuring her. She is corroborated by the evidence of other witnesses. On the part of the defendant, the evidence of several disinterested witnesses, who were passengers on the same car, is that plaintiff arose from her seat, pressed her way around some passengers, and stepped on the running board while the car was running at a speed of from five to seven miles an hour, and fell into the street; that the car did not start suddenly forward after slowing up; that it did not lurch, but was running as such cars ordinarily move.

1. The contention of the defendant that there is a failure of proof is not borne out

*Rehearing denied December 1, 1903.

†1. See Carriers, vol. 9, Cent. Dig. § 1236.

by the evidence. Plaintiff's evidence that she was thrown from the body of the car into the street, if believed by the jury, must have established in their minds, beyond peradventure, that there was an unusual and very severe lurching or jerking of the car to cause the plaintiff's misfortune; and we think the court correctly overruled the demurrer to the evidence offered at the close of plaintiff's evidence, and again at the close of all the evidence.

2. The first instruction given for plaintiff is as follows: "The court instructs the jury that a common carrier of persons, such as a street car corporation, is bound to use the highest degree of care for the safety of its passengers." Defendant contends, not that the instruction erroneously declares the law in the abstract, but that the term "the highest degree of care" should have been defined, or the instruction modified, and cites *Dougherty v. Missouri R. Co.*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; *Smith v. C. & A. Ry. Co.*, 108 Mo. 243, 18 S. W. 971; *Jackson v. Grand Ave. Ry. Co.*, 118 Mo. 199, 24 S. W. 192; and *Freeman v. Railway*, 95 Mo. App. 94, 68 S. W. 1057—in support of its contention. *Dougherty v. Missouri R. Co.*, supra, was a suit by a passenger for damages caused by a sudden, violent start of the defendant's horse car. Instruction No. 8 given for the plaintiff told the jury that, under the circumstances of the case, it was the duty of the manager or driver of the car to exercise the "utmost human foresight, knowledge, skill, and care." The instruction was approved, but on a rehearing the majority of the Supreme Court were of the opinion that the instruction stated the abstract proposition too broadly as to the degree of care incumbent on the defendant. In *Smith v. C. & A. Ry. Co.*, supra, it is said an instruction that "the law imposes on a common carrier of passengers the utmost care in carrying them safely is not erroneous, where an instruction is also given that the carrier is not an insurer of the safety of passengers, and that negligence on the part of its servants must be shown." In *Jackson v. Railroad*, 118 Mo., loc. cit. 225, 24 S. W. 192, the *Dougherty* and *Smith* Cases are approvingly cited. In *Freeman v. Metropolitan Street Ry. Co.*, 95 Mo. App. 94, 68 S. W. 1057, an instruction which declared the defendant (a passenger carrier) "guilty of negligence, unless he exercised the utmost human skill, diligence, and foresight to prevent the accident" to the passenger, was held erroneous. *Leslie v. W., St. L. & P. Ry. Co.*, 88 Mo. 50, was a suit by a passenger for damages occasioned by the negligence of the carrier. In respect to the duty of the carrier to the passenger, the court instructed the jury that the defendant was bound to use the highest degree of care. The court held that, as a general statement of the liability of the carrier, the instruction was not objectionable, and that the fact that the instruction proceeded to state hypotheti-

cally the facts upon which the plaintiff might recover sufficiently qualified the general proposition. The instruction under consideration is not qualified in any manner, nor is there any other instruction given in the case which hypothetically sets out facts upon which the plaintiff might recover. The second instruction (above quoted), in general terms, tells the jury that if the motorman was negligent, and his negligence caused the car to lurch, etc., plaintiff could recover. The two instructions, when considered together, in effect, told the jury that it was the duty of the motorman to exercise the highest degree of care, and if he failed to exercise such high degree of care, and the car lurched, and plaintiff was thrown into the street, she could recover. In *Furnish v. Railroad*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781, an instruction defining the skill, diligence, and foresight required of a passenger car driver was defined as "such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances." In *Feary v. Railroad*, 162 Mo. 75, 62 S. W. 452, an instruction telling the jury, "If defendant's servants and employees exercised all the care and foresight that was reasonably practicable, then there is no negligence," was approved. The court, through Marshall, J., said: "The instruction under consideration requires all the care and foresight that was reasonably practicable. The law requires nothing that is unreasonable." The highest degree of care signifies nothing short of the exercise of the utmost human skill and care. There can be no degree of care higher than the highest. "Carriers of passengers," says Story (*Story on Bailments* [2d Ed.] § 600), "bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go; that is, with the utmost care and diligence of very cautious persons." In *Gilson v. Railway Co.*, 76 Mo. 282, the court said: "The care required is that care, prudence, and caution which a very competent and prudent person would use and exercise in a like business and under like circumstances." In *Shearman & Redfield on Negligence* (4th Ed.) § 405, it is said: "The obligation of a common carrier is said to be the utmost care and skill which prudent men are accustomed to use under similar circumstances." In *Dodge v. Steamship Co. (Mass.)* 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541, the words "utmost care and skill" were held not to mean the utmost care and diligence which men are capable of exercising, but to mean the utmost care consistent with the carrier's undertaking, and with due regard for all the other matters which ought to be considered in conducting the business. In *Libby v. Railroad Co. (Me.)* 26 Atl. 943, 20 L. R. A. 812, it is said: "A common carrier of passengers, although not an insurer, must do all that human care, vigilance, and foresight can, under the circumstances, consid-

ering the character and mode of conveyance, to prevent accident to passengers." While, as an abstract proposition, common carriers of passengers are bound to use the utmost care and skill to prevent injuries to their passengers, yet the rule should be applied in a practical manner. That it may be so applied, the text-books and many of the cases have set up some standard (usually the standard of care, skill, and foresight which a very competent and prudent person would be expected to use and exercise under like or similar circumstances) by which the jury may measure the degree of care required. And it seems to us that some such standard should somewhere be incorporated in the instructions to the jury in this class of cases, so that they may not be left to set up a standard of their own, and to run it up as high as their imaginations will allow them. But if it is not done, the omission has never, so far as we are informed, been held to be reversible error. This very question has, at the present term of this court, in the case of *Fillingham v. St. Louis Transit Company*, been so fully and exhaustively treated in an opinion by Goode, J., that nothing remains to be said.

3. The court gave the following instruction: "If the jury find in favor of the plaintiff, they should assess her such damages as they think, under the evidence, would compensate her for the pain and suffering she has endured by reason of her injuries, and such further sum as they think would fairly compensate plaintiff for the injuries sustained"—to which defendant objected, and counsel insists here that it gave the jury a boundless commission to assess damages. The word "think" has various meanings. Its meaning must be ascertained from the connection in which it is used in a sentence. Some of its meanings, according to Webster, are "to form an opinion by reasoning; to judge; to conclude; to believe." The jury, by the instruction, were required to think of the damages under the evidence, not outside of it, and to think out (judge) the damages from the evidence. We see no substantial objection to the wording of the instruction, and we think that it was as well understood by the jury as if the word "believe" or "find" had been used instead of the word "think."

Other assignments of error are discussed in the briefs, but they are found to be without merit, and the judgment is affirmed.

REYBURN and GOODE, JJ., concur.

STANTON v. GIBBINS et al.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

MORTGAGE FORECLOSURE—LIMITATIONS—
BARRED OBLIGATION—DEATH
OF MORTGAGOR.

1. Rev. St. 1899, § 4276, provides that no suit to foreclose a mortgage or deed of trust there-

after executed to secure any obligation shall be maintained after such obligation has been barred by limitations. Section 4277 provides that no such suit shall be maintained to foreclose any mortgage or deed of trust theretofore executed to secure any such obligation, after the expiration of two years after the passage of the act. *Held*, that a mortgage, executed prior to the passage of the statute, to secure an obligation already barred when the statute was passed, could only be foreclosed within two years thereafter, though, were the obligation still enforceable, the life of the security would be coterminous therewith.

2. While, on the death of a debtor, limitations do not run against the creditor during the time administration is delayed, yet, where the creditor is the decedent, limitations on a matured obligation continue to run, as his heirs cannot prolong the period of limitations in their own favor by delaying to take out letters of administration.

Appeal from Circuit Court, Andrew County; Alonzo D. Burnes, Judge.

Action by John L. Stanton, as administrator of the estate of Elizabeth Calvert, deceased, against Edward R. Gibbins and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James M. Rea, for appellant. P. Mercer, for respondents.

ELLISON, J. Defendants on March 12, 1872, executed a note for \$300, together with a mortgage to secure it, to Elizabeth Calvert. The note was due in one year. A payment of \$100 was made on the note April 2, 1885. Elizabeth Calvert died April 18, 1889. Plaintiff was appointed administrator of her estate August 3, 1901, and this action was begun on July 31, 1902. The statute of limitations was made a defense, and the trial court found for defendants.

Prior to 1891 an action to foreclose a mortgage on real estate might have been maintained if brought any time within 20 years, notwithstanding the obligation secured was barred earlier. In that year the Legislature enacted the following statute, being sections 4276, 4277, Rev. St. 1899, viz.:

"Sec. 4276. No suit, action or proceeding under power of sale to foreclose any mortgage or deed of trust, executed hereafter to secure any obligation to pay money or property, shall be had or maintained after such obligation has been barred by the statute of limitations of this state.

"Sec. 4277. Nor shall any such suit be had or maintained to foreclose any such mortgage or deed of trust heretofore executed to secure any such obligation after the expiration of two years after the passage of this act."

The first of these sections provides that mortgages or deeds of trust executed "hereafter" (that is, after the enactment of the statute) shall be barred at the same time with the obligation which it secures. The second section, as presently explained, gives two years after the enactment of the stat-

¶ 2. See *Limitation of Actions*, vol. 23, Cent. Dig. §§ 424, 426.

ute in which to institute suit to foreclose a mortgage or deed of trust which had been executed before such enactment. The mortgage here in question was executed prior to the enactment of the statute referred to, and therefore it came under the last section, giving a period of two years' limitation; and the note itself being barred, and more than two years since the statute took effect having elapsed prior to bringing this action, it is barred. The object of the statute was to provide that the life of mortgages and deeds of trust thereafter executed should continue as long as the life of the note lasted, but no longer; and that mortgages and deeds of trust executed before the statute should end within two years after the passage of the act, unless, of course, the obligation secured was not yet barred. The statute does not, under either section, end the life of the mortgage or deed of trust at any time before the obligation secured is barred. But in cases where the mortgage was executed prior to the act, it would be barred in two years, if at any time before the two years had run the obligation had become barred.

2. But plaintiff contends that on account of the death of Elizabeth Calvert, mortgagee and payee of the note, in 1889, before the note was barred, it arrested the running of the statute until an administrator was appointed, in 1901; that, by not counting the intervening time, the action was seasonably brought. The rule is that, where the decedent is the debtor, limitation does not run against his creditor in favor of his estate during the time administration is delayed. But where the decedent is the creditor, and limitation has begun to run before his death, it will continue to run, without interruption, after his death, notwithstanding administration is not had on his estate. In other words, the heirs of a creditor whose claim matured before his death, as in this case, cannot prolong the statute of limitations in their own favor by delaying to take out letters of administration on their ancestor's estate. A question as to the true interpretation of this statute first came before us shortly after its enactment, in the case of *Little v. Reid*, 75 Mo. App. 266; and, in an opinion written by Judge Smith, we put upon it a construction which we believe to be sound, and which has not been questioned in any other case.

The second branch of this case, on the question whether the statute of limitations is arrested by the death of one of the parties during the time there is a failure to administer on his estate, does not present the fact which appeared in *Little v. Reid*. In that case the debtor died, and it was properly held that the time administration on his estate was delayed should not be counted as a part of the time limited. In this case it is the creditor who died, which involves a different rule, as stated above. With this distinction in mind, there is no conflict between the decision of the St. Louis Court

of Appeals (*Schlueter v. Albert*, 39 Mo. App. 154) and *Little v. Reid*, supra.

The result is that the judgment should be affirmed. All concur.

SHAW v. BAMBRICK-BATES CONSTRUCTION CO.*

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

MASTER AND SERVANT — INJURIES — NEGLIGENCE — FELLOW SERVANT — EVIDENCE — BURDEN OF PROOF.

1. A servant engaged in loading pieces of stone into a box attached to the arm of a derrick is a fellow servant with one whose sole duty it is to observe when the box has been filled, and to give notice to the engineer to elevate the box; the latter servant being vested with no power of control over the other workmen, and the master being represented by another person.

2. Where the essential facts for determining who are fellow servants are not in controversy, the question is one of law.

3. One relying on the absence of the relation of fellow servants has the burden of establishing its nonexistence.

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by John Shaw against the Bambrick-Bates Construction Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

T. J. Rowe, for appellant. W. H. O'Brien and B. R. Brewer, for respondent.

REYBURN, J. Action for damages for personal injuries suffered by plaintiff in November, 1900, while in employ of defendant as a quarryman. Plaintiff, with three other workmen, was engaged in loading rock in a box in defendant's quarry at Forest Park Boulevard and Grand avenue, in the city of St. Louis. The box was fastened by three chains to the boom of the derrick, and could not be raised until the three chains were properly attached and adjusted. The derrick was on the bank above, and was operated by a steam engine stationed about 28 feet southeast of the quarry bank. The rock was loaded into the box down in the quarry about 35 or 40 feet below the bank where the derrick and engine operating it were located; the engine being, as stated, about 28 feet back from the quarry bank. Thus the engineer in charge of the engine could not see the men in the quarry filling the box, nor could these workmen see the engineer; and therefore another workman, variously designated as derrick foreman by plaintiff, and by others derrickman or side-line man, was stationed at the top of the bank, whose duty it was to look over and notice when the box was filled, and then signal the engineer to hoist it to the top of the bank, when the same workman dumped its contents into the crusher, which

*Rehearing denied December 1, 1903.

¶ 2. See *Master and Servant*, vol. 24, Cent. Dig. § 1062.

was about 15 or 20 feet from the bank. The proof also showed that at times one of the workmen below signaled to or called to the attention of the man on the bank that the box was prepared to be hoisted. Plaintiff had been employed at the quarry for nearly five months, and on the morning in question the box had been lowered and filled with stone, and then, weighing about a ton, was begun to be suddenly hoisted, and plaintiff was caught between the wall of the quarry and the box, and received the hurts complained of.

Plaintiff's cause of action was thus pleaded: "Plaintiff, for his cause of action, states that defendant is and was at the time hereinafter stated a corporation existing under the laws of the state of Missouri, and liable to suit as such in the courts of this state, and engaged in the quarrying of stone within the corporate limits of the city of St. Louis, at a quarry fronting on Laclede avenue, in said city. Plaintiff further states that he was employed by defendant, prior to and on November 14, 1900, in quarrying stone at the bottom of said quarry, some seventy (70) feet below the natural surface of the ground, and was exercising due care, and that defendant used a steam derrick and chain, with a large truck or box attached thereto, to raise from the quarry the stone gotten by plaintiff and other workmen; that the agents or servants of defendant in charge of said quarry on above date carelessly, negligently, and wantonly, and without notice to plaintiff, who was at the time engaged in loading said truck with stone at the bottom of said quarry, started defendant's engine, and caused said truck or box as aforesaid to be suddenly raised and shifted, thereby striking plaintiff and throwing him against the wall of said quarry, and crushing his body, feet, and arms, breaking his ankle, and causing internal injuries; that, as a result of said defendant's said carelessness, negligence, and wanton acts, plaintiff is permanently injured, his earning capacity permanently impaired, has suffered and will suffer great loss of time, as well as large expenses for medical services, medicine, and nursing, and has suffered and will suffer great mental pain and anguish."

The assignment of negligence relied on in the petition is the carelessness, negligence, and wantonness of defendant's servants in charge of its quarry, without warning to plaintiff, who was engaged in loading the box with stone at the bottom of the quarry, in starting the engine, and causing the box to be suddenly raised and shifted, striking and injuring him. The complaint is barren of any charge of incompetency or unfitness on part of any of his fellow servants, or of any assertion that the machinery and appliances were unfit or perilous, or the place where he worked was hazardous, or not reasonably safe. Defendant insists that plaintiff and the workman at the top of the quarry bank—Luke Eurich by name—who did not appear at the trial, and who, if any one, was guilty of

the carelessness producing the accident, were mere fellow servants, and the common employer, appellant, in consequence, was not liable. In *Moore v. Railway*, 85 Mo. 594, the court says: "If we may venture a general proposition on the subject, it is that all are fellow servants who are engaged in the prosecution of the same common work, leaving no dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master himself, or of some servant placed by the master over them. If a person employs another to perform a duty which he would have to discharge if another were not employed to do it for him, such employé, as to that service, stands in the master's stead, with relation to other persons." And the Supreme Court has further said that a foreman may occupy a dual position (that is, he may be at the same time a fellow servant and representative of the master), and when the master delegates to a servant power to superintend, control, and direct the men engaged in the performance of work, such person is, as to the men under him, a vice principal, whether he be called "superintendent," "conductor," "boss," or "foreman," and for his negligent acts in performing the duties of his master the latter is liable. *Miller v. Railway*, 109 Mo., loc. cit. 356, 19 S. W. 58, 32 Am. St. Rep. 673. But under the facts herein made patent, plaintiff and the workman at top of the bank were at the time of the injury directly co-operating with each other in performing the work of their common master—engaged under the same foreman and in the same general business. So far as the record discloses, the servant signaling the engineer was delegated by the master with no power to superintend, control, or direct the other workmen engaged in the common employment; and it cannot be said that this workman, whose sole duties appear to have been to observe when the box was filled by his fellow workmen at the bottom of the quarry, and give notice to the engineer to begin its elevation to the top for transportation to the crusher, where the same workman turned in the contents, took the place of the master, or in any way was his representative. The proof establishes that the master was represented at the quarry other than by Luke Eurich, the man who signaled the engineer; such representative being termed by plaintiff the "general foreman." Under the facts here exhibited, the injured quarryman and Eurich were *prima facie* mere fellow servants. Where the essential facts for determining who are fellow servants are not in controversy, the question then resolves itself into simply one of law, but it devolves upon him relying upon the absence of such relationship to establish by proof its nonexistence. *McGowan v. Railroad*, 61 Mo. 528; *Blessing v. Railway*, 77 Mo. 410; *Sheehan v. Prosser*, 55 Mo. App. 569.

The doctrine of the case of *Steube v. Iron, etc., Co.*, 85 Mo. App. 640, relied on by re-

spondent, that where, from the nature of the work in which the workmen were engaged, and from its hazardous character, it is the duty of the master to superintend it, which he cannot escape by delegating the oversight to an employé in other respects a fellow servant, fails to fit the facts constituting plaintiff's case. Nor are the many cases applicable cited by respondent, where the employer had violated the obligation to furnish the employé at all times a reasonably safe place in which to do the work required of him, as in *Zellers v. Light Company*, 92 Mo. App. 107, *Weldon v. Railway*, 93 Mo. App. 668, and other cases cited, for no such allegation was contained in the petition nor established by the proof.

Under the facts in evidence herein, plaintiff and the signaling workman were fellow servants at the time of the casualty, engaged in a common employment under the same master, and so associated and situated towards each other that they could report to their common master for redress of any delinquent conduct on the part of each other, and could each exercise preventive care over the conduct of the other; the latter constituting general and established tests of the attitude of servants of the same employé. *Parker v. Railway*, 109 Mo., loc. cit. 409, 19 S. W. 1119, 13 L. R. A. 802. The appellant was not liable to respondent for any injury resulting from the negligence of his fellow servant in the same common service. *Parker v. Railway*, 109 Mo. 362, 19 S. W. 1119, 13 L. R. A. 802; *Ryan v. McCully*, 123 Mo. 636, 27 S. W. 533. And the judgment is reversed, and the cause remanded.

BLAND, P. J., and GOODE, J., concur.

STATE ex rel. BARRINGER v. HAWKINS et al.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

NOTARIES PUBLIC—ACTIONS ON BOND—LIMITATIONS—APPLICABILITY OF GENERAL STATUTES—ACCRUAL OF ACTIONS—DISCOVERY OF FRAUD.

1. The provision of the general limitation law, which by Rev. St. 1899, § 4292, is declared not to extend to actions otherwise limited by statute, does not apply to an action on the bond of a notary public for his misconduct, which is limited to three years after accrual by Rev. St. 1899, § 8836.

2. Under Rev. St. 1899, § 8836, providing that no suit shall be instituted against a notary or his sureties more than three years after the cause of action accrued, the cause of action for falsely certifying the acknowledgment of a deed of trust which he had forged did not accrue so long as the notary's fraudulent concealment prevented the injured person from knowing, in the exercise of reasonable diligence, that he had a cause of action.

3. The fraudulent concealment by a notary of a false acknowledgment certified by him postponed the running of limitations, not only as against him, but as against the sureties on his bond as well.

4. In an action on a notary's bond for falsely certifying an acknowledgment, the court should

have required the jury to pass on the question whether plaintiff could have discovered the fraud sooner than he did by the exercise of reasonable diligence.

Appeal from Circuit Court, Nodaway County; Samuel Davis, Judge.

Action by the state, on the relation of Jacob Barringer, against A. W. Hawkins and J. H. Todd. From a judgment for plaintiff, defendants appeal. Reversed.

E. A. Vinsonhaler, for appellants. L. C. Cook and J. W. Tompson, for respondent.

ELLISON, J. The defendants are sureties on the official bond of W. H. Hawkins, a notary public of Nodaway county, and plaintiff brought this action against them for the malfeasance of Hawkins in falsely certifying that he had taken the acknowledgment to a certain deed of trust (which he had forged) to secure the payment of a note of \$1,000 to the plaintiff. The judgment in the trial court was for plaintiff.

The defense of the surety defendants is that the statute governing notaries and their duties prescribes that no suit shall be instituted against a notary or his sureties more than three years after the "cause of action accrued." Section 8836, Rev. St. 1899. It is conceded that, at the time this action was instituted, more than three years had elapsed since the forgery of the deed of trust and the making of the false certificate. But plaintiff seeks to avoid the apparent running of the statute by showing that the notary fraudulently and corruptly concealed his act for a long space of time; that he paid interest to plaintiff on the sum which he pretended he had loaned for him, pretending that the person he represented as the borrower had left it with him to pay to plaintiff, and in other ways kept alive in plaintiff the implicit belief that the loan had really been made, and that the deed of trust, including the certificate of acknowledgment, was genuine; that within one year after he learned of the notary's gross fraud and deception he brought the present action. The question is, when did the cause of action accrue? The contention of the parties is this: Defendants insist that it accrued when the notary made the false certificate, and plaintiff insists that it did not accrue until he discovered the fraud and concealment. Our conclusion is that it accrued when plaintiff discovered the fraud, or, when, by proper diligence, as an ordinarily prudent man, he, under the circumstances, should have discovered it. Our general statute of limitations declares that its provisions shall not apply to cases where the defendant's improper conduct prevents the action being brought. Section 4290, Rev. St. 1899. But the limitation relied on by defendants is a special limitation, presented by the notary statute, and it is declared by the general limitation law that "the provisions of this chapter shall not extend to any

action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute." Section 4292. From those provisions, it is clear that no part of the general statute of limitations finds application to the case. We are thus left to answer the question of when did the cause of action accrue, independent of any statute. In *Revelle v. Ry. Co.*, 74 Mo. 438, the Supreme Court held that the time in which an action should be brought against a railroad for double damages for killing stock was governed by a special statute of limitations, and on that account was, by the general statute itself, excluded from the influence of the latter statute, and that the action must be brought within the three years, regardless of the railroad's fraudulent concealment of the killing. But that statute (section 1710, Rev. St. 1879) provided that the action should be "commenced within three years after the commission of the offence, and not after," whereas the statute now under consideration prescribes, as already said, that the suit must be brought within three years after the cause of action accrued. That statute left no room for construction, since it fixed upon the time by naming a specific and definite period, while this statute uses an expression, "cause of action accrued," which leaves something to be determined more than a mere calculation of time. After full consideration, we have concluded that the cause of action did not accrue, so as to enable the notary to take advantage of it, so long as his fraudulent concealment prevented plaintiff from knowing, in the exercise of the diligence which an ordinarily prudent man under the same circumstances would have exercised, that he had a cause of action. One of the theories which support a statute of limitations, and which justify such statute, is that a creditor or an injured party is given a reasonable time in which to go into court for redress of his grievance, whatever it may be, and that if he lies idly by, neglecting to seek redress for the specified time, he is cut off. He has slept on his rights until, from the policy of the law that disputes should have an end, and from justice to the opposite party, who may lose his means of protection and defense, he should not be permitted at such late day to ask relief. When the party who is thus protected by the statute himself fraudulently conceals from the other, by acts which would deceive an ordinary prudent man in the same situation, that there is a cause of action, that other cannot be accused of lack of diligence. For he cannot be blamed for not bringing into court that which his opponent fraudulently prevented him from knowing existed. And no sympathy need be wasted on the fraud feator by reason of his losing the protection of the statute, since he brought it upon himself by his own misconduct. We have

not been cited to a direct adjudication of the question in this state. But in *Shelby Co. v. Bragg*, 135 Mo. 298, 36 S. W. 600, it is plainly intimated that the rule exists without the aid of a statute. The court said that, "whether by force of the statute or independent of it, a fraudulent concealment of a cause of action will delay the operation of the statute of limitation until after discovery of the fraud. Thus, in an action to recover from a sheriff or constable money collected on process, it was held that the statute did not commence to run until return of process was made by the officer, or there had been a demand of payment by the party in interest. *State ex rel. v. Minor*, 44 Mo. 373; *Kirk v. Sportsman*, 48 Mo. 383. These cases refer to no statute as a basis for the exception." It is said in 19 *Amer. & Eng. Ency. of Law* (2d Ed.) p. 248, that it was once the doctrine that exceptions to the statute on account of fraud were only recognized in equity where the statute itself omitted any exception, but that the later rule was "to ingraft on the statutes an implied exception in favor of cases where the defendant fraudulently conceals the cause of action." The case of *Lieberman v. Bank*, 2 *Pennewill*, 416, 45 *Atl.* 901, 48 *L. R. A.* 514, 82 *Am. St. Rep.* 414, was in equity, but the rule is stated after full examination to be at law as just quoted.

2. There is, however, at issue in such cases whether the plaintiff had been neglectful—whether he had used due diligence to ascertain the fraud and concealment, regard being had to its nature and character. And this is stated to be the rule in *Shelby Co. v. Bragg*, *supra*, as well as in the *Encyclopedia* just cited.

3. As has been stated, this action is against the sureties alone, and from that fact it has been urged that, while the improper conduct of the principal in concealing the cause of action might prevent the starting of the statute as against him, it would not have that effect as against the sureties. The law does not support this contention. *Bradford v. McCormick*, 71 *Iowa*, 129, 32 *N. W.* 93. While the sureties in this case have not been in the least guilty of any fraud, yet they stand good for the officer, and, when they are liable for his default, the default and their liability continues during the continuance of his fraudulent misconduct. Notwithstanding we approve of the view taken of the matters foregoing by the learned trial judge, we find that the judgment should be reversed for the reason that the jury were not required, in plaintiff's instructions, to pass upon the question whether plaintiff could have discovered the fraud sooner than he did by the exercise of reasonable diligence. That inquiry was wholly omitted.

The instructions offered for defendant were properly refused. They were too peremptory in tone. The jury should be left to judge from all the circumstances whether

plaintiff, acting as a man of ordinary prudence and diligence, would have discovered the fraudulent concealment. It may be that a retrial might disclose that plaintiff should have discovered the fraud at some period of the time after its perpetration, earlier than he did. The statute would begin to run from the time when he should have discovered it, if there was, in truth, such time before he actually did make the discovery.

The judgment is reversed, and cause remanded. All concur.

LYNCH v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

CARRIERS OF PASSENGERS—STREET RAILWAY—LANDING PASSENGER—RUNNING PAST CROSSING—PROXIMATE CAUSE OF INJURY—SAFE PLACE TO ALIGHT.

1. Running past a street crossing is not the proximate cause of injury to a street car passenger hurt in an attempt to alight.

2. Where a street car stops 15 feet beyond a street crossing, at a place where the ground slopes up from the track so as to be on a level with the car's step at a point reached by a passenger in her first step in alighting, but the place from all appearances is safe, there is no negligence sustaining a recovery by the passenger for straining the muscles of the leg in alighting.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by Mary E. Lynch against the St. Louis Transit Company. Judgment for plaintiff, and defendant appeals. Reversed.

Boyle, Priest & Lehmann and George W. Easley, for appellant. Jos. Wright, for respondent.

GOODE, J. The important portions of the testimony are subjoined:

Plaintiff testified as follows: "Q. Did you ask the conductor to back the car up to the crossing? A. Why, I had no idea of such a thing. There was no danger. I didn't ask him because I didn't see any danger in getting off there. Q. You didn't see any danger in stepping from the car where you were? A. No, sir; it seemed to me that I was stepping as I would an ordinary step. Q. It looked to you a perfectly safe place? A. It looked to me safe; yes, sir. Q. Or you wouldn't have stepped? A. I wouldn't have stepped. * * * Q. Now, Miss Lynch, you walked out upon the rear platform, saw the place at which the car had stopped, stepped from the car without asking the conductor or requiring of the conductor that he move the car back to the crossing or carry you to the crossing west, didn't you? A. I saw no necessity, because I saw no danger in getting off there. Q. Please answer my question. You did not make any such request of the conductor? A. No, sir. Q. You said not a word to the conductor? A. No,

sir. Q. You had seen a lady get off there ahead of you in safety, hadn't you? A. I hadn't seen her get off. Q. Well, you stepped from the car—from the bottom step? A. I don't know how many steps there were, but I stepped from the bottom. Q. Now, in stepping from the bottom step of the car, did you step up or did you step down? A. I stepped up. Q. Then the ground upon which you stepped was higher than the lower step of the car? A. The ground was sloping up from the place. Q. It was higher, wasn't it? The ground was higher than the lower step of the car? A. It didn't seem to be very much higher; it was sloping up. Q. Now, that being true, your stepping up from the lower step of the car, the ground must have been higher than the lower step, wasn't it? A. Yes, sir. Q. When you stepped off there, which foot did you put forward? A. My left foot. * * * Q. And then you followed it with the right? A. Yes, sir. Q. And you stood there until the car moved away? A. Yes, sir. * * * Q. And your sister stepped off behind you, did she? A. Yes, sir. Q. And from the same place in the car? A. Yes, sir. Q. And stepped to the ground, did she? A. Stepped as I stepped, I guess. I don't know how she stepped. Q. And she was not injured? A. No, sir. Q. And the ground there was of the same general formation, wasn't it—I mean at the platform? A. Well, I suppose so. She didn't step just where I did, because I was there, you know. She stepped to one side. Q. No, she stepped either to your right or to your left? A. Yes, sir. Q. And I say the ground there is of the same general formation? A. I guess it is. It mightn't be. Q. Well, you saw it, didn't you? A. When? Q. That day you stepped. A. That day I saw where I was stepping, but I wasn't examining the rest, though. Q. Did you or did you not say anything to the conductor? A. I did not. Q. About having stopped the car at that place? A. I did not. Q. Either before or after you alighted? A. No, sir. Q. And when the car moved away your sister assisted you? You felt that you had a pain in your ankle, was it? A. No, sir. Q. Where was it—in the limb? A. In the limb and above the ankle, between the knee and the ankle. Q. You felt that pain, and your sister assisted you in getting up the rest of the terrace? A. Yes, sir. Q. Is there much of a terrace there in addition to that? A. No, I say it may be a little higher than this (indicating). I don't know just exactly what it is, but she had to just take hold of me. Q. You are assuming that this is the bottom or the rail? A. No, from the floor, I should think, slants up from that point; and, of course, you understand, in this slanting it may appear to be higher than in a straight line. Q. Now, assuming that this is the track (indicating)? A. Yes, sir. Q. The ground slanted in that direction, did it? A. Yes. Q. And it came to a place about

¶ 1. See Carriers, vol. 9, Cent. Dig. § 1245.

this high from the track? A. I should think it was pretty near that. Q. You don't mean that you stepped to this point? A. No, sir; I took what would be a natural step, and then I stepped right out, and then my sister had to take me up the rest of the way to the top of this. * * * Q. Well, did you step clear to the top of this terrace? A. No, sir; I made one step. Now it would seem to me that my sister dragged me up two or three steps before I got to the top. Q. Well, then, that would be about six feet to get to the top would it? If you stepped two feet at a step, you would have to step six feet to get to the top; or four or six feet, you say, she dragged you up? A. I don't know. I couldn't tell you that. Q. Did your left foot slip when you put it on the ground when you alighted from that car? A. No, sir; the minute my foot touched the ground I felt this strange feeling right through my limb. Q. Did you jump when you got off the car—jump forward on your left foot in any way? A. No, I stepped just a natural step stepping out of the car. Q. And you saw where you were stepping? A. I thought I saw where I was stepping. Q. You were looking down? A. I was looking at the place I was going to get out, just as I look always when I am stepping out of a car. I looked just in the same way, of course, that we step out of a car generally. We step right down onto the street, if the step is higher than the paved street. Q. This time, I understand, you stepped up a little? A. Yes, sir; I had to take a step up. Q. Did you take hold of the hand rail as you got off, do you remember? A. I couldn't tell you that, but I think so. Probably I did so. But, as I say, about that I couldn't be positive. I generally make a practice of doing so. Q. But you say you just took one step with your left foot, and you felt this pain immediately? A. Immediately that my foot touched— Q. That your foot touched the ground? A. As soon as I got my foot there."

Julia F. Lynch gave this testimony: "Q. Now, when you walked out to the rear platform your sister was in advance of you? A. Just in advance. Q. She turned, and walked down the steps, and stepped off? A. Yes, sir. Q. You immediately stepped off the car, too? A. To the side of her. Q. From the same step she had taken? A. Yes. Q. And stepped immediately to her side? A. Yes, sir. Q. Was the ground slanting there also? A. Slanting, yes. Q. And you were not injured? A. No, I was not injured. Q. As a matter of fact, you are a little bit heavier than your sister, aren't you? A. I think we were about the same then. * * * Q. Neither of you complained to the conductor that he had passed over the crossing, or as to the condition of the ground, and neither of you asked him to back the car back to the crossing or carry you on to the next crossing, that you might

alight on the crossing? A. Well, we saw no danger in getting off. Q. Well, I didn't ask you that. You didn't do that did you? A. No. Q. You walked out there upon the platform, as was your custom, and down the steps, looked where you were to step, and you stepped off in perfect safety? A. Not in perfect safety, my sister didn't. Q. Well, you stepped off in perfect safety, didn't you? A. I did, yes. Q. And you assisted in getting her up the terrace? A. Yes, sir. Q. She walked, with your assistance, over to the Cullens'? A. She managed to get there with my assistance. Q. And she remained there until about eight o'clock in the evening? A. Yes, sir. Q. And this accident occurred about twelve, or a little before? A. Yes, we were trying to restore her—see what we could do for her pain—all that time. Q. I didn't ask you a word about that. I say the accident occurred about twelve, or a little before that, in the daytime? A. About that time; just a little before twelve."

Michael R. Cullen, who lived near the locality, testified: "Q. Describe to the jury the lay of that ground as it was on the 20th day of last April at a point 15 or 20 feet west of the crossing. A. Well, it looked at that time, on the north track, that the rails were put in an entrenchment and left an embankment. (Defendant objects as incompetent.) Mr. Wright: Describe it as it appeared to you on that day. The Court: Not the track, but the ground on the north side of the track. A. It looked as if, though there was an embankment left there— (Defendant objects that witness should state the condition as he saw it.) The Court: Just state as you saw it. Mr. Wright: How did it appear to you? A. How did it appear to me? Q. Yes, was there a slope up from the track or not? A. There was a slope up from the track. Q. How much slope? About how much? A. Well, of course, as to measurement, I couldn't be very accurate about that; but after you are about a foot and a half from the track there is an elevation. At that time there was an elevation going up about, well, I should say a foot and a half, it looked to me, and then along a rough terrace of ground, and then another elevation all along there. The Court: Well, was there a wagon road on the north side of the track? A. Not a wagon road. Q. Couldn't teams drive through there? A. They could. Q. And how wide was this first elevation you spoke of? You say there was a sort of terrace about a foot and a half high? A. It appeared to be that. It might not be quite that much. Q. From where? From the track? A. Not from the track. It didn't begin at the track. It was off a distance of probably 14 to 18 inches from the track. Q. Was the ground level off from the track about 18 inches? A. The ground was level for about 18 inches. Q. Then the slope began? A. Then the slope began. Q. For about how far? A. Well, I should judge for about 18 inches. Q. Then

it was level again was it? A. Level probably six inches. Q. Sort of a step then? A. Exactly like a step. Then there would be a little mound beyond that again. Q. What do you mean by a mound? A. As if clay was thrown up on top of it. Q. Was it like a terrace? A. Something on that order."

Mary Cullen said: "Q. Just describe that crossing there. A. Directly west of the street, where we generally get off, there seems to be—I would call it—a slight hill, an elevation, or an embankment, rather rough and uneven on the surface and sloping side. It begins to slope very close to the car tracks on the north."

James H. McNamara said: "Q. Do you know about the height of the car steps above the track—the cars that run along there? A. They are about 18 inches above the track, and the edge of the step is out about 18 inches over the track—14 to 18. Q. Well, now, I want to ask you this: Suppose a person steps off of that car, and takes a step of about two feet, say, puts his foot on the ground, would the ground that he put his foot on be on the same level as the step, say at a point 15 feet from the crossing? A. Why, a person stepping off the car step on to the ground would step almost straight out, because the ground rises and catches their step. Q. Then where he would put his foot would be just about on a level with the step? A. About on a level with the step—about 18 inches above the track. Q. You just said that the step, I believe, was 18 inches above the track? A. Yes, sir. Q. Now, take it 20 feet west, how would it be? There it would be a little lower, as I understand, according to your testimony? A. At 20 feet the step would be shorter a person would have to take to reach the bank, because the bank is steeper, and hence nearer to the step. The lower the ground is, the further you have to step from the track—from the step of the car down. Q. Well, would a person stepping off from a car a step of about two feet—would his foot be placed on ground that was lower than the step, or on ground that was higher than the step? A. No; it would be placed on ground that was higher, because it is inclined all the way from the car track up the bank, and, no matter where you step on the bank, you would be stepping on the same incline."

Plaintiff got a verdict, and the defendant appealed.

Opinion.

The plaintiff was hurt in stepping from one of the defendant's trolley cars Sunday, April 20, 1902. Plaintiff and her sister, Miss Julia F. Lynch, had attended church that morning, and afterwards taken passage on a west-bound Cass avenue car to be carried to Euclid avenue. They signaled by ringing the bell before reaching the place where they wished to get off, which was the west crossing of the intersection of St. Louis and

Euclid avenues. But, instead of the car stopping at the crossing as usual, it moved past it, and stopped so that the rear platform was about 15 feet further west. After it had stopped, plaintiff's sister and another lady passenger got off safely, but when plaintiff stepped off she was instantly seized with a severe pain in her left leg, which transfixed her for a few moments on the spot where she stepped, and caused her to suffer for several weeks. The evidence as to what her injury was is indefinite, but we gather that she wrenched or sprained the muscles of her leg between the ankle and the knee.

The charges of negligence against the transit company are that the car crew failed to heed plaintiff's signal to stop at the crossing on the west side of Euclid avenue, and instead ran past the crossing, and stopped the car at a place where they knew it was dangerous to alight. The place is averred to have been a bank of earth, which subjected plaintiff to a great effort and strain in stepping from the platform of the car to the ground; but all the evidence went to disprove that averment. It is difficult to describe the spot so as to convey an accurate impression, and we must refer to the testimony which accompanies this opinion, from which the reader is likely to form an approximately true image. Some photographs were introduced in evidence, which exactly portray to the eye the configuration of the ground. The street was unmade there, and a low embankment of easy grade extended from the railway track to a level some six or seven feet away. The embankment is spoken of by the witnesses as a terrace, but it was no terrace in the proper sense of the word. At the point where the plaintiff got off there was a sort of rough shelf or step formed in the side of the slope, and a person stepping from the car step would naturally and easily put his foot down on a nearly horizontal, but not entirely smooth, surface. The plaintiff and her sister, both of whom testified with praiseworthy candor, said the spot looked to them to be perfectly safe.

The omission of the carmen to stop the car at the crossing was not the proximate cause of the injury to the plaintiff, because, while maybe the accident would not have happened if that had been done, passengers are constantly let off cars at other places than street crossings without harmful consequences. Most other portions of streets are as safe to alight on as crossings, and varieties of cars are constantly being used which permit passengers to board and alight anywhere along one side of a car, which, of course, contemplates their doing so away from crossings. There is an ordinance of the city of St. Louis requiring cars to stop at crossings for the convenience of the public in getting on and off, but this ordinance was not counted on or put in evidence; and, if it had been, we apprehend the question of plaintiff's responsibility would still turn on

whether the place where the car stopped was a safe one for alighting. What a street railway company or other carrier is bound by law to do in discharging passengers from a vehicle is to use high care to select a safe landing place, and in other ways to endeavor to land them safely.

The pivot of the case is whether there was evidence from which the jury could rightly deduce the inference that the place where plaintiff was discharged was unsafe, or that defendant ought to have foreseen there was danger of an accident if she was discharged there. She was willing to get off at that point, and waived the inconvenience incident to being carried past the crossing. The spot where she stepped to the ground appears to have been as safe as the crossing itself, or safer; for, instead of a downward step, she had to take a horizontal one. The time was just after noon, when every feature of the ground was visible. One may slip or wrench a muscle by stepping on a slightly uneven surface, small pebble, or other body in the street at any point; but the occurrence of such an accident does not necessarily authorize an inference of negligence on the part of any one. *Henry v. Ry. Co.*, 113 Mo. 525, 21 S. W. 214; *Ward v. Andrews*, 3 Mo. App. 275. And the particular accident under investigation presents no characteristic which bespeaks either that the defendant was negligent in selecting a landing place for the plaintiff, or even that the place selected was unfit. The occurrence rather falls in the category of pure accidents, for which, as human ken cannot embrace them, nobody is to blame. Blame for an accident attaches only when it was one to be foreseen and averted by the exercise of the degree or quantum of care which the law exacted of the parties concerned in the situation and relationship they were in at the time. *Fuchs v. St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; *Sullivan v. Ry. Co.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167; *Bowen v. Ry. Co.*, 95 Mo. 268, 8 S. W. 230; *Waller v. Ry. Co.*, 59 Mo. App. 410; *Banks v. Ry. Co.*, 40 Mo. App. 458. In this case the law imposed on the car crew the duty of exercising that high vigilance to prevent injury to the plaintiff which very cautious railway men are wont to exercise. If the place chosen for the plaintiff to land was safe, the carmen fully performed their duty, high though it was. As indicated, the fact that plaintiff got hurt as she did does not by itself justify the conclusion that the place was unsafe. The injury was a singular one, and is really unaccounted for by the evidence. If due to the unevenness of the ground where she stepped, the risk was of a trifling character, and no greater than is constantly encountered with impunity by multitudes of men every day. In some way she sprained her foot or leg severely as she stepped from the car; but there was nothing about the place where she alighted which suggested to her, or any

one who saw it, that an injury was likely to happen in getting off there. She testified she saw no danger; that she took an easy, natural step, nearly straight out from the lowest step of the car, and that the instant she put her foot on the ground a violent pain struck her. Her sister testified the same way concerning the apparent safety of the place; and all the testimony shows there was no risk, or even the least difficulty, in getting off a car there. The accident thus plainly presents itself as the result of pure chance, into which no blamable human agency entered as an active cause. The defendant cannot be held answerable from the fact that plaintiff got hurt in leaving its car while the car was standing at a safe place, although that place was a short distance from the one where passengers usually alighted. There was no tie of causation between the plaintiff's injury and any negligence of defendant, no negligence of the defendant being shown. The defendant, or other carrier, should not be the least remiss in the choice of landing places, and cannot lawfully be. It must choose them with great care; and, where there is an embankment or other surface fault which enhances the peril of alighting, the place is an improper one to discharge a passenger. But a careful study of the evidence in the present case discloses nothing tending to prove that the bank of dirt on which plaintiff stepped presented any perceivable difficulty or hazard.

The facts before us are like those in *Conway v. Lewistown, etc., Ry. Co.*, 90 Me. 199, 38 Atl. 110, which was to recover damages for a broken ankle, the injury having been caused by stepping on a loose stone in getting off a street car. In that case, as in this one, the assignments of negligence against the defendant were running the car past the crossing and stopping it at an unsafe place; that plaintiff complained in her testimony of a slight ditch or depression in the ground where she got off, but the excavation was not dangerous, nor the step she had to take in leaving the car long or difficult. The opinion said, assuming her description of the place to be accurate, that there was a failure to establish liability on the part of the defendant, since neglect to stop the car precisely at the crossing was not culpable, nor was the place of alighting difficult and unsuitable as to render it actionable negligence to permit a vigorous young woman to get off there. Further, that her injury was not the probable or ordinary result of stopping at that particular point, but was due to an event which could not have been anticipated.

As we find no evidence which has a tendency to prove the defendant's servants were guilty of any negligent act in their conduct toward the plaintiff, the judgment is reversed.

BLAND, P. J., and REYBURN, J., concur.

ASH & GENTRY v. CITY OF INDEPENDENCE.*

(Court of Appeals at Kansas City, Mo. Feb. 28, 1903.)

MUNICIPAL CORPORATION—BREACH OF CONTRACT—CAUSE OF ACTION—LIMITATIONS.

1. A cause of action against a city for failure to properly assess damages to property, by reason of which plaintiffs were prevented by injunction from completing a contract for improvements for the city and receiving pay therefor, accrues so that limitations commence to run at least from the time when plaintiffs were notified by the injunction of the city's failure in precedent performance.

Appeal from Circuit Court, Jackson County; John W. Henry, Judge.

Action by Ash & Gentry against the city of Independence. From a judgment for plaintiffs, defendant appeals. Reversed.

Paxton & Rose and W. S. Flournoy, for appellant. L. A. Laughlin, for respondents.

ELLISON, J. Plaintiffs were contractors in certain street improvements in the city of Independence. After having done a large part of the work, they were prohibited by an injunction obtained by a property holder from going on therewith, on the ground that the city had not had assessed the damages and benefits caused by said improvement, as required by law. The plaintiffs were thus prevented from completing the work. Tax bills were afterwards issued to plaintiffs for the work done, and these were declared invalid on two grounds—one, that the city levied the tax upon only a part of the property abutting upon the street improved; and the other, that the whole work had not been completed. *City of Independence v. Gates*, 110 Mo. 874, 19 S. W. 728. The plaintiffs brought the present action against the city for damages on the ground that, by the fault of the city in not having the damages assessed, they were prevented from completing the work, and were thereby deprived of valid tax bills. On a trial, judgment was given for the city, and plaintiffs appealed the case to the Supreme Court, where it was transferred to this court. 145 Mo. 120, 48 S. W. 749. That result was reversed in this court, and the cause remanded for new trial; this court holding the city liable on the case there presented. *Ash & Gentry v. Independence*, 79 Mo. App. 70. On a retrial an amended answer was filed, in which, among other defenses, the statute of limitations was pleaded, and a constitutional question was attempted to be raised. Plaintiffs obtained judgment for damages, and defendant appealed to the Supreme Court, and that court, being of the opinion that there was no constitutional question presented, transferred the case here.

These facts appear on the question of limitation: The contract for the improvement was made by these plaintiffs August

8, 1887. By its terms, work was to be begun within 10 days thereafter, and was to be completed within 20 days after that, viz., September 7, 1887. Time was stipulated as a condition of the contract. The injunction which stopped plaintiffs from work was issued September 17, 1887, and was made perpetual March 15, 1888. This action was begun more than five years thereafter, to wit, on March 25, 1893. We determined in the case of *Brady v. St. Joseph*, 84 Mo. App. 399, that the five-year period of limitations applied to a case of the kind before us. The question then is, when did plaintiffs' cause of action accrue against the defendant city? It accrued on the first day that plaintiffs might have instituted their action. The contract was that plaintiffs should make full performance by September 7, 1887. That implied that defendant would perform all duties on its part necessary as a prerequisite to plaintiffs' performance. So soon, therefore, as defendant's act of omission in failing to have damages and benefits assessed necessarily prevented plaintiffs from performance within the time they were bound to perform, they had a right to abandon it and look to defendant for consequent damages. They were not bound to wait further. They were not bound to put up with either defendant's caprice or indifferent neglect. If they were, how long must they wait before their right to sue would come about? It is not pretended that defendant complied with its duty to plaintiffs in the respect referred to, and the case shows that an injunction put an end to the work on that account; and though the work, with the apparent acquiescence of all concerned, proceeded from September 7th, the contract date for its completion, until September 17th, the date of the injunction, yet at that date, at least, defendant's wrongful omission became effective in stopping plaintiffs' performance. And it then, at least, became known to plaintiffs that defendant had itself abandoned the contract by failing in precedent performance on its part. The facts existed at that time to complete plaintiffs' cause of action, and from that time the statute began to run. It follows that plaintiffs' action is barred by the statute.

Plaintiffs contend that the city had a reasonable time in which to perform the duty of having an assessment of damages and benefits. This contention is answered in what we have already said of the contract.

The further contention is made that defendant, by its conduct, was estopped from setting up the statute of limitations. It is sufficient to say of this that no such issue was made by the pleadings in the trial court.

The judgment is reversed. All concur.

On Rehearing.

(Nov. 9, 1903.)

BROADBUSH, J. An opinion was delivered in this case on the 2d of February, 1903. A

*Rehearing denied December 7, 1903.

motion for rehearing was sustained, and the cause resubmitted at the October term of the same year. After reconsideration, we are of the opinion that the first holding was right. The rule in *Heman v. Gilliam* (Mo. Sup.) 71 S. W. 163, afterwards followed in *Sparks v. Villa Rosa Land Co.* (Mo. App.) 74 S. W. 120, which plaintiff insists governs in this case, we do not believe has any application whatever. In each one of those cases the controversy was between the contractor and the landowner, and no reference was made to the statute of limitations. The former opinion in this case is therefore adopted, and the cause reversed. All concur

DERGE et al. v. HILL et al.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

ESTATES OF DECEDENTS — REMAINDER IN HOMESTEAD — LIABILITY FOR DEBTS — FAILURE TO ENFORCE LIABILITY — ADMINISTRATOR DE BONIS NON.

1. The estate in remainder in a homestead is subject to sale during administration for the payment of claims against the estate.

2. Where for 14 years the creditors of a decedent's estate, knowing that there was a deficiency of assets, permitted the administrators to neglect to sell the estate in remainder in the homestead, and made no protest on final settlement of the estate, they could not obtain the appointment of an administrator de bonis non for the purpose of selling such estate.

3. Laws 1903, p. 52, providing that if, after final settlement of an estate, assets be discovered, letters of administration of such assets shall be granted to those to whom administration would have been granted if the original letters had not been obtained, did not warrant the appointment of an administrator de bonis non to sell the estate in remainder in the homestead, there having been no assets "discovered."

Appeal from Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Application by A. Derge and others against Jefferson Hill and others for the appointment of an administrator de bonis non of the estate of Thomas Hill, deceased. From a judgment of the circuit court affirming a judgment of the probate court denying the application, applicants appeal. Affirmed.

R. L. Spencer and Wm. Utz, for appellants. W. B. Norris and Joseph Morton, for respondents.

ELLISON, J. This proceeding is an application by creditors for the appointment of an administrator de bonis non of the estate of Thomas Hill, deceased. The probate court and the circuit court, on appeal, denied the application, and the applicants have brought the case here.

It appears that Hill died in 1888, leaving a widow and children and both real and personal property. The real estate consisted of 451 acres of land, and the personalty

amounted to more than \$4,000 in value. Letters of administration were taken out in September, 1888, and demands amounting to more than \$8,000 were allowed within two years. These demands being far in excess of the personal estate, the probate court, on August 4, 1890, ordered the administrators to take charge of and rent the real estate. A few days thereafter the administrators presented their petition to that court for an order of sale of the real estate, and on the same day the widow asked that her homestead therein be set off. The homestead was duly set off January 15, 1891, amounting to 77 acres of the land. On February 15, 1891, the court ordered the real estate sold, including the remainder in the 77-acre homestead. Different parts of the land were sold at different times, there being nine renewal orders of sale, until all was sold save the remainder in the homestead. The proceeds of sales were applied on claims against the estate. Finally, on due notice given, the administrators made final settlement, which was approved March 6, 1890, and they were ordered to distribute the money remaining in their hands to the creditors and take vouchers, when in August, 1902, 14 years after the beginning of administration, they were discharged. The appointment of an administrator de bonis non is sought for the purpose of now subjecting to sale the estate in remainder of the homestead.

We entertain no doubt of the correctness of the ruling of the trial court. It is now sought to have what may be termed a new administration of the estate to do that which was, without cause or excuse, left undone in the original administration. The estate in remainder in the homestead of the widow was subject to sale during the whole course of the former administration (*Keene v. Wyatt*, 160 Mo. 1, 60 S. W. 1037, 63 S. W. 116), and it was in fact ordered to be sold. Yet, during a course of 14 years, with a full knowledge of a deficiency of assets, these creditors permitted the administrators to neglect its sale, and stood by, without appeal or protest, when final settlement was made of the estate. They had means of forcing then what they vainly seek to have done now. To permit an order of sale to be made now (which is the ultimate object of this proceeding) should not be allowed. *Gunby v. Brown*, 86 Mo. 253.

The point has been made that the property now sought to be subjected to the payment of debts was in the former administration—was administered upon—and, in consequence, its liability to disturbance by administration de bonis non was ended and closed with the judgment of final settlement duly rendered and unappealed from. Authorities thought to be applicable have been cited by each party. But, in the view we have taken above, it is not necessary to pass on that question.

2. It is suggested by the applicants that

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1361.

the recent Laws of 1903, p. 52, entitle them to maintain this proceeding. That law reads as follows: "If all the executors or administrators of an estate die or resign, or their letters be revoked, or after final settlement of an estate is had and the executor or administrator has been discharged, unadministered assets of the estate be discovered after such final discharge and there are unpaid allowed demands against said estate, in cases not otherwise provided for, letters of administration of the goods remaining unadministered shall be granted to those to whom administration would have been granted if the original letters had not been obtained; and the administrator shall perform the like duties and incur the like liabilities as the former executors or administrators." That statute refers to assets discovered after final settlement. In this case there were no assets afterwards found. The homestead was administered upon. It was set off to the widow, and the remainder was ordered to be sold, as above set out. There is no reason in calling it an after-discovered asset, and no room exists for the application of the statute.

The judgment is affirmed. All concur.

WABASH R. CO. v. BOWRING et al.
(Court of Appeals at Kansas City, Mo. March 2, 1903.)

**EXEMPTIONS—RIGHT TO CLAIM—EQUITABLE
SET-OFF—CROSS-JUDGMENTS
—ASSIGNMENT.**

1. The exemption by Rev. St. 1899, § 3159, of a certain number of hogs, sheep, and cows to the head of a family, is for the purpose of furnishing food, and does not cover a hog chiefly valuable and used for exhibitions on account of its great size.

2. The right given the head of a family by Rev. St. 1899, § 3162, to claim any property to a certain value as exempt, in lieu of articles specifically exempt, is personal to him, and, having assigned a judgment without making such claim, the assignee cannot make it.

3. Equity will set off plaintiff's judgment against defendant's, plaintiff's being prior to defendant's, and for costs, in an action on the same cause of action, and defendant being insolvent.

4. Plaintiff's right to have his judgment against defendant set off against defendant's judgment against plaintiff is not affected by defendant's equitable assignment of half of his judgment, plaintiff not assenting thereto, or by his assignment of all of it, the assignee taking with knowledge of plaintiff's prior judgment.

Appeal from Circuit Court, Johnson County; Wm. L. Jarrott, Judge.

Suit by the Wabash Railroad Company against A. P. Bowring and others. Judgment for defendants. Plaintiff appeals. Reversed.

George S. Grover, for appellant. Chas. E. Morrow, for respondents.

ELLISON, J. This is a proceeding in equity whereby the plaintiff seeks to have its judgment against defendant Bowring set off

against his judgment against plaintiff. The trial court refused plaintiff's prayer, and it duly appealed to this court.

The case has a lengthy history. It has been twice before in this court. Bowring sued the plaintiff railway company in Clay county for negligence in killing a hog owned by him of enormous size, alleged to weigh 1,500 pounds, and to be of the value of \$1,500. After one or two trials without result he failed in the trial court, and on appeal here the judgment was reversed and the cause remanded. 77 Mo. App. 250. At the next trial the defendant (Bowring) dismissed his case at the close of the evidence, and judgment was rendered against him in this plaintiff's favor for costs amounting to \$361.18. Execution was issued against him for such costs, and returned nulla bona. This plaintiff was then compelled to pay and did pay said sum. Defendant (Bowring) afterwards brought a new suit in Jackson county, alleging "that on the 14th day of September, 1896, plaintiff was the owner of an exceedingly valuable animal of the swine species. Said animal was three years of age, and was about the weight of 1,500 pounds, measured 7 feet and 9 inches in length, and 7 feet 6 inches around the girth, and was 42 inches in height. Said animal was used by plaintiff for exhibiting in covered tent at fairs and other public assemblies for profit and gain, and for the purposes so used, and by reason of its enormous size and education, was of the reasonable value of fifteen hundred dollars, all of which defendant had full knowledge." A change of venue was taken to Johnson county, where in March, 1900, plaintiff obtained judgment for \$225 as the value of the hog, which he immediately assigned to defendants Hollis and Houts. This judgment was affirmed in this court. 90 Mo. App. 324. The parties were thus left each with a judgment against the other. Plaintiff then instituted this proceeding for the purpose stated at the outset.

At the trial it was shown, among other things, that Bowring was the head of a family, and that he had no property. It was further shown that he gave written notice of claim to the sheriff of Johnson county, January 11, 1902 (about two years after obtaining his judgment in Johnson county and assigning it to Hollis and Houts), to the judgment as selected by him in lieu of other property, he having none other.

The ground upon which defendants seek to sustain the judgment of the trial court is that the hog was specifically exempt from execution against defendant Bowring under section 3159, Rev. St. 1899, which, in the first and second division thereof, exempts the following property when owned by the head of a family: "First, ten head of choice hogs, ten head of choice sheep and the product thereof in wool, yarn or cloth, two cows and calves, two plows, one ax, one hoe and one set of plow gears, and all necessary farm im-

plements for the use of one man; second, two work animals, and feed of the value of twenty-five dollars for the stock above exempted." The statute, in a subsequent section (3162), then permits the claimant, at his election, to select, in lieu of the property mentioned in these two divisions, any other property, not exceeding in value the sum of \$300.

The claim is that a hog, being specifically exempt and being the only property owned by a debtor, is exempt without the necessity of selection by the debtor; and that, being exempt, it could be sold without becoming subject to execution. We have no doubt of the correctness of that statement of the law.

Defendants are also right in their further contention that, being so exempt, a judgment for its value, when lost, is also exempt. *Crawford v. Carroll*, 93 Tenn. 661, 27 S. W. 1010, 26 L. R. A. 415, 42 Am. St. Rep. 943; *Howard v. Tandy*, 79 Tex. 450, 15 S. W. 578; *Below v. Robbins*, 76 Wis. 600, 45 N. W. 416, 8 L. R. A. 467, 20 Am. St. Rep. 89; *Wylie v. Grundysen*, 51 Minn. 360, 53 N. W. 805, 19 L. R. A. 33, 38 Am. St. Rep. 509; *Stebbins v. Peeler*, 29 Vt. 289; *Thompson on Homesteads*, §§ 748, 749.

Analogous to this principle is the doctrine that insurance money or a judgment for insurance on exempt property is also exempt. *Thompson on Homesteads*, § 750; *Wright v. Brooks*, 101 Tenn. 601, 49 S. W. 828; *Ellis v. Pratt City*, 111 Ala. 629, 20 South. 649, 33 L. R. A. 264, 56 Am. St. Rep. 76; *Puget Sound Packing Co. v. Jeffs*, 11 Wash. 466, 39 Pac. 962, 27 L. R. A. 808, 48 Am. St. Rep. 885.

But was the particular hog over which this litigation began exempt within the meaning of the statute? We think it was not. The primary purpose in keeping hogs is for food, and, evidently, the object of the statute in exempting 10 head of hogs was to afford the debtor and his family the use of them for food. That would include, incidentally, their propagation as well as their sale to others, who would, in turn, use them for such purposes. In each of these uses they are subserving their primary purpose; that is, the animals are kept in existence, and they are bartered from man to man for food. The hog in controversy was one of abnormal size and weight, and the value of which consisted, not in either of the purposes just mentioned, but as a show hog, exhibited over the country from place to place in a tent, for pay. The animal was so profitable in that way that it was withdrawn from the ordinary uses to which such animals are put, and devoted to purposes wholly outside those contemplated by the Legislature.

As illustrative of this view of the statute, we refer to the provision of the exemption laws of most states that one or more work animals shall be exempt, upon which it is held that if a stallion is kept alone for

breeding purposes he would not be within the statute. *Robert v. Adams*, 39 Cal. 383, 99 Am. Dec. 413; *Kreig v. Fellows*, 21 Nev. 307, 30 Pac. 994; *Smith v. Dayton*, 94 Iowa, 102, 62 N. W. 650; *Allman v. Gann*, 29 Ala. 240. In the last case it was said that "if the horse was kept for a business or livelihood outside of the comforts, the wants, and requirements of the family, and of its several members, then such horse is not exempt."

Notwithstanding a debtor may not be allowed to claim an article of property as specifically exempt under section 3159, yet, as said above, if no claim is made under that section he may claim the same property under section 3162. In this case, though Bowring valued the hog at \$1,500, the jury valued it at only \$225; and, accepting the latter sum as the true value, he insists that, as he had no other property, his claim of exemption should be allowed him under the latter section. The difficulty with such claim is that it has been ruled by this court in a well-considered opinion written by Judge Hall that the right to select property under the latter section in lieu of that made specifically exempt under the former is a personal privilege of the debtor, which cannot be transferred to another; that if the debtor elects to claim under the latter section, and makes his selection of property, he may then sell it, and the purchaser will also hold it exempt; but, if he sells the property before he makes the selection, the right of selection does not pass to the purchaser. *Hombs v. Corbin*, 20 Mo. App. 497, 507. That view was concurred in by Judge Phillips in a separate concurring opinion, which by oversight was not published. That case was approved by the St. Louis Court of Appeals in *Stotesbury v. Kirtland*, 35 Mo. App. 148, 156; and the same is decided in *Alt v. Bank*, 9 Mo. App. 91; *Taylor v. Switzer*, 110 Mo. 410, 19 S. W. 735; *Keithley v. Southworth*, 75 Mo. App. 445. And the same proposition of law was clearly stated in *Hombs v. Corbin*, when in this court, on the second appeal (34 Mo. App. 393), though by inadvertence it was said that the contrary was held when the case was first here. That statement doubtless came to be made by the court mistaking on the second appeal the date when the notice of claim of selection of exempt property was made. The record shows the date of that notice was April 16, 1886, more than three years after the debtor had sold the property. In this case Bowring had no property but the hog, and, it not being specifically exempt under section 3159, he, ordinarily, had the right to select it (that is, the judgment for its value) under section 3162; but, as we have already stated, he transferred his interest in the judgment, and thereby all right of exemption ceased under the latter section.

The judgment should be reversed, and cause remanded. All concur.

Supplementary Opinion.

(Nov. 23, 1903.)

SMITH, P. J. The plaintiff's judgment antedated that of the defendant, and the moment the latter was recovered, the defendant being insolvent, the plaintiff's equitable right of set-off attached to it, and became a right which a court of equity, when its interference is appropriately invoked, will enforce. The mere fact that the plaintiff and defendant Bowring each had a judgment against the other was not sufficient to justify a set-off in equity. A set-off is ordinarily allowed in equity only where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. 2 Story's Eq. Juris. § 1436. Where a party has a plain redress at law, chancery will generally refuse to assume jurisdiction. Where the demand sought to be set off is certain and definite, and the insolvency of the adverse party is admitted, the chancellor has jurisdiction to retain the matter and give full redress by decreeing a set-off. The rule is founded in reason and justice, and will be enforced when a proper case is made out. *Field v. Oliver*, 43 Mo. 200; *Barnes v. McMullins*, 78 Mo. 260; *Footte v. Clark*, 102 Mo. 394, 14 S. W. 981, 11 L. R. A. 861; *Fulkerson v. Davenport*, 70 Mo. 541. And so it has been ruled that, if a party seeking the benefit of a set-off show that the adverse party is insolvent, this will be sufficient to justify the intervention of a court of equity to protect him against his adversary's judgment. And such a case being distinctively one of equitable cognizance, it is governed by the principles and rules of procedure applicable to proceedings in equity. *Gemmell v. Hueben*, 71 Mo. App. 291; *Wendover v. Baker*, 121 Mo. 273, 25 S. W. 918.

There is a great variety of cases asserting the rule and illustrating its application, but the underlying and persuading principle which moved equity in all of them was the injustice of compelling the defendant to pay the demand against him, and take the uncertain claims of insolvency of the plaintiff when called upon with an execution. *Barnes v. McMullins*, 78 Mo. 260, and cases there cited; *Footte v. Clark*, 102 Mo. 398, 14 S. W. 981, 11 L. R. A. 861; *Gemmell v. Hueben*, 71 Mo. App. 291. In all these cases there had to be some fact, such as insolvency or nonresidence, disclosing the imminent danger of the defendant being compelled to pay without receiving credit for his cross-demand.

"The right of set-off is not an equity which the original debtor may, at all events, assert against the assignor or assignee of the debt, whether he has or has not notice of its existence. There is no such equity to have debts set off against each other which attaches to the debts themselves and travels with them into whatsoever hands they may come, though it is doubtless true that where there are mutual subsisting debts, and either an express

or implied agreement of stoppage pro tanto or mutual credit, a court of equity will enforce it against his assignee with notice." *Wolcott v. Sullivan*, 1 Edw. Ch. 390. The right of set-off does not attach to the debt itself, nor depend upon the mutuality of the debts in their origin as an inherent quality belonging to such debts, but upon the situation and rights of the parties between whom it is sought to be enforced. It is a privilege attaching to the remedy only. *Greene v. Darling*, 5 Mason, 201, Fed. Cas. No. 5,765; *Waterman on Set-Off*, § 17. It has been held by us that in actions at law, where the right of exemption exists, the right of set-off will not overthrow it. *Wagner v. Carpet Co.*, 63 Mo. App. 206; *Lewis v. Gill*, 76 Mo. App. 504. And so it has been held in a Pennsylvania case (*Wilson v. McElroy*, 32 Pa. 82) that, in an action against an officer for seizure under an execution property of a defendant exempt by statute, the execution debt could not be "defalked against the damages" recovered for the wrongful seizure. And we take it that while the chancellor, in enforcing the equitable right of set-off, will most generally follow the exemption statutes, yet he will not always do so, for there may be facts and circumstances disclosed which equity and good conscience would require the enforcement of the right notwithstanding the statute. This principle finds illustration in *Duffy v. Duffy*, 155 Mo. 144, 55 S. W. 1002, where an insolvent son, the head of a family, who owed a debt of record,—a judgment to his deceased father's estate,—was denied his statutory exemptions until that debt was paid. And in *Lietman's Case*, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374, it was held that the statute of exemptions could not be invoked by an heir to exempt his interest in the real estate of his deceased father as against a debt he owed the estate. The statute of exemptions, though invoked, was by our Supreme Court held inapplicable in each of these cases. And this ruling, it was declared, rested upon the wholesome principles of right and justice.

It seems that Bowring brought an action against the plaintiff carrier for a breach of a contract of affreightment, and failed to make out his case, and judgment was given against him for costs; and in another action on the same contract he succeeded in obtaining judgment. It is now insisted that Bowring is entitled to have his judgment satisfied by plaintiff without satisfying that of plaintiff herein against him. The only ground upon which this insistence rests is that Bowring is the head of a family, and therefore his judgment against plaintiff is exempt under the statute.

Bowring may well felicitate himself on the forbearance of the court to require of him in the action in which he recovered the judgment to pay the cost that had been adjudged against him in the other suit in which he was unsuccessful as a condition upon which he would be allowed to further prosecute that

action. Surely, it cannot be that after being allowed to prosecute his several actions without payment of any cost, and that after he succeeds in the last one to obtain a small judgment, much less than that previously rendered against him for cost, a court of equity in a proceeding of this kind will refuse to decree that his judgment be set off by that of the plaintiff herein. It seems that the amount of the cost which Bowring was adjudged to pay plaintiff was due to officers of the court and witnesses, and for which the plaintiff was primarily liable under the statute, and that these costs it has paid. The plaintiff has thus paid for Bowring a greater sum than that of his judgment against it, and now to require it to satisfy the judgment against it under such circumstances would be most inequitable and unconscionable.

We cannot think that in a case like this the equitable right of set-off ought to be denied because the statute of exemption is invoked. A decree that would in effect require the plaintiff to pay the insolvent Bowring the amount of his judgment against it before he pays that of plaintiff against him, under the circumstances, if not *contra bonos mores*, would, in our opinion, be so inequitable and unjust that a chancellor would hesitate long before ordering it to be entered. As between plaintiff and Bowring, we see no reason why the equitable doctrine may not be appropriately invoked and applied.

The contention of defendants Hollis and Houts that Bowring had a statutory right to claim and hold his judgment against plaintiff as exempt property was discussed and disposed of adversely to them in the opinion to which this is supplementary, and, as no reason is now seen for a different disposition of it, it must stand undisturbed.

But Hollis and Houts claim that the latter made an agreement with Bowring before any of the several actions were brought against the plaintiff that he was to have one-half of whatever the amount of the recovery should be as a fee for his services therein, and that the assignment was made to secure them as to that. It sufficiently appears from the record that Hollis was entirely familiar, not only with the litigation that was carried on between Bowring and plaintiff through all of its various stages, but that he was fully apprised of Bowring's insolvent condition, and he must be held to have had full knowledge of the existence of plaintiff's judgment at the time of the assignment of Bowring's judgment against plaintiff. In this state such an assignment gives an attorney no lien on the judgment for his fee (*Skinker v. Smith*, 48 Mo. App. 91), and even in those jurisdictions where such a lien is given an assignment of the judgment prior to the motion to have the set-off made will not defeat the right of set-off (*Yorton v. Ry. Co.*, 62 Wis. 387, 21 N. W. 516, 23 N. W. 401; *Marshall v. Cooper*, 43 Md. 46; *Levy v. Steinbach*, Id. 212; *Waterman on Set-Off*, § 361). And the reason of the

rule is said to be that the assignee attorney stands in no better position than the judgment creditor, and is subject to the same equitable rights which existed in favor of the adverse party. *Gano v. Ry. Co.*, 60 Wis. 12, 17 N. W. 15; *Yorton v. Ry. Co.*, supra; *Graves v. Woodbury*, 4 Hill, 559, 40 Am. Dec. 296; *Hovey v. Morrill*, 61 N. H. 9, 60 Am. Rep. 315; *Rowe v. Langley*, 49 N. H. 395. And so it has been held in New York that the lien of an attorney given by the law of that state has always been regarded as subject to the equitable right of set-off between the parties. *Sanders v. Gillett*, 8 Daly, 183; *Ward v. Wordsworth*, 1 E. D. Smith, 598; *Spence v. White*, 1 Johns. Cas. 102; *Pinder v. Morris*, 3 Caines, 185; *People v. New York Common Pleas*, 13 Wend. 649, 28 Am. Dec. 495; *Brooks v. Hanford*, 15 Abb. Prac. 342. And so, too, it has been expressly held in Maine and California, and perhaps elsewhere, that if the right of set-off had attached at the time of the assignment, as in this case, the assignee must take the demand cum onere with the right of set-off still clinging to it; or, which is the same thing, neither of the parties assigning his judgment to a third party could have defeated the right of the other to have his judgment set off. *McBride v. Fallon*, 65 Cal. 301, 4 Pac. 17; *Peirce v. Bent*, 69 Me. 381; *Chase v. Woodward*, 61 N. H. 79; *Langston v. Roby*, 68 Ga. 406; *Wells, Fargo & Co. v. Clarkson*, 5 Mont. 336, 5 Pac. 894; *Irvine v. Myers*, 6 Minn. 562 (Gil. 398).

Crecellus v. Bierman, 72 Mo. App. 355, was a case where there was a motion to set off cross-judgments. It appears from the report of the case that on a certain date Crecellus had recovered judgment in an action of slander against Bierman for \$500, and that afterwards the latter recovered judgment against the former for a much larger amount. It was sought by Bierman to set off his judgment against the prior judgment of Crecellus. It was shown that Crecellus had, prior to the bringing of the slander suit, entered into an agreement with his attorney to give him for his services in the case 50 per cent. of the amount of the recovery, and it was held that this operated as an equitable assignment of one-half of the judgment; citing *Schubert v. Herzberg*, 65 Mo. App. 579. But it was further held that as to the judgment defendant, being only an assignment for a part of the judgment without the consent of the judgment defendant, the latter was not bound thereby, and that his right to set off the whole judgment by his cross-judgment was not affected by the equitable assignment of his attorney; citing *Bank v. Noonan*, 88 Mo. 372; *Loomis v. Robinson*, 76 Mo. 488; *Burnett v. Crandall*, 63 Mo. 410; *Love v. Fairfield*, 13 Mo. 301, 53 Am. Dec. 148.

In *Black on Judgments*, § 954, it is said that "most of the cases [citing them in note 81] seem to agree in the rule that where a judgment recovered by the plaintiff has been assigned to his attorney in good faith, in pay-

ment for his services in the action, the court should refuse to set off against it that recovered by defendant against plaintiff prior to the assignment," provided the attorney taking the assignment had no notice of such prior judgment. As Hollis had, as has been stated, notice of the prior judgment at the time of the assignment of the latter to him, this rule is inapplicable here. There is much diversity of opinion among the courts as to when or to what extent or under what circumstances one judgment may be set off against another after the assignment to a third party, as may be seen by reference to the cases cited in note 78 to section 954 of Black on Judgments. We have not gone to the great length that many of them have in applying the right. We have gone no further than to declare, if the assignee has notice of the other judgment at the time of taking the assignment, that he will take subject to the equitable right to set it off. *Skinker v. Smith*, 48 Mo. App. 91.

The plaintiff did not assent to the equitable assignment of Bowring to Hollis of 50 per cent. of the amount of the judgment, and so it was ruled in *Crecelius v. Bierman* that such assignment was inoperative as to the plaintiff. So that the claim of Hollis and Houts is entitled to no consideration on account of the prior agreement made between Bowring and Hollis, as respecting the fee for his legal services. And since Hollis and Houts at the time of the assignment occupied no situation superior to that of any other creditor, and since they took the assignment as a security for the amount of the fee which Bowring owed to them with full knowledge of the existence of the plaintiff's prior judgment to which the right of set-off attached, it seems clear to us that the plaintiff's right of set-off should have been upheld by the trial court; and accordingly its decree is reversed, and cause remanded. All concur.

In re HILL'S ESTATE.

STRODE, Public Adm'r, v. BIERMAN.*

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

ADMINISTRATORS—WHO ENTITLED TO ADMINISTRATION—NONRELATIVES—PUBLIC ADMINISTRATORS—DUTIES—APPOINTMENT—EXECUTORS—APPOINTMENT BY WILL.

1. Where the public administrator takes charge of an estate of a person dying intestate, without known heirs, under Rev. St. 1899, § 292, making it his duty so to do, and files notice of the fact in the office of the probate clerk, as required by section 295, no appointment by the probate court is required, to invest him with his office.

2. Under Rev. St. 1899, §§ 7-11, giving priority in administration first to the husband or wife, then to the distributees, and providing for the appointment of some other suitable person by the court when the persons entitled fall

to apply, a nonrelative and stranger in blood to deceased is not entitled to letters as a matter of right.

3. While no particular form of appointment of an executor in a will is required, and any language which expressly or impliedly clothes a given party with executorial authority is sufficient, yet the court must be able to gather a testamentary intent that the person named shall take charge of the estate, collect the assets, liquidate the debts, and perform the duties and possess the powers usual to the office of executorship.

4. A will bequeathing lawbooks and office furniture to A., expressing a desire that he send his effects to his executors, and that his private letters be burned without being read, and that A. direct anything that might be done about testator's affairs in a certain city in connection with the will, did not constitute A. executor, in view of the fact that testator was a lawyer, acquainted with the use of such terms, and in another clause had expressly requested certain legatees to act as executors.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

In the matter of the estate of Edwyn W. Hill, deceased. Petition by Paul H. Bierman for appointment as administrator of said deceased, and for the removal of Garrard Strode, public administrator. From a judgment of the circuit court, on appeal from the probate court, denying the application of said Bierman, he appeals. Affirmed.

Johnson, Houts, Marlatt & Hawes, for appellant. J. K. Hansbrough, for respondent.

REYBURN, J. On the 20th day of July, 1901, Edwyn W. Hill, an attorney at law, died in the city of St. Louis, unmarried, without relatives or kin in the state of Missouri, and, so far as was known at the time of his decease, intestate. On the 24th of July, 1901, the respondent herein, Garrard Strode, public administrator of the city of St. Louis, took charge of the estate, consisting in this jurisdiction wholly of personalty, and filed notice in obedience to sections 292, 295, Rev. St. 1899. Thereafter, in due course, he published notice to the creditors, prepared and filed inventory and appraisement, and continued to administer the estate up to the time hereinafter indicated. After the public administrator, by virtue of his office, had taken charge of the estate, a will was found in Canada, probated the 26th day of May, 1902; and on the 4th of June, 1902, appellant addressed a motion or petition to the probate court of the city of St. Louis, setting forth the facts above narrated; averring that the probate of the will had been confirmed by the probate court of the city of St. Louis, and that by the nineteenth clause the testator had expressed his desire that the appellant (petitioner therein) might have charge of and direct the administration of the estate situate in the city of St. Louis under said will; and concluding with a prayer for the revocation and annulment of the authority of Strode, and the granting of letters testamentary or of administration to administer the estate in Missouri to petitioner in com-

*Rehearing denied December 1, 1903.

¶1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 124.

pliance with the expressed desire of the testator. Upon a hearing on the 23d day of September, 1902, the probate court sustained the application, and revoked the authority of Strode, from which order Strode, on the 20th of October, 1902, appealed to the circuit court of the city of St. Louis, where the cause was submitted to the court upon an agreed statement of facts. No declarations of law were asked or given, and a judgment was rendered overruling the application of Bierman, and confirming the authority of Strode to administer the estate under the will, from which Bierman, after due preliminary steps, has appealed to this court. On the 26th of May, 1902, Strode again filed notice in the office of the clerk of the probate court that he had again taken charge of said estate to administer under the will; and on the 21st day of October, 1902, letters of administration d. b. n. c. t. a. were granted to Bierman.

In addition to a recital of the foregoing facts, the agreed statement displayed intact the will of Edwyn W. Hill, the deceased—a lengthy instrument, comprising 20 clauses. After various recitals, specific legacies, and bequests, not affecting this controversy, the document contains the following clauses:

"9th. I bequeathe and will to my old friends, Col. F. A. Benson and Seth S. Smith, the sum of fifty dollars each and request them to act as my executors. * * *

"14th. I will and bequeathe my lawbooks in St. Louis to Paul H. Bierman, also my office desk, and desire him to send my effects to my executors. I also desire my private letters to be burned without being read. * * *

"19th. I desire Mr. P. H. Bierman to direct anything that may be done about my St. Louis affairs in connection with this will; his address is 816½ Chestnut St., St. Louis, Mo."

Under section 292, Rev. St. 1899, in July, 1901, in the absence of knowledge of any will, and under the facts as they appeared and were believed to exist, it was the duty of the respondent, as public administrator, to take charge of the estate of the deceased; and if subsequently the situation had continued without change, and no will had been discovered, his right to administer would doubtless never have been assailed. No appointment by the probate court was required, for where the public administrator, of his own motion, has taken charge of the estate of a deceased under any of the specifications now contained in the above section, and has given notice under section 295, his attitude towards such estate is the same as if he had taken charge under letters of administration or upon order of the probate court. *Leeper v. Taylor*, 111 Mo. 322, 19 S. W. 955; *Vermillion v. Le Clare*, 89 Mo. App. 60. Appellant, a nonrelative and stranger in blood to the deceased, could not have applied for letters as a matter of right under the provisions of the statute (Rev. St. 1899, §§ 7-11).

Neither, under the view we take, did the will confer any right of administration upon, or exhibit that the deceased desired him to administer the estate in Missouri. The appointment of an executor may be constructive as well as express. No particular form of appointment, nor the use of the word "executor," is required. Any language adopted in the will which expressly or by fair implication clothes a given party with the authority and duties of an executor will be held to constitute such appointment. But the court must be able to gather a testamentary intent that the party named should take charge of the estate, collect the assets, liquidate the indebtedness, and perform the duties and possess the powers usual to the office of an executorship. *Schouler, Executors* (3d Ed.) pp. 49, 50, pars. 38, 37; *Woerner, Administration* (2d Ed.) § 229, pp. 503, 504. Applying this well-established rule, the language of the two clauses of the will of Hill, in which alone he mentions appellant, fall short of exhibiting any testamentary purpose on the part of the deceased that appellant should administer his affairs in the city of St. Louis. The fourteenth clause expresses the desire that the private letters of the testator should be destroyed unread, and creates appellant devisee of his lawbooks and office desk. The nineteenth clause denotes the wish that appellant should direct anything that might be done about the St. Louis affairs in connection with the will, giving appellant's business address. It should also be borne in mind that the testator was himself a lawyer, necessarily familiar with the import of the title of executor, and by clause ninth had nominated, in express terms, executors, and in the subsequent course of the instrument, in the fourteenth clause, the first naming appellant, had alluded to his executors as such. The rights of appellant and the duties of respondent were not affected by the production of the will, since it was silent respecting who should be intrusted with the administration of the estate in this jurisdiction. The respondent was performing the obligation devolved on him by statute in taking charge of the estate under color of his office, and respondent had no legal authority to apply for or have issued to him letters testamentary or of administration, the latter of which, in lieu of the former, he had chosen to be invested with.

The judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

BRIERRE et al. v. CEREAL SUGAR CO.
(Court of Appeals at St. Louis, Mo. Nov. 11, 1903.)

PLEADING—EXHIBIT IN COMPLAINT—
VARIANCE—EVIDENCE.

1. An exhibit in a complaint for goods sold and delivered, showing the date and parties to

the transaction, and the amount, brand, and price of sugar sold, is sufficient, under the statute, to authorize the admittance of evidence to support it.

2. A declaration on quantum meruit for goods sold is supported by proof of an express contract.

3. An offer in evidence of an abandoned count which declared upon a contract of defendant to insure goods stored by it was properly excluded as immaterial where the issue was on a count for goods sold and a general denial.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Suit by Maurice E. Brierre and another against the Cereal Sugar Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

E. T. & C. B. Allen, for appellant. Abbott & Edwards, for respondents.

REYBURN, J. This suit, as originally brought, appears to have embraced two causes of action pleaded in distinct counts, but voluntarily plaintiffs struck out the second count, and proceeded to trial before the court upon the first count, in which they averred that about the 8th day of October, 1901, at special instance and request of defendant, they sold and delivered to it certain goods and merchandise of the value and for the price of \$1,577.76, the items of which, as well as the dates when the various articles were sold, and the prices charged therefor, respectively, appear from the bill of items thereto annexed, and marked "Exhibit A"; that the prices charged for said goods are, and were at the time when said goods were sold and delivered, reasonable and proper, and defendant promised and agreed to pay same, but though requested, has refused and refuses to pay therefor; and judgment, with interest from the date of demand, was prayed.

The exhibit referred to was as follows:

"St. Louis, Mo., October 3, 1901. Cereal Sugar Company, St. Louis, Mo. To Theo. Brierre's Sons, Dr. 100 Bbls. 'Imperial Brand' Austrian Sugar, 31,874 lbs.. \$4.95, \$1,577.76."

For answer, defendant filed a general denial.

The situation exhibited by the testimony appears to have been that plaintiffs, merchants in New Orleans, had consigned a lot of sugar for sale to a merchandise broker in the city of St. Louis, consisting of two car loads, containing 100 barrels and one car of 800 sacks; and October 3, 1901, the broker sold the 100 barrels at \$4.95 per 100 pounds to defendant, and embracing 31,874 pounds, at \$1,577.76. In the course of his examination, the broker identified the following sale slips and letter which were sent defendant by him, and admitted over objection:

"St. Louis, Oct. 3, 1901. Sold to Cereal Sugar Co., St. Louis. For Acc't of Theo. Brierre's Sons, New Orleans, 100 Bbls. Imp'd Granulated Sugar, \$4.95, Delivered at Warehouse. Terms Net Cash, payable to Third

Nat'l Bank. Ship via after paying freight and other expenses. M. F. S. Boswell, Per B.

"St. Louis, Oct. 4, 1901. Sales Made for account of Theo. Brierre's Sons, New Orleans, to Cereal Sugar Co., St. Louis, by M. F. S. Boswell. 100 Bbls. Imperial Gran. Sugar, 31,874, at \$4.95, \$1,577.76, less demurrage and switching. Terms Net Cash. Memorandum.

"St. Louis, Oct. 8, 1901. Cereal Sugar Company, City—Gentlemen: Please find enclosed a/c for the 100 Bbls. Imported Granulated Sugar sold to you, also certificate of weights and memo. bill. The freight has been prepaid, so that after deducting the demurrage and switching charges on both cars to the store, Mess. Theo. Brierre's Sons wish you to pay balance to the Third Nat'l Bank here to credit of the bank that sent the B/L, and oblige. Very truly, M. F. S. Boswell."

Delivery of the sugar was made October 8th, and defendant began its use, consuming 15 barrels, when defendant claimed and notified the broker that the sugar was discovered to be in poor condition. In response to the complaint, he called on defendant's representatives on the evening of October 10th, and with them examined the sugar. Defendant charged other deteriorations, but the chief fault found at this inspection appeared to have been that the barrel heads were out of about 10 or 12 barrels, and, probably in course of transportation, cinders had gotten in such exposed barrels; and the broker deposed that, as he believed this condition could not extend far down in the sugar, he proposed to the officers of defendant that they could remove the damaged sugar, and he would make good to them to the extent of the unmerchantable sugar in the 100 barrels from the sugar contained in the 300 bags then stored in defendant's warehouse; that this proposition seemed perfectly satisfactory, no objection being made. On the morning of the 11th of October, defendant's place of business and its contents were visited by fire, and the sugar in the barrels remaining were destroyed. It further appeared in evidence that the inventory of stock of defendant, prepared for the adjusters of the insurance, included 85 barrels of the sugar involved in this controversy, 15 barrels having been used by defendant. The testimony of defendant was in conflict with the statements of the merchandise broker, and tended to establish that the sugar had been rejected by reason of its bad and damaged condition, having considerable black specks through it, also being injured by water, and in some instances dried out, causing it to become very hard, and that the agreement by the defendant with the broker was that, as defendant was in urgent need of sugar, it could use a few barrels, and whatever charge, if any, for separating the inferior part from the good, plaintiffs would pay, and whatever quantity defendant used would be charged and paid for.

The defendant, at close of plaintiffs' testimony and at close of the whole case, asked an imperative declaration that, under the pleadings and evidence, the plaintiffs were not entitled to recover, which the court refused. At instance of plaintiffs, the court declared that, under the law and the evidence, the plaintiffs were entitled to recover from defendant in a sum equal to the reasonable value of the sugar in controversy, as shown by the evidence. No other declarations were submitted by defendant, and the court made a finding in favor of plaintiffs, and gave them judgment for the reasonable value of the sugar, \$1,419.90, with interest.

1. The case of *Dawson v. Quillen*, 61 Mo. App. 672, invoked by appellant to maintain the position sought to be upheld, that there was no account filed by plaintiffs here sufficient to comply with the statute, upon examination will be found merely to reiterate that, where a pleading does not comply with the statutory requirement, the adverse party may exercise his election between moving to have it made more definite, or at the trial object to the introduction of any evidence to support it, the latter being the remedy or course determined on and attempted by appellant in this action; but the authority cited shows that the pleading discussed did not contain the items of the accounts, nor was any exhibit attached. The transaction between plaintiffs and defendant involved the purchase of 100 barrels of sugar of the brand and description detailed in the exhibit, which also showed the quantity and price, and fully complied with the statute.

2. There was no departure from the issues of the pleadings as charged by appellant, even though the plaintiffs' form of action may be conceded to be quantum meruit, while their proof was directed to establish an express contract. Whatever may be the rule prevailing in other states, it is well established in this state that a party may sue upon quantum meruit when an express contract existed and is proven at the trial, but the contract price will limit the recovery. In the words of the able commissioner in *Mansur v. Botts*, 80 Mo. 651: "It is a rule of common law, long established, that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, when the contract has been fully executed, and it is not necessary to declare upon the special contract." Such was the rule at common law, and the code has not modified it. In *Keith v. Ridge*, 146 Mo. 90, 47 S. W. 904, the Supreme Court reviewed the earlier cases, and approved the rules enunciated, quoting: "If one party, without the fault of the other, fails to perform his side of the contract in such a manner as to sue on it, still, if the other party has derived a benefit from the part performed, it

would be unjust to allow him to retain that without paying anything. The law therefore generally implies a promise on his part to pay such a remuneration as the benefit conferred is reasonably worth, and, to recover that quantum of remuneration, an action of *indebitatus assumpsit* is maintainable. *Yeats v. Ballentine*, 56 Mo. 535, and cases cited. The established rule extracted and deduced from all the cases is that, where a party fails to perform his work according to the stipulations of his agreement, he cannot recover on the special contract; but if the services rendered by him or the materials furnished are valuable to the other party, and are accepted by such party, then he would be liable to pay the actual value of the work performed or the materials furnished, not exceeding the contract price, after deducting for any damage which had resulted from a breach of the agreement. *Eyerman v. Mt. Sinai Cemetery Association*, 61 Mo. 491. The principle upon which this rule is based is so fair, just, and equitable that, while at first its application was limited to a certain class of contracts, it has now become in this state a rule of general application to all contracts, where it can be applied without doing the defendant injustice." In *Moore v. Gaus*, 113 Mo. 107, 20 S. W. 975, the Supreme Court declares that, where the contract is performed, the plaintiff may sue in *assumpsit*, using the common count of quantum meruit, and that it was allowable to unite a count in *assumpsit* with one on the contract in the same petition.

3. The second count of the petition, which the plaintiffs abandoned, contained allegations that defendant, a warehouseman, agreed with plaintiffs, for the consideration of two cents per bag per month, to store 300 sacks of coffee of plaintiffs, and also to take out sufficient insurance thereon to protect plaintiffs against loss or damage as result of fire; the premiums for such insurance to be advanced by defendant and repaid by plaintiffs. An averment of violation of this contract was made, and judgment asked for the damages incurred in consequence. Defendant tendered this abandoned pleading in evidence, and it was excluded by the court as irrelevant, and in this ruling we find no error. This section of the petition concerned another transaction, different from that the basis of the first count, and had no relevancy to the controversy on trial.

No other assignments of error justifying consideration have been presented. The finding of fact by the trial court is supported by substantial testimony, and will not be disturbed. The judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

**INTERSTATE HOTEL CO. v. WOODWARD
& BURGESS AMUSEMENT CO. et al.**

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

CONTRACTS—IMPLIED PROMISE—ACTION—DEFENSES—STATUTE OF FRAUDS—FINDINGS OF JURY—CONCLUSIVENESS ON APPEAL.

1. The findings of the jury on conflicting evidence are conclusive on appeal.

2. A petition which alleged that plaintiff and defendant entered into verbal contract whereby plaintiff agreed to erect and equip a theater, and to pay a matter in dispute between defendant and a third person, and whereby defendant agreed to lease the theater for a specified time; that plaintiff procured a settlement with the third person for a sum stated, and also performed other undertakings specified in the contract, and expended an additional sum; that defendant, with knowledge of the expenditures, repudiated the contract, and refused to return to plaintiff the amount so expended, though requested so to do—did not set up an action for the recovery of damages for a breach of the verbal contract, but constituted an action on the implied promise of defendant to return to plaintiff the money which it had expended in carrying out the contract before the repudiation thereof by defendant.

3. It is no defense to an action on an implied contract for the recovery of money expended by plaintiff in carrying out a verbal contract between it and defendant before the repudiation thereof by defendant that the verbal contract was void under the statute of frauds.

4. It is no defense to an action on an implied contract for the recovery of money expended by plaintiff in carrying out a verbal contract between it and defendant, before the repudiation thereof by defendant that the verbal contract was void because ultra vires.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by the Interstate Hotel Company against the Woodward & Burgess Amusement Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Wollman, Soloman & Cooper, for appellants. Dwight P. Dilworth and Austin & Austin, for respondent.

SMITH, P. J. The petition alleges that the plaintiff and defendants are business corporations, and that about March 1, 1901, they entered into a verbal contract by which it was agreed that if the former would procure and cause to be erected and equipped a theater at a certain place in Kansas City, of a certain size and style of architecture, to cost not less than the amount therein specified, the plans and specifications to be made by certain architects, and pay and settle a certain matter in dispute between the latter and the Coates Opera House Company—that is to say, the sum of \$500—and procure the release of such latter from a certain lease of the said opera house, then such latter would lease said theater for the term of 10 years at a yearly rent of \$12,000. It was further alleged that, in pursuance of the contract,

plaintiff paid the \$500 and procured the said release, and, further, that it duly performed certain of the other undertakings specified in the contract, and in doing so expended \$100 more, making in all \$600. It was further alleged that the defendants, with full knowledge of the expenditures made by plaintiff under said contract, without cause or excuse, wholly repudiated and abandoned said contract, and refused to return to plaintiff the said several amounts of money so expended by it, although requested so to do, etc. The answer was a general denial, with which was coupled the defense of the statute of frauds and that of ultra vires. There was a trial to a jury, resulting in a judgment for plaintiff, and defendants appealed.

The decisive issue in the case was whether the plaintiff and defendants entered into the verbal contract pleaded in the petition and denied by the answer. It is true that touching this issue there was quite a conflict in the evidence, but it was very fairly submitted to the jury by both the instructions of the plaintiff and the defendant, and they found for plaintiff, which finding is conclusive here. And the same is true as to the acts of part performance by the plaintiff. But it is contended that, even if the contract was entered into and performed by plaintiff, as in its petition, alleged, no cause of action can be based thereon. The action is not that to recover damages for a breach of the contract, but rather to recover for a breach of the implied promise of defendants to return to plaintiff the money which it had expended in carrying out the contract up to the time of the repudiation.

No cause of action lies for nonperformance of the contract. From the facts stated the law will imply a promise which, though relating partly to the same subject-matter, is a distinct promise from that agreement covered by the statute of frauds. The contract here pleaded is doubtless nonenforceable if either party chooses to refuse performance, but this fact does not avail to do away with what has been done under it.

And so it is that where a party resisting performance has received benefit, or if money has been paid or work done for him, his subsequent repudiation does not do away with these facts, but a recovery may be had on the basis of what has been done. *Parker v. Niggeman*, 6 Mo. App. 546; *Gray v. Gray*, 2 J. J. Marsh. (Ky.) 21; *Hawley v. Moody*, 24 Vt. 606; *Kidder v. Hunt*, 1 Pick., loc. cit. 331, 11 Am. Dec. 183; *Greer v. Greer*, 18 Me. 16. And this principle has been applied in actions on various kinds of contracts. *Robinson v. Siple*, 129 Mo. 208, 31 S. W. 788; *Wiggins v. Ry. Co.*, 73 Mo. 389, 39 Am. Rep. 519; *Jarrett v. Morton*, 44 Mo. 275; *Treacy & Wilson v. Chinn*, 79 Mo. App. 652.

The facts stated in the petition and proved at the trial constituted a good cause of action.

As this action is not on the verbal contract, but is for the breach of the contract

¶ 3. See *Frauds*, Statute of, vol. 23, Cent. Dig. § 282.

implied from the facts stated in the petition, it follows that the defense of the statute of frauds and that of ultra vires have no place in the case. The pleading of and reliance on these special defenses probably results from a misconception of the cause of action alleged in the petition. If the action were one to recover damages for a breach of the express contract, as it is not, these defenses might with propriety be invoked by defendants.

No error prejudicial to the defendants on the merits is discovered in the action of the trial court in admitting or rejecting evidence or in the giving or refusing of instructions.

The judgment, which is, as we think, clearly for the right party, must be affirmed. All concur.

BUMPAS v. WABASH R. CO.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

RAILROADS—KILLING ANIMALS ON TRACK—SUFFICIENT FENCE—POINT OF ENTRY—EVIDENCE REBUTTING PRESUMPTION—INSUFFICIENT GATE—NOTICE TO COMPANY.

1. It is the place where an animal gets upon a railroad track, and not the place where it is killed, that fixes the liability of the company under Rev. St. 1899, § 1105, requiring railroad companies to fence their tracks.

2. At a point where animals were killed on a railroad track there was a sufficient fence to turn stock, but a few hundred feet from the place was an open gate blocked by snow. Tracks were found approaching the gate and inside the right of way, while through the gateway the snow was packed and frozen so that tracks would not naturally appear there. Aside from the gate, there was no other place where the animals could have entered the right of way. *Held*, that the evidence rebutted the presumption that they strayed upon the track at the point where they were killed.

3. Where a gate in the fencing of a railroad right of way through which animals strayed onto the track where they were killed was open for 10 or 15 days, and owing to blocking by snow could not be closed without being taken down, the manner in which it came to be open in the first instance was immaterial to the railroad company's liability.

4. Where a gate in the fencing of a railroad right of way has been open and blocked by snow for such a length of time that the company knows, or in the exercise of reasonable care could know, its condition, the company is liable, under Rev. St. 1899, § 1105, requiring it to fence its right of way and provide sufficient gateways therein, for the killing of animals which strayed onto the track through the gate.

Appeal from Circuit Court, Adair County; Nat. M. Shelton, Judge.

Action by A. F. Bumpas against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. S. Grover, for appellant. Joseph Park & Son, for respondent.

BROADBUSH, J. This is an action, under section 1105 of the Revised Statutes of 1899, to recover damages on account of the alleged killing of two horses belonging to plaintiff

on defendant's railroad in Adair county, Mo., on the 14th day of February, 1902. On the evening of the day previous to the alleged date two young horses escaped from plaintiff's son at his home, and although search was made for them they were not found until the morning of the next day, when they were both found dead, lying along defendant's track several hundred feet from a gate and farm crossing on a Mr. Ryan's farm, and about two miles from plaintiff's home. It was shown that a Mr. Bailey occupied the Ryan farm as a tenant; that the railroad was fenced on both sides where the horses were found dead; that the gate was open, and had been for some days prior thereto, sufficient to admit the passage of horses; that the gate could not be shut by reason of the fact that it was obstructed by snow, which, according to one witness, had fallen about 15 days prior to the date when the horses were found dead by the track, and by other witnesses not for so long a time; that the gate had remained open since the falling of the snow; that said gate had no latch or fastening of any kind, and had had none since it was put up; that the farm crossing was used by the tenant of the Ryan farm in passing over defendant's railroad to the barn on the opposite side; that a highway led from plaintiff's place to said gate at said crossing; that horse tracks were seen approaching the gate and on the inside of the right of way, but no tracks were seen in the passage through the gate, but one witness or more states that the ground or snow was packed so hard at that point that the horses in passing would have made no tracks; and that the horses were injured in such a way as to show unmistakably that they had been struck and killed by a railroad engine. The evidence further showed that the said crossing was in frequent use by Bailey, the tenant, and his family, but that their habit was to close the gate after passing through; but that it was left open at the time in question because the snow had drifted at that point, and it could not be closed without taking the gate from its hinges. Under the instructions of the court, the jury found for the plaintiff the value of the two horses, which sum was doubled by the court. Defendant appealed.

The theory as found in plaintiff's instructions was that under the evidence it was the duty of defendant, under said section 1105, Rev. St. 1899, to have kept said gate closed; and the jury were instructed that if they found that it had been left open for such a length of time that defendant knew, or by the exercise of reasonable care could have known, it was open, and that plaintiff's animals passed through said open gate onto the defendant's railroad where they were killed, the verdict would be for plaintiff. The jury were also instructed as to the probative force of circumstantial evidence, and that if it found that the horses "went upon said

railroad through an open gate as charged, and were struck and killed by defendant's locomotive and cars," the finding should be for the plaintiff. The court was asked to instruct the jury that under the pleadings and evidence they should find for the defendant, which the court refused.

The defense of defendant mainly is that the evidence failed to show that the horses got upon defendant's track by reason of the insufficiency of its fence, as it was shown that when found they were at a point on or near the railroad where there was a sufficient fence; that there was no evidence that they passed through the open gate in question; and that the defendant violated no duty it owed to plaintiff with respect to said gate.

It is true that no complaint was made as to the sufficiency of defendant's fence on both sides of its track where the animals were found. But, as we understand the law, that is not a test of defendant's liability, but, on the contrary, it is the settled law in this state that it is the place where the animal gets upon the track, and not where it is killed, that fixes the liability of the road. *Ehret v. Ry.*, 20 Mo. App. 251.

In *Brassfield v. Patton*, 32 Mo. App. 572, it was held that "railroad companies are not liable to the owner of stock killed or injured unless it got upon the track at a place where the companies are by law required to fence, no matter at what place it may be killed." A great many cases may be found to the same effect. In fact, under the statute, any other construction would be without reason to support it. And it has also been held that, "if the place of injury or killing be shown, it will be presumed, in the absence of anything to the contrary, that the animal strayed upon the track at that point." *Pearson v. Ry. Co.*, 33 Mo. App. 543. In this case there was nothing to show that the animals got upon the track at the point where they were killed, but the presumption is rebutted by the evidence that there was a sufficient fence at that point to turn stock, and there were other circumstances going to show that they got upon defendant's right of way through the open gate at said crossing. All the witnesses on that point testify that tracks were seen approaching said gate, and that tracks were found inside the right of way, and that the animals were found dead a few hundred feet from the place. It is true that tracks were not found at the passage leading through the gateway, but the witnesses explain that the hard frozen condition of the same at that point was such as to prevent animals from making impressions with the feet upon its surface. There was no other place where they could have entered, and the only reasonable inference to be drawn from the facts is that they entered through said open gate.

The evidence showed that perhaps the gate in question was sufficient, except it lacked

proper fastenings to secure it when closed. It was not erected by the railroad company, but by the tenant and his landlord, and there is no reason assigned why there was no provision made for securing it when closed. It has been held that if the proprietor of the land at the farm crossing was satisfied with a sliding gate at his farm crossing instead of a gate hung and fastened with a latch or hook, as prescribed by the statute, no one else has a right to complain, even though not as convenient to the owner as if it were hung with hinges and fastened with a latch. *Harrington v. Ry. Co.*, 71 Mo. 384; *Ry. Co. v. Kavanaugh*, 163 Mo. 54, 63 S. W. 374. But we know of no case where a railroad company would be excused for an entire failure to provide some fastening, at least, for gates that lead from a public highway over a farm crossing, although the owner may not require strict compliance with the statute in that regard. Such a gate, in no way fastened, would not be a substantial compliance with the requisitions of the statute and would not accomplish its purpose.

However, it was not shown whether at the time in question the gate came open by reason of its lack of a fastening or was left open, and under the proof it is immaterial. There was evidence that it had remained open for 10 or 15 days prior to the killing of plaintiff's horses, and that it could not be closed without first being taken down, by reason of the accumulation of snow in the gateway. And the jury were properly instructed as to the duty of defendant if it found that the gate had been so open for such a length of time that the defendant might, by the exercise of reasonable care, have discovered such fact.

It seems to us that the case was well tried, and that the defendant, under the pleadings and proof, was clearly liable, under the statute, to plaintiff for damages for his horses killed. Cause affirmed. All concur.

BODE v. FIREMEN'S INS. CO. OF NEWARK, N. J.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

FIRE INSURANCE—INTEREST OF PLAINTIFF IN PROPERTY—SUFFICIENCY OF ALLEGATION—ISSUE—VALUE OF PROPERTY—NECESSITY OF ALLEGATION—AMOUNT OF RECOVERY—APPLICABILITY OF STATUTE—IDENTITY AS BUILDING—ADMISSION IN PLEADINGS.

1. In an action on a fire insurance policy plaintiff alleged that the insured, his assignor, was the assignee of a contract for the sale and conveyance of the lots by deed, and had erected a dwelling house thereon. The defendant alleged in its answer that the insured's interest was other than the unconditional and sole ownership, and that the building was on ground not owned by the insured in fee simple. *Held*, in view of the answer, that the allegation of the petition was sufficient to show an interest in the insured in the property.

2. No issue was raised by the pleadings as to whether insured had any interest in the property.

3. Rev. St. 1899, § 7969, providing that in suits on fire insurance policies the defendant shall not be permitted to deny that the property was worth the full amount of insurance, etc., renders unnecessary an allegation as to the value of the property or of the interest of the insured therein.

4. Rev. St. 1899, § 7969, providing that in actions on fire insurance policies the defendant shall not be permitted to deny that the property was worth the full amount of insurance, and section 7970, making the same rule applicable where policies were issued by more than one company, provided that the two sections shall apply only to real property, are applicable to the case of a building erected on land by the assignee of a contract for a deed.

5. Where, in an action on a fire insurance policy, the pleadings of the parties admit that the structure insured was a building, it will be regarded as having acquired identity as a building, though not completed.

Appeal from Circuit Court, Buchanan County; W. K. James, Judge.

Action by William F. Bode against the Firemen's Insurance Company of Newark, N. J. Judgment for plaintiff, and defendant appeals. Affirmed.

Fyke Bros., Snider & Richardson, for appellant. Elliot Spaulding and Jno. Geo. Parkinson, for respondent.

SMITH, P. J. This is an action on a fire insurance policy. The petition in substance alleged: (1) That on November 2, 1901, Hans Neilson entered into a written contract with David V. Clark whereby the former agreed to sell and convey by deed to the latter certain lots in the city of St. Joseph at a time specified in said contract; (2) that on December 11, 1901, the said David V. Clark assigned all his rights under said contract to Elizabeth Clark, and that the latter caused to be constructed thereon a two-story frame dwelling house with a brick basement and shingle roof, and which said dwelling was practically completed at the time the same was insured; (3) that on the 15th of January, 1902, the defendant issued to the said Elizabeth Clark the \$800 policy of fire insurance sued on to cover said building; (4) that at the time of the taking out of said insurance the plaintiff, through her agent, explained and imparted to the defendant, its officers and agents, complete knowledge of the exact title and interest she had in said lots and the building thereon, and that defendant issued said policy with a full understanding of the exact condition of said title and her rights thereunder. The petition further alleged the assignment of the policy to the plaintiff, etc. The answer contained a general denial, to which was added a paragraph setting forth a provision of the policy to the effect that: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership or if the

subject of insurance be a building on ground not owned by the insured in fee simple;" and which was followed by an allegation that at the time of the issue of the said policy the interest of the insured in said property was other than the unconditional sole ownership thereof, and that the subject of the insurance was a building on ground not owned by the insured in fee simple, etc. The contract referred to in the petition required Mrs. Clark to pay Neilson \$400 within 90 days after the date of the contract, and that upon the payment of which the latter was to execute to the former a warranty deed for the lots; and there was also a further requirement therein that she should erect a house on said lots at a cost of not less than \$890. In the face of the policy the subject of the insurance was described as a "two-story frame, brick basement, shingle-roof dwelling house." It was also stipulated in the policy that the insured should have "permission to finish and complete building." At the conclusion of the evidence the court instructed the jury, at the request of the plaintiff, as follows: "Provided that you find from the evidence that the defendant company's agent, John C. Landis, knew the interest of Elizabeth Clark, the insured, and knew at the time of the issuing of said policy that the subject of insurance was a building on ground not owned by the said Elizabeth Clark in fee simple, and that the interest of the insured was other than that of sole ownership, and provided that you further find from the evidence that the interest of Elizabeth Clark under said policy in said loss, if any, was assigned to plaintiff prior to the bringing of this suit, your verdict will be for the plaintiff." The court, at the request of the defendant, gave an instruction the converse of that part of plaintiff's just quoted. The verdict of the jury was for plaintiff, and the defendant appealed.

It is contended by the defendant that the petition fails to state a cause of action, in that it does not allege that the plaintiff's assignor, Mrs. Clark, had an interest in the property covered by the policy. To this contention we cannot agree. The petition, it seems to us, very fairly and explicitly describes the interest of the insured. It shows an equitable interest; that under the written contract Neilson was obligated to execute a deed conveying to her the fee-simple title to the lots; impliedly she had been put in possession, and had made lasting and valuable improvements thereon—had erected a dwelling house thereon. If the allegation of the petition as to interest or title be defective, that of the answer that she had a title less than a fee simple aids it, and cures the defect. How can it be contended, in the face of such allegations, that the petition does not allege that the insured had an interest in the property? It seems clear to us that from

¶ 1. See Insurance, vol. 23, Cent. Dig. § 1602.

these allegations the interest of the insured in the property may be reasonably inferred, and, if so, the petition in that respect is not subject to the objection urged against it. *Jones v. Phil. Underwriters*, 78 Mo. App. 296.

The defendant next contends that the petition is further defective in that it fails to allege the value of the property, or that of the insured therein. Under the statute (section 7969, Rev. St. 1899) such an allegation was not required. The value of the property was conclusively fixed by the policy, and an allegation of the amount for which the insurance was effected was all that was required. *Jones v. Phil. Underwriters*, supra; *Havens v. Ins. Co.*, 123 Mo. 417, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570. We cannot see that this case is at all analogous to that of *Millis v. Ins. Co.*, 95 Mo. App. 211, 68 S. W. 1066. There the building and machinery covered by the policy were on a mining lease, and had been erected and placed there to be used in the prosecution of mining operations, and did not become a part of the land, and were not, therefore, to be regarded as real property. It was accordingly held that sections 7969, 7970, had no application to the policy. But here the insured held a valid enforceable obligation for a conveyance to her of the fee in the lots, and she had erected a substantial dwelling house thereon, and therefore the interest she had was not that in personal, but in real, property. She had an interest in land which can by no sound reasoning be converted into an interest in personal property. The building was a dwelling house, and was a permanent structure. It was an integral part of the realty, and in no sense personalty. It was *prima facie* a part of the realty on which it was built. *Brown v. Turner*, 118 Mo., loc. cit. 32, 20 S. W. 660. It stands admitted by the pleadings that the structure on the lots was a building; and, though not entirely complete, it must accordingly be regarded as having acquired the identity as a building.

We do not think the plaintiff's instruction is subject to the defendant's animadversion. It is substantially admitted by the pleadings, as already stated, that Mrs. Clark had a "title"—an interest in the lots—though that title and interest was not that of a fee-simple estate. Under the pleadings, as we construe them, there was no issue raised as to Mrs. Clark's interest in the lots. There being no such issue made by the pleadings, the trial court was not required to submit it to the jury. The only issue touching her interest was whether the defendant's policy writing agent knew when he wrote the policy that her title was only an equitable interest, and not that in fee simple; and this issue was very fully submitted to the jury by both the instructions of the plaintiff and the defendant. There was, it is true, a palpable and irreconcilable conflict in the evi-

dence, but the jury settled that; and by that settlement we are conclusively bound.

The judgment must be affirmed. All concur.

GILPIN v. MISSOURI, K. & T. RY. CO.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

RAILROADS—KILLING ANIMALS ON TRACK—NECESSITY OF CATTLE GUARDS—DETERMINATION OF QUESTION—SUFFICIENCY OF EVIDENCE.

1. The question whether cattle guards could be placed at a railroad crossing without endangering the safety of the company's employes is not for the determination of the company alone, but is triable as any other question of fact.

2. Evidence in an action against a railroad company for the killing of animals on its track held insufficient to sustain a finding that cattle guards could have been erected without endangering the safety of the company's employes.

Appeal from Circuit Court, Boone County; John A. Hockaday, Judge.

Action by George A. Gilpin against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. P. B. Jackson, for appellant. Webster Gordon, for respondent.

ELLISON, J. This action is for frightening plaintiff's mare by one of defendant's trains, causing her to run along the track and into a bridge, whereby she killed herself. The statement was in three counts. The finding was for plaintiff on the first, and defendant on the second and third. Defendant appealed.

The place where the mare entered on the track was within the switch limits of the company at McBaine, a station where defendant had a depot and several switch tracks used for the ordinary business at railroad stations and for the passing of trains. There were no fences and cattle guards at the place where the mare went upon the track, as are ordinarily required by statute to be maintained by railroads. The defense was that cattle guards could not be maintained at such place without endangering the lives and safety of its employes in handling trains at such station.

It is well settled that if cattle guards could not have been placed at the crossing where animals go on to the track, without endangering the life or limb of the railway's employes in transacting the business of the road with the public, and in performing the necessary work connected with the operation of the cars, such as switching cars, trains, etc., no liability arises for omitting to so place them. *Pearson v. Ry. Co.*, 33 Mo. App. 543; *Jennings v. Ry.*, 37 Mo. App. 652; *Orenshaw v. Ry.*, 54 Mo. App. 233; *Grant v. Ry.*, 56 Mo. App. 65; *Webster v. Ry.*, 57 Mo. App. 451; *Hurd v. Chappell*, 91 Mo. App. 317.

Those cases, however, show that the question whether the cattle guards could properly be omitted was not to be left to the opinion of the railway company. That evidence should be heard on the question, and, if in conflict, should be submitted for a jury to determine. See, also, *Glasscock v. Ry.*, 82 Mo. App. 146, and *Downey v. Ry.*, 94 Mo. App. 137, 67 S. W. 945. If, however, says Judge Goode in the case last cited, the evidence shows, without dispute, that a necessity did exist for the tracks to be uninclosed at the point in controversy; an appellate court may reverse the judgment. This is only an enforcement of the rule that exists in all cases where the evidence is undisputed. Such rule was applied in the cases first above cited.

In the case at bar it was clearly made out by defendant that to have maintained cattle guards where the mare went upon the right of way would have endangered the lives of the employes in performing their necessary duties connected with the operation of the road at that place. Plaintiff attempted to meet this by introducing himself and one other witness in rebuttal. But there was a total failure. Cox testified that any obstruction would be dangerous, but that an obstruction "at the crossing could not interfere with what was going on at the depot." Plaintiff was asked a single question, and gave his answer. He was asked if he had seen "any handling of trains by the employes of the railroad in which a cattle guard down there at that public road crossing, 565 feet away, would interfere with it." This question not only confined the witness to what he himself had seen, but it confined the place of interference with work to the depot, whereas he may never have seen any operation of the trains where there could have been danger, and yet the usual and frequent operation of the cars might necessarily have been such as would have made it dangerous work over a cattle guard. And while a cattle guard might not have interfered with the operation of the road at the depot, 565 feet away, it might have seriously interfered with it at many other places within the switch limits. His answer was that: "I think they handled them there every day. While the cattle guard was in there, I saw them working over it. Never saw anybody get hurt. So far as a cattle guard is concerned, it being at the road where this switching is done, I don't see any danger there at all." He then stated that: "I never did any railroading, and don't know anything in the world about it." His answer is, in great part, unintelligible. The second sentence refers to a former time when there was a cattle guard at this place. That he "never saw any one get hurt," without something more, does not meet the case made by defendant at all. How often he saw them, does not appear. He doubtless referred to the operation of the road in the daytime, when danger is not so great. The question

is, what would be the general condition of the road as to the reasonable safety of employes? not whether some one had seen them on some occasions get through their work without injury. The last sentence of the answer we fail to comprehend. We cannot undertake to say what the witness meant. The case made out by defendant in its own behalf should have been met by evidence to the contrary from witnesses who knew something of the matter about which they were interrogated, and expressed in such manner that it could be understood. The plaintiff, however, asserts in the first point in his brief that such evidence did not apply to the first count, on which the finding was had in his favor, but that it applied and was intended to apply to points arising on the second and third counts, which were found for defendant. That being true, it leaves the case made by defendant without even an attempt to meet it.

The uncontradicted evidence showing that the judgment should have been for the defendant, it will be reversed. All concur.

WEBB CITY v. PARKER.*

(Court of Appeals at Kansas City, Mo. Nov. 9, 1903.)

CITY ORDINANCE—VIOLATION—PROSECUTION—PROOF—SELLING LIQUOR ON SUNDAY—INDICTMENT—EVIDENCE—DATE OF SALE.

1. In a prosecution for violation of a city ordinance the city attorney testified that the city clerk, who, under Rev. St. 1899, § 5774, is legal custodian of all records belonging to the city, delivered to him the ordinance in question, and that he kept the same in his office; that it was signed by the mayor, president pro tem. of the council, and clerk; that the last sheet, on which their names were written, had within a few days before the trial been carried away by some one, and that it was the original and only ordinance of the kind in existence, there being no published or certified copy. The city clerk testified that the ordinance in the hands of the city attorney was recorded in the ordinance book in which all ordinances were recorded. He produced the journal of the council, which showed that at a regular session the ordinance was read a second and third time and passed. The journal further recited that the ordinance was duly approved. This entry was approved by the mayor, and attested by the clerk. *Held*, that the ordinance was sufficiently proved.

2. Where an indictment for a violation of a city ordinance prohibiting a sale of liquor on Sunday charged that the sale was made on a certain Sunday, evidence that it was made on a different Sunday within a year before the finding of the indictment is sufficient to support the conviction.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by the city of Webb against O. A. Parker. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. E. Booth, for appellant. W. J. Owen, for respondent.

*Rehearing denied December 7, 1903.

† 2. See *Intoxicating Liquors*, vol. 22, Cent. Dig. § 267, 272.

SMITH, P. J. An ordinance of plaintiff city, entitled "Council Bill No. 259—Ordinance No. 19—Misdemeanors," provided that whoever should "keep open any ale or porter house, grocery or tippling shop, or sell or retail any fermented or distilled liquors at any time on the first day of the week commonly called Sunday," should be deemed guilty of a misdemeanor, and be punished by fine, etc. The defendant was prosecuted and convicted on an information based on the above-quoted ordinance provision. The cause was removed into the circuit court, where on a trial anew the defendant was convicted, and from that judgment has appealed here.

The complaint, while not as formal and specific in its averments as it might have been, is nevertheless, we think, sufficient. The evidence was ample to prove the violation of the ordinance as charged in the complaint.

The defendant insists that the ordinance on which the prosecution was based was never passed by the plaintiff city, and that there was no valid ordinance in existence prohibiting the act charged or authorizing the prosecution. The city attorney testified that the city clerk, the legal custodian of all the records and papers belonging to the city (section 5774, Rev. St. 1899), delivered to him said Ordinance No. 19 (Council Bill No. 259), and that he had kept the same in his office; that it was signed by the "mayor," "president of the council pro tem.," and "clerk"; that the last sheet, on which their names were written, had within a few days before the trial been torn off and carried away by some one to him unknown, and that it was the original and the only ordinance of the kind in existence. There was no published or certified copy of it. The city clerk testified that the ordinance in the hands of the city attorney was recorded in the ordinance book in his office and in which all the ordinances were recorded. He produced the journal of the council, which showed that at a regular session of the council held on January 20, 1896, the rules were suspended, and said Ordinance No. 19 (Council Bill No. 259) was read a second and third time and passed, all the councilmen voting "Yea." The journal further recites that said ordinance, with others, was duly approved. This entry was approved by the mayor, and attested by the clerk. The court held, and we think correctly so, that the ordinance was sufficiently proved. It did not purport to be a manuscript copy of the ordinance, but the original ordinance itself, as passed by the council and approved by the mayor, and it was therefore, in our opinion, primary evidence. Dillon's Munic. Corp. (4th Ed.) § 422; The Town of Tipton v. Norman, 72 Mo., loc. cit. 385, 386. And it was sufficiently identified and proved to establish its binding force and efficacy.

The defendant further complained of the action of the court in refusing an instruction requested by him, which, amongst other

things, told the jury that it must be proved that sales of intoxicating liquors were suffered to be made by defendant between the hours of 6 o'clock a. m. and 12 o'clock noon on August 4, 1901, before he could be convicted. It has been repeatedly decided in this state that a conviction under an indictment for selling liquor will be sustained if it appears that the sale was made on any day within one year next before the finding of the indictment. State v. Carnahan, 63 Mo. App. 244; State v. Bradford, 79 Mo. App. 346; State v. Lantz, 90 Mo. App. 17. Time is not material in the statement of the offense, and therefore a sale may be alleged on one day and the proof may be of a sale on another day. State v. Small, 31 Mo. 197; State v. Heinze, 45 Mo. App. 403. It would therefore seem to follow that where the charge is that the sale was made on a certain Sunday, and the proof shows that it was made on a different Sunday within the year before the finding of the indictment, that would be sufficient to support the conviction. As was said by us in Columbia v. Johnson, 72 Mo. App., loc. cit. 237: "This case is in no respect analogous in its facts to that of Kirkwood v. Autenreith, 21 Mo. App. 73, where there were several actions for similar offenses, and the only distinguishing feature of any one offense from the others was the particular day on which it was committed. No such difficulty is presented by the record before us in this case."

It results that the judgment must be affirmed. All concur.

CITY OF KIRKSVILLE ex rel. FLEMING MFG. CO. v. COLEMAN.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

STREET IMPROVEMENTS—SPECIAL ASSESSMENTS—DESCRIPTION OF WORK IN RESOLUTION OF COUNCIL—ESTIMATE BY CITY ENGINEER.

1. Under Rev. St. 1899, § 5860, providing that when the council deem it necessary to improve a street it shall declare by resolution, published for two weeks, that such work is necessary to be done, a resolution should not state merely that it is necessary to pave a street, but should state the kind of paving.

2. Under Rev. St. 1899, § 5859, providing that the council may include in the special assessment for a street improvement the cost of bringing the street to the established grade, when in its opinion the general revenue does not warrant an expenditure therefrom for it; provided the resolution declaring the work necessary to be done, in addition to the other work of improvement therein provided for, include and describe the work of bringing it to grade, description in the resolution of the work of bringing the street to grade is necessary.

3. Rev. St. 1899, § 5858, providing that before the council makes a contract for street improvements an estimate of the cost thereof shall be made by the city engineer which shall not be exceeded in letting contracts, is not satisfied by an estimate made after the resolution of the council declaring an improvement of a street necessary, but not describing it, and be-

fore passage of the ordinance describing the work and ordering it to be done.

Appeal from Circuit Court, Adair County; Nat M. Shelton, Judge.

Action by the city of Kirksville, on the relation of the Fleming Manufacturing Company, against Dorothy Coleman. Judgment for defendant. Plaintiff appeals. Affirmed.

Rieger & Rieger and W. P. Cave, for appellant. Campbell & Ellison, Millan & Greenwood, and C. E. Murrell, for respondent.

ELLISON, J. This action is based on a special tax bill issued for grading and macadamizing one of the streets of Kirksville, a statutory city of the third class. The trial court held the bill to be void, and the plaintiff, who is assignee of the bill, has brought the case here for review.

The ordinance and proceedings for the improvement are based upon sections 5858-5860, Rev. St. 1890. It is therein provided that whenever the city council shall deem it necessary to improve a street it shall declare by resolution, published for two weeks, that such work is necessary to be done. That if within 10 days thereafter a majority of the resident property owners abutting such improvement do not file with the city clerk their remonstrance against the proposed work, then the council shall have power to order it to be done. It is further provided that whenever, in the opinion of the council, the general revenue of the city will not justify paying for bringing a street to an established grade, the resolution shall so declare; and, in addition to the other work therein provided for, shall include and describe the work of bringing such street to the established grade. It is further provided that, before any contract is let for the improvement, an estimate of the cost thereof shall be made by the city engineer.

In this case the council passed a resolution on July 8, 1897, declaring it necessary to grade, pave, gutter, curb, and terrace the street. The resolution further declared that in the opinion of the council the general revenue did not warrant an expenditure therefrom for bringing the street to the established grade, and that the cost of so bringing it to grade should be included in the special tax bills. On July 19th the city engineer made his estimate in the following words: "The undersigned respectfully submit to your Hon. body, his estimate of the cost of grading, paving, guttering, curbing and terracing Brown avenue from Jefferson street south to Michigan street and fix the cost of said street improvements at seven (7) cents per square foot." Afterwards, on August 10th, the council passed an ordinance establishing the grade on such street, and on the same day passed an ordinance prescribing the kind and character of improvement and directing it to be done.

The law is well settled in this state that

before the council has power to pave a street it shall, as a preliminary move in that direction, pass a resolution declaring that it deemed the improvement necessary. City, to Use, v. Eddy, 123 Mo. 546, 27 S. W. 471; Wheeler v. Poplar Bluff, 149 Mo. 36, 49 S. W. 1088. One of the principal objects and purposes of such resolution is that, by its publication, the property owners affected may be advised of what is contemplated, so that they may have an opportunity to arrest the proceedings by a majority protest against it. Manifestly, when the improvement is such that it may be done in various ways, or be composed of one of many kinds of material, substantially affecting the quality or cost of the work, the council should state in such resolution in what manner it was proposed to improve the street. In the resolution now under consideration it was declared that "It is deemed by said council necessary to improve Brown avenue from Jefferson street south to Michigan street by grading, paving, guttering, curbing, and terracing the said avenue." There is in this no mention, directly or indirectly, of the kind of paving. That street pavement consists of a variety of material, of widely different cost as well as quality, is a fact of such general knowledge that the courts will take judicial notice of it. And so, too, that various opinions are entertained as to the value or expediency of the different kinds. This is evidenced by sharp contests which are frequently waged by property owners asserting their choice of material, either as to what is best quality or what can best be afforded. If a city council is to be permitted to acquire the power to improve a street by use of the very general word "pave," then they have a wide range within which to move, and the action they finally take may be against the will and wish of the property holders which the law says shall govern. The owners of abutting property may very much desire that the street be paved with certain material, and they may be unalterably opposed to other kinds. In such case, under a resolution couched in the general language of this one, they would be compelled to protest against any pavement, or else give the council a carte blanche to use any material, at any price, it might choose. The property owner ought not to be put to such dilemma. The resolution should inform the citizens, substantially, of the kind and character of improvement, to the end that he may exercise his election of withholding the power, as contemplated by the statute.

The resolution is also radically defective for another reason. As already stated, there was an ordinance passed establishing a grade on the street in question, and the resolution contemplated that said grade had been or would be established. It declared the general revenue of the city was not in condition to justify paying for bringing it to grade, and that it should be included in the special

tax bills against the abutting property. This was proper enough so far as it went. But the statute aforesaid, in express terms, requires that such work, as well as the paving, shall be described. This is evidently required that the property owner may be able to ascertain how the grading will affect his property, as, for instance, whether it will cause a fill or an excavation at the point where it passes his property. In cities of uneven surface, bringing a street to the established grade is of very great importance, since it has a decided effect on the value and convenience of property.

There is yet another fatal defect in the proceeding, in that there was no proper estimate of the cost. An estimate is declared necessary by the statute, and its absence avoids the proceedings. *City of Independence v. Briggs*, 58 Mo. App. 241; *City of Marshall v. Rainey*, 78 Mo. App. 416; *Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088. A recent opinion, written by Judge Goode for the St. Louis Court of Appeals, takes the same view of the importance and necessity for an estimate. *City of De Soto ex rel. v. Showman*, 73 S. W. 257. The estimate here was made after the preliminary resolution was passed, but before the passage of the ordinance directing the work to be done. The estimate could not have been based on the resolution, for that paper failed to name or describe the kind of work to be done. There is therefore no means of knowing whether the engineer was estimating a pavement of wooden blocks, macadam, asphaltum, concrete, vitrified brick, or some other kind. Afterwards an ordinance was passed naming and describing the pavement, but no estimate was made after the council determined and acted on that ordinance, and there is no mental process whereby the engineer, at the time he made his estimate, could have foreseen what the council might afterwards do. Neither is there any way known how the council could know that the material and mode of paving it prescribed was the same the engineer had estimated. If the resolution had been properly specific, it probably could be presumed that the estimate was based upon such specification. Or if the estimate had been made after the ordinance directing and describing the work, it probably would be presumed that it was based on the ordinance. But taking the proceedings as they are disclosed by the record there was no estimate made in this case such as is contemplated by the statute. It is quite likely that it was so well understood between members of the council, the engineer, and property owners as to what kind of paving was intended, and what was to be considered in the estimate, that it caused every one to overlook the necessity for a record embracing in some substantial way all the requirements of the law before there can be legally imposed a special tax upon the property of the citizen. It is well known and universally recognized that

there is nothing the law guards with more care and jealousy than it does the right of a man to demand that, before his money or property be taken from him without his consent, every provision of the law made for that purpose shall be strictly followed.

The result is that the tax bill is without legal support, and was properly held to be void by the trial court. The judgment is therefore affirmed. All concur.

CORNETT v. HALL.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

REPLEVIN—CHATTELS—JOINT OWNERSHIP—CO-TENANTS.

1. Plaintiff and defendant were joint owners of 16 head of cattle, under agreement that they were to be divided equally. Defendant, without plaintiff's knowledge or consent, repudiated plaintiff's ownership, and made two divisions of 8 each, one of which divisions he sold to a third party. *Held*, that plaintiff was entitled to replevin the cattle remaining in defendant's possession.

Appeal from Circuit Court, Henry County; W. W. Graves, Judge.

Action by John B. Cornett against H. O. Hall. From a judgment for defendant, plaintiff appeals. Reversed.

James Wilson and C. C. Dickinson, for appellant. Campbell & Duckworth, for respondent.

ELLISON, J. This is an action of replevin for eight head of cattle. The trial court gave a peremptory instruction in favor of the defendant, and plaintiff appealed.

In view of the court giving a peremptory instruction for defendant, it will only be necessary to state the material points which the evidence in behalf of plaintiff tended to show, regardless of any dispute thereof by defendant. It appears that plaintiff, either by joint purchase with defendant of one Stevens, or by purchase from defendant just after the latter became the purchaser from Stevens, became the owner of the undivided half of 16 head of cattle, defendant retaining the other half; the manual holding being left with defendant. The cattle were to be divided equally; but defendant, without plaintiff's knowledge or consent, repudiated plaintiff's ownership, and divided them into two divisions of 8 each, and sold one of the divisions to his brother. Plaintiff thereupon brought this action of replevin for the 8 head retained by defendant.

We regard the action as well brought, and that the case as made by plaintiff should have been submitted to the jury. It is well understood that ordinarily one tenant in common cannot maintain replevin against his co-tenant. But where one of them repudiates the interest of the other in property which is susceptible of division, that other may bring replevin for his share. *Cobbey on Re-*

plevin, §§ 236, 238; 17 Am. & Eng. Ency. of Law (2d Ed.) 700-702. In this case the whole evidence shows that the cattle could be equally divided, and that defendant did divide them, and sold one-half. As already stated, there was evidence tending to show that the cattle were to be divided between the parties. They were not divided as agreed. But this failure was due to an act of the defendant, of which he cannot take advantage. If plaintiff chooses to acquiesce in the division as made, he merely accepts defendant's act, and the latter is not injured.

From the face of the record now presented, it may be that on retrial the case may present an issue which may as well be referred to now. It seems that when defendant paid Stevens for the cattle he used a check which he got of plaintiff for \$46. If it should appear that this was merely an ordinary loan of money, plaintiff could not assert an interest in the cattle therefor, much less have it adjusted in an action of replevin. But if this was a part payment for an interest in the cattle, such interest, for any reason, never having passed to plaintiff, yet plaintiff would have a right to an adjustment in the judgment of such sum so advanced. *Hickman v. Dill*, 32 Mo. App. 509. It is, of course, impossible to state at this time what may develop in another trial. It is, however, not clear how the issue just suggested can arise. For the case, as the evidence in plaintiff's behalf tended to show, made him the owner of one-half the cattle, and that he had paid \$46 of the purchase money. We do not see wherein a point made in defendant's brief, that "[this [case] at most is but an executory agreement to sell," is applicable to the case made by plaintiff. If plaintiff's view of the case is to be accepted (and we must accept it at this stage), he became the owner of the undivided half of the cattle; and defendant, having repudiated his ownership, divided the cattle, and sold them, left plaintiff with a right to the remaining half.

The judgment is reversed and the cause remanded. All concur.

WABASH RY. CO. v. SWEET.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

INJUNCTION—NONSUIT—SUBSEQUENT ACTION—PAYMENT OF COSTS.

1. Where plaintiff took a nonsuit, costs being adjudged in favor of defendant, and afterwards commenced another action on the same ground in another county, the court in which the second action was pending had power to stay any further proceedings until plaintiff paid the costs adjudged against him in the first action, and hence injunction would not lie in the court in which the first action was prosecuted to restrain plaintiff from prosecuting the second action without paying the costs of the first.

Appeal from Circuit Court, Clay County; J. W. Alexander, Judge.

Suit for an injunction by the Wabash Railway Company against T. B. Sweet. From a decree dissolving a temporary injunction and dismissing the petition, plaintiff appeals. Affirmed.

George S. Grover, for appellant. C. H. Nearing, for respondent.

BROADDUS, J. This is a suit in equity to restrain defendant from prosecuting a suit against plaintiff in the circuit court of Jackson county, Mo.

The substantial allegations of the petition are that on August 23, 1902, the defendant herein instituted suit against this plaintiff in the circuit court of Clay county, Mo., where he then and has since continuously resided, to recover damages in the sum of \$5,000 for the alleged killing by this plaintiff of his minor son on July 9, 1902; that said suit came to trial on November 15, 1902; that at the close of his evidence the court sustained a demurrer thereto, but before entering up its judgment permitted plaintiff to take a nonsuit, with leave to move to set the same aside; that he thereafter took nonsuit, and the court rendered its judgment of nonsuit, and adjudged to plaintiff herein all its costs in said case against him, and awarded execution thereon; that the costs in said suit were \$101.97, whereof \$87.71 represented the sum therein expended by this plaintiff as costs; that defendant herein has never at any time paid said costs, or any part thereof; that in December, 1902, he instituted suit against the plaintiff, on the same cause of action, in the circuit court of Jackson county, Mo., where the same is now pending; that defendant is insolvent, and that his said action is vexatious and without merit. The object of the proceeding is to enjoin defendant from prosecuting his said suit until he has paid said costs, and, if he shall not do so on final hearing, to make said injunction final. A temporary injunction was issued in vacation by the judge of said court on the 10th day of January, 1903, which was duly served. The defendant demurred to plaintiff's petition, which was sustained by the court on the ground that it contained no equity; and dissolved the injunction. Plaintiff appealed.

There is no doubt about the authority of a court in a proper case to stay proceedings. "Where a second action is waged between the same parties for the same cause, the presumption is that the second action is vexatious; and, unless the presumption is overcome, the court in such case will order the proceedings stayed until the costs in the first suit are paid." *Jones v. Barnard*, 63 Mo. App. 501; *Hewitt v. Steele*, 136 Mo. 327, 38 S. W. 82; *Buckles v. Ry. Co. (C. C.)* 47 Fed. 424. And it does not appear that the respondent denies such to be the law, but he does deny that such power exists in a court other than that in which the action is pending.

It will be observed that the proceeding is not, strictly speaking, an effort to interfere with the jurisdiction of the circuit court of Jackson county, but to restrain defendant from an alleged wrongful prosecution of an action in such court. There is no doubt but what, under the authorities in this state, the relief asked here could have been obtained in the case pending in the Jackson county circuit court. In *Jones v. Barnard*, supra, the defendant by motion raised the question of the right of plaintiff to prosecute his action therein without having paid the costs adjudged against him in a former suit between the same parties on the same cause of action. The court used the following language: "An examination of the numerous authorities * * * fully sustains the position that the court may require the plaintiff in a second suit for the same cause of action to pay the costs in the former case which has been dismissed, before being allowed to further harass the defendant." The opinion refers to the power of the court in which said second suit is pending. In *Hewitt v. Steele*, 136 Mo., loc. cit. 332, 38 S. W. 82, the opinion is that: "Every court of justice has power to control its proceedings so as to prevent oppression between its suitors. * * * Upon this principle it is that when the merits of a cause have been heard, and the plaintiff is either nonsuited or a verdict passes against him, he will not be permitted to harass the defendant with a second suit on the same ground until the costs of the first are discharged." The power to act is placed upon the ground that the court has control of its own proceedings and exercises it to prevent abuse. In other words, it exercises its inherent power to supervise its own proceedings so as to prevent vexatious litigation. It seems to be the exercise of a species of equity by the right of control over its own processes. The court, in support of its views, cites *Newton v. Bewley*, 1 Browne, 38; *Melchart v. Halsey*, 2 W. Bl. 741. In *Fox v. Packing Co.*, 96 Mo. App. 173, 70 S. W. 164, it was held that: "Where, after a nonsuit on a trial, the plaintiff begins a new action, it is in the discretion of the court to stay proceedings until the costs of the former action is paid." From these authorities I conclude that the Jackson county circuit court, by reason of its control over its own proceedings, had jurisdiction to afford the relief asked for in this case; that, having jurisdiction of the second suit, it could have stayed any further action therein until the plaintiff in the latter had paid the cost of the first case. It had jurisdiction of all the parties and of the subject-matter, without the intervention of a separate suit in equity. I know of no authority which permits a court to interfere with the rights of litigants in a court of concurrent jurisdiction, with all the parties before it, clothed with the power by summary process of doing full justice, whether in law or in equity.

It is claimed that the Jackson county circuit court has no authority by the summary process of determining the rights of parties herein, but the authorities cited hold to the contrary, and in my opinion have been too well fortified by reason to be overturned on the ground that equity rights cannot be tried on a motion, but must be adjudicated on a bill in equity. And another principle applies: The presumption that the circuit court of Jackson county will afford plaintiff herein full redress under the law. *Hardware Co. v. Lang*, 54 Mo. App. 147.

For the reason given, we are of the opinion that the judgment of the lower court was right and should be sustained. All concur.

HALLIWELL CEMENT CO. v. STEWART.
(Court of Appeals at Kansas City, Mo. Nov. 28, 1903.)

ACTION ON NOTE—COUNTERCLAIM—PLEADING—VARIANCE.

1. In an action on a note, where the answer sets up a counterclaim based on fraud and deceit, defendant must prove that plaintiff's representations were false and that he knew it.

2. Under an answer setting up a counterclaim based on fraud and deceit, the defendant cannot recover on proof of a mere breach of warranty.

Appeal from Circuit Court, Jackson County; E. P. Gates, Judge.

Action by the Halliwell Cement Company against James A. Stewart. From a judgment in favor of defendant, plaintiff appeals. Reversed.

L. E. Durham and Porterfield, Sawyer & Conrad, for appellant. Fyke Bros., Snider & Richardson, for respondent.

ELLISON, J. This is an action on a promissory note for balance due thereon. The note and balance claimed as unpaid were not denied by defendant. But he set up in his answer a counterclaim for damages by reason of plaintiff's fraud and deceit, alleging that the note was given for purchase of cement which was to be used in the construction of sidewalks for Kansas City, Mo.; that plaintiff, in order to induce defendant to buy the cement, falsely and fraudulently represented to him that the cement was a good cement and fit for construction of sidewalks, well knowing that it was not fit, and that it would not pass inspection of the city inspector; that he relied upon such fraudulent representations as being true, and believed they were true; that in truth they were not true, and that the cement was wholly unfit and unsuitable, and that the sidewalk constructed therewith was rejected, and he was compelled to take up and remove it, at a cost of \$368; "so that defendant says, by reason of the acts and representations of the plaintiff aforesaid, he has sustained damages in the sum of \$647.60," for which he demanded judgment.

Defendant's counterclaim is a claim for

damages based on fraudulent and false representations. In such case it is necessary to prove, among other things, that the representations were made intending that they should be acted on, that they were false and known to be false by the party making them, and not known to be by the other party, but relied upon by him and acted upon on the faith of their being true. *Bank v. Byers*, 139 Mo. 652, 41 S. W. 325; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380. But the trial court refused instruction No. 6 for plaintiff, wherein it was declared that defendant must prove that the representations were false and fraudulent and that plaintiff knew it. Furthermore, the court, over the protest of plaintiff, gave for defendant an instruction on his counterclaim which almost wholly omitted the necessary elements which go to make up a case for damages on fraudulent representations. The truth is, the answer seems to have been lost sight of when it came to acting on the instructions, and, as finally formulated and given to the jury, they present a case for damages by reason of a breach of warranty merely, and so the case is briefed by defendant in this court. But that cannot be allowed in the face of the answer and the range of the evidence given under its allegations. If defendant relies upon a warranty and its breach, he should plead it, and may do so by amendment. If plaintiff sold him the cement and warranted it to be fit for a certain purpose, when it was not, he is liable, regardless of whether he made fraudulent representations. So, if he sold the cement to defendant for a particular purpose, for the ordinary price, there was an implied warranty that it was fit for that purpose. *Brewing Co. v. McEnroe*, 80 Mo. App. 429.

Instruction No. 5 for plaintiff was faulty in the latter half. "Did believe" should be substituted for "had good reason to believe." No. 6 could well have added therein the additional condition that defendant relied upon the representations. No. 7 should be amended so as to read, "mere expressions of opinion honestly entertained and made in good faith."

In case the character of the counterclaim is changed to a claim on warranty, the instructions must then, of course, conform to that theory.

The judgment is reversed and cause remanded. All concur.

GOTWALD v. ST. LOUIS TRANSIT CO.
(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

STREET RAILWAYS—EJECTION OF PASSENGER—INJURIES—ACTION—DECLARATION OF CONDUCTOR—RES GESTÆ—INSTRUCTIONS.

1. In an action against a street railway company for injuries sustained by a passenger on his being thrown from a car by the conductor, the statement of the conductor, made shortly

after the occurrence, and when passengers were crying, "Stop the car!" to the effect that he was not going to stop the line for a man, was not admissible as part of the *res gestæ*.

2. Though plaintiff's witnesses testified that the car proceeded without stopping, the erroneous admission of the declaration of the conductor was not harmless.

3. In an action against a street railway company, the complainant alleged that plaintiff had refused to pay his fare until the car had passed a dangerous curve, plaintiff at the time the fare was demanded having hold of a rail to keep from being thrown from the car, and being incumbered with packages, but that the conductor threw him from the moving car, which allegations were sustained by plaintiff's testimony, and the answer alleged that on refusal to pay his fare the conductor had put plaintiff off without unnecessary force, which theory was sustained by the conductor's testimony. The court instructed that if the jury found that plaintiff refused to pay his fare the conductor had a right to put him off, but had no right to use any more force than necessary, nor to subject him to injury by pushing him off while the car was moving; and, if the conductor violently pushed him from the car when it was moving so rapidly as to throw him to the ground and injure him, plaintiff was entitled to recover. *Held*, that the instruction was not open to the objection that it permitted a recovery on a different cause of action from that stated in the petition.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Action by Joseph Gotwald against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Boyle, Priest & Lehman, for appellant. Jas. M. & I. A. Rollins, for respondent.

REYBURN, J. Action for personal injuries alleged to have been sustained May 10, 1892, about 10:30 p. m., by the forcible ejection of plaintiff from a car of defendant by its conductor. The petition, after charging that plaintiff took passage on a car of the Spring Avenue Division, proceeding north on Thirteenth across Wash street, and that, the car being crowded, he was compelled to stand on the rear platform, thus sets forth his complaint: "Plaintiff further states that he was carrying a lot of packages in his arms, and that upon approaching Fourteenth and Biddle streets said company's car was moving rapidly, and, there being a curve at this point, it became necessary for plaintiff to hold on to the car with one hand while holding the packages with the other, to prevent being thrown from the car by the swinging of said car around said curve. Plaintiff states that upon approaching Fourteenth and Biddle streets and said curve, said company's conductor demanded plaintiff's fare, and plaintiff requested said conductor to wait until they had passed this dangerous point. After passing this curve, said plaintiff arranged his packages, and proceeded to place his hand in his left pants pocket for his money to pay his fare, and, before he could produce same, said company's conductor caught said plaintiff by the shoulders and neck from the

rear, and threw him forcibly and bodily from the car while said car was in motion, plaintiff striking the hard street, and injuring him as follows." The character and severity of the injuries are then detailed, and damages asked. Additional to a general denial, the defendant interposed a plea that plaintiff refused to pay his fare upon demand therefor, and that defendant's conductor put plaintiff off because of his failure and refusal to pay his fare, using no unnecessary force for that purpose. From a verdict and judgment thereon for plaintiff, defendant has appealed.

1. In the examination in chief of a witness on behalf of plaintiff the following was elicited, and is quoted verbatim: "Q. Well, at the time up near the corner of Fourteenth and Biddle street did you notice what took place there, if anything? A. I was standing inside of the street car. At the time I recollect there was a great commotion. Many people hollered, 'Stop the car!' 'Stop the car!' So I turned around, and I saw a man in the street. Then again, I hear some fellow say down there—he says— By Mr. Hocker (counsel for the defendant, interrupting): Well, I object to that. This is afterwards. Q. Did you hear the conductor say anything? By Mr. Hocker (counsel for defendant): I object to that. By the Court: He may answer. A. He said, 'I am not going to stop the line for a man.' By Mr. Hocker (counsel for the defendant, interrupting): Just one moment. Did I get your name right, Brizzi? A. Yes, sir. By Mr. Hocker (counsel for defendant): When was that remark made? A. That was a remark when a man near me was very agitated, and wanted the conductor to stop the car. By Mr. Hocker (counsel for the defendant): When was the conductor's remark made? A. He answered. By Mr. Hocker (counsel for defendant): It was after the occurrence? A. After the occurrence. By Mr. Hocker (counsel for the defendant): I object to that as incompetent, and not part of the *res gestæ*. By the Court: He may answer. (To which ruling of the court, defendant, by its counsel, duly excepted.) Q. Did the conductor stop the car? By Mr. Hocker (counsel for the defendant): We make the same objections. (Which were overruled by the court, and the witness answered.) A. Not as I remember. (To which ruling the defendant saved exceptions.)" Respondent's insistence that the appellant failed to properly object and preserve its exceptions to the admission of this testimony does not appear sustained by the record, and we will therefore proceed to consider its admissibility, which is questioned by appellant either as an admission or as part of the *res gestæ*. A well-considered and leading case, involving the question of what statements succeeding an event constitute *res gestæ*, is that of *Leahy v. Railway*, 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300, wherein Judge

Black, after consideration and analysis of many of the leading text-writers, as well as prominent decisions in this state and of other states and of federal courts, deduces the conclusions that the declaration, to be part of the *res gestæ*, need not be coincident in point of time with the main fact to be proved, but that it is sufficient if the two are so nearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous exclamation of the real cause; that the declaration is then a verbal act, and may well be said to be a part of the main fact or transaction; or, if the subsequent declaration and the main fact at issue, taken together, form a continuous transaction, then the declaration should be received, but that mere narratives of past events, disconnected from the main fact, and already transpired, are inadmissible. See, also, *Barker v. Railway*, 126 Mo. 143, 28 S. W. 866, 26 L. R. A. 843, 47 Am. St. Rep. 646. Counsel for respondent urge that in no event could this testimony have been prejudicial to appellant, as plaintiff and his witnesses had testified that the car proceeded without stopping; but proof of the fact that the car did not stop after plaintiff's ejection, and of the conductor's remark, was important, had a direct tendency to create prejudice in the mind of the jury, and should have been excluded, and we cannot say that its admission was harmless.

2. The third instruction for plaintiff was as follows: "If you find from the evidence that plaintiff refused to pay his fare, then the conductor had a right to put him off the car, but he had no right to use any more force than was necessary to put him off, nor to subject him to danger of injury by pushing him off the car while it was moving so rapidly as to endanger his safety. If you find from the evidence that the conductor violently pushed plaintiff from the car, and that at the time the car was moving so rapidly as to throw him to the ground, and that he was injured by being so thrown to the ground, then the plaintiff is entitled to recover." The complaint averred and plaintiff testified that he had refused to pay his fare until after the car had passed the dangerous curve, and the answer averred that upon refusal to pay his fare the conductor had put him off, using no unnecessary force therefor; and the testimony of the conductor on behalf of defendant tended to establish the theory of the answer. This instruction therefore was based on the issues in the pleadings, and was not amenable to appellant's charge that it permitted a recovery upon a different cause of action from that stated in the petition.

For the error indicated above, the cause will be reversed and remanded.

BLAND, P. J., and GOODE, J., concur.

HEYDE v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. Nov. 17, 1908.)

STREET RAILROADS — INJURIES TO PASSENGERS — DERAILMENT OF CAR — NEGLIGENCE — QUESTION FOR JURY — INSTRUCTIONS — EXCESSIVE DAMAGES.

1. In an action by a street car passenger for injuries sustained by the derailment of the car at a switch, the petition alleged that defendant's employes carelessly suffered the car to leave the track and collide with another car. There was evidence of the condition of the track and switch, with evidence that cars often left the track at that place. Defendant's testimony showed that such accidents could be prevented by locking the switch. *Held*, that an instruction authorizing the jury to find for plaintiff if defendant's employes in charge of its tracks and switches could have prevented the accident was within the issues presented by the evidence.

2. In an action by a street car passenger for injuries sustained by the derailment of the car at a switch, a witness testified that cars frequently jumped the track at that point. The motorman testified that a car was not apt to leave the track if everything was in good condition, and the master mechanic of the defendant stated that such accidents might be prevented by locking the switch, and that it would take about a minute to lock it. *Held*, that evidence of defendant's negligence was sufficient to prevent a nonsuit.

3. A street railway company, in the management of its cars and the care of its tracks, owes to its passenger the duty of exercising the high degree of care which skillful and practical railroad operatives would exercise under similar circumstances.

4. Where a street car passenger shows that he was free from negligence, and was injured by the derailment of the car on which he was riding, a prima facie case of negligence on the part of the company is shown.

5. A street car passenger was injured by the derailment of the car. Her physician testified that the injury to her nervous system and to her shoulder would be permanent. There was testimony that plaintiff was feeble, and afflicted with dizziness, palpitation of the heart, and partial paralysis of her arm and hand, and was unable to do her housework, which she formerly did. *Held*, that a verdict for \$2,000 was not excessive.

Appeal from St. Louis Circuit Court; J. A. McDonald, Judge.

Action by Elizabeth Heyde against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle, Priest & Lehman, for appellant. M. Tucker, for respondent.

Opinion.

GOODE, J. On July 12, 1902, respondent took passage on one of the appellant's street cars at Twelfth and Lami streets, in the city of St. Louis, to be carried to the corner of Grand and Franklin avenues. When the car was running on Cherokee street, near its intersection with California avenue, it stopped close to a switch on which was standing a Bellefontaine car. In a moment or two the car plaintiff was in started again. Its front

end passed the switch and the Bellefontaine car safely, but the rear trucks left the main track, ran on the switch, collided with the Bellefontaine car, and hurt the plaintiff. This action was brought to recover for the injury.

The charge of negligence is that "whilst the said car [that is, the one plaintiff was on] was at or near the intersection of Cherokee and California avenues, in the city of St. Louis, defendant's servants, agents, and employes carelessly and negligently caused and suffered said car to leave its track and collide with another of said defendant's cars." On this averment of the petition, it is contended the plaintiff was limited, in making out a case, to the negligence of the servants of the transit company who were in charge of the car, and that the court erred in giving an instruction (again referred to below) allowing the jury to find for plaintiff if employes of the defendant in charge of its tracks and switches could have prevented the accident by high care. The reasoning is that the averment states the negligence to have occurred whilst the car was at the intersection of the two streets, and that no servants of the company could have been guilty at that instant of negligence which caused the plaintiff's injury, except the car crew. Evidence in regard to the condition of the track and switch at the place of the accident went in without objection; evidence, too, that cars often left the track and ran on the switch at that point. Indeed, the latter fact was elicited by the defendant's counsel in his cross-examination of plaintiff's witness Reyner. Defendant put in testimony to show such accidents could be prevented by locking the switch. The instructions given did not frame issues outside the evidence.

Another point pressed on our attention is that, on the whole evidence, plaintiff should have been nonsuited, because it was conclusively shown the accident was one which could not have been foreseen, and hence could not have been prevented; that the testimony shows inspections of the track were made at regular intervals; and that within the 36 hours preceding the collision the tracks were inspected at the point where it occurred, and found to be in good condition. All the evidence does not warrant those statements. Charles Reyner, whose place of business had been at the southeast corner of Cherokee street and California avenue for two years, witnessed the accident. He swore: Cars frequently jumped the track at that point. Did so every week. Sometimes the front end of a car would leave the rails, and sometimes the rear end, as happened in this instance. That he had witnessed the same occurrence within two weeks. The motorman of the car in question swore a car was not apt to leave the track if everything was in good condition, while Otto Schmidt, general master mechanic of the transit company, testified that accidents of this kind might be prevented by putting a key or wedge in the switch

*Rehearing denied December 1, 1903.

¶ 4. See Carriers, vol. 9, Cent. Dig. § 1283.

and locking it; that it would take from a half minute to a minute to lock it. Of course, we do not decide, as a matter of law, that appellant had to lock the switch, but merely that the foregoing evidence, taken as a whole, precluded a nonsuit. No conclusion that this accident was unavoidable by carefulness was to be drawn by the court, with such testimony before it. The question fell to the jury for decision. Respondent was undoubtedly free from negligence herself, as she was sitting quietly in the car as a passenger. The collision therefore made a prima facie case for her. *Lemon v. Chanslor*, 68 Mo. 341, 30 Am. Rep. 799; *Hipsley v. R. R.*, 88 Mo. 348; *Furnish v. R. R.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; *Clark v. R. R.*, 127 Mo. 197, 29 S. W. 1013; *Och v. R. R.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; *Olsen v. R. R.*, 152 Mo. 426, 54 S. W. 470. We think the defendant fell short of overcoming this prima facie case so thoroughly as would have justified the circuit court in directing a nonsuit.

The court gave an instruction that if the jury found the agents, servants, and employés of the defendant in control of the car on which plaintiff was a passenger, or of the track on which said car was running, or the switch at the place where the derailment occurred, could have prevented said derailment and collision by the exercise of the very high degree of care and foresight of skillful, careful, and practical railroad operatives under the same or similar circumstances, then the plaintiff was entitled to recover. That instruction states the law with reference to the care defendant was bound to exercise to prevent an injury to the plaintiff, and is couched in approved language. *Furnish v. Ry.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; *O'Connell v. Ry.*, 106 Mo. 482, 17 S. W. 494; *Willmott v. Ry.*, 106 Mo. 535, 17 S. W. 490; *Jackson v. Ry.*, 118 Mo. 199, 24 S. W. 192; *Hite v. Ry.*, 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555; *Sullivan v. Ry.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167; *Feary v. Ry.*, 162 Mo., loc. cit. 100, 62 S. W. 452; *Parker v. Ry.*, 69 Mo. App. 54; *Freeman v. Ry.*, 95 Mo. App., loc. cit. 99, 68 S. W. 1057.

As said above, after plaintiff had proven she was a passenger, and herself guiltless of any want of care, and that she was injured by the derailment and collision, the burden fell on the defendant to exculpate itself from carelessness. Decisions we have cited above uphold the doctrine as the law in Missouri, as it is elsewhere.

The verdict, which was for \$2,000, is attacked as excessive. We think that sum was not unwarranted by the evidence. Plaintiff's physician swore the injury to her nervous system was getting worse all the time, and would be permanent; further, that the injury to her shoulder was permanent. There was testimony that plaintiff is very feeble, has no use of her arm, is afflicted with diz-

ziness, has sick spells, is compelled to lie in bed days at a time, and is unable to do any work she formerly did. She swore she had dizzy spells, pain in her arm, palpitation of the heart, and partial paralysis of her arm and hand; that before the injury she did the housework, but was unable to do it now. Certainly this verdict is not so inordinate that we ought to denounce it. There was ample evidence to show plaintiff incurred expense for medical treatment, and would likely incur future expense of that sort.

The accident was of a kind which casts no doubt on the merits of this action, but leaves the mind perfectly clear that the plaintiff was seriously hurt, while she was free from fault, and that the defendant was to blame.

The case seems to have been fairly tried, and the judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

WALDOFFEL v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

CARRIERS—INJURY TO PASSENGER—DAMAGES — PHYSICIAN'S SERVICES — ABSENCE OF PROOF—APPEAL—BILL OF EXCEPTIONS—EXTENSION OF TIME.

1. Under Rev. St. 1899, § 728, limiting the power of the trial court to extend the time for filing bills of exceptions beyond the term of court at which exceptions are taken to cases wherein good cause is shown for the extension, it will be presumed, in the absence of a showing to the contrary, that the power was not abused where the court extended such time.

2. In an action for injuries to a passenger it was error to instruct the jury that they might add "a reasonable sum for medical attendance," where there was no evidence of any employment or charge, or of the value of the professional services rendered, and plaintiff herself testified that no bill had been rendered by the physician, and that she did not know what his bill was.

Appeal from St. Louis Circuit Court; John A. Blevins, Judge.

Action by Leonore Waldoffel against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Boyle, Priest & Lehman, for appellant. Sheridan & Sheridan and Henry B. Davis, for respondent.

REYBURN, J. The St. Louis Transit Company has appealed from a judgment of the circuit court of the city of St. Louis, rendered upon the verdict of a jury awarding her damages for personal injuries.

The portions of plaintiff's petition material, omitting formal averments, are thus set forth: "Plaintiff further states that on or about the 1st day of March, 1902, plaintiff, for value received, was accepted by the defendant as a passenger on its trolley car in charge of its agents or servants at the said

intersection of Olive and Sixth streets in said city, to be safely carried by defendant to the said intersection of Ninth and Lynch streets, as aforesaid, and defendant thereby agreed and it became its duty as aforesaid to well and safely carry and transport plaintiff to said Ninth and Lynch streets as aforesaid, and plaintiff entered the trolley car of the defendant for the purpose of said transportation. But plaintiff says that defendant, unmindful of its duty in the premises, and in violation of its contract aforesaid, failed to carry plaintiff well and safely to the said Ninth and Lynch streets, but so carelessly and negligently conducted itself in the premises that defendant failed to provide a safe step from its trolley car, and failed to keep the mud off the step provided, that plaintiff, without any fault on her part, was, in alighting from the car of defendant, thrown from the car by reason of said unsafe step, and the mud collected thereon, and by reason of said fall plaintiff's clothes were destroyed, and plaintiff's ankle was wrenched so that plaintiff was confined to her bed for the space of six weeks, and plaintiff's nervous system was destroyed, and plaintiff was and is injured internally, and said injuries are permanent, and plaintiff has and will suffer great pain and anguish, and has and will in the future be put to great expense for medicine and medical attendance; all to her damage in the sum of twenty-five thousand dollars, for which, with costs, she asks judgment." The answer was a general denial, coupled with a special plea, which, in the view taken by us, may be dismissed without further consideration.

At the threshold of this case we are confronted by respondent's arraignment of the bill of exceptions of appellant that section 728, Rev. St. 1899, limited the power of the trial court to extend the time for filing bills of exceptions beyond the term of court at which the exceptions are taken to such cases wherein good cause is shown for the prolonging. In *Dodd v. Guiseff*, 73 S. W. 304, this court had occasion to consider the same objection, and held that under the above statute authorizing the trial court, in its discretion, to extend the time for filing the bill of exceptions in the absence of the opposite showing, the usual presumption would be indulged in that such power was neither abused nor arbitrarily exercised, but that the court, possessed of the statutory right to make such extensions of time, acted properly, and with discretion, and the grounds of its action would not be inquired into.

2. That portion of the ninth instruction, given at the instance of plaintiff, concerning the measure of her recovery, and to which objection is made, is as follows: "If, therefore, the jury find that the plaintiff was injured, while a passenger on the defendant's railway, in alighting from the defendant's car, and the cause of such injury

was the old and wornout condition of the step, and the condition of said step was known to the defendant, its agents or servants, prior to the said injury, or could have been ascertained by them by the exercise of such care as a very cautious person would have exercised under like circumstances, then the jury will find for the plaintiff, and assess her damages at such a sum as the jury believe from the evidence will compensate the plaintiff for the pain and anguish already suffered by her, or which she may suffer in the future, by reason of her injuries; and to this the jury may add a reasonable sum for medical attendance, not exceeding the amount sued for in plaintiff's petition; but if the jury find that the plaintiff was not injured by reason of the condition of said step, then the jury will find for the defendant." The attending physician testified respecting the extent and character of the injuries of his patient, but he failed to show any employment or charge, or the value of his professional aid. The plaintiff also on cross-examination showed the length of time the physician had attended her, but expressly stated he had rendered no bill to her, and she did not know what his bill was. In *Duke v. Railway*, 99 Mo. 347, 12 S. W. 636, the petition stated "that on account of said injuries it was necessary for plaintiff to expend, and she did expend, a large sum of money for professional services of physicians and nurses and for drugs, to wit, one thousand dollars, and was damaged in bodily pain, anguish, and suffering, and in the permanent injury of her hip and ankle and the loss of her suit of hair in the sum of twenty-five thousand dollars." The instruction for plaintiff upon the question of damages was as follows: "And if you further believe that on account of such injuries it became and was necessary for plaintiff and she did expend large sums of money for professional services, physicians, and nurses, and also for drugs and medicines, and that from the overturning of the train as aforesaid she suffered mental anguish and bodily pain, and was, as to the physical parts of her body heretofore mentioned, permanently injured and disabled, and that the overturning of said car in which the plaintiff was seated as a passenger was the direct and proximate cause thereof, you will find for the plaintiff, and assess her damages at such sum as will, in your opinion, compensate her therefor, not to exceed twenty-five thousand dollars." The chief objection urged against this instruction was that it authorized the recovery by plaintiff of money expended for physicians' and nurses' services, drugs and medicines, when in fact the evidence failed to show any sum or sums disbursed for any such purposes. The court, finding this objection well taken, says: "There was an entire failure of proof as to the allegation in the petition that the plaintiff expended a large sum of money for pro-

fessional services of physicians and nurses and for drugs under the most liberal construction that can be placed upon it, and it was error in the court to instruct the jury as if there was evidence in the case in support of that averment. Where there is no evidence showing the amount, or the proximate amount, of expenses incurred for medicines, medical attention, or like services, the jury have no basis upon which to form an estimate of the damages that ought to be assessed on account thereof, and damages of this kind cannot be found except upon such proof." And the judgment was reversed solely on the above proposition. Again, in *Rhodes v. City of Nevada*, 47 Mo. App. 499, a judgment for personal injuries against defendant was reversed exclusively for a similar error, where the language of the instruction authorized the jury in estimating plaintiff's damages amongst matters mentioned to take into consideration her "expenses for medical treatment." To the same effect might be cited a long line of cases in the Supreme Court and the Courts of Appeals of this state affirming the doctrine of the above cases. *Robertson v. Railway*, 152 Mo. 382, 58 S. W. 1082; *Morris v. Railway*, 144 Mo. 500, 46 S. W. 170; *Smith v. Railway*, 108 Mo. 243, 18 S. W. 971; *Minster v. Railway*, 58 Mo. App. 276.

The judgment is accordingly reversed, and the cause remanded.

BLAND, P. J., and GOODE, J., concur.

TAYLOR v. KELLOGG.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

GUARDIAN AND WARD—LEASE OF PREMISES—COLLECTION OF RENT—NEGLIGENCE—LIABILITY OF GUARDIAN.

1. A curator is bound to exercise the same measure of prudence and diligence in the care and management of his ward's estate that a prudent and diligent man would exercise in the care and management of his own business.

2. A curator, who leased his ward's premises for a proportion of the crop to be grown thereon, and who took no steps to collect the rent or enforce the statutory lien on the crops, the tenant being insolvent, is chargeable with the reasonable value of his ward's proportion of such crops.

Appeal from Circuit Court, Holt County; Gallatin Craig, Judge.

In the matter of the final settlement of the accounts of Edgard J. Kellogg, guardian of William A. Taylor, in which Taylor appeared and objected. From a judgment of the circuit court, on appeal from the probate court, for the guardian, the ward, William A. Taylor, appeals. Reversed.

H. B. Williams, for appellant. Jno. W. Stokes, for respondent.

SMITH, P. J. The defendant, who was the plaintiff's guardian and curator, filed his

final settlement with the probate court, and the plaintiff thereupon appeared and objected thereto on the ground that the defendant had failed to charge himself in such settlement and accounting with the rent of 20 acres of land belonging to plaintiff for the year 1899. In the circuit court, where the matter was taken by appeal, the plaintiff's objections were disregarded, and judgment given accordingly. The plaintiff appealed.

It was conceded at the trial that the defendant rented the 20-acre piece of land for the year 1899 to one Bob Taylor, the latter agreeing to pay as rent two-fifths of the corn crop grown that year thereon. It is not disputed but that the defendant's part of the corn so raised was something like 280 bushels. It does not appear that defendant received any part of this corn, or what became of it. There is some evidence tending to prove that the tenant made way with it. The defendant admitted at the trial that he had made no effort to collect the rent. The law is well settled in this state to the effect that a curator is bound to exercise the same measure of prudence and diligence in the care and management of his ward's estate that a prudent and diligent man would exercise in the care and management of his own business. *Taylor v. Hite*, 61 Mo. 142; *In re Hutton's Estate*, 92 Mo. App. 132; *State ex rel. v. Elliott*, 82 Mo. App. 458; *Reynolds' Appeal*, 70 Mo. App. 576. Applying this rule of law to the facts here, and it is obvious that the plaintiff's objection was not without merit. The negligence of the defendant was of the grossest kind. He took no steps to collect the rent. He had his landlord's statutory lien on the crop for the rent. He could have enforced it by attachment. *Rev. St. 1899, §§ 4115, 4123*. But, instead of resorting to the remedy which the law thus afforded him for the recovery of the rent due him, he stood idly by, and let the entire crop be dissipated. The fact that the tenant was insolvent called for a greater vigilance and activity on the part of the defendant in endeavoring to secure it. Such a dereliction of his fiducial duty cannot be tolerated. He should have been charged with the reasonable market value of the rent corn which was lost by his negligence.

It results that the judgment must be reversed, and the cause remanded. All concur.

DONNELLY v. AIDA MIN. CO.*

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANT.

1. A foreman in charge of a crew of miners is not a fellow servant with the men while tak-

*Rehearing denied December 7, 1903.

1. See *Master and Servant*, vol. 34, Cent. Dig. § 451.

ing part in their work, so as to relieve the master from the liability of his negligence in doing the work.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by John Donnelly against the Aida Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. R. Robertson, for appellant.

Howard Gray, for respondent, cited the following authorities: *Kelly v. Stewart*, 93 Mo. App. 48; *Dayharsh v. Hannibal & St. Joseph R. R. Co.*, 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; *Russ v. Wabash Western R. R. Co.*, 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; *Haworth v. K. C. South R. R. Co.*, 94 Mo. App. 215, 68 S. W. 111; *Borden v. Falk Co.*, 71 S. W. 478, 97 Mo. App. 536 (by this court Jan. 5, 1903); *Gormly v. Iron Works*, 61 Mo. 492; *Brennan v. Berlin Iron Bridge Co.*, 74 Conn. 382, 50 Atl. 1030; *M. K. & T. R. R. Co. v. Smith* (Tex. Civ. App.) 72 S. W. 418; *Merchants' & Planters' Oil Co. v. Burns* (Tex. Civ. App.) 72 S. W. 626.

ELLISON, J. This is an action for personal injury to plaintiff, alleged to have resulted from the negligence of defendant. The plaintiff prevailed in the trial court. It appears that plaintiff and others were engaged as miners in defendant's lead and zinc mine under the charge and supervision of a foreman who employed and discharged the men; that these employes and the foreman, at the time of the casualty, were engaged in mining about 120 feet under ground, and that in cutting in the top of the drift was cut ahead so that it left a slope from the top down; that a large lot of dirt and rock had been blasted loose at the top of the drift, and that the foreman and another were at the top getting the dirt down, and plaintiff and others were at the bottom shoveling it into cars, whence it was taken to the shaft, and thence taken up to the surface. The evidence tended to show that while plaintiff was engaged in stooping and shoveling the dirt he could not observe what the foreman was doing at the top of the slope. At the moment of the accident plaintiff was attempting to change the position of a large rock so that he could break it in smaller pieces, and thereby be able to shovel it onto the car. At this time the foreman, without warning of any kind, rolled another rock from the top, which struck plaintiff violently as it reached the bottom, and crushed his hand. There was ample evidence to show that the foreman's act was negligent, and that plaintiff was in the exercise of due care when injured, and we do not feel called upon to discuss but one question, which is practically all that is argued by the counsel.

Defendant contends that, notwithstanding the foreman was ordinarily not a fellow servant with the employes under his charge and control, and that his acts, ordinarily,

were the acts of the master, yet he may have a dual capacity; that he may be either principal or fellow servant, depending altogether on the character of the act with which he is charged; that, although he was defendant's foreman, placed in charge and control of the plaintiff, yet, if plaintiff's injury was the result of the foreman's taking part in the labor and negligently performing such labor, it was the negligent act of a fellow servant, for which defendant is not liable. The position thus taken by defendant is directly opposed to the case of *Hutson v. Ry. Co.*, 50 Mo. App. 300, and other cases cited in plaintiff's brief. In that case the section foreman negligently struck one of his men with a pick which he was himself wielding in an effort to help remove a railroad tie. We ruled that there was no logical distinction between the act of a vice principal in negligently ordering a servant to do an imprudent thing and in doing the thing himself. In the one case he wills the servant shall do the act, and in the other he wills that he himself shall do it. The view taken in that case seems to us to be so reasonable, and the view opposed to it so utterly untenable and fanciful, that we can do no less than affirm it here. The same position had been taken by the Supreme Court in *Gormly v. Iron Works*, 61 Mo. 492, and *Dayharsh v. Ry. Co.*, 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900. In *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510, the court said that: "Stone's [the foreman's] negligence in assisting in fastening the hooks to the stone to be raised may have caused the injury; and that he was then performing the duty of a common workman, and not those strictly pertaining to the duties of foreman, in no wise relieves the company from liability. If the act done by him had been done under his direction as he did it by one of the employes of the company, its liability could not be doubted, and for the reason that the negligent act, although committed by the hand of another, was, in law, the act of the foreman, and consequently the act of the master. And it could be no less the act of the master when performed by the foreman in person." It is certainly the law that the master's personal negligence renders him liable to the servant, and the fact that the negligence occurs in the master's participation in the work of the servant cannot affect the liability. *Sherman & Redfield on Neg.* § 187; *Wharton on Negl.* § 205. In the instances where a corporation is the master it is necessarily represented in all that it does by an agent or vice principal—in this case by the foreman, who had charge and control of the direction of the work, and how it should be conducted; and his participation in the work may have made him a fellow laborer, but it did not make him a fellow servant, from the fact that it did not lessen his position or authority as master. His power to control the work and direct the manner of its per-

formance remained. In this instance he did an act himself which, if he had but directed another to do, liability would not have been questioned.

But defendant makes the claim that the Supreme Court has made different rulings since the cases above mentioned. We do not find it so. In *Hawk v. McLeod Lumber Co.*, 166 Mo. 121, 63 S. W. 1022, it was held that a "sawyer" and a "deck hand" working in a mill under a common foreman were fellow servants, and the mill company was not liable for injury to the deck hand by the negligence of the sawyer. In that case, while Judge Gantt states that the sawyer's position was superior to that of the hand, yet he had no control over him, and in no way acted for or represented the company. The company was represented by the foreman. The case of *Richardson v. Mesker*, 171 Mo. 666, 72 S. W. 506, by no means asserts the rule contended for by defendant.

The defendant offered no instructions other than a demurrer to the evidence, which was properly overruled. The plaintiff properly submitted the case on his theory.

Judgment affirmed. All concur.

DONK BROS. COAL & COKE CO. v. ARONSON et al.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

PARTNERSHIP—ACTIONS AGAINST—PLEADING—DENIAL OF PARTNERSHIP—SUFFICIENCY.

1. Under Rev. St. 1899, § 746, providing that a partnership need not be proved unless put in issue by the opposite party by affidavit filed with the pleadings, partnership may be put in issue by an answer, properly verified, denying its existence, without incorporating such denial in a separate paper and affidavit.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Donk Bros. Coal & Coke Company against Jerome W. Aronson, Jacob Lippe, and others. From a judgment granting defendant Lippe a new trial after rendering judgment for plaintiff, plaintiff appeals. Affirmed.

John F. Green, for appellant. A. W. Tyler and Sale & Sale, for respondents.

REYBURN, J. This, an action for balance of an account for goods sold and delivered, brought originally against four defendants, but dismissed as to one, proceeded to trial before the court as a jury. Defendants were sought to be charged as copartners under the firm name of Mound City Coal & Ice Company. Defendant Jacob Lippe, for separate answer, pleaded that he was not a partner with his codefendants under the partnership title, or at any time averred; that he was not a partner with said parties nor in the Mound City Coal & Ice Company in any manner or capacity dur-

ing the time set forth; and that he never at any time or in any manner had contracted the debt sued on by plaintiff, and was not indebted to plaintiff; and this answer was verified by the affidavit of this defendant. The plaintiff offered evidence to establish the correctness of the account sued on, and rested without tendering any proof of the persons composing the alleged copartnership of the Mound City Coal & Ice Company. The defendant Jacob Lippe thereupon asked the following declaration of law: "The court declares the law to be that under the pleadings and evidence in this case they must find a verdict in favor of the defendant Jacob Lippe," which the court refused to give, and gave the declaration prayed by plaintiff thus: "The court declares the law to be that under the pleadings herein the partnership of Jerome W. Aronson, Henry Aronson, and Jacob Lippe is admitted as charged in plaintiff's petition, said copartnership not having been denied by affidavit filed with the pleadings in the cause." Defendant Lippe thereupon asked leave to file an affidavit to conform to the ruling of the court, which was as follows: "State of Missouri, City of St. Louis—ss. Jacob Lippe being duly sworn on his oath states, that he was not at any of the times stated in the petition in the above entitled cause, a member of any firm doing business under the name of Mound City Coal and Ice Company, and that he was not a partner with any of his co-defendants named in the petition in any manner at any time stated in the petition. Jacob Lippe"—which the court denied leave to file, and rendered judgment against all the defendants for the amount claimed, with interest accrued. Respondent Lippe alone filed a motion for new trial, which the court sustained, and plaintiff has appealed.

Section 746, Rev. St. 1899, inter alia, provides: "And where plaintiff or defendant sues or is sued as a corporation, and where plaintiffs or defendants sue or are sued as a partnership, and the names of the several partners are set forth in the petition or answer, it shall not be necessary to prove the fact of such incorporation or partnership, unless the opposite party put such fact in issue by affidavit filed with the pleadings in the cause." The then able presiding judge of the Kansas City Court of Appeals has ably portrayed the object of this provision of the statute in *Haysler v. Dawson*, 28 Mo. App. 531, stating its design to be to make the party first purge himself of the imputation of a mere dilatory plea, and relieving the opposite party of the necessity of making proof unless put in issue in the statutory method. The question here presented appears not to have been directly presented to this court, but in *Walker v. Point Pleasant*, 49 Mo. App., loc. cit. 247, the judge announcing the decision by implication would have held a

verified plea or answer supported by affidavit denying the corporate existence of a municipal corporation a compliance with the statute then in force, if the question had then been before him for decision. Nor does the Supreme Court seem to have been expressly called upon to determine the point here made by appellant, though again inferentially language adopted in *Short v. Taylor*, 137 Mo., loc. cit. 525, 38 S. W. 952, 59 Am. St. Rep. 508, and *Flynn v. City of Neosho*, 114 Mo., loc. cit. 573, 21 S. W. 903, strongly inclines toward the position contended for by respondent. In *Meyer Bros. v. Ins. Co.*, 73 Mo. App., loc. cit. 169, when the Kansas City Court of Appeals was first invited to construe the above provision of the statute, the court held, where the answer of defendant, sued as a corporation, specially denied its corporate existence, and was verified by affidavit, that under the statute, if defendant had desired to put in issue its corporate existence, it should have done so in the manner required by the statutory provision by affidavit filed with the pleadings, but it was further held that the defendant, a private corporation, was concluded from such denial in this case by appearing and defending in its corporate name, and one judge dissented from that paragraph of this opinion, holding that the answer did not put in issue the corporate existence of defendant. In *Richards v. McNemee*, 87 Mo. App. 396, the same court, all the judges concurring, with the only change in its individuality the succession of the judge rendering the decision vice the judge dissenting in the former case of *Meyer Bros. v. Ins. Co.*, had again presented a similar question respecting the existence of a partnership challenged by answer authenticated by jurat. In the original opinion the ruling in *Meyer Bros. v. Ins. Co.* was adhered to, and it was held that it was not sufficient to merely swear to a pleading filed in the case, which denied the partnership or incorporation, but to answer the terms of the statute, the affidavit of itself must contain all the necessary denials. *Richards v. McNemee*, 87 Mo. App., loc. cit. 401. Upon motion for rehearing the court modified its former ruling, and announced as its conclusion that such a construction of the statutory provisions was too technical in view of what was generally understood as necessary to constitute an affidavit. In this latter expression of the Kansas City Court of Appeals we concur, believing that the actual evil sought to be remedied by this legislation is reached, and the true object of the statute attained, by the proper verification of a plea traversing the existence of a partnership or corporation, without incorporating such denial in a separate paper and affidavit.

The judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

JOHNSON v. BURKS.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1908.)

VENDOR'S LIEN—EXCHANGE OF LANDS—REMEDY AT LAW—INSOLVENCY OF DECEASED—PRESUMPTIONS—COMPETENCY OF WITNESSES—TRANSACTIONS WITH DECEASED—SELF-SERVING DECLARATIONS.

1. One conveying lands to another in consideration of a conveyance by the latter of other lands under an agreement for the exchange of land is entitled to a vendor's lien on the lands conveyed by him to secure the portion of the consideration represented by lands to which he obtains no title.

2. Equity will enforce a vendor's lien against the grantee, though solvent, and though the grantor has an adequate remedy at law under a covenant of warranty.

3. The fact that no administration of the estate of a decedent was had authorizes the rebuttable inference that he died without having property subject to administration, and that he was at the time of his death insolvent.

4. A widow is not a competent witness to prove the transactions between her deceased husband and his grantee leading up to the conveyance.

5. A grantee claiming under a deed from her deceased father is incompetent to show that the consideration of the deed was other than that therein expressed—love and affection and a nominal money consideration.

6. Declarations of a deceased grantor of lands as to his object and purpose in making the deed to his grantee were self-serving and inadmissible.

Appeal from Circuit Court, Grundy County; Paris C. Stepp, Judge.

Suit by Will H. Johnson, administrator of the estate of Daniel Welch, deceased, against Mollie P. Burks. From a decree for plaintiff, defendant appeals. Affirmed.

Platt Hubbell, Geo. Hubbell, and O. N. Gibson, for appellant. Peery & Lyons and Hugh C. Smith, for respondent.

SMITH, P. J. The salient facts of this case, as disclosed by the record, before us, may be stated in this wise, viz.: That in the year 1880 Daniel Welch was the owner of two lots in the city of Trenton, and Richard Burks claimed to be the owner of 100 acres of farm land lying near said city. Welch exchanged the city lots with defendant for his land. Each conveyed to the other by a deed of general warranty the subjects of the exchange. The consideration named in the deed of the former was \$3,500, and in that of the latter \$3,000. Shortly afterwards Burks conveyed to his daughter the Welch lots by deed in which the expressed consideration was "natural love and affection and the sum of ten dollars." Welch conveyed the Burks land by a warranty deed to another, and under certain mesne conveyances Thomas Brunson succeeded to the Burks title. In 1896 one Hall, in an action of ejectment against Brunson, recovered 40 acres of the Brunson land. Later on Brunson brought his action against the plaintiff, as administrator of Daniel Welch—he being then dead

—for the breach of the covenants of warranty contained in Welch's deed conveying the said 40 acres, and recovered \$1,125. Still later on the plaintiff discharged said judgment. The plaintiff brought this suit, the object of which was to obtain a decree of the court declaring that plaintiff was entitled to a vendor's lien and the enforcement thereof against said city lots for the amount of money which he was compelled to pay on account of the failure of the title to the 40 acres which had been conveyed as aforesaid by his intestate, Daniel Welch. The finding and decree of the trial court was for the plaintiff, and the defendant appealed.

The effect of the transaction of the exchange of properties between Welch and Burks was that the former sold to the latter his city lots for an agreed consideration of \$3,500, and such latter, in payment, or part payment, thereof, conveyed to the former his farm lands at an agreed price of \$3,000. It is a conceded fact that such latter had no title to 40 acres of the land, and that to the extent of the value of that 40 he did not pay to such former the contract price of his city lots. About one-third of the purchase price of the city lots has not been paid. Will not equity imply a lien in favor of the vendor against the lots conveyed for the unpaid purchase price? It is the defendant's contention that a vendor's lien is not implied when there is an exchange of lands, and nothing more. It is very well settled that the vendor's lien arises as well where by exchange land is to be received as where money in specie is to be paid. *Pratt v. Clark*, 57 Mo. 189; *Bennett v. Shipley*, 82 Mo. 448; *Bank v. Knapp*, 61 Miss. 485; *Drinkwater v. Moreman*, 61 Ga. 395; *Bryant v. Stephens*, 58 Ala. 636; *Burns v. Taylor*, 23 Ala. 255; *Dawson v. Girard*, 27 Minn. 411, 8 N. W. 142; *McDole v. Purdy*, 23 Iowa, 277. And the principle on which this lien, in the nature of a trust, is founded, is that it would be against conscience to permit a person who has obtained the land of another to keep it, and not pay the full consideration money. 2 Story on Eq. Juris. § 1219. And the right to enforce the vendor's lien may exist contemporaneously with the right to recover at law. *Stewart v. Caldwell*, 54 Mo. 536; *Pratt v. Clark*, supra; *Bishop v. Seal*, 87 Mo. App. 256; *Simily v. Adams*, 88 Mo. App., loc. cit. 621. Especially will equity grant relief where the legal remedy is inadequate; as, for example, where the party complained of is insolvent. *Bishop v. Seal*, supra; *Harper v. Rosenberger*, 56 Mo. App. 388. And, generally speaking, the lien of the vendor exists; and the burden is on the purchaser to establish that in the particular case it has been intentionally displaced or waived by the consent of the parties. If, under all the circumstances, there remains a doubt, then the lien attaches. Story on Eq. Jur. § 1224. This is not a case where it is contended that the vendor has by some act

of his waived or caused to be displaced his lien, but it is rather one where the lien was not implied, or did not arise, in consequence of the transaction. Whether the transaction be called an exchange or sale of lands is of no special importance, since equity will regard the substances, rather than the form, of such a transaction. *Simily v. Adams*, 88 Mo. App. 621. Burks could not be allowed to hold the lots sold and conveyed to him by Welch exempt from the lien until he had paid or performed the consideration, for "that would be against conscience." *Pratt v. Clark*, 57 Mo. 189. By the deed of Welch he had acquired the fee-simple title of the lots of the latter. The final consideration for this has not been performed or paid. He has not conveyed to the latter the fee-simple title to the 100 acres of land, but only to a part of it, or six-tenths, and to that extent the purchase price or consideration has not been paid or performed. It is true Burks and Welch both supposed the deed of the former to be effective to convey the title to the whole 100 acres, instead of only 60 acres of it. There is nothing in the facts of the transaction that indicates that Welch intended to waive the right which the law gave him. In legal effect, he has no more been paid the full price agreed upon for his lots than he would have been had Burks delivered to him as "payment in part counterfeit coin." *White v. Street*, 67 Tex. 177, 2 S. W. 529. The conveyance by Burks of the 40 acres was wholly ineffectual to pass the fee. If it had not been included in his deed at all, the condition of Welch would not have been different from what it is. The fact remains that Burks has acquired title to the lots, and has not in any way paid the entire purchase price. If, under these circumstances, we had a doubt—as we have not—as to whether Welch was entitled to a lien, that doubt would be resolved in favor of its existence.

But it is contended by the defendant that, as the estate of Burks is solvent, and the plaintiff may have his action against it on the covenants of the deed, he has an adequate remedy at law, and that, therefore, the interference of a court of equity cannot be successfully invoked. It is conceded that Burks died in the county where he had for many years previously thereto resided, and that there was no administration of his estate in that or in any other county. This circumstance of itself we think sufficient to authorize the rebuttable inference that he died leaving no property or effects subject to administration, and that in legal contemplation he was, when that event happened, insolvent. The evidence offered is by no means sufficient to satisfy us that Burks was solvent at the time of his death, or to rebut the inference of insolvency. And, besides this, the trial court, after hearing all the evidence offered and given, found the issue in favor of the plaintiff. In view of

this, we feel it to be our duty to defer to the finding of the trial court in respect to this issue.

But suppose the Burks estate is solvent, and that an action at law on the covenants of the Burks deed to Welch could be maintained for the recovery of the amount which the plaintiff has been compelled to pay to Brunson, must this case fail for that reason? It is now well settled in this state, as we have seen, that a vendor has an adequate remedy at law by an action on the covenants of warranty by reason of an eviction, but this does not preclude equitable relief, for the right of a vendor to enforce his lien may well, and frequently does, exist contemporaneously with a right of recovery at law. And the ancient jurisdiction always exercised by courts of equity in cases of trust will not be ousted by the fact that courts of law could afford apparently adequate relief. The contention that a vendor must be insolvent before a court of equity will lend its aid to enforce the lien of the vendor for the unpaid purchase price cannot be sustained.

The defendant further objects that she is a good-faith purchaser of one of the lots from her father, instead of a volunteer, and that the lot in her hands is not subject to be charged with the plaintiff's lien. The conveyance of the lot by her father on its face shows that it was voluntary, and without consideration. She accepted it, and claims under it. The widow of Richard Burks, her grantor, was called as a witness, and testified as to the transaction between her husband and the defendant in respect to the making of the deed by the former to the latter, and also as to the negotiations between such former and latter which preceded and led up to the execution of the deed. This evidence was stricken out by the court on the objection of plaintiff, and this action of the court we do not think was error. Evidence of this kind by a wife is excluded on the ground of public policy. Mrs. Burks was disqualified to be a witness under the statute. *Moore v. Wingate*, 53 Mo. 398; *Holman v. Bachus*, 73 Mo. 49; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Shanklin v. McCracken*, 140 Mo. 356, 41 S. W. 898; *Patton v. Fox*, 169 Mo. 107, 69 S. W. 287. Nor is the action of the trial court to be condemned for rejecting the offer of the defendant to testify that the consideration recited in the deed from her father to herself was other and different from that therein stated, and in that way to change her prima facie quality of volunteer to that of a bona fide purchaser for value. *Saetelle v. Ins. Co.*, 81 Mo. App. 509; *Ashbrook v. Letcher*, 41 Mo. App. 369; *Nichols v. Jones*, 82 Mo. App. 657. Nor was defendant any more competent to testify to the consideration of the deed, or as to the

acts of performance of the contract under which she claims the consideration was other than that expressed in the deed, than to the contract itself. *Saetelle v. Ins. Co.*, supra; *Sitton v. Shipp*, 65 Mo. 297; *Mulock v. Mulock*, 156 Mo. 442, 57 S. W. 122. And so it has been ruled that the disability as a witness of one of the original parties to the contract or cause of action in issue and on trial, where the other party is dead, is co-extensive with every action where such instrument or cause of action may be called in question. *Chapman v. Dougherty*, 87 Mo. 617, 56 Am. Rep. 469; *Meier v. Thieman*, 90 Mo. 433, 2 S. W. 435; *Baker v. Reed*, 162 Mo. 355, 62 S. W. 1001; *Davis v. Wood*, 161 Mo. 29, 61 S. W. 695; *Patton v. Fox*, supra.

Nor do we think the court erred in excluding the testimony of the witnesses Burkeholder and Curd, in substance that the defendant's grantor and father had told them the object and purpose he had in view in making the deed to the defendant. *Tucker v. Tucker*, 32 Mo. 464. These declarations of the father of defendant were not against his interest at the time they were made, but were in their very nature self-serving. We do not know of any authority that gives countenance to the notion that the declarations of a grantor, whether living or dead, are admissible in evidence in favor of a volunteer or a fraudulent grantee to show a valuable supporting consideration, where the deed itself recites the consideration to be that of love and affection and a mere nominal money consideration.

The plaintiff, as administrator of Welch, occupies as to the defendant very much the position of a creditor of her grantor, and as between the plaintiff as a creditor of defendant's grantor and the defendant claiming title under him to the property sought to be charged with the lien it certainly cannot be that she can show herself a bona fide purchaser for value by the self-serving declarations of her grantor, no difference when made.

Looking at all the facts and circumstances disclosed by the evidence, and we think the trial court was fully justified in finding that the defendant was not a bona fide purchaser for value, but a mere volunteer, in whose hands the property was as much subject to be charged with the lien as if it had remained in the hands of her father.

The amount for which Brunson recovered judgment against plaintiff on the covenant of warranty, and which has been paid by him, was, in legal effect, the measure of that part of the consideration for the conveyance by Daniel Welch of his city lots to Richard Burks which remains unperformed and unpaid by the latter.

We think the decree was for the right party, and should be affirmed. All concur.

HEMLEY v. HARMON.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

CHattel Mortgages — Validity — Mortgagor's Insolvency—Avoidance by His Administrator.

1. Where a chattel mortgage was void as against the creditors of the mortgagor because it was not recorded in the proper county, and the mortgagor died insolvent and in possession of the mortgaged property, his administrator, being a trustee for his creditors, had the right to impeach or avoid the mortgage.

Appeal from Circuit Court, Harrison County; P. O. Stepp, Judge.

Action by Russell H. Hemley, administrator of S. H. Bagley, deceased, against Bonifant R. Harmon. From a judgment for plaintiff, defendant appeals. Affirmed. See 91 Mo. App. 22.

O. N. Gibson, for appellant. Hall & Hall, for respondent.

BROADDUS, J. This case was formerly in this court. See *Bagley v. Harmon*, 91 Mo. App. 22. On the former hearing it was reversed and remanded, since when the present plaintiff was substituted for that of Bagley, the former administrator. The evidence is somewhat different from what it was on the former trial. It appears that S. H. Bagley was a resident of the city of Trenton, in Grundy county, Mo., for several years prior to his death, and was engaged in running and operating a harness store, and in making, buying, and selling harness and other merchandise usually connected therewith. About the 10th of July, 1900, he moved his stock from Trenton to Gilman City, in Harrison county, Mo., and purchased a stock of harness from one Wm. Dorney, and added it to the stock moved from Trenton. On the 10th of July, 1900, he gave Dorney a chattel mortgage on the stock to secure a note of \$435.30, due January 1st after date. While said Bagley continued to run and operate said business in Gilman City from that time until his death, October 15, 1900, he resided in Trenton, Grundy county, Mo., as shown by the testimony and the admissions contained in defendant's answer and made on the trial. Instead of causing said mortgage to be recorded in Grundy county, the county in which Bagley, the mortgagor, resided, as required by law, said Dorney caused said mortgage to be recorded in Harrison county, Mo., on the 1st day of August, 1900. He had it recorded in Grundy county, Mo., on the 30th day of November, 1900, six weeks after the death of Mr. Bagley, the mortgagor, and after letters had been granted upon his estate, the property had been inventoried, appraised, and sold to appellant. After her appointment the administratrix took possession of the mortgaged property, and by order of the probate court opened up and ran the harness store covered by the mortgage, and sold at retail

until the ——— day of November, 1900, when she sold the stock to appellant for 72½ cents on the appraised value, and the tools at 50 per cent. of appraised value. T. F. Fulkerson, as a friend, advised and assisted the administratrix in making the trade, and some time during the negotiations he learned of the mortgage on the goods, but was not present at the time the trade was closed. The negotiations commenced at Trenton, at which time Fulkerson called plaintiff to his office. The parties disagreed about the assignment of insurance on the stock, and appellant went home. Two or three days after this the administratrix went to Gilman City and closed the trade with him at the price named. In a day or two Fulkerson and one Mr. Powell went over to Gilman City with plaintiff to invoice the goods and complete the trade. After appellant had satisfied himself as to the invoice of the goods previously taken by the administratrix, they figured up the amount, appellant took possession of the property, and they went to the bank to get the money. The statement of facts thus far is practically agreed to be correct.

The evidence of Mrs. Bagley, the administratrix, tended to show that there was nothing said to her about the said mortgage at or prior to the time of the sale and transfer of the goods to the defendant; that when she went to the bank to receive the purchase price defendant, for the first time, proposed to deduct from the same the amount of said mortgage; that she refused to do so without instructions from her attorney, who later told her not to allow the credit. On the other hand, defendant's testimony was to the effect that he was to take the property free of the mortgage debt. It is agreed, however, that defendant took possession of the goods and disposed of them in the usual course of trade.

There was a trial before a jury, which resulted in a verdict for the plaintiff.

The issue raised on instructions by the respective sides was whether the property was sold by Mrs. Bagley, the administratrix, to defendant for a certain cash price, without giving credit for the amount of said mortgage, or for such price less a credit of said amount. And the defendant by one other instruction asked the court to say to the jury that "the plaintiff in this case represents S. H. Bagley, deceased, and is bound by his contracts, and will not be permitted in law to impeach or avoid the chattel mortgage in question, because it was void as to creditors, or because it was recorded in the wrong county, and the fact, if it be a fact, that the estate of said S. H. Bagley is insolvent, gives the said Mary Bagley or the plaintiff in this case no right to impeach or avoid said chattel mortgage." This the court refused.

No particular objection can be taken as to any of the other instructions given, which

leaves for our consideration alone the propriety of the action of the court in refusing to give the one mentioned. The question is presented by this instruction of the right of an administrator to impeach the validity of a chattel mortgage executed by his intestate. It seems that under certain circumstances he may do so. In *Hughes v. Menefee*, 29 Mo. App. 192, the deceased had agreed for a consideration to execute a chattel mortgage on certain personal property of which he died seized and which went into the possession of his administrator. The suit was to compel the administrator to execute the agreement made by the deceased. The court held that "while, ordinarily, the administrators are the representatives of the deceased, they are also trustees for the creditors of the estate of the deceased; and in case of a contest between the general creditors and one asserting a particular claim, as here, they may be said to represent the general creditors. Especially is this so when the estate is insolvent." It was decided that the administrator could defend on behalf of plaintiff, Hughes, who was asserting the right to have an unrecorded agreement for a mortgage enforced, and that "a regular written mortgage, duly acknowledged, but not recorded, is void. * * * When possession is not delivered there can be no valid chattel mortgage in this state, as against creditors, unless it be executed, acknowledged, and recorded." See *Riddle v. Norris*, 46 Mo. App. 512, where the same rule of law is repeated.

We find no other cases to the same import in this state. The case of *Hughes v. Menefee* is in accord with the decision in *Kilbourne v. Fay*, 29 Ohio St. 264, 23 Am. Rep. 741, where it was held that "when a chattel mortgage is declared void by statute 'as against the creditors of the mortgagor,' and the mortgagor dies in possession of the mortgaged property, leaving an insolvent estate, such property becomes assets in the hands of the executor or administrator of the mortgagor, whose duty, as well as right, it is to defend his possession against the claim of the mortgagee, notwithstanding such mortgage was valid as against the mortgagor." The appellant has cited us to *Jacobi v. Jacobi*, 101 Mo. 507, 14 S. W. 736, *Riddle v. Norris*, 46 Mo. App. 512, and kindred cases, to support his theory of the case. But these cases refer to the rights and duties of assignees. An assignee represents the assignor, and not the creditor. In the two cases named it was held that he could not defend against the mortgage of his assignor on the ground that it was fraudulent as to creditors for the reason given. But the authorities are to the effect that the administrator or executor is the trustee of the creditors of the estate they are administering. *Hughes v. Menefee*, supra; *Story's Eq. §§ 1255-58-60*. And an administrator or executor, as such trustee, is in duty

bound to defend the estate in his hands, it being insolvent, against the claim of a mortgagee under a fraudulent mortgage.

Other errors are alleged to have occurred during the trial, but they do not appear to have been of sufficient importance to have changed the result, and for that reason will not be considered. The court was right in refusing the instruction asked. For the reasons given, the cause is affirmed. All concur.

BARBER ASPHALT PAV. CO. v. MESERVEY et al.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1908.)

SPECIAL TAX BILLS—LIMITATIONS—CITY CHARTER.

1. Kansas City Charter, art. 9, § 23, provides that special tax bills shall be made payable in four installments, and shall be payable and collectible, the first on May 31st next after date of issue of the tax bill, the second in one year, the third in two years, and the fourth in three years after the first installment is due and collectible, as above mentioned; and when any installment becomes due and collectible as therein provided interest thereon and on all unpaid installments shall be due and collectible to that date; and if any installment or interest thereon is not paid when due, all the remaining installments, with interest, shall immediately become due and payable; and the lien of all tax bills shall continue for a year after the last installment specified therein shall have become due and payable; and no default in the payment of any previous installment shall operate to diminish the period during which such lien shall continue. *Held*, the lien of a tax bill for all its installments continues for a year after the last installment becomes due on its face, though it became due earlier because of default in payment of the other installments.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Suit by the Barber Asphalt Paving Company against Bessie M. Meservy and others. Judgment for defendants. Plaintiff appeals. Reversed.

Scarritt, Griffith & Jones, for appellant. Meservy, Pierce & German, for respondents.

SMITH, P. J. This is a suit on certain special tax bills, which was begun on May 29, 1900. The date of the tax bills was December 17, 1895. On May 31, 1896, the first installment became due; also the interest on the second, third, and fourth; and were paid. On May 31, 1897, the second installment became due; also interest on the third and fourth; and were paid. On May 31, 1898, the third installment became due; also interest on the fourth. On May 31, 1899, the fourth installment, according to its terms, became due. Neither of the latter was paid. The petition was in four counts, one of which is based upon each of the two unpaid installments of the two tax bills. The defendants demurred to each count of the petition for the reasons, first, that they several-

ly did not state facts sufficient to constitute a cause of action; second, that the allegations in each show that the lien of the tax bills had expired prior to the commencement of the suit. This demurrer was sustained by the trial court, and, plaintiff declining to plead further, judgment was rendered on each count of the petition in favor of the defendants. From that judgment plaintiff has appealed.

The question thus presented for decision is whether or not a suit, as here, to enforce the lien of an installment tax bill, which was begun within one year after the date of the maturity of the last installment, as therein recited, was seasonably begun. It is suggested that its decision must be dominated and controlled by that in *Burnes v. Ballinger*, 76 Mo. App. 58. The question passed upon in that case arose under the provisions of the statute relating to cities of the second class (article 3, c. 30, Rev. St. 1899). In one of the sections thereof (section 1405) it was expressly provided that "the owner of any lot or parcel of ground fronting on such street shall within ten days after the letting of the contract for such work notify the city engineer in writing that he desires to pay for such work in five annual payments, then the city engineer shall make out five special tax bills for each one-fifth part of the cost of such work, bearing interest as aforesaid, which rate shall be fixed in each case by ordinance—each payment to bear not to exceed ten per cent. interest from the date of issue to date of payment, which rate shall be fixed by ordinance—said interest payable semi-annually on the first days of February and July of each year at the office of the city treasurer; and if default is made in the payment of the interest due on either of said days then the principal and interest due on such special tax bills shall become due and payable and may be collected as provided in section 1407," which provides that "every such tax bill shall be a lien on the property therein described, against which the same may be issued on the date of the receipt of the city engineer therefor, and such lien shall continue two years after the maturity thereof but no longer, unless suit be brought to collect same," etc. In the case just referred to (*Burnes v. Ballinger*) there had been five special tax bills issued under said section 1405, and dated December 7, 1892. Default was made in the second, which was due and payable on July 1, 1893, and this had the effect, under the statute, to make due and payable, as of that date, the three others, though, according to the terms thereof, they became due and payable later on. The suit on all of the tax bills was not begun until more than two years after the default on that becoming due and payable on July 1, 1893. It was held that, since there had been a default in payment of interest on all the tax bills more than two years before the suit was brought on them, they had

all become due more than two years before that event, and were therefore then barred.

But the statute influencing that decision is to be distinguished from the charter provision under which the tax bill sued on in this case was issued, and for that reason we do not think that decision should be accepted as a guiding precedent in this. The tax bills here were issued under the provision of section 23, art. 9, of the charter, which is as follows: "The common council may by ordinance provide that special tax bills * * * shall be made payable in four equal installments, and such tax bills when issued, shall be payable and collectible as follows: The first installment shall become due and collectible on the 31st day of May (following or the second following the date of issue of the tax bills), * * * the second installment shall become due and collectible in one year, the third installment in two years, and the fourth installment in three years after the first installment is due and collectible, as above mentioned. * * * Such tax bills, including each installment thereof, if not paid in full before the expiration of 30 days from the date of issue thereof, shall bear interest from the date of issue at the rate of seven per cent. per annum, and when any installment becomes due and collectible as herein provided, interest thereon and all unpaid installments shall be due and collectible to that date. If any installment of any such tax bills or interest thereon be not paid when due, then all the remaining installments shall immediately become due and collectible, together with interest thereon at the rate of ten per cent. per annum from the date of the issue of such tax bills, less the sum of any interest that may have already been paid on said installments. Suits may be brought to enforce the payment of such tax bills or any installment or installments thereof, with all interest thereon, in the manner herein provided for the bringing of suits on other tax bills. * * * The lien of all tax bills issued under this section shall continue for a period of one year after the last installments specified therein shall have become due and payable and no longer, unless within such year suit shall have been instituted to collect such tax bill and notice of the bringing of such suit shall have been filed with the city treasurer, in which case the lien of such tax bill shall continue until the termination of such suit, and until the sale of the property under execution on the judgment establishing the same; and no default in the payment of any previous installment shall operate to diminish the period during which such lien shall continue. Such tax bills and liens thereof shall be assignable and shall be of the same force and effect, and suits may be brought thereon in the same manner as other tax bills issued by this city, and all other provisions relating to special tax bills issued pursuant to the authority given in this article shall apply to those

issued under this section, excepting so far only as the other provisions of this article conflict with those contained in this section." It will be observed that the foregoing charter provision authorizes the issue of not five distinct tax bills, as the statute does, but only a single tax bill, to be payable in four annual installments; and that it also provides that, if default shall be made in the payment of the first, second, or third, or the interest thereon, that the effect of that default shall be to make due and collectible (payable) any installment which by its terms is to subsequently become due and collectible, and that the lien shall continue for a period of one year after the last installment of it—the tax bill—shall become due and payable, and no longer. Under the statute the lien continues for two years "after the maturity of the tax bills," no difference when that is; but under the charter it—the lien—continues for a period of one year after the last installment specified in the tax bill shall become due. To hold that the accidental circumstances of a default by the abutting lot owner in the payment of the first, second, or third installment shall have the operative effect to start the running of the statutory period of limitation from that point, would be to adopt a construction that would nullify and abrogate that part of the said charter which expressly declares that it shall continue for a period one year after the last installment shall become due and collectible, or, which is the same thing, that it shall continue for one year after the last installment shall by its terms become due and collectible. If the freeholders had intended to provide that the one-year period should begin to run from the date of the accident of a default in the payment of any one of the installments except the last, then they surely would not have declared, as they did, that it—the period—should continue for one year after the last installment of the tax bill should become due and collectible. Their expression would have been different from that employed by them in the section of the charter quoted.

There is no rule of construction with which we are acquainted that would justify us in concluding that it was the intention of the freeholders to declare by the language employed in that section that the lien of the tax bill should continue for the period of one year after the last installment of it became due according to its terms only where the prior installments were all paid in the order they became due and collectible, or that the period of limitation should, by the accident of a default in the payment of any prior installment, be made to begin and end at an earlier date. This charter provision has been in force for more than 10 years, and under it many thousands of special tax bills have been issued for street improvements in the payment of which default has been made, and for the enforcement of the lien thereof vari-

ous suits have been brought, and in the defense of which the abutting lot owners employed many of the ablest and most learned lawyers in the western part of the state, who interposed every defense—every objection that the resources of their combined genius could evolve or suggest—in that behalf; but the construction here contended for was never thought of or invoked by any of them in any case, so far as we can discover, but the distinction was left to be accorded to the very able and ingenious counsel for the defendant—late as he is in the field—to urge it for the first time in this case. So far as we know, for a period exceeding two Roman lustrums it has been the accepted construction of said charter provision by lawyers and laity that the lien of a tax bill issued under it continued for a period of one year after the last installment thereof became due according to the terms of that installment. No doubt, if the construction contended for by defendant and adopted by the trial court be approved by us, many owners of defaulted tax bills will find out for the first time that they have slept on their rights, and that the lien of their tax bills has expired by the lapse of time, and that what they have been led to believe a valuable security had perished. Under the construction that the lien of the tax bill continues for the period of one year after the last installment thereof becomes due according to the terms thereof—a construction hitherto unquestioned—we have the right to assume that thousands of dollars have been and are invested in such tax bills, which the holders, after default in the payment of the installments or the interest thereon, have, in fancied security, refrained from suing until the time for doing so, under defendant's construction, has passed. The construction adopted by the trial court would, in its effect, be most mischievous in its consequences. It could not benefit either the property owner or the contractor making the improvement; nor, indeed, any one. The general understanding of the law, and the constant practice under it for so long a period as here, unquestioned by public or private action, is persuasive evidence of the true meaning. *Venable v. Railway*, 112 Mo., loc. cit. 123, 20 S. W. 493, 18 L. R. A. 68; *Sedgwick on Const. & Stat. Law*, 213. It is asserted, and not disputed, that it has been the common opinion of the members of the legal profession who have heretofore had occasion to construe the said charter provisions, that the lien therein provided continued for one year from the date the last installment of the tax bill became due according to its express terms, and this is at least good evidence of what the law is. "*Optimus legum interpretis consuetudo*."

We conclude that a reasonable and practical construction of the said charter provision requires us to hold that the lien of a special tax bill issued under it continues for one year from the date the last installment becomes due according to the terms therein ex-

pressed, and from this it results that the action of the trial court in sustaining the demurrer was an error for which the judgment must be reversed, and the cause remanded.

BROADDUS, J. (concurring). As this case has been sufficiently stated in the separate opinions of Judges SMITH and ELLISON, I shall therefore only briefly state my conclusions of the law which governs the question at issue. Under the first clause of section 23, "such tax bills when issued shall be payable and collectible as follows: The first installment shall become due and collectible on the 31st day of May next succeeding the date of issue of the tax bills, provided," etc.; "the second installment shall become due and collectible in one year; the third installment in two years; and the fourth installment in three years after the first installment is due and collectible, as above mentioned." The fourth clause, which is general in its nature, is that "the lien of all tax bills issued under this section shall continue for a period of one year after the last installment specified therein shall have become due and payable, and no longer." The fifth clause, "and no default in the payment of any previous installment shall operate to diminish the period during which such lien shall continue." The contention arises out of the proper construction of this clause. Under clause 3, the last installment becomes due and collectible upon default in the payment of a previous installment, but no reference is made as to the lien of the tax bill itself. It seems to me that the language means just what it says: that the lien "shall continue for a period of one year after the last installment specified therein shall become due and payable, and no longer"; that is, the lien of the tax bill shall continue for one year, not after the last installment may become due by reason of default in the payment of a prior installment, but after the last specified installment shall have become due by the terms of the tax bill itself. The language that no previous default "shall operate to diminish the period during which the lien shall continue" refers to what lien? Certainly the lien of the tax bill, and not merely the lien of the last installment. To hold that it refers alone to the lien of the last installment would do violence to the plain language of the clause, and, in my opinion, to the intent of the lawmakers.

For these reasons I think the cause should be reversed.

ELLISON, J. (concurring). The charter provisions involved are found in section 23 of article 9 of the Charter of Kansas City. The section is lengthy, and for convenience in argument has been very properly abridged by the respective counsel. So far as is necessary for a construction of the section as applicable to this case, we need only notice five clauses, which we designate as first, second, third, fourth, and fifth: First. "Such

tax bills when issued shall be payable and collectible as follows: The first installment shall become due and collectible on the 31st day of May next succeeding the date of issue of the tax bills, provided, that if such period is less than thirty days after the issue of the tax bills, then the first installment shall become due and collectible on the 31st day of May of the next year; the second installment shall become due and collectible in one year; the third installment in two years, and the fourth installment in three years after the first installment is due and collectible, as above mentioned." Second. "When any installment becomes due and collectible, as herein provided, interest thereon and on all unpaid installments shall be due and collectible to that date." Third. "If any installment of such tax bills or interest thereon be not paid when due, then all the remaining installments shall immediately become due and collectible." Fourth. "The lien of all tax bills issued under this section shall continue for a period of one year after the last installment specified therein shall have become due and payable, and no longer." Fifth. "And no default in the payment of any previous installment shall operate to diminish the period during which such lien shall continue." The principal and interest of the third installment and the interest for the third year on the fourth installment were defaulted more than a year before this action was brought, but the principal of the fourth installment was defaulted within less than a year of bringing the action. Defendant contends that the default of the third year's interest of the fourth or last installment caused it to become due, and that, more than a year having elapsed before bringing suit, the lien of both the third and fourth installments is barred. I think not. The second clause of the section of the charter provides that when an installment becomes due the interest thereon and on each of the other installments shall also be due, but no penalty is added for nonpayment of such interest. But the third clause does provide a penalty, viz., that, if any installment and the interest on such installment shall not be paid when due, then all the remaining installments will become due. The installments are not made to become due before the time specified on their face by a default of the annual interest on any installment which is itself not due on its face. There may be a default in payment of the annual interest on installments not due, and it will not affect them. The only default of interest which will alter the face of such future installments is a default in the payment of the principal or interest of an installment which has become due, for so the charter reads. The third clause of the charter matures all the remaining installments on a default of one for the purpose of collecting the tax bill, if the holder so elects. But under the fourth and fifth clauses, if he does not so elect, the lien of the tax bill continues for

a year after the last installment becomes due, unaffected by a default in any of the installments due previous to the last one; that is to say, shall become due on its face.

I concur in reversing the judgment and remanding the cause.

MEISCH v. SIPPY.*

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

BREACH OF MARRIAGE PROMISE—VERDICT—DISQUALIFICATION OF JUROR—PROOF—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. Statements of a juror that he had formed an opinion before trial, contrary to his answer to questions on the voir dire examination, cannot be proved, to show his disqualification and impeach the verdict, either by other members of the jury or persons who took no part in the trial.

2. Affidavits of witnesses unknown and not discoverable by the exercise of due diligence at the time of trial of an action for breach of marriage contract, detailing facts which, if established at the trial, would show that no contract of marriage was ever entered into, though the affidavits of such witnesses are denied by affidavit of plaintiff, entitle defendant to a new trial.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Amanda Meisch against Joseph E. Sippy. From an order granting a new trial, plaintiff appeals. Affirmed.

Johnson, Houts, Marlatt & Hawes, for appellant. F. A. C. McManus, for respondent.

BLAND, P. J. The suit was to recover damages for an alleged breach of contract of marriage, aggravated by seduction under the promise and birth of a child. The answer was a general denial, and a disclaimer of knowledge of the birth of a child or responsibility therefor. Plaintiff offered evidence tending to prove the allegations of her petition, and the defendant evidence tending to support his answer. There was a verdict for plaintiff, assessing her damages at \$3,500, which was set aside on motion for new trial, and a new trial granted. From the order granting a new trial, plaintiff appealed. The new trial was granted on the ground of misconduct on the part of one of the jurymen (Chas. Heinze) in the jury room after the jury had retired to consider of their verdict.

The learned trial judge handed down the following memorandum of his ruling on the motion:

"I feel bound to grant a new trial in this cause in order to maintain unimpaired the right of every litigant to have his or her case adjudicated before twelve impartial men. I have a very high regard for the right of trial by jury, and I realize the great importance of maintaining the system in its integrity. Every citizen who is called into

court to have his rights determined by judicial proceeding ought to feel that he has had a fair, full, and impartial hearing. And there should be no reasonable ground of complaint left to him at the end of the proceedings. Judicial proceedings should be free from even a semblance of suspicion. In this case it seems that one juror (Chas. Heinze) had heard the matters to be tried talked over before the trial (no doubt some time before), but did not remember it when being examined as to his qualifications as a juror in the case, and therefore did not disclose the fact, and was accepted to try the cause. It seems that this came to him during the trial, and it is to be regretted that he did not then disclose it; but he did not. And he is one of the nine jurors who rendered the verdict. I regret that it is necessary to set aside this verdict, because, but for the facts above stated, the trial was, in my judgment, fair to both sides. The defendant will be required to pay all accrued costs, and the case will have an early setting, if the plaintiff desires it."

To prove the alleged misconduct, the following affidavits were filed:

"My name is Joseph E. Scully. I reside at 3120 Newstead avenue, in this city, and was selected as a jurymen in November, 1902, in circuit court room No. 5, of the St. Louis circuit court, and acted as such in the case of Meisch v. Sippy. While we, as jurymen, were in consultation with each other over the evidence of the cause, we were more or less interrupted by one of the jurors telling us that he knew all about this case; that his sister knew the plaintiff, and had told him all the facts concerning it, which facts he repeated in my presence to them. Mr. Heinze, the jurymen mentioned above, particularly said to me that: 'I know this family, and she is a nice girl, and my sister has told me all about the case; but I did not know these were the same parties until I got home and my people told me this was the same case, but I did not know this until after I was on the jury and heard some of the evidence; then I knew it was the same case my sister had told me all about.' This was frequently repeated. I make this affidavit for the reason that I was called to the office of Mr. McManus and asked whether such a state of facts were true, and, on answering 'yes,' he reduced the same to writing and asked me to sign it, which I now do. Joseph E. Scully."

"My name is John J. Groves. I reside at No. 2318 N. Broadway, in the city of St. Louis, Missouri. I have lived all my life in this city, and I am acquainted with one Charles Heinze, who does business at Tenth and Chambers streets. I met him on the Third (3d) street market almost daily, and have known him for at least six or seven years. I also knew he was a jurymen on the Sippy case, for I heard him speaking about it on or about the 24th day of November,

*Rehearing denied December 1, 1903.

1902, while I was on the market. I met Mr. Heinze in company with two other persons; I was buying right near them, and heard the following conversation: Heinze says to his companions: 'Last week I was in a better place than out here on the street.' On being asked 'Where?' he said, 'On a jury in the Sippy case. I was in a nice warm room there,' and on being asked, 'What kind of a case was you on?' Heinze said it was a breach of promise case. 'When I first went on the jury I didn't know I knew anything about it, but when I heard the evidence, pshaw! I knew the whole thing long before, for when she had him arrested down at the four courts summer before last, my sister told me the whole thing, and I always knew she was a nice girl.' Of course, there was more said than I have given; I cannot use the exact language. Yes, I know Joseph Sippy, and have known him for a long time, but not familiarly. I voluntarily told him about having heard this conversation, because I thought if the speaker had such knowledge as he said he had, it was not fair that he should act as a jurymen, and I think so yet. John J. Groves."

"My name is Henry Pins. I have lived in the northern part of St. Louis, Missouri, all my life, and for the last seven or eight years at 1409 Clinton street. I know Charles W. Heinze, who keeps a grocery store at the corner of (10th) Tenth and Chambers streets. I knew he was a jurymen on the breach of promise case of Meisch v. Sippy, though I knew neither of the parties to the suit. My information came to me in this way: I am in the habit of dealing at his store, and often drop in to the same for the purpose of buying tobacco. One evening I was in the store, and Heinze was there talking to another man—I believe he had whiskers—anyway Heinze said, 'You bet we gave it to him; I wanted to give him ten thousand, but the other fellows would not stand for it; I had it in for him anyway on account of what I had heard about the matter.' This was said in such a manner as to attract my attention, and, listening further, I heard they were talking about a case that a girl living on Prairie avenue had brought suit against a sprinkling contractor for seducing her, and in the conversation Heinze said he had been on the jury, and had gone home in the evening and learned that his family knew the girl, too; and, after he had gotten on the jury, then he found out it was the same case that had been in the four courts about a year or so before that. I can't give the words as he said them. I give them as nearly as I can. In substance, Heinze was boasting to his friend that he gave a verdict in favor of the girl, because she was a friend of a friend of his; I clearly heard him say, 'I had it in for him anyway,' and he said he knew all about the matter beforehand. My attention was attracted by that remark, and I naturally thought that was a queer remark for a

man who had been on the jury to make. Yes, I repeated this conversation the next day after I heard it. I know that the conversation I heard between those men was in November, because it was before I left the city to go hunting, but I cannot say the exact day. Henry Pins."

"* * * Defendant further says that his case was not tried by an impartial and unbiased jury, in this: that a member of said jury who signed the majority verdict was prejudiced against defendant, and had knowledge of the entire cause from plaintiff's side of the case prior to his being accepted as a jurymen, and who, upon being questioned prior to being accepted as a jurymen, as to said knowledge, falsely denied that he had known anything concerning the particular facts in said cause, and also denied on his voir dire that he had heard anything concerning the case at bar, and yet, when debating the question in the jury room, as well as elsewhere, made the remark that he knew all about the cause, as his sister was an intimate friend of plaintiff, and had told this said jurymen the particulars of the whole transaction; that such jury improperly received this recital from the jurymen, and were more or less influenced thereby against this defendant; that said jurymen's name is Charles W. Heinze; that he admitted in the jury room, while advocating the interests of plaintiff, that he had conversed during the trial with members of his family regarding the case; this conduct was against the positive instructions of the court, and said jurymen lives at No. 926 Tyler street, and does business at 1000 Chambers street. That he has endeavored to have the deposition of said jurymen taken, but was stopped by the rulings of the commissioner and the judge of this court; so he presents such facts by the affidavits of Scully, Pins, and Groves as part of this affidavit. * * * Joseph E. Sippy."

An attempt was also made to take the deposition of the jurymen Heinze, but, on account of objections that were interposed by plaintiff's counsel, nothing of any moment was elicited from him, except evidence tending to support the verdict.

In rebuttal, the plaintiff filed the following affidavit:

"* * * This affiant further states that she does not know and never did know any of the jurymen who sat upon the jury which tried her case, and that she never saw any of the said jury to her knowledge before the trial; and she particularly states that she does not know Mr. C. W. Heinze, and never saw him or heard of him before said trial; neither does she know any sister or relative of said C. W. Heinze, and is not an intimate friend of any sister or relative of said C. W. Heinze, and that she never heard of C. W. Heinze or his sister. * * * Amanda Meisch."

1. It will be noted that Scully, one of the

affiants, was one of the jurors. It is contended by the appellant that these affidavits were incompetent evidence to impeach the verdict of the jury, and should have been disregarded by the court in passing on the motion for new trial. If there is any rule of law more firmly established in this state than any other, it is that affidavits of jurors will not be heard for the purpose of impeaching their verdicts; that consideration of public policy forbids it. *State v. Branstetter*, 65 Mo. 149; *Sawyer v. Railroad*, 37 Mo. 240, 90 Am. Dec. 382; *State v. Alexander*, 66 Mo. 148; *McFarland v. Bellows*, 49 Mo. 311; *Phillips v. Stewart*, 69 Mo. 149; *State v. Dieckmann*, 75 Mo. 570; *State v. McNamara*, 100 Mo. 100, 18 S. W. 938; *State v. Palmer*, 161 Mo. 152, 61 S. W. 651; *State ex rel. Rogers v. Gage Bros. & Co.*, 52 Mo. App. 464; *New York Store Mer. Co. v. Chapman*, 89 Mo. App. 554. It is equally well settled, on grounds of public policy, that a verdict cannot be impeached by the affidavits of outside parties to statements of the jurors made after their discharge. *State v. Cooper*, 85 Mo. 256; *State v. Rush*, 95 Mo. 199, 8 S. W. 221; *State v. Schaefer*, 116 Mo. 96, 22 S. W. 447; *Easley v. Railway*, 113 Mo. 236, 20 S. W. 1073; *State v. Sprague*, 149 Mo. 425, 50 S. W. 901; *Proffer v. Miller*, 69 Mo. App. 501; *Herring v. Railroad*, 80 Mo. App. 562. In view of these well-settled rules, the affidavits filed by respondent were wholly incompetent to impeach the verdict, and should not have been considered. It follows that the learned circuit judge was, in granting a new trial, influenced by evidence that he should have rejected and refused to consider; hence the exercise of his discretion in granting a new trial, on the ground of misconduct of the jury, is unsupported by any competent evidence. We agree with him that the trial was fair to both sides, and that the verdict should be permitted to stand, unless prejudicial error intervened at the trial, or unless a new trial should be granted on account of the newly discovered evidence.

Respondent, in his brief, has referred to many alleged errors in the admission and rejection of evidence. An examination of the record fails to disclose any prejudicial error in the admission or rejection of evidence. It seems to us from the abstracts furnished us that respondent, in the examination of his witnesses and in the cross-examination of plaintiff's witnesses, was allowed a wide field and a somewhat free hand, and has no substantial ground to complain that he was not permitted to get before the jury all the competent and relevant evidence he had to offer. The instructions given cover every issue made by the pleadings, and are eminently fair.

Respondent's counsel comments fiercely on the evidence tending to impeach the character of the plaintiff for chastity and veracity. This feature of the evidence, we have

no doubt, from the zeal he exhibits, counsel for respondent exploited for all it was worth before the jury, the proper tribunal to pass upon it. His appeal to us, to review the evidence and pass upon the plaintiff's credibility, is asking us to exercise a function that does not pertain to this court.

2. Another ground in the motion for a new trial which merits attention is that new evidence favorable to the defense and material to the issues was discovered after the trial. In support of this ground, respondent filed affidavits of himself, and of William Veitch and wife, and of Dr. Fannie Thompson.

The affidavit of William Veitch is as follows:

"My name is William Veitch, and I reside with my wife and child at No. 1012 Taylor avenue, St. Louis City, Missouri. After the newspapers contained an account of the Sippy trial, my wife and I were conversing with reference to the account, and she told me she had been a friend of the girl, and she had related many things to her. Chancing to meet Mr. Sippy, I informed him regarding the evidence of my wife. We had never spoken of the affair before, and, had I known that my wife was possessed of any information earlier, I should certainly have informed the parties, but I rarely meet any of them, and have no interest in the matter, and would not have known anything about this had I not accidentally discovered the matter at the time by the chance remark made by my wife. Prior to the trial I did not know that my wife was acquainted with Miss Meisch. Wm. Veitch."

The affidavit of Mrs. William Veitch reads as follows:

"My name is Mrs. William Veitch, and I live at No. 1012 North Taylor avenue, St. Louis, Missouri. I am living there with my husband and child, and I know Amanda Meisch in the neighborhood of two years. I met her first at Mrs. Smith's on Saturday after Thanksgiving, a year ago, viz., in 1901. Mrs. Smith lives at or in close proximity to No. 4215 North Second street, and is a fortune teller. While there I met a woman, and in a general way she told me that her name was Amanda Meisch, and that she lived on Prairie avenue, in this city. While waiting we became quite familiar in conversation, and she related to me her history. Among many things she asked me if I was acquainted with Mr. Sippy, and I told her 'yes'; that I had met him, and was well acquainted with his family, and she said, 'I sued him for \$10,000 for being the father of my child'; and then we talked about different things concerning the suit, and during the conversation she showed me a little silver heart with the initials of J. E. S. engraved upon it, and I said to her, 'Did Mr. Sippy give you this?' and she answered, 'No, he didn't exactly give it to me, but I wanted one, and went and got this made at a jewel-

er's.' I cannot distinctly remember whether she said the jeweler's was on Grand avenue or Salisbury street. My best impression is that she said it was on Grand avenue, but at any rate she further said that another one just like it had been given to her by Bud Irwine, but she wanted one with J. E. S. on it, so she went to the jeweler's and got the one she then wore attached to her watch chain and was showing it to me, and she also stated that she had the initials J. E. S. engraved thereon. We sat there and talked for about three hours. She also said that Mr. Sippy had paid her her wages after Christmas before she left the house of his mother, and of the \$100 that she received from him at that time she had given forty dollars of it, after the baby was born, to a gypsy fortune teller for the purpose of having her call on Mr. Sippy's mother and try and have her exert her influence to cause him to marry her afterwards. When leaving, she invited me to call at her house, No. 2976 Prairie avenue, giving me at the same time one of her father's cards, and inviting me to call and see the child. On the following Tuesday I called at her home, and found her waiting for me. I remained the greater part of the afternoon, and we conversed along the lines of our former conversation had at Mrs. Smith's; in fact, she talked of little else; and she told me in this conversation that she was out one night while she was working at Sippy's, and came home with a gentleman; that when she arrived in the house Mr. Sippy was there, and he had seen her, and told him 'that the gentleman was only one of my uncles.' She wished to know of me whether I thought the fact of her being out with this man would injure in the trial, and I then asked, 'Did you ever go with other men?' and she said: 'Certainly I did; there was a gentleman in Okawville, Illinois, that desired to marry me, and I told Mr. Sippy of it while we were in Forest Park, and he told me it would be the best thing for me to do to marry that fellow, but I told him that I did not want that man, that I wanted him; and he said, "Pshaw! girl, you had better marry when you can get a chance; I am not the marrying kind; I'll never marry any one."' After this we frequently went together, meeting down town, and going to different fortune tellers. We mostly met at Nugent's dry goods store, and once went to lunch at Phil Moore's (or Mohr's), on Ninth and St. Charles streets; and once when I met her at Nugent's—the exact date I cannot now remember—she said to me, in the presence of my sister, 'Now, Rosa, you are going to stick by me in this trial, are you not? If you do, I'll see that my father pays you well for it;' and I told her that I would not be a witness for any one, and she said, 'Well, keep still then, and don't tell Mr. Sippy what I have told you.' Once when we were talking over the sub-

ject, I said to her: 'How is it that a girl as old as you are allowed the man to get the advantage of you before you were married to him?' and she said, 'Oh! he won't never marry any one; he would always feel my legs and ask me when I was going to give "it" to him.' I frequently asked her, 'Didn't he ever give you anything or write to you?' and she as often said, 'No, he never gave me anything; his mother gave me a ring and some other little things, but I never had a scratch of a pen from him in my life.' She also said, 'He had a little diamond ring, and I wanted it badly, but he would not give it to me;' and she said, 'If I had only got that, my lawyer said I would be all right in my case; but, oh! he was too sharp, he would not give it to me.' Once she also told me in the front parlor of the house that she was seven months in that condition before she knew it, and that she did not know it until she was told of it by an examination made by Dr. Heine Marks, and when telling this she would say, 'But I did know it, and I first went to Dr. Heine Marks. I told him I did not know who was the father of the child;' and she would add, 'I wonder if that will have any effect on my case?' I once asked her why she didn't tell Sippy of it, and she said, 'Oh! I did not know I was in that condition for seven months, and I did not speak or see him from the time I left his mother's house until I saw him in the courtroom of the four courts.' I have never told any one about these conversations with Amanda until my husband and I were talking about the verdict and the newspaper accounts, and then I told him about them. A few days after I told him I was brought down to the office. Of course, if I had known Mr. Sippy better I might have told him of them had I been questioned on the subject, but I never seen him. The whole thing is no affair of mine, and I have no interest in it. Mrs. Rosa Veitch."

Dr. Fannie Thompson was the attending physician of the appellant at the birth of the latter's child, and was a witness for the respondent at the trial, and testified in his behalf. Her affidavit, therefore, cannot be looked to as furnishing any evidence of newly discovered evidence. The excuse that she makes in her affidavit for not disclosing all she knew is that she was intimidated by the harsh language of the presiding judge addressed to her when on the stand as a witness. This allegation is not supported by what appears in the abstract of her examination; on the contrary, it shows that this person, notwithstanding she was appellant's physician, was a willing witness for the respondent. So willing and eager was she to testify in his behalf, and to divulge knowledge and information she had gained of appellant when attending her as her physician, that the instructions and orders of the presiding judge were of little avail to stop her.

The idea that she was intimidated, in view of what appears in the abstracts, seems to us incredible.

The affidavit of respondent sets forth the substance of the evidence of Mrs. Veitch, and the other usual allegations as to diligence, etc., incorporated in affidavits for a like purpose. The affidavits of both Veitch and his wife show that diligence would not have discovered the evidence of Mrs. Veitch before the trial. Her evidence is very important to the defense; if true, it is also true that no contract of marriage was ever entered into between the appellant and respondent. Her affidavit bears the apparent marks of sincerity and truth. It is denied, however, by the affidavit of appellant. But Mrs. Veitch seems to be a disinterested witness, and we think, on an examination of the evidence as we find it in the abstract, that on account of the materiality of the evidence of Mrs. Veitch, as disclosed in her affidavit, justice will be subserved by a retrial of the cause. The order awarding the new trial is therefore affirmed.

REYBURN and GOODE, JJ., concur in the result and in the reasoning of the second paragraph, but express no opinion on the question of whether a juror's statement, that he had already formed an opinion before trial concerning the merits of the case, may be proven to show his disqualification and as ground for new trial.

REITZ v. LOTZ'S ADM'R.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

CONTRACT TO SELL LAND—STIPULATION—INSERTION IN DEED—BREACH OF CONTRACT.

1. Where a contract for the sale of land states that the vendor "agrees in this sale to sign petition for dramshop license" to the vendee, failure to include this condition in the deed is not a breach of the contract, it being merely personal.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by Karolina K. Reitz against Reverend Peter J. Lotz, continued after his death against his administrator. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Kortjohn & Kortjohn and Koehler & Reiss, for appellant. E. A. Hobein and F. A. Wizenus, for respondent.

Opinion.

GOODE, J. Action for damages for breach of a stipulation in a contract for the sale and conveyance by the defendant, Lotz, to the plaintiff of a lot on the corner of Sidney street and Iowa avenue, in the city of St. Louis. The defendant, a Catholic priest whose parish included the lot mentioned, is now dead, and the cause proceeds against

his administrator. He executed the following agreement:

"St. Louis, Sept. 4, 1901.

"Articles of agreement by and between Rev. Father Lotz, party of the first part, of Francis De Sale's Parish, sold to the party of the second part, Mrs. Karolina K. Reitz, the southeast corner of Iowa avenue and Sidney street, said corner fronting 38' in middle of lot on Iowa avenue by a total depth eastwardly of 125' or more on the south line of Sidney, being the property of Francis De Sale's Parish for the sum of one thousand one hundred dollars (\$1,100). And the party of the first part, Rev. Father Lotz, is to furnish a clear warranty deed for said Lot No. —, in City Block No. 2074, and no tax for this year, 1901.

"Rev. Father Lotz furthermore agrees in this sale to sign petition for dramshop license whenever it may be required, to said Mrs. Karolina Katherine Reitz or her administrator.

"Received from Louis Horman, her agent, one hundred dollars (\$100) earnest money on the above sale, and balance to be paid on delivery of warranty deed.

"Should there be any defective clause on said lot, said earnest money to be returned to said Mrs. Karolina K. Reitz, and the expense of said title investigation.

"[Seal.]

Rev. P. J. Lotz.

"This Sept. 4th, '01."

The title to the lot was vested in the archbishop of the diocese, Rev. John J. Kain, who executed a warranty deed of the usual form, conveying the property to the plaintiff; but she rejected that deed because it contained no covenant that Father Lotz, or whoever might be the parish priest, should sign her petition for dramshop license whenever requested. The archbishop refused to insert a covenant of that kind in the deed, whereupon the plaintiff repudiated the purchase, and began this action to recover \$100 earnest money she had paid on the lot and money paid for excavating and other work preparatory to building.

The complaint filed before the justice states that the agreement signed by the defendant provided that the deed which was to be executed pursuant to said agreement should contain a term binding the grantor to consent to a dramshop being conducted on the premises, as plaintiff's object in buying them was to conduct a dramshop on them. By comparing that main averment of the complaint with the stipulation in reference to a petition for dramshop license contained in the agreement signed by the defendant, it will be instantly seen that plaintiff failed to establish her cause of action. The agreement contains no term binding Father Lotz to procure a deed containing a covenant that the grantor in the deed would consent to a dramshop being conducted on the premises, but merely a plain clause that Father Lotz himself would sign a petition for license to

the plaintiff when asked. The clause of the agreement with reference to the deed which should be made simply bound the defendant "to furnish a clear warranty deed for said lot." This proviso was faithfully complied with, for it is not denied that the deed executed and tendered by Archbishop Kain would have passed a good title to the plaintiff. The stipulation in regard to petitioning for dramshop license was a personal one on the part of the defendant, which could not have been carried appropriately into a covenant in a deed, and would not have gained increased power to bind the defendant if it had been. No breach of contract by the defendant was established. So the plaintiff's cause of action wholly failed, and the judgment is affirmed.

BLAND, P. J., concurs. REYBURN, J., not sitting.

HOFFMAN v. GILL

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

FRAUDULENT VALUATION OF PROPERTY—PETITION—ALLEGATIONS OF FRAUD—INSTRUCTIONS—APPLICABILITY TO FACTS—PUNITIVE DAMAGES.

1. The allegation in a petition that "defendant corruptly and fraudulently, with the intent to cheat and defraud the plaintiff," etc., sufficiently charges fraud on defendant's part.

2. Where, in an action to recover damages resulting from defendant's overvaluing certain jewelry, and thereby inducing plaintiff to accept the same as security for a loan to a third person, defendant testified that when he pretended to examine the jewelry and estimate its value he was aware of the intended disposition thereof by the third person, and it was shown that the jewelry belonged to defendant, but was delivered to the third person to sell, an instruction that if plaintiff loaned money to the third person, and took as collateral security certain jewelry, and plaintiff asked defendant for the value of the same, and if the opinion given by defendant was his honest opinion, and if he did not enter into a conspiracy with the third person, and had no knowledge of the alleged loan by plaintiff to the third person, and was acting in the usual course of business and without reward, the verdict should be for defendant, was properly refused, as not being supported by the evidence.

3. In an action for the recovery of damages resulting from defendant's overvaluation of jewelry, and thereby inducing plaintiff to accept the same as security for a loan made to a third person, punitive damages are not recoverable.

Goode, J., dissenting in part.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by T. G. Hoffman against W. A. Gill. From a judgment for plaintiff, defendant appeals. Modified.

Dodge & Mulvihill, for appellant. Henry M. Walsh, for respondent.

BLAND, P. J. This cause went to the circuit court by appeal from a justice's court.

§ 2. See Damages, vol. 15, Cent. Dig. § 194; Fraud, vol. 23, Cent. Dig. § 63.

The evidence is that in 1898, and for many years prior thereto, defendant, Gill, owned and conducted a jewelry store in the city of St. Louis. In 1898 he had an arrangement with one Joseph Finnegan, by which Finnegan was furnished articles of jewelry by defendant to be taken out and sold, and when sold Finnegan would pay defendant his cost price and a per cent. of the amount realized over and above the cost. In May, 1898, Finnegan was furnished by the defendant with one diamond stick pin, a large sunburst, and a Marquise diamond ring to sell and account for. On the 15th of May Finnegan called on plaintiff, and wanted to borrow \$500, and offered to pledge the jewelry as security for the loan. Plaintiff was anxious to make the loan, and had previously advertised that he had money to loan, but was not acquainted with Finnegan, nor did he know the value of the jewelry, and it was agreed between Finnegan and plaintiff that an expert should be consulted and his opinion of its value obtained. The jewelry houses of Eugene Jaccard and Mermod-Jaccard were seen, but neither would give an opinion as to the value of the jewelry. Plaintiff then remembered that this brother knew the defendant, Gill, and he procured a letter of introduction from him. With this letter he and Finnegan called on defendant for his opinion as to the value of the jewelry. Plaintiff testified as follows as to what took place on the occasion: "I showed the diamonds to Gill, and he examined them, and said, 'I cannot place any price on these goods so hurriedly; you will have to leave these.' 'Oh, well,' I said, 'don't be in a hurry, take your time, but be sure you are right;' and he kept them overnight, and told me to come again next day. I would have to give him about twenty-four hours to examine the goods. I called next afternoon, and asked whether he had examined them. He told me he had. I said, 'What do you think they are worth?' 'Well, they are reasonably worth \$600 of any man's money.' And after that I felt satisfied that I could loan that amount of money—\$500—on them, and I did." Finnegan testified that he was present, and something was said about the jewelry, but he did not understand what was said. Gill testified that he had the goods in his possession about five minutes; that he did not keep them over night; that he had been in the business for 17 years, and was an expert on the value of diamonds; that plaintiff asked him what the value of the goods was in his opinion, and that he told him they were worth about \$600, and that they were worth that sum; that he did not tell or intimate to plaintiff that he had any interest in the goods or that they were his, or that there was an arrangement between himself and Finnegan as to what he was to get out of the goods if disposed of. After getting defendant's opinion of the value of the goods, plaintiff loaned Finnegan \$507, and took

Finnegan's individual notes, due in 30, 60, and 90 days, and the jewelry as a pledge to secure them. Finnegan testified that he paid defendant his cost price of the goods, and divided with him the profits out of the money he got from the plaintiff. He further testified that he never called to pay the notes; that he treated the transaction as a sale of the goods; that the jewelry was good for the money, and was, in fact, well worth the money. Kranke, a witness for plaintiff, testified that he had been in the jewelry business for 17 years; that he had seen and examined the goods, and purchased them from the plaintiff, and that they were worth about \$400. After the notes became due Finnegan could not be located by the plaintiff, and the testimony is that he (Finnegan) is wholly insolvent; that plaintiff had the jewelry examined in Pittsburg, New York, and St. Louis, and tried to sell it in all three cities, and finally sold it to Kranke for \$298, the best price he could obtain. In March, 1902, Finnegan for the first time informed plaintiff of the interest which Gill had in the jewelry, and plaintiff then commenced this suit to recover \$200 actual damages and \$300 punitive damages, alleging a conspiracy between Finnegan and defendant to cheat and defraud him. The jury found for plaintiff, and assessed his actual damages at \$200, and his punitive damages at \$100. Defendant appealed.

1. Defendant insists that as the petition does not allege that the defendant falsely, fraudulently, and knowingly made the statements, etc., it is wholly insufficient to support a judgment. The petition charges that "the defendant corruptly and fraudulently, with the intent to cheat and defraud the plaintiff," etc. This allegation is sufficient in a pleading to charge fraud in any court.

2. Defendant asked, but the court refused, the following instruction: "If the jury believe from the evidence that plaintiff loaned one Finnegan \$507, and took as collateral security some diamonds, and that plaintiff asked defendant what was the value of said diamonds, and that if you believe from the evidence that the opinion given at said time by defendant was his honest belief as to the actual value of said diamonds, believing same to be true, and that if you believe and find that defendant did not enter into a conspiracy with said Finnegan, and that defendant had no knowledge of the alleged loan between plaintiff and Finnegan, and was acting in the usual course of business and wholly without reward, then the plaintiff cannot recover, and your verdict must be for the defendant." There is no evidence in the record to support this instruction. Gill testified that he was aware of the disposition Finnegan was to make of the jewelry when he pretended to examine it and estimate its value for plaintiff. The jewelry was his. The disposition which was to be made of it was not "in the usual course of business,"

but was to dispose of it by cheat and fraud and for a sum largely in excess of its value.

3. This is not a case for punitive damages. Such damages are not recoverable except in cases where malice, violence, or passion and wanton recklessness is shown. *Kennedy v. Railroad*, 36 Mo. 351; *Nelson v. Wallace*, 48 Mo. App. 193; *Lewis v. Jannoupoulo*, 70 Mo. App. 325; *Dorsey v. Railway*, 83 Mo. App. 528; *Yowell v. Vaughn*, 85 Mo. App. 206. It is therefore considered that unless the plaintiff will, within 10 days from the filing of this opinion, enter a remittitur of \$100, the judgment will be reversed, and the cause remanded for retrial, but if the remittitur be entered within 10 days it is considered that the judgment shall stand as affirmed for the sum of \$200.

REYBURN, J., concurs. GOODE, J., dissents from paragraph 3.

KITREDGE v. CHILlicOTHE LOAN & BUILDING ASS'N.*

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

BUILDING AND LOAN ASSOCIATIONS — PREMIUMS FOR LOANS — USURY — COMPETITIVE BIDDING — ESTOPPEL — CONSENT TO CHANGE — ERROR IN DECREE — COSTS.

1. A minimum premium fixed by a building and loan association for a loan to any member is usurious.

2. Where a premium paid a building and loan association for a loan is the result of competitive bidding resulting in the fixing of the premium in excess of that fixed by the association itself, the premium is not usurious.

3. A building association issued to a borrowing member a warrant for a certain sum in full of all demands for return premium, which was accepted by his agent, and credited on the member's note. The member claimed that he knew nothing of the transaction, though it was entered on his passbook, and denied the agent's authority, but did not offer to return the money. *Held*, that he was estopped from complaining of the retention of the premiums by the association.

4. A building association notified a borrowing member that it would not, after a certain date, pay to borrowers one-half of the premiums, and with this understanding paid the amount of prior premiums as specified in the warrant issued by the association, which the member received. *Held* to amount to an implied consent of the member to the proposition to thereafter withhold one-half of the premiums paid.

5. The court on appeal will not disturb a decree for an error in allowing a building association to charge a borrowing member with monthly interest on the loan at the sum of \$8.34 while the correct amount was \$8.33½.

6. A trial court, in the exercise of its equitable jurisdiction, may apportion the costs of the suit between the parties.

Appeal from Circuit Court, Livingston County; J. W. Alexander, Judge.

Suit by J. H. Kittredge against the Chillicothe Loan & Building Association. From a decree for defendant, plaintiff appeals. Affirmed.

*Rehearing denied December 7, 1903.

¶ 1. See *Building and Loan Associations*, vol. 8, Cent. Dig. § 46.

L. A. Martin, for appellant, cited the following authorities: *Brown v. Archer*, 62 Mo. App. 277; *Moore v. Building Ass'n*, 74 Mo. App. 468; *Price v. Loan Ass'n*, 75 Mo. App. 551; *Barnes v. Guarantee S. & B. Ass'n*, 83 Mo. App. 466; *Miller v. Loan Ass'n*, Id. 669; *Clark v. Mo. Guar. S. & B. & L. Ass'n*, 85 Mo. App. 388; *Fowles v. Loan Co.*, 86 Mo. App. 103.

Paul D. Kitt and Jno. L. Schmitz, for respondent.

SMITH, P. J. The defendant is a building and loan association incorporated under the statutes of this state. In November, 1891, the plaintiff was a stockholder in said association, holding seven shares therein, of the par value of \$200, and on the 13th day of said month procured a loan to be made to him by it of the sum of \$1,400, and executed his promissory note to it for that amount, payable one day after date, with 8 per cent. interest from date, and to secure which he pledged said shares of stock, and executed a deed of trust on certain real property. The plaintiff claimed that he had fully paid said note, and was entitled to have said association enter satisfaction of said deed of trust on the margin of the record thereof, but which was denied by said association. It claimed there was still due it on said note, after giving all the credits to which it was entitled, the sum of \$301. The plaintiff thereupon brought this suit in equity, the object of which was to obtain an order for the appointment of a receiver, and a further decree for an accounting between plaintiff and said association, and that in said accounting plaintiff be charged with \$1,400 and lawful interest thereon, and credited for all money paid to it, etc. The plaintiff's petition contained an allegation to the effect that during the period of 108 months which said note had been running he had paid in dues, interest, premium, and fines an amount far in excess of that due on his note. There was a further allegation charging said association with exacting usurious interest, and that it had been grossly mismanaged, and was insolvent. The answer was a general denial. There was an allegation therein contained to the effect that the said loan was regularly awarded to plaintiff by said association, and for which he bid a monthly premium of 50 cents upon each share in open and fair competition with other borrowing stockholders; that plaintiff borrowed the said sum of \$1,400, for which he executed his said note, payable in monthly installments of \$19.84, etc. There was a trial before the court, which resulted in a finding and decree that plaintiff was indebted to said association in the sum of \$156.39, and that said deed of trust be foreclosed, etc. It was also decreed that said association pay the costs of this suit, except the cost of subpoenaing

plaintiff's witnesses and their attendance, which should be paid by said plaintiff. The other issues made by the pleadings were impliedly found for the association.

There is disclosed by the record a very marked and irreconcilable conflict in the testimony, and therefore we may with propriety defer to the finding of the trial judge. The plaintiff claims that the association had in vogue a rule that no bid for its funds available to borrowing stockholders would be accepted at less than 25 cents a share per month. It is quite well settled that the directory of such an association as this cannot fix a minimum premium for preference of loan under which a member may not borrow. *Brown v. Archer*, 62 Mo. App. 290, and other cases cited in plaintiff's brief. It follows that such an association cannot charge a fixed premium without competition among the members, and, if it does so, such premium is unauthorized and usurious. But the difficulty here in the way of the plaintiff's theory is that the evidence is quite variant as to whether or not such minimum rule ever existed at all, or, if so, whether or not it was ever put in operation where a stockholder was a bidder for a preference of loan; but, however this may all be, it seems to be an undisputed fact that no such rule was observed by the association when plaintiff's bid was made and received. On the contrary, it appears that plaintiff's bid was as much as 50 cents per month on each share. Even if the plaintiff's bid was started at the minimum of 25 cents, it was increased until 50 cents was reached, when the amount bid for was stricken off to him at the latter bid. It has been held that if a by-law does fix an amount below which no bid will be received, and a borrower bid over that amount, even though no one else bid, he will be bound, and the loan will not be deemed usurious. *Thornton & Black. on B. & L. Ass'n's*, § 229. And it has been held further that, if a purchase of a loan is made upon competition in bidding beyond the minimum premium fixed, the purchaser cannot complain of the fixed premium because of the rule of the association. *Stiles' Appeal*, 95 Pa. 122; *Albright v. Lafayette B. & L. Ass'n*, 102 Pa., loc. cit. 424; *Orangeville Mut., etc., Ass'n v. Young*, 9 Wkly. Notes Cas. (Pa.) 251; *Brightly's Dig.* 2998. The evidence in the present case shows that on the occasion of the sale of the money which was bid for by the plaintiff there was competition in the bidding, and that the transaction was in all respects open and fair, and conducted in conformity to the rules and regulations of the association. There was no element present in it that would render it usurious.

The plaintiff claims that he should be accorded a credit for one-half of the premium he had paid. It appears that in 1893 the association issued to him a warrant for \$42 in full of all demands for return premium.

which was accepted by his agent, and credited on the plaintiff's note. When confronted with this warrant at the trial, the plaintiff claimed that he had not before been advised of this transaction of his agent, although it was entered on his passbook when it took place, seven years before. He denied the agent's authority. He did not offer to return the money; and, besides this, the inference is not an unfair one that he had been previously apprised of the transaction. Under the circumstances he ought to be estopped to further complain of the retention of the premiums by the association. *Cover v. B. & L. Ass'n*, 93 Mo. App. 302. The association had notified the plaintiff and its other stockholders that it would not after a certain date—that of the warrant—pay to borrowers one-half of the premiums, and with this understanding the amount of prior premiums paid and specified in the warrant was received. This amounted to an implied consent of the plaintiff to the proposition to thereafter withhold the payment of one-half of the premium paid. But it seems that the plaintiff was allowed by the trial court a part of the premiums claimed to be withheld, but what part of it, or on what account, we are unable to determine by reason of anything contained in the record.

The charge made by the plaintiff that the directors, as borrowers, fared better than other stockholders, we do not think is sustained by the evidence. Nor do we discover anything in the record to justify the conclusion that the directors were guilty of any breach of trust calling for the interference of a court of equity.

The plaintiff complains that the association charged him with monthly interest on his loan the sum of \$8.34, while the correct amount was \$8.33½. It would seem that this "vulgar fraction" was to that extent in excess of the lawful rate. It may be that this amount was included in the allowance made by the trial court, but, whether so or not, we would hardly feel authorized to disturb the decree on that ground. "*De minimis non curat lex*."

It appears that the premiums received by the association were far from uniform, but varied from time to time accordingly as money was plentiful or scarce, or as the rate of interest varied in the country; but we find nothing in the entire record of the association, as presented to us, to influence the conviction that the association engaged in the extortion of usury or other illegal exactions from any one or all of its stockholders. Nor is there any evidence tending to show it to be in a state of insolvency, or anything in its condition that would justify the appointment of a receiver.

In view of the character of the evidence already stated, we feel it to be our duty to defer to the finding of the circuit court.

The trial court, in the exercise of its equitable jurisdiction, had the right to appor-

tion the cost in the manner it did, as already stated.

We think the decree should be affirmed, and it is so ordered. All concur.

MEYERS v. CHICAGO, R. I. & P. RY. CO.
(Court of Appeals at Kansas City, Mo. Nov. 23, 1908.)

RAILROADS—INJURIES ON PREMISES—DUTY OF RAILROAD—CONTRIBUTORY NEGLIGENCE—WHAT IS, AS QUESTION OF LAW.

1. A railroad is required to keep a wagonway leading into its stockyards in reasonable repair only. It is under no duty to keep it absolutely safe.

2. Plaintiff, driving a wagon loaded with hay to defendant railroad's stock lots, left the wagonway, and, for his own convenience, drove upon an incline on defendant's premises having a 25 per cent. grade, when his wagon—its wheel slipping into a rut—overturned, injuring plaintiff. The ground was slippery, and plaintiff had full knowledge of all the existing conditions; and, had he continued on the wagonway until he reached the place where he wished to unload, he would not have been injured. *Held*, that plaintiff was guilty of contributory negligence.

3. Where the facts are undisputed, and are such that reasonable minds can draw but one inference therefrom, the question of contributory negligence is one of law for the court.

4. Negligence, such as to preclude a recovery for injuries, is merely the absence of such care as a person of ordinary prudence would exercise under similar circumstances.

Appeal from Circuit Court, Daviess County; J. W. Alexander, Judge.

Action by Luther C. Meyers against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

A. Low, W. F. Evans, and Frank P. Seebree, for appellant.

J. H. Wise and Hamilton & Dudley, for respondent, cited the following authorities referred to in the opinion: *Lamb v. Railway*, 147 Mo. 171, 48 S. W. 659, 51 S. W. 81; *Gratiot v. Railway*, 116 Mo. 450, 21 S. W. 1094; *Tabler v. Railway*, 93 Mo. 79, 5 S. W. 810; *Huhn v. Railway*, 92 Mo. 440, 4 S. W. 937; *Keim v. Transit Co.*, 90 Mo. 314, 2 S. W. 427; *Nagel v. Railway*, 75 Mo. 658, 42 Am. Rep. 418; *Norton v. Ittner*, 56 Mo. 351; *Weber v. Railway*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541; *Fulks v. Railway*, 111 Mo. 340, 19 S. W. 818; *Corcoran v. Railway*, 105 Mo. 406, 16 S. W. 411, 24 Am. St. Rep. 394.

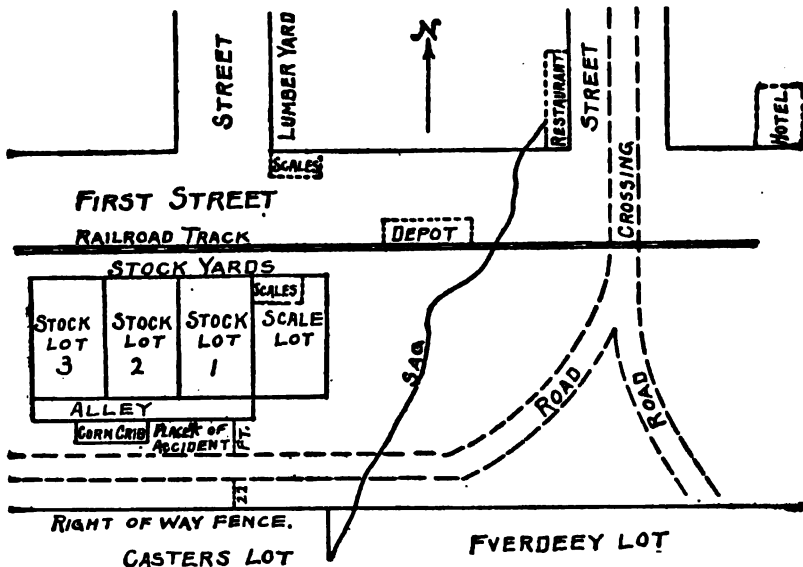
SMITH, P. J. Action to recover damages for negligence. The petition of the plaintiff alleged that defendant, at its station at Winston, kept stockyards and pens for the transaction of its business in loading and shipping stock, and for the use and benefit of the public, and that it maintained a road or approach along and over its right of way,

¶ 2. See *Negligence*, vol. 37, Cent. Dig. § 221.

and through said yards and pens, for the use of persons having hay, grain, or live stock to deliver at said stockyards; that defendant negligently permitted said road and approach to get out of repair and remain so, and permitted a gully or rut to be worn and washed in said road, making the same dangerous for persons riding over it with a team and wagon loaded with hay or other feed for the use of said stockyards, and that while plaintiff, in the exercise of due care, was driving a wagon and team loaded with hay for delivery to said stockyards over said road and approach alongside of and through said stockyards, the wheels of his wagon ran into said rut and gully, and his wagon turned over and upset, and he was thrown violently to the ground and injured, etc. There was a trial to a jury, which resulted in a judgment for plaintiff, and defendant appealed.

The defendant assails the judgment on the ground that the trial court erred in denying the demurrer interposed by it at the conclusion of all the evidence.

The following plat of the locus in quo will be found helpful in reaching a correct understanding of the facts of the case as we shall presently state them to be:



It will be seen by reference to the plat that from a crossing over defendant's railroad track a road runs south, and then curves until it runs east between the south side of defendant's stock lot alley and its right of way fence. The space between the alley fence on the south side of the stock lots and the right of way fence was 22 feet. The wagonway along there was about 5 feet wide, and through long years of usage by the public in passing over it to points beyond, and those using it to reach the abutting stock pens with wagons loaded with hay or other feed, it had become worn down below the original level of the ground on either side of

it. A strip of ground about 12 feet wide was thus left lying between the alley fence and this worn wagonway. It inclined from the alley fence to the wheel rut in the north side of the wagonway to somewhere between 2 and 3 feet. A day or two preceding that on which the plaintiff was injured there had fallen a light snow. The ground was then frozen quite hard. On the day of the injury the snow had melted away, leaving the surface of the ground very slippery. The plaintiff, with full knowledge of the condition of the ground on that day drove a span of horses, attached to a wagon loaded with loose hay, from the east along the road until he reached a point not quite opposite the south end of stock lot 1, where he drove onto the incline, and continued to a point indicated by a star (*), where the hindermost wheels of his wagon slid down the incline until they dropped into the rut in the wagonway, when the superincumbent load of hay, with plaintiff standing on the top of it, went over. There is no substantial variance in the evidence as to these facts.

If it be conceded, as it must be, that the defendant owed the plaintiff the duty to keep the roadway through its stockyards in a rea-

sonably safe condition for the use of those having occasion to transact business with it, and if it be further conceded that the defendant neglected the full performance of this duty, still, ought the plaintiff to be allowed to recover? If the plaintiff had not deflected from the wagonway, but kept on along it until opposite the point where he desired to unload, his wagon would not have turned over. It is not disputed but what the surface of the ground in the wagonway was sufficiently even to make it reasonably safe for vehicles driving over it. The defendant, at most, was only required to keep this way in reasonable repair. It was not required to keep

it absolutely safe to its full width. The wagonway was reasonably safe, and that, it seems to us, was all that was required. When the plaintiff, to subserve his own convenience, left the wagonway and went upon the "sidling" strip, he did so at his own risk. From where he stood upon the top of his load of loose hay, the face of the incline was perfectly visible to him. He could see the incline was about a 25 per cent. grade, or a descent of 1 foot to 4, from the alley fence to the wagonway. He knew, too, of the slippery condition of the upper surface of the ground, and he may be presumed to have known the risk of his wagon caroming into the rut when he drove it upon the slippery incline. He had full knowledge of all the existing conditions. He knew, if he continued on the wagonway until he reached the point where he desired to unload, that he could do so in safety. He knew, too, that if he drove upon the slippery incline it would be at the risk of turning his wagon over. No man exercising ordinary prudence would have attempted this without at least first descending from his lofty stand to the ground, and from there would have guided the course of his team. To remain on the top of the load while attempting to drive along the incline was an act of the greatest imprudence, as respected his own personal safety. Though his wagon turned over, yet, if he had exercised ordinary care and prudence by alighting before driving upon the incline, he would not have been hurt. Will the law impose a liability on the defendant for an injury which was brought about, at least in part, by the plaintiff's own imprudent and careless conduct—a result to which his own imprudence was a contributing cause, and without which it would not have ensued?

Upon the undisputed facts in the case, we think but a single inference can be drawn, and that is of negligence. But it is contended that the question of negligence was one for the jury, and not for the court. *Young v. Ry. Co.*, 72 Mo. App. 263; *Graney v. St. Louis*, 141 Mo. 180, 42 S. W. 941, and cases cited in plaintiff's brief. It is most generally so, but where the facts, as here, are undisputed and are such that reasonable minds can draw no other inference from them than that plaintiff was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law. *Beach on Contrib. Negl.* § 447; *Fowler v. Randall* (Mo. App.) 73 S. W. 931; *Lenix v. Ry. Co.*, 76 Mo. 86; *Butts v. Ry. Co.*, 98 Mo. 272, 11 S. W. 754; *Fink v. Furnace Co.*, 10 Mo. App. 61. The negligence that will preclude a recovery is nothing more than the absence of proper care—such care as a person of ordinary prudence would exercise under similar circumstances. *Barton v. Ry. Co.*, 52 Mo. 253, 14 Am. Rep. 418; *Doss v. Ry. Co.*, 59 Mo. 27, 21 Am. Rep. 371. The salient facts of this case are undisputed, and, as it appears to us, are such that rea-

sonable minds can draw no other conclusion than that the plaintiff himself did not exercise due care—was at fault—and therefore the question of contributory negligence should have been determined as one of law by the court.

The judgment must accordingly be reversed. All concur.

TUCKER v. McCLENNY.

(Court of Appeals at Kansas City, Mo. Nov. 9, 1908.)

UNLAWFUL DETAINER—LESSEE HOLDING OVER—ACTION BY GRANTEE OF LESSOR—COMPLAINT—SUFFICIENCY—EXHIBITION OF DEED—NECESSITY—DEFENSE—PARTIES.

1. A complaint in an action for unlawful detainer instituted by the grantee of the lessor, which alleged that plaintiff, on a day stated, had the legal right to the possession of the land (describing it), and that he had ever since been, and still was, entitled to possession thereof; and that defendant willfully and without force held possession of the same after the termination of the time for which it was let to him, was sufficient, under Rev. St. 1899, § 3321, declaring that a person willfully and without force holding over land after the termination of the term for which it was let to him, and after demand of possession, is guilty of unlawful detainer.

2. A purchaser of leased premises is not required to exhibit the lessor's deed when making a demand on the tenant holding over after the termination of the lease for a delivery of the possession to him; Rev. St. § 3321, declaring that a person who willfully and without force holds over any lands after the expiration of his tenancy, and who does not surrender the possession thereof on the demand of the one legally entitled to the possession, shall be guilty of unlawful detainer, not requiring the exhibition of the deed; and section 4137, providing that a purchaser, before commencing suit against the lessee of his grantor for past-due rent, must exhibit to the lessee the deed under which he claims title, being inapplicable to actions of unlawful detainer.

3. Rev. St. 1899, § 3353, providing that, if any lessor shall grant any lands before the expiration of the term for which they were let, his grantee shall have the same remedies against one guilty of unlawful detainer by holding over after the expiration of the term as the lessor would have had if he had not sold the premises, places the grantee in the lessor's place as to remedies against the lessee holding over; and, in an action by such grantee, evidence of his title is made admissible by the express provisions of section 3355.

4. A grantee of land in possession of a third person under a lease still in force, who, before the expiration of the term, conveyed the premises to another by deed stipulating that the right of possession should not accompany the transfer, but should remain in him until he recovered the actual possession, when it should pass to the purchaser, was entitled to maintain an action for unlawful detainer against the lessee holding possession after the expiration of his lease.

5. A lessee holding over after the expiration of his term, when sued by his lessor's grantee for unlawful detainer, cannot show in defense that, without the consent of his lessor, he sublet distinct tracts of the premises to third persons, who were not made parties to the suit.

Appeal from Circuit Court, Boone County; Jno. A. Hockaday, Judge.

Action by E. C. Tucker against A. M. McClenny. From a judgment for plaintiff, defendant appeals. Affirmed.

N. T. Gentry and Chas. J. Walker, for appellant. C. B. Sebastian, for respondent.

SMITH, P. J. This is an action of unlawful detainer, which was brought to recover the possession of certain farm lands, consisting of 180 acres. The material facts which the evidence tends to prove, and which gave rise to the controversy, may be shortly stated in this wise; that is to say: The Equitable Securities Company—a corporation—on June 9, 1894, by a certain deed, acquired the fee-simple title to said lands. That afterward the defendant went into possession of said lands under a lease from the said securities company, which was to expire on the 1st day of March, 1902. That before the expiration of said lease, and on January 2, 1902, the said securities company sold and by deed conveyed said tract to this plaintiff. That on February 2, 1902, the plaintiff sold and by deed conveyed 109.4 acres of said tract to one Chas. McLane. That on February 11, 1902, the plaintiff further sold and conveyed 44 acres of said tract to one G. V. Castleman. That there was a stipulation in each of said deeds to the effect that the grantor therein—the plaintiff—was “to give possession as soon as he got it and not before.” That on the 9th of March, 1902, the plaintiff called on the defendant, who was still in possession, and demanded that he deliver to him (plaintiff) the possession, accompanying his demand with an exhibition of the deed which the said securities company had delivered to him. That the defendant refused to turn over the possession to the plaintiff, and three days thereafter this action was brought. There was a trial in the circuit court, in which the plaintiff had judgment, and defendant appealed.

At the beginning of the trial the defendant objected to the introduction of any evidence on the ground that the complaint nowhere alleged the relation of landlord and tenant between plaintiff and defendant, or how the plaintiff derived any right to the land. This objection was overruled, and, as we think, properly so. The complaint alleged that on the 1st day of March, 1902, the plaintiff had the legal right to the possession of said land—describing it—and that he had ever since been, and still was, entitled to the possession thereof; that the defendant willfully and without force holds the possession of said lands after the termination of the time for which they were let to him, etc. The allegations of the complaint followed form No. 135, Rev. St. 1899, which is one of those prepared by the revisers of the Statutes of 1855, as adapted to the statute, and which, it may be seen, has been carried forward into the appendix of each successive revision. *Bradford v. Tilly*, 65 Mo. App. 151. It seems to us that the complaint

is quite sufficient under the statute (Rev. St. 1899, § 3321). We have not been referred by the defendant's very learned and industrious counsel to any established precedent which upholds their contention.

At the conclusion of all the evidence, the defendant requested an instruction in the nature of a demurrer, which was by the court denied.

It is contended that the exhibition of the deed by plaintiff to defendant was insufficient. By turning to the statute in relation to forcible entry and detainer, it will be seen that it nowhere requires the grantee or the assignee of any lessor to exhibit to the lessee his deed, in order to entitle him to bring his action under section 3321, *supra*. It is true that in the statute relating to landlord and tenant there is a section (4137) which provides that the purchaser of land, before commencing suit against the lessee of his grantor or vendor who has made default in the payment of the rent, shall at the time of demanding the rent exhibit the deed under which he claims title; but obviously this statute has no application to actions of unlawful detainer. By section 3353 it is provided that, if any lessor shall grant any lands before the expiration of the term for which they were let, his grantee shall have the same remedies against one guilty of unlawful detainer by holding over such lands after the term for which they were demised as such lessor would have had if he had not granted such lands. It is thus seen that this section puts the grantee in the lessor's shoes as to the remedies of the latter against the lessee. In an action under the forcible entry and detainer statute, evidence of derivative titles is admissible. Section 3355. While the grantee of a lessor is not required by the statute in such action to make proof that he exhibited his deed to the lessee before commencing the suit, he is required to make proofs of his rights under the title derived from the lessor, which was done in this case.

It is contended that as the plaintiff had, previous to the date of the suit, sold and by deeds conveyed distinct parts of said tract to McLane and Castleman, respectively, he did not at that date have a right to the possession of the entire tract. But this contention cannot be upheld, because of a stipulation in each of the deeds from plaintiff to McLane and Castleman in which it was agreed that the right to the possession should not accompany the transference of the legal title, but was to remain in the plaintiff until he recovered the actual possession, when it should pass to his grantees. This stipulation in the deed had the effect to restrict and control the operation of the deeds. *Logan v. Woolwine*, 56 Mo. App. 458, and cases there cited. Accordingly it is clear that the right to the possession at the date of the commencement of the suit was in the plaintiff, and not in McLane and Castleman, as to that part of the land conveyed to them.

As we have seen, the plaintiff as the grantee of the lessor, the securities company, sustained the same relation to the defendant as that company would have sustained, had it not conveyed its title to plaintiff. And it cannot be that the plaintiff's action must fail because it appears that the defendant, during the time covered by his lease, had, without the consent of his lessor, placed Brown, Sims, and McQuitty in possession of certain distinct parts of the tract. It is true that an action of this kind is required to be brought against the party in the actual possession; but was not the defendant, as to plaintiff, in the actual possession? But can it be that a tenant can put others in possession of parts of the land demised to him, and then he and they hold over the time for which the land was demised to him, and, when he is sued for unlawful detainer, can he successfully defend the action on the ground that the others holding under him have not been joined as defendants? In what way was the defendant prejudiced by this nonjoinder? If no substantial prejudice resulted to him, as manifestly it did not, then such defense was not available to him. It may be that the lessor or his grantee may not desire to dispossess some or all of the persons holding under the lessee. It may be that they or some of them are willing to pay the rent to the lessor or his grantee, or enter into leases with him, and thus to continue their occupancy; and in such case must such lessor or his grantee be compelled to bring his action against the lessee and all those holding under him, or else fail? The lessor or his grantee is entitled to the possession of the entire demised premises, as against his lessee, and it can be no defense to the latter that he has put others in possession of parts of the premises. If a tenant who is holding over after the expiration of his term can defeat an action of this kind by interposing such defense, then the Legislature has enacted the forcible entry and detainer statutes to very little effect.

Some other minor points have been suggested in the briefs of counsel, and these we have examined and found without merit.

It is clear to us that upon the evidence adduced the plaintiff was entitled to recover, and it results that the judgment must be affirmed. All concur.

ALBIN v. CHICAGO, R. I. & P. RY. CO.*

(Court of Appeals at Kansas City, Mo. Nov. 9, 1903.)

RAILROADS — PASSENGERS — INJURY WHILE CROSSING INTERVENING TRACK — VARIANCE — WAIVER — MEASURE OF DAMAGES — FUTURE PAIN AND ANGUISH.

1. Where plaintiff was at defendant's depot for the purpose of taking a train, and, though he had purchased no ticket, was crossing an in-

tervening track for the purpose of boarding a train with the intention of paying his fare thereon, he was entitled to the measure of care due a passenger.

2. It appearing that plaintiff was directed by the station agent to board the train, the fact that it was a freight train, not carrying passengers, did not make plaintiff a trespasser.

3. In an action against a railway company for personal injuries, in which it was alleged that defendant was negligent in the operation of a switch engine which struck plaintiff, but evidence showing that defendant's station agent was negligent in directing plaintiff to board a certain freight train, and also negligent in failing to have the place sufficiently lighted, was received without objection, defendant could not thereafter object that there was a variance.

4. In an action against a railroad company for personal injuries, an instruction authorizing a recovery for pain and anguish likely to be suffered was erroneous, plaintiff being entitled to recover only for such pain and anguish as would reasonably result in the future.

Appeal from Circuit Court, Gentry County; Gallatin Craig, Judge.

Action by James W. Albin, by guardian, against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

See 67 S. W. 934.

W. F. Evans and McDougal & Seabee, for appellant. Peery & Lyons and Harber & Knight, for respondent.

BROADBUSH, J. This is a suit for personal injury alleged to have been sustained by the negligence of the defendant. The gist of the petition is as follows: Plaintiff states that on or about the 20th day of April, 1900, at and near the depot, station, and platform owned and used by said defendant railway company in the city of Caldwell, Sumner county, Kan., and in the nighttime, and while the plaintiff was lawfully attempting to cross one of the railroad tracks of said defendant railway company, being the track nearest the platform in front of said depot and station, for the purpose of boarding a train of cars of said defendant company and taking passage thereon, which said train of cars so intended to be boarded by plaintiff was then on the second track from said platform in front of said depot and station, the defendant, by its agents, servants, and employes, while operating and running a locomotive engine and tender attached thereto (commonly called a "switch engine") on said first track nearest the said platform in front of said depot or station, carelessly, negligently, unskillfully, and recklessly ran said engine and tender backwards on and against the plaintiff," etc. Plaintiff's testimony showed the following state of facts: The plaintiff, who at the time of the injuries was a boy less than 18 years of age, had been born and reared in Gentry county, Mo., and at the time of the trial and for some time prior thereto had lived with his mother in the neighborhood of Darlington, about five miles from the place of trial, and had worked as a farm hand prior to the time he was injured.

*Rehearing denied December 7, 1906.

¶ 1. See Carriers, vol. 9, Cent. Dig. §§ 985, 986.

About the middle of April, 1900, he had gone with his mother to visit relatives at Weatherford, Okl. On the way down they had gone from El Reno to Weatherford on a freight train. His mother started him home alone on the morning of the 19th, and gave him sufficient money to pay his fare. He came from Weatherford to El Reno on a freight train on the "Choctaw" Railroad, the same way he had gone there, and paid his fare on the train. He arrived at El Reno about daylight to take the Rock Island from there north. He waited there about an hour and a half, and then took a freight train north for Caldwell, for the reason, as he states, that there was no passenger train north till that evening, and paid his fare on the train. He arrived at Caldwell (which is a division on defendant's road, and as far as the train went) about 6 o'clock in the evening, got off the train at the depot, and immediately went into the depot, and inquired when the passenger train would leave for Topeka. The agent told him 7 o'clock, and, thinking he had ample time, the plaintiff went uptown, got his supper, walked around, and got back to the depot about 10 minutes after the train had gone. The agent told him that there would be no other passenger train till the next morning, and he then inquired if there would be a freight train, and the agent told him there would be one out about 11 o'clock. Preferring to take this train rather than wait till the next morning, he waited around the depot till the train came in or was made up. The train, however, did not get ready to pull out until about 1 o'clock on the morning of the 20th. When the train pulled up in front of the station plaintiff asked the agent in charge of the office if that was his train. The agent replied that it was, and told him to get on it. All of the foregoing testimony in regard to the time and manner of his arrival, his inquiries at the depot, and the directions of the agent, and what he did in pursuance thereof, was admitted at the trial without objection upon the part of appellant. The depot faced to the east, and the train was standing on the second track in front and a little south of the waiting room. The plaintiff had purchased no ticket, because, as he says, the money was just as good, and he had theretofore paid his fare on the trains on defendant's road. Following the directions of the depot agent, he left the waiting room, crossed the platform toward his train, and as he was crossing the first track in front of the depot he was struck by the tender in the rear of a switch engine which was backing south in front of the depot. He fell toward the tender on the footboard, and was carried some 25 feet, when it seems the switch engine was stopped by a signal from the yardmaster. He got off the footboard, and started to walk, and fell down or sat down on the edge of the platform, where he was discovered 10 or 15 minutes later. The plaintiff testified that there was no light on

the rear of the engine or tender, and that no bell was ringing, nor was any other signal given of the approach of the backing train; that it was a dark night; that there were no lights in front of the depot sufficient to light up the tracks; and that he did not see the switch engine, although he looked, and was not aware of its being on the track until he was struck. The plaintiff's leg was broken just above the knee, and he sustained a "T" fracture extending down into the knee joint, was confined to his bed for six weeks, and went on crutches for two months thereafter, and the knee joint is permanently stiffened and injured, and the testimony tends to show that he will never have the full use of the limb. The testimony for defendant was contradictory to that of plaintiff. The station agent denied having directed plaintiff to get on the train. All of the employees of the company testified that there were a number of lights at different points around the depot. It is not contended by appellant that any bell was rung while the engine was backing. The conflicting testimony was weighed and passed upon by the jury, and they found in favor of plaintiff, and the only questions for decision by this court are whether the plaintiff's own testimony showed that he was entitled to recover, and whether the case was properly tried and submitted to the jury on correct instructions.

The court instructed the jury, at the request of plaintiff, in substance, that if they believed from the evidence that defendant was operating trains of cars for the purpose of carrying freight and passengers from Caldwell to Topeka; that defendant had a station at Caldwell, in charge of an agent, who directed passengers as to the trains they should take; that plaintiff had informed said agent of his desire to take passage to Topeka; that there was a freight train then standing on the second track in front of said depot; that plaintiff asked said agent if that was his train; that said agent informed him that it was, and told him to go and get on it, and that in pursuance of said directions, while plaintiff was attempting to cross the first track for the purpose of boarding said train, and while the plaintiff was in the exercise of ordinary care, the agents and servants of defendant carelessly and negligently ran the switch engine backward against the plaintiff without warning of any kind, and without having any light thereon or other signal of its approach, and injured plaintiff without fault or negligence on his part—then they should find for the plaintiff. The second instruction for plaintiff defined ordinary care; and the third stated the measure of damages to be the physical injury inflicted, if any, the pain and suffering endured, if any, in consequence of the injury, the physical pain and mental anguish, if any, the jury should believe from the evidence he is likely to suffer in the future because of said injury, the character of the injury, and its continu-

ance, if permanent, and to what extent, if any, the plaintiff's capacity for earning a livelihood should be impaired after his majority. The instructions asked by defendant, and which the court refused to give, were, in effect (except the third), demurrers to the evidence. They were (1) that the verdict should be for the defendant; (2) that, if plaintiff stepped on the track immediately in front of the tender, and was struck, he could not recover; (4) that the plaintiff was a trespasser, and defendant owed him no duty, unless the men in charge of the engine saw him in time to have averted the injury; (5) that the freight train did not carry passengers, and plaintiff had no right to attempt to board it. The third instruction asked by defendant was as follows: "The jury are instructed that it is the duty of one before entering upon a railroad track to look and listen for approaching trains. And if you believe from the evidence that the plaintiff could have seen or heard the approaching engine before entering upon the railroad track, then he cannot recover, and your verdict must be for defendant." The court refused to give this instruction as asked, but modified it so that plaintiff would be required to use only ordinary care to see or hear the engine, and offered to give the same in its modified form, which was refused and declined by defendant.

Defendant's first and principal contention is that under the pleadings and evidence plaintiff was not entitled to recover. This contention is predicated upon the ground that plaintiff seeks to recover by reason of the negligence of defendant's agents in operating the switch engine which struck him while he was crossing defendant's track on his way to board the freight train in question, of which, it is insisted, there was no evidence. If the plaintiff was a mere trespasser, as contended by defendant, he was not entitled to recover under the evidence, as he was at the time of his injury in a place where he had no right to be. But there was evidence—contradicted, it is true—that he was, in the eye of the law, a passenger at the time he was injured. This evidence was that he was at the defendant's station for the purpose of taking passage on defendant's freight train, and that he made the attempt to do so at the direction of said agent. "To become a passenger, and entitled to protection as such, it is not necessary that a person shall have entered a train or paid his fare, but he is such as soon as he comes within the control of the carrier at the station, through the usual approaches, with intent to become a passenger." And "there can be no doubt that a carrier is under the duty of exercising care for the safety of such person, since he comes on the carrier's premises by invitation." *Fetter on Carriers of Passengers*, vol. 1, § 228, and authorities cited. And, being a passenger, he had the right to rely upon the direction of the station agent

to him to board the train. *Talbot v. Railway*, 72 Mo. App. 291; *Newcomb v. Railway*, 169 Mo. 409, 69 S. W. 348. And under the rule announced in those cases it was immaterial whether or not the said freight train carried passengers, as plaintiff was directed by the station agent to take passage on it.

But it is claimed that, as the negligence of the defendant under the allegations of the petition was in the operation of the switch engine, and there being no proof of such, the plaintiff's case failed. While there was no such proof, yet the other facts given in evidence which constituted the plaintiff a passenger, viz., the direction of the station agent for him to take passage on said freight train, and for failure to have the place sufficiently lighted, which was received without objection by defendant, and upon which it joined issue before the jury, did, if true, constitute negligence. It is true that under the pleadings there was a variance, for the petition was based upon allegations of negligence of the persons operating the engine, and not upon that of the station agent in directing plaintiff to board said freight train, and for failure of defendant to provide sufficient light; but the defendant is not in a condition to avail itself of such variance between such proof and the pleadings, not having excepted to the introduction of such evidence when offered for the reason that it was not responsive to the pleadings; and, having made no affidavit of surprise, it thereby waived the point. *Chouquette v. Elec. Ry. Co.*, 152 Mo. 257, 53 S. W. 897; *Mellor v. Ry.*, 105 Mo., loc. cit. 471, 16 S. W. 849, 10 L. R. A. 36.

But it is contended that, if plaintiff had looked, he could have seen the approaching engine in time to have avoided the injury. But plaintiff testified that he did look, but failed to see the engine before he was struck by it; that he failed to see it because there was not sufficient light. It is true that all defendant's agents and employes present stated that the engine was lighted, and that there were platform lights. The question was one of fact for the jury, and we are not authorized on the mere preponderance of evidence in favor of defendant on the question, however great, to overturn the finding. Nearly every assumption of defendant is against the evidence, consequently much of the law cited by its counsel, however sound, has no application. Among the most unfounded of these assumptions is that the plaintiff was a trespasser; but the jury thought different.

It is further contended that plaintiff's instruction No. 3, defining his measure of damages, was erroneous, in that it authorizes damages to be assessed for future pain and anguish likely to be suffered. The rule is that it is not the possible or probable future pain and anguish which may result from injury that will justify an award of damages, but only such damages which, from

the evidence, will reasonably result in the future. *Bigelow v. St. Ry. Co.*, 48 Mo. App. 367; *Curtis v. Ry.*, 18 N. Y. 534, 75 Am. Dec. 258; *Baker v. Independence*, 93 Mo. App. 165; *Beasley v. Linehan Trans. Co.*, 148 Mo., loc. cit. 413, 50 S. W. 87.

For the error in giving said instruction, the cause is reversed and remanded. All concur.

STRAUSS v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

STREET RAILROADS—INJURY TO PASSENGER—ASSAULT BY CONDUCTOR—PETITION—DEMURRER—WAIVER—STATUTES—APPEAL AND ERROR—VERDICT.

1. An appeal on the record, in the absence of a bill of exceptions, restricts the court to a review of questions arising on the face of the record.

2. Where a demurrer to a petition on the ground that defendant is not a necessary party to a complete determination of the action is overruled, an answer on the merits is equivalent to a withdrawal or abandonment of the demurrer, under Rev. St. 1899, § 602, relating to waiver of objections.

3. A carrier is liable where plaintiff, after a street car had stopped for the purpose of receiving passengers, and while still, or slowly moving, attempted to get on, and was violently and without provocation assaulted by the conductor, causing plaintiff to fall from the car, whereby he sustained injuries.

4. By pleading to the merits defendant waives all objections to the petition except that it fails to state facts sufficient to constitute a cause of action and the objection that the court has no jurisdiction over the subject-matter of the action.

5. Any defects in a petition alleging that plaintiff, after a street car had stopped for the purpose of receiving passengers, and while still, or slowly moving, attempted to get on, and was violently assaulted by the conductor, causing plaintiff to be thrown and fall from the car, whereby he sustained injuries, such assault being without provocation or justification, and committed while plaintiff was on the car or step thereof, are cured by verdict, under Rev. St. 1899, § 629, requiring pleadings to be liberally construed with a view to substantial justice between the parties.

Appeal from St. Louis Circuit Court; David G. Taylor, Judge.

Action by Edward Strauss against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle, Priest & Lehman, for appellant.
A. R. Taylor, for respondent.

REYBURN, J. In view of the conclusion reached in this cause, we deem it best to exhibit the pleadings intact. Plaintiff's cause of action was thus set forth: "The plaintiff states the defendant is, and at the time herein stated was, a corporation by virtue of the law of Missouri, and used and operated the railway and car herein mentioned for the purpose of carrying passengers for hire from one point to another as a public car-

rier of passengers. That on the evening of June 18, 1902, the defendant, by its servants in charge of its car, stopped its car at Broadway and Catlin streets, in the city of St. Louis, for the purpose of receiving passengers on said car, and as the plaintiff at such invitation was proceeding to get upon said car as a passenger whilst stopped, or slowly moving, defendant's conductor in charge of said car violently, wickedly, willfully, and maliciously assaulted the plaintiff, kicked him in the breast and on the body, causing him to be thrown and fall from said car and sustain a compound and comminuted fracture of his right arm and dislocation of the elbow and other injuries and bruises on his body. And plaintiff avers that his said injuries and said assault were without any provocation or justification, whilst he was a passenger on said car and the step thereof. That by said injuries the plaintiff has suffered and will suffer great pain of body and mind, has been permanently disabled from labor, and has lost and will lose the earnings of his labor; has incurred and will incur large expenses for medicines, medical and surgical attention, and nursing—to his actual damages in the sum of ten thousand dollars; and as said injuries were wrongfully, willfully, and maliciously inflicted, the plaintiff claims ten thousand dollars by way of punishment for said wrongful acts. The plaintiff prays judgment in the total sum of twenty thousand dollars." To this complaint defendant filed the demurrer following: "Comes now the defendant, and demurs to the petition of plaintiff filed in this cause for the grounds of objection following, to wit: (1) Because said petition does not state facts sufficient to constitute a cause of action. (2) Because said petition does not show or allege that the alleged assault was made by the conductor whilst engaged in the performance of any duty for the defendant, but does allege that the act complained of was the personal act of the conductor, done of his personal malice, and no ratification by the defendant is pleaded"—which demurrer the court overruled, and defendant filed an amended answer thus: "Comes now the defendant, and, leave of court therefor having first been had and obtained, files this, its first amended answer to plaintiff's petition: Defendant, for first amended answer to plaintiff's petition, denies each and every allegation therein contained. For further answer and defense, defendant says that the car which plaintiff attempted to board was at the time and place alleged in the petition in charge of defendant's conductor, one Joseph Jezeck; that said Joseph Jezeck had for several weeks prior to said date been continuously in charge of said car on defendant's Broadway Line, and during that time had regularly passed the point where plaintiff attempted to board said car; that on two or three several occasions prior to the said 18th day of June, 1902, said Jezeck, while in charge of said

*Rehearing denied December 1, 1903.

car, had been threatened with assault, and had been assaulted, by plaintiff, at or near Horn's Grove or Mannion's Park, on defendant's said line, and on one occasion, a week or two prior to this occurrence, plaintiff attempted to assault said conductor with a dangerous knife, and at another time, and within about one week prior to June 18, 1902, plaintiff assaulted said conductor by throwing a rock and striking said conductor therewith on the breast; that on the said 18th day of June, 1902, when defendant's car in charge of said Jezeck as conductor thereof had arrived at or near said Mannion's Park, plaintiff attempted to board the same and approach the platform thereof in a manner threatening to said conductor, who was at that time on the said platform of said car; that said conductor, by reason of the previous assault on him made by plaintiff, and by reason of the ill feeling cherished against him by plaintiff, and by reason, further, of the angry and threatening manner of plaintiff in approaching said car, believed that plaintiff was then about to make an assault upon him and do him great bodily harm and injury, and, so believing, and out of regard for his own personal safety, said conductor put his foot forward over the platform of said car and against plaintiff, and thereby prevented him from boarding said car and making upon said Joseph Jezeck the then apprehended assault, and for said purpose using no more force than was reasonably necessary to accomplish that end." The reply was a general denial. A jury trial resulted in a verdict in behalf of plaintiff for substantial sums as actual and punitive damages, and an appeal was taken to this court.

No bill of exceptions was filed in this case, which is before this court upon the naked record, and restricting consideration or review to questions arising on the face of the record. If material error appear patent on the face of the record, the judgment should be reversed, even in absence of a motion for new trial or in arrest, but not otherwise. Appellant's counsel has argued at length the propositions comprehended in the demurrer to the petition, but the first ground of objection only can be considered in the condition in which this controversy has arrived in this court. By pleading to the merits and filing an answer, the defendant's attitude is not unlike its position would be if it had withdrawn its demurrer. The demurrer admitting the allegations of the petition, and the answer to the merits denying them, are illogical, contradictory of and opposed to each other, and cannot stand together. If the appellant relied upon the infirmities in the petition arrayed in its demurrer, it was compelled to stand upon its demurrer, and not proceed to a trial of the issues of fact, and it cannot be permitted to speculate by trial of those issues, and now return to and restore its demurrer, but must be held to have

waived and abandoned it. *Pickering v. Telegraph Co.*, 47 Mo. 457; *Scovill v. Glasner*, 79 Mo. 449; *Estes v. Shoe Co.*, 155 Mo. 577, 56 S. W. 316. The rule is firmly settled in this state that when a defendant pleads to the merits he thereby waives all objections to mere formal defects and everything in the petition, excepting, first, that the petition fails to state facts sufficient to constitute a cause of action, and, secondly, the objection to the jurisdiction of the court over the subject-matter of the action. *Rev. St. 1899*, § 602; *Seckinger v. Mfg. Co.*, 129 Mo. 590, 31 S. W. 957; *Paddock v. Somes*, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254; *Childs v. Ry.*, 117 Mo. 414, 23 S. W. 373. Considered most favorably for defendant, the petition states a cause of action, and any defects therein are cured by verdict. *Rev. St. 1899*, § 629.

In this situation, the judgment must be affirmed.

BLAND, P. J., and GOODE, J., concur.

STATE v. MURPHY.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

ASSAULTING ELECTION OFFICER—REPEAL OF STATUTE—SUFFICIENCY OF INDICTMENT.

1. An indictment alleged the holding of a general election, and that one Z. was a judge of election in a certain ward, and that defendants, "with force and arms in and upon the said Z. willfully and on purpose did make an assault, and him, the said Z., did then and there unlawfully and maliciously strike, beat, bruise and wound, contrary to the form of the statute," etc. The indictment was drawn under Act May 31, 1895, § 80 (*Laws 1895*, p. 40), punishing assaults on election officers, but which was expressly repealed by *Laws 1899*, p. 179. *Held* that, inasmuch as the indictment was sufficient to charge a general assault, a demurrer thereto should have been overruled, notwithstanding the repeal of the statute.

Appeal from St. Louis Court of Criminal Correction; L. A. Steber, Special Judge.

Paul J. Murphy was indicted for assaulting an election officer, and from a judgment sustaining a demurrer to the indictment the state appeals. Reversed.

C. P. Williams, for the State. John A. Gerenz and Harry A. Walsh, for respondent.

REYBURN, J. The state has appealed from the judgment of the St. Louis court of criminal correction sustaining a demurrer based upon the grounds that no offense was stated therein under the laws of this state, and that the statute upon which it was sought to charge defendant had been repealed, being directed against an indictment in the following language: "The Grand Jurors of the State of Missouri, within and for the body of the City of St. Louis, now here in court, duly empaneled, sworn and charged, upon their oath present, That on the 4th day of November, one thousand nine hundred and two, at the City of St. Louis afore-

said, and in each ward and election precinct of the said City of St. Louis a general election was had and held pursuant to the constitution and laws of the State of Missouri for the choice and election of certain officers of the United States and of the State of Missouri, to-wit: members of congress, judges of the Supreme Court, members of the senate and house of representatives of the State of Missouri, and other officers, and that then and there at the City of St. Louis at the polling place of the 10th election precinct of the 14th ward of said city, one G. F. Ziegler was a judge of election within and for the said 10th election of the said 14th ward, and that then and there Paul J. Murphy and T. F. Burke, with force and arms in and upon the said G. F. Ziegler, wilfully and on purpose did make an assault and him the said G. F. Ziegler did then and there unlawfully and maliciously strike, beat, bruise and wound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the state." Section 80 of an act approved May 31, 1895, entitled "An act to create a board of election commissioners," etc., enacted at the Extra Session of the Thirty-Eighth General Assembly of the State of Missouri, provided that any person committing an assault upon a judge of election in the performance of any duty required of him should be guilty of a misdemeanor punishable by imprisonment or fine, or by both. Laws Mo., 1895, p. 5 (Ex. Sess.). By section 49 of an act approved June 19, 1899, entitled "An act to provide for the registration," etc., enacted by the Fortieth General Assembly, the act of May 31, 1895, was expressly repealed. Laws Mo. 1899, p. 179. While the indictment here presented does not literally conform to the language of the above section of the act passed by the Thirty-Eighth General Assembly, the demurrer was filed and sustained upon the evident theory that the indictment sought and intended to charge the offense under the above section, which had been repealed by the subsequent legislation above mentioned. In absence, however, of such special provision imposing punishment for an assault upon an election officer in discharge of his duties, if the indictment is sufficient to charge a common assault under the general statutes, the demurrer should not have been sustained. The uniform ruling of the Supreme Court has been that an indictment for an offense created by statute will be sufficient where the language of the statute has been substantially followed. *State v. Adams*, 108 Mo. 208, 18 S. W. 1000, and cases cited. Again, the rule is equally well established that redundant language, immaterial allegations, and surplusage may be gotten rid of in an indictment. "Surplusage," as defined by Bishop, "is any allegation without which the pleading would be adequate at law," from which the same eminent authority concludes that "in general, unnecessary averments in an indictment may

be treated as mere waste material to pass unnoticed, having no legal effect whatever. They need not be proved, and all things go on as though they were not in the record." Bishop, *Crim. Procedure*, vol. 1, § 478. The same author also enunciates the doctrine that, "if an indictment on a statute covers in allegation all the statutory terms, thus showing a complete offense, it will not be ill should it add something by way of making the offense appear more enormous; nor need the latter be proved. And the same rule applies to all matter aggravating the crime beyond what is simply necessary to constitute it, whether under a statute or at common law." Vol. 1, § 479. See, also, Wharton, *Crim. Prac. & Pleading*, § 158. If, after striking out portions of an indictment, sufficient remains to constitute a valid charge of the crime intended to be charged, such striking out is permissible, and the indictment is good. *State v. Meyers*, 99 Mo. 107, 12 S. W. 516; *State v. Taylor*, 117 Mo. 181, 22 S. W. 1103; *State v. Flanders*, 118 Mo. 227, 23 S. W. 1086; *State v. Inks*, 135 Mo. 678, 37 S. W. 942. In *State v. Walker*, 167 Mo. 366, 67 S. W. 228, words not affecting the sense of the information, it was decided, might be rejected as surplusage.

Applying the foregoing tests to the indictment before us, and rejecting as surplusage unnecessary averments and descriptive allegations of official character of the party upon whom the assault was charged to have been made, the indictment is good under the general statutes, and the demurrer should have been overruled.

Judgment reversed, and cause remanded for new trial.

BLAND, P. J., and GOODE, J., concur.

HANNON v. ST. LOUIS TRANSIT CO.*
(Court of Appeals at St. Louis, Mo. Nov. 3, 1903.)

STREET RAILWAYS—INJURY TO PASSENGER ALIGHTING—TIME TO BE ALLOWED—VARIANCE—IMPEACHING TESTIMONY—DAMAGES—INSTRUCTIONS—HARMLESS ERROR.

1. Where a passenger on a street car has a young girl with her, extra time should be allowed her in alighting, in view of her delay necessary to assist her companion to alight.

2. There is no variance between a complaint alleging that while plaintiff was alighting from a street car, and before she had a reasonable time to alight, the car started, and proof that it did not stop a sufficient time to allow her to alight, in view of her delay caused in assisting a young girl with her to alight.

3. Judgment will not be reversed for variance, in the absence of a showing, under Rev. St. 1899, § 655, providing that no variance shall be deemed material unless proved so by affidavit.

4. The conductor of the street car having testified, in an action for injury to a passenger in alighting, that the car did not start till after the passenger alighted, evidence that while assisting her to arise from the ground he recognized that she had been thrown from the car is admissible to impeach him.

*Rehearing denied.

5. Error in an instruction in an action for personal injury, in which the testimony showed that plaintiff paid his physician \$20 for his services, authorizing a recovery for any expenses necessarily incurred for medical attention, instead of leaving it to the jury to decide whether the amount paid was reasonable, is not materially prejudicial, so as to require a reversal.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Mary Hannon against the St. Louis Transit Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Boyle, Priest & Lehman, for appellant. A. R. Taylor, for respondent.

REYBURN, J. This action for damages for personal injuries was commenced before a justice of the peace of the city of St. Louis, in which, without reciting the formal allegations, the averments requisite for the consideration of the questions presented are as follows: "That on the twenty-third day of June, 1902, the defendant, by its servants in charge of its car, received the plaintiff as a passenger thereon at Randolph street and Jefferson avenue, and, for a valuable consideration paid by the plaintiff to the defendant, the defendant undertook and agreed with the plaintiff to safely carry her to her point of destination on defendant's line—Gamble and Jefferson avenue—and there stop said car and allow the plaintiff a reasonable time and opportunity to leave said car; yet the plaintiff avers that the defendant, unmindful of its undertaking and of its duty in the premises, did, whilst the plaintiff was proceeding to alight from said car at said point, and whilst she was in the act of alighting, and before she had a reasonable time or opportunity to so alight, negligently cause and suffer said car to start and move, whereby the plaintiff was thrown from said car and injured." The evidence of plaintiff tended to show that, in company with her niece, at about 9 o'clock in the evening of the day named, she boarded a north-bound Jefferson avenue car at Randolph street, intending to get off at Gamble street. The car was an open or summer car, with seats at right angles to the length of the car, and running boards along each side for entering and leaving the car, and plaintiff took an outside or east seat with the child next to her. After due payment of fare, plaintiff states that she gave the usual signal for the car to stop at Gamble street; that the car stopped, and she had stepped upon the east running board to take off the child, when the car lurched forward, and she was thrown to the street, receiving the hurts complained of, the child remaining on the car, which ran but a few feet before being stopped. The testimony of the child, whose age does not appear, substantiates the description of the occurrence given by her aunt. The testimony of these two witnesses, with proof of the nature and extent of plaintiff's injury by

a prominent physician, constituted plaintiff's evidence, and in its defense defendant introduced its conductor, motorman, and two lady passengers, whose testimony conflicted with that of plaintiff and the child, and tended to establish that the car had remained stationary until after plaintiff had gotten off, when she tripped and fell.

The first and second propositions advanced by appellant, that the evidence did not correspond with or support the allegations of the petition, and that the first instruction for plaintiff should not have been given, may be treated together.

The instruction arraigned is as follows: "If the jury find from the evidence that on the twenty-third day of June, 1902, the defendant was operating the car mentioned in the evidence, for the purpose of carrying passengers for hire; and if the jury find from the evidence that on said day the plaintiff was, by the defendant's servants in charge of its car, received as a passenger thereon; that she paid her fare; that the car stopped at her destination to allow her to get off, and that whilst she was in the act of getting off the defendant's servants in charge of said car caused or suffered it to start before she had reasonable time to get off, and that thereby the plaintiff was thrown from said car and injured; and if the jury believe from the evidence the plaintiff was exercising ordinary care at the time—then she is entitled to recover."

Defendant, in effect, contends that the testimony proves beyond dispute that the car was stopped sufficiently long to enable plaintiff individually to alight in safety, and that if she had not paused to assist her niece she would not have been injured. This contention does not impress us with much force. It was the duty of the servants of defendant in charge of the car, perceiving, as they should have done, if in the proper exercise of their employment, the delay occasioned to plaintiff in assisting her small companion to get off, to have caused the car to remain at rest to permit the plaintiff to alight in safety under the conditions attending her situation, and the law did not exact of her to abandon her youthful associate.

It might be further replied, if further answer to these objections were deemed essential, that defendant failed to take advantage of or bring itself within the protection of the statute provided where the variance between the allegation and the proof is deemed material. Section 655, Rev. St. 1899. It has been repeatedly held that, without such showing in the manner designated by statute, no mere variance will warrant a reversal. *Ridenhour v. Railway*, 102 Mo. 270, 13 S. W. 889, 14 S. W. 760, and cases cited.

2. In the cross-examination of the conductor of the car plaintiff was permitted to interrogate this witness as follows: "As soon as I saw her I went to her assistance. She was then rising, and the little girl was

by her side. Q. Didn't you then say to her, 'I didn't know the little child was with you; I thought you were off'? A. No, sir; I didn't say it. Q. Didn't you then say, 'Why didn't you wait until the car stopped'? A. I did; I asked her why she got off before it stopped. Q. You asked her why didn't she wait until the car stopped? A. Yes, sir; and she said the car was stopped when she got off." Objection is made to this testimony as inadmissible either as part of the *res gestæ* or as admissions on part of defendant. Without deeming it necessary to consider or determine whether these objections were tenable, the conductor in his examination in chief had stated that the car had stopped; that plaintiff had got off the car, and he looked around to see if everything was all right, when he saw plaintiff on the ground on her knees, apparently; that he got off, and went to her assistance, and that from the time the car stopped it did not move at all until after he had assisted her up and taken her name; that the car had given no sudden lurch while plaintiff was standing on the running board, and from the time the car stopped until he gave the signal to go ahead, after he had taken her name and assisted her to arise, the car did not move. This evidence, elicited on cross-examination, was material, and entirely proper for the purpose of impeaching the witness, as tending to show that at the time of the occurrence, whilst assisting plaintiff to her feet, he recognized that she had been thrown from the car.

3. Plaintiff's second instruction is as follows: "If the jury find for the plaintiff, they should assess her damages at such sum as they believe from the evidence will be a fair compensation to her (1) for any pain of body or mind which the jury may believe from the evidence she has suffered or will suffer by reason of said injuries; (2) for any loss of the earnings of her labor which the jury may believe from the evidence she has sustained by reason of said injuries; (3) for any expenses necessarily incurred for medicines, medical or surgical attention, which the jury may believe from the evidence the plaintiff has sustained or will incur by reason of said injuries, and directly caused thereby."

This portion of the charge is questioned as failing to leave to the decision of the jury whether or not the amount paid for medical or surgical attention was reasonable. The abstract of the testimony showed that the plaintiff had paid the physician \$20.

In *Gorham v. Railway*, 113 Mo. 408, 20 S. W. 1060, the instruction assailed was in language following: "(2) If you find for plaintiff you will, in assessing his damages, take into consideration his age and condition in life; the injury sustained by him, if any; the physical pain and mental anguish suffered and endured by him on account of said injury, if any; his loss of time, if any; such damages, if any, as you believe from the evidence he will sustain in the future as the

direct effect of such injury; such sums as he has paid out for medical attention on account of said injury, if any; together with all the facts and circumstances in evidence in the cause; and assess the damages at such sum as from the evidence you may deem proper, not exceeding \$15,000, the amount sued for." And the Supreme Court said: "Defendant next points out a supposed error in the second of plaintiff's instructions, in that there was no evidence that plaintiff had paid out any sums of money for medical attendance. The criticism is true. There was no proof that he had paid anything for such attention, but there was proof that he had become liable for such payment. There was positive testimony by plaintiff's physician (uncontradicted by defendant) touching the nature and amount of his services to plaintiff, and that their value was 'about \$50.' The instruction would have been more accurate had it called for a recovery of the reasonable value of the necessary medical aid rendered to plaintiff, instead of 'such sums as he has paid out for medical attention on account of said injury, if any.' But we do not regard such an error as materially prejudicial to the substantial rights of the defendant upon the merits, and hence consider it no ground for a reversal of the judgment, in view of the positive terms of the statutes to that effect. Rev. St. 1889, §§ 2100, 2303."

No reversible error is shown in the record, and the judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

FAY FRUIT CO. v. MCKINNEY.*

(Court of Appeals at Kansas City, Mo. Nov. 9, 1903.)

FOREIGN CORPORATIONS—RIGHT TO TRANSACT BUSINESS IN STATE—DRUMMERS AND TRAVELING SALESMEN—RESIDENT AGENT—INTERSTATE COMMERCE—APPEAL.

1. Rev. St. 1899, §§ 1025, 1026, provide that foreign corporations shall file with the Secretary of State a copy of their charters, with certain other statements, and that the Secretary of State shall issue a certificate authorizing them to do business, and that no foreign corporation which has failed to comply with these provisions shall be permitted to maintain an action on any demand, provided, however, that the act shall not apply to drummers or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident. A foreign corporation dealing in fruit kept a general agent in the state, who had an office the rent of which was paid by the corporation. The corporation shipped fruit into the state consigned to itself, and its agent, having applications for fruit, would take his purchaser to the railway yards, exhibit the fruit, sell it as it stood in the car, collect the price, and remit to the corporation. *Held*, that the corporation was not within the proviso of the statute relative to traveling salesmen.

2. Rev. St. 1899, §§ 1025, 1026, requiring foreign corporations to file with the Secretary of State a copy of their charters and certain other

*Rehearing denied December 7, 1903.

statements, and obtain a certificate authorizing them to do business in the state, etc., is not a regulation of interstate commerce.

3. In an action by a foreign corporation, in which defendant claimed that plaintiff had no right to sue because not having complied with Rev. St. 1899, §§ 1025, 1026, requiring such corporations, as a condition precedent to maintaining an action, to obtain a certificate from the Secretary of State authorizing them to do business in the state, plaintiff could not, for the first time on appeal, raise the question of the invalidity of the statute on the ground that it was a regulation of interstate commerce.

Appeal from circuit court, Jackson county; J. H. Slover, Judge.

Action by the Fay Fruit Company against James McKinney. From a judgment for plaintiff, defendant appeals. Reversed.

Hardin & Taylor, for appellant. Wollman, Solomon & Cooper, for respondent.

BROADDUS, J. The plaintiff is a corporation organized under the laws of California, and deals in fruits grown in that state. It sold to defendant 362 boxes of oranges, and, the latter refusing to pay the price, for reasons not necessary to state, it instituted this action on the account, and recovered judgment in the trial court.

The ground relied upon in the trial to defeat the action was that plaintiff, being a foreign corporation, was doing business in this state without first obtaining a certificate from the Secretary of State authorizing it to do business in this state, as is provided by our statute. That statute (sections 1025, 1026, Rev. St. 1899) requires that such corporation shall file with the Secretary of State a copy of its charter, with certain other statements, and that the Secretary of State shall issue a certificate authorizing it to do business. The statute further imposes a penalty for failure to comply with its provisions, and enacts that a corporation violating its terms should not be permitted to maintain an action on any demand it might have against one with whom it may have dealt. The statute, however, contains a proviso that its provisions "shall not apply to drummers or traveling salesmen soliciting business in this state for foreign corporations which are entirely non-resident." The evident object of the statute was to require those nonresident corporations which located themselves in this state for the transaction of business to place themselves under our laws, and assume the burdens of taxation as required of resident corporations.

The plaintiff claims that it was not evading this statute in conducting its business in this state, and that its mode of doing business, as exemplified in this instance, was protected by the proviso just quoted, wherein foreign corporations are permitted to solicit business through drummers or traveling salesmen. Undoubtedly, foreign corporations may advertise their goods in this state, and may send traveling salesmen into this state to solicit purchases from them in their for-

eign location, wherever that may be. But (without first complying with the statute) they cannot establish an agent here for the sale of their goods in this state, which have been shipped to such agent, or to themselves to be received by him, for the purpose of selling to whomsoever he may find who will buy of him. If that could be done, it would work an easy destruction of the law. In this case it was shown that plaintiff had a general agent at Kansas City, Mo. At one part of his testimony he called himself a general agent and at another part a general salesman, but under either designation the same result follows on the facts shown. He kept an office in such city, the rent of which was paid for by plaintiff, and he had charge of its business in a certain district of country, including the city of St. Joseph. He testified that it was common for plaintiff to ship fruit from California to some point in another state, not to some customer who had ordered or contracted for the fruit, but consigned to itself. And that then he, being advised by plaintiff that the fruit had been shipped, and having application for fruit, would "divert the car" at Kansas City by ordering it stopped at that place, take his purchaser to the railway yards, and sell as it stood in the car, collect the price, and remit to plaintiff. Much of plaintiff's business was done in that way. We do not see how the case can be distinguished from *Ehrhardt v. Robertson*, 78 Mo. App. 404, and *Williams v. Scullin*, 59 Mo. App. 30. There is no doubt but the case made shows that plaintiff maintained a permanent agent here, to whom it shipped goods that he might sell them to whoever would buy. The goods were shipped, not in response to an order, or a sale already made by plaintiff through a "traveling salesman or drummer," but to plaintiff's own order, and were to be sold by its agent to whomsoever would purchase at the proper price. Plaintiff's only witness was its agent who made the sale. The following question was put to him both in deposition before trial and at the trial: "Q. As I understand you, then, you say all of those cars that you have been selling here are shipped by the Fay Fruit Company and delivered here to its own order, and then you, on behalf of the Fay Fruit Company, as their agent, while the cars were standing here on the tracks, handle and sell them to whosoever you can? A. Yes, sir." That answer fixes the manner of plaintiff's business in this state, and the arrangement whereby sales to various customers were made while the fruit was on a car standing in the railway yards was no less than if plaintiff had put it in its cold-storage warehouse to await purchasers. The business was transacted and the sale made in this state by an agent kept here for that purpose. To allow plaintiff to escape the burdens of domestic corporations by such mode would be to allow success to a palpable evasion of the statute.

It was argued by plaintiff that its business was interstate commerce; that it was protected by that law; and that the statute of this state, if held applicable, would be void, as being a regulation of such commerce. In our opinion, the statute makes no effort whatever to regulate commerce. It merely provides a regulation for those foreign corporations which conclude to fix a situs in this state for the transaction of business therein, and yet seek to go free of the burdens cast upon domestic corporations. *Commonwealth v. Schollenberger*, 156 Pa. 201, 27 Atl. 30, 22 L. R. A. 155, 36 Am. St. Rep. 32. But plaintiff has no right to interpose such theory from the fact that no such point was made by the pleading or otherwise raised in the trial court.

We think the judgment should have been for the defendant, and it will accordingly be reversed. All concur.

ICKENROTH v. ST. LOUIS TRANSIT CO.
(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

STREET RAILROADS — PASSENGER — ASSAULT AND BATTERY BY SERVANT — EXEMPLARY DAMAGES — MALICE — ERRONEOUS DEFINITION.

1. The carrier is liable to a passenger in an action for damages for assault and battery, who, from bad conduct, justifying his expulsion, is expelled from a street car by the conductor, using more force than necessary for the purpose.

2. The carrier is not liable to a passenger for assault and battery, who, from having assaulted the conductor, and using a crowbar in a threatening manner, is injured in a street car by the conductor, using such force only as necessary to repel the assault.

3. The carrier is not liable to a passenger for assault and battery, who, from having used violent, boisterous, or profane language, or having been guilty of disorderly conduct in the presence of other passengers, is ejected from a street car by the conductor, using only such force as necessary for the purpose.

4. A charge on exemplary damages, when requested, is proper in an action against the carrier for assault and battery on a passenger in a street car who is maliciously assaulted by the conductor.

5. Malice is the intentional doing of a wrong act without just cause or excuse, and a definition that by the term "malice" "is not meant mere spite, hatred, or dislike, but it means that condition of the mind which makes a person disregard the rights of others by doing an act without just cause or provocation," is erroneous.

6. In an action for assault and battery punitive damages are allowed if the assault is of a wanton, malicious, or brutal nature.

Appeal from St. Louis Circuit Court; J. R. Kinealy, Judge.

Action by Caspar Ickenroth against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Boyle, Priest & Lehmann and George W. Hasley, for appellant. G. N. Fickeisen, for respondent.

GOODE, J. The petition in this cause contains two counts, of which the first complains of an assault on the plaintiff by the conductor of a street car operated by the defendant company, and the second of an assault by both the conductor and motorman. The second count is as follows: "And for another and further cause of action against defendant, plaintiff states that on the 11th day of November, 1901, he became and was a passenger on the aforesaid car, by boarding the same and paying his fare for transportation; that while plaintiff was so a passenger on said car said conductor, the servant of defendant, willfully, unlawfully, and maliciously assaulted plaintiff, and repeatedly kicked him on the hands and body; that in answer to solicitation on the part of said conductor the motorman of said car, also a servant of defendant, then and there took part in said assault on the plaintiff, and in the course of said assault struck plaintiff on the back of the head with a heavy iron bar, felling him to the ground; that by reason of the blows and kicks inflicted on him as aforesaid plaintiff suffered and will continue to suffer great pain and mental anguish, and was greatly humiliated, to his damage in the sum of \$2,500. Wherefore, the premises considered, plaintiff prays judgment against defendant in the sum of \$2,500 for actual damages and his costs. And plaintiff further prays judgment against defendant for the further sum of \$2,500 as exemplary damages." The answer was a general denial. After the evidence was in, the plaintiff elected to go to the jury on the second count of the petition.

As the issue of this appeal depends on the action of the court below in instructing the jury, the instructions passed on are transcribed. The plaintiff prayed the court to instruct the jury as follows: "(1) The jury are instructed that if you find and believe from the evidence that on the day in question plaintiff became and was a passenger on one of defendant's cars, and that while he was so a passenger on said car he was, without any cause, assaulted by a person in the employ of defendant, and acting as its agent and servant in operating said car as conductor; and if you find from the evidence that in the course of such assault the plaintiff was struck on the hand and kicked, and that such striking and kicking were done by said conductor while acting for defendant as aforesaid; and if you find that plaintiff suffered injury therefrom—then you will find for the plaintiff, and assess his damages at such sum, not to exceed \$2,500, as you may believe from the evidence will be a fair compensation to the plaintiff for the humiliation, if any, suffered by him, and the bodily pain and mental anguish, if any, which he suffered and will continue to suffer, and all of which were the direct results of such striking and kicking. (2) If you find for the plaintiff under the foregoing instruction, and you further find from the evidence that the assault

¶ 6. See *Assault and Battery*, vol. 4, Cent. Dig. § 54.

referred to in the foregoing instruction was made by the agent and servant of defendant, and that it was made with malice, then you may assess in favor of plaintiff exemplary damages in addition to the actual damages, not to exceed \$2,500. By the term 'malice,' used in the foregoing instruction, is not meant mere spite, hatred, or dislike, but it means that condition of the mind which makes a person disregard the rights of others by doing an act without just cause or provocation. (3) If you find from the evidence that plaintiff caused a disturbance on said car, and that the conductor undertook to eject him from the car, then the conductor of said car was justified only in using as much force as was reasonably necessary under the circumstances to eject said plaintiff; and if you find that the said conductor did undertake to eject plaintiff from said car, and that in so doing he used more force than was reasonably necessary under the circumstances, then you will find for the plaintiff." Which instructions the court gave to the jury, and the defendant's counsel excepted.

The defendant, upon its part, prayed the court to instruct the jury as follows: "(1) The court instructs the jury that, if the motorman assaulted and struck the plaintiff without justification, he would be liable in an action against him for all injury he thereby caused the plaintiff, but the defendant is not liable to plaintiff on account of such assault by the motorman, and such assault should not be considered by the jury in arriving at their verdict. (2) The court instructs the jury that they should wholly disregard and exclude from their consideration the evidence which they have heard concerning the assault made upon plaintiff by the motorman with the switch bar, and they should not consider, in arriving at their verdict, any injury plaintiff may have sustained in consequence of being struck on the head by the motorman with the switch bar." Which requests the court granted.

Defendant further asked the following instructions, which were refused: "(1) The court instructs the jury that under the pleadings and the evidence offered by the plaintiff their verdict should be for the defendant on the second count of the petition. (2) The court instructs the jury that the plaintiff has not sued the defendant for wrongfully ejecting or removing him from the car on which he was riding, but he charges in the petition that the employees of the defendant unlawfully assaulted and beat him while he was a passenger on one of the defendant's cars; and if you find from the evidence that the plaintiff, while a passenger on the defendant's car, used violent, profane, or boisterous language, or was guilty of disorderly conduct in the presence of other passengers thereon, and that the conductor attempted to eject and did eject the plaintiff from the car, and in so doing used such force only as was necessary for that purpose, then such acts upon

the part of the conductor did not constitute an assault upon the plaintiff, and the verdict of the jury should be for the defendant. (3) The court instructs the jury that if they believe from the evidence that the plaintiff, on the 11th day of November, 1901, while a passenger on one of defendant's cars near Mulanphy street, used violent, boisterous, or profane language or was guilty of disorderly conduct in the presence of other passengers, who were then and there upon said car, then it became and was the duty of the defendant's conductor to remove the plaintiff from the car, and use such force as was necessary for that purpose. (4) The court instructs the jury that in his petition the plaintiff claims damages because of an assault charged to have been committed upon him by the defendant's conductor while he was a passenger on the defendant's car. You are further instructed that if you believe from the evidence that the plaintiff, while a passenger on the defendant's car, used boisterous, violent, or profane language or was guilty of disorderly conduct in the presence of the other passengers then on the car, and that on account of the use of such language, or conduct, the defendant's conductor put plaintiff off the car, or attempted to do so, and that the plaintiff received his injuries complained of in his petition while the conductor was so putting him off the car, then the jury will find in favor of the defendant. (5) The court instructs the jury that if they believe from the evidence that the plaintiff used violent and threatening language to the conductor, and that he at the time held in his hand and used in a threatening manner toward the conductor a dangerous instrument, viz., a crowbar, and if they further believe from the evidence that such conduct upon the part of the plaintiff caused the conductor to apprehend and that he did apprehend that plaintiff was about to do him great bodily harm, and that the conductor, to avoid such apprehended danger, committed the acts complained of by plaintiff in his petition, then the jury should return a verdict for the defendant. (6) The court instructs the jury that if they believe that the plaintiff assaulted the conductor, and was using a crowbar in a threatening manner, then the conductor had the right to defend himself, and to use such force as was necessary to repel such assault. (7) The court instructs the jury that if they believe from the testimony that the conduct of the plaintiff justified the conductor in attempting to remove the plaintiff from the car, as explained in the other instructions, then under the petition in this case the verdict of the jury should be for the defendant."

The court, of its own motion, gave the following instructions: "(1) The court instructs the jury that in his petition the plaintiff claims damages because of an assault charged to have been committed upon him by the defendant's conductor while he was a pas-

senger on the defendant's car. You are further instructed that if you believe from the evidence that the plaintiff, while a passenger on the defendant's car, used boisterous, violent, or profane language, or was guilty of disorderly conduct in the presence of the other passengers then on the car, and that on account of the use of such language or conduct the defendant's conductor put plaintiff off the car, or attempted to do so, and that the plaintiff received his injuries complained of in his petition while the conductor was so putting him off the car, then the jury will find in favor of the defendant, providing you find from the evidence that in so putting plaintiff off the car the conductor used no more force than was reasonably necessary under the circumstances for that purpose. (2) The court instructs the jury that if they believe from the evidence that the plaintiff used violent and threatening language to the conductor, and that he at the time held in his hand and used in a threatening manner toward the conductor a dangerous instrument, viz., a crowbar, and if they further believe from the evidence that such conduct upon the part of the plaintiff caused the conductor to apprehend that plaintiff was about to do him great bodily harm, and that the conductor, to avoid such apprehended danger, committed the acts complained of by plaintiff in his petition, then the jury should return a verdict for the defendant, providing you further believe from the evidence that plaintiff's said conduct toward the conductor was such as to cause a man of ordinary prudence, situated as was the conductor, to apprehend that plaintiff was about to do him great bodily harm."

It will be seen that the court refused to allow the plaintiff to go to the jury for damages on account of an assault on him by the motorman, because that assault, if it occurred at all, occurred after the plaintiff had ceased to be a passenger.

This verdict was returned: "We, the jury in the above entitled cause, find the issues herein joined in favor of the plaintiff and assess his actual damages at the sum of \$750.00 dollars, and his exemplary damages at the sum of \$175.00 dollars. [Signed] Henry J. Linneman, Foreman."

The defendant company appealed.

Opinion.

While the plaintiff was a passenger on one of the St. Louis Transit Company's street cars, an affray occurred between him and the conductor of the car, in which the plaintiff was more or less hurt, and now seeks damages for his loss and suffering. Plaintiff became a passenger near O'Fallon Park, in the northern part of the city of St. Louis, intending to leave the car at Howard street. The evidence is conflicting and uncertain as to when the altercation began, what it was about, or who was to blame. Ickenroth and Jacob Harbstreet had been working for a

day or two for the same contractor, the former as stone cutter, the latter as carpenter; but they swore they did not know each other, although both boarded the car after quitting work late in the evening, and were seated together while in transit. Ickenroth carried an iron or steel crowbar 2½ feet long, and of good size, to use in setting building stones. The car was well filled with passengers, among whom were some women. It is well-nigh impossible to give the particulars of the affray so contradictory is the testimony of the witnesses. At least four different hypotheses concerning the true facts may be derived from the evidence: First. That the conductor causelessly assaulted and beat the plaintiff. Second. That plaintiff was intoxicated, boisterous, and profane, and the conductor reproved him for his conduct. As he resented the reproof, and refused to refrain from the use of vile language, the conductor put him off the car, employing more force in doing so than was necessary. Third. That Ickenroth began the affray by assaulting the conductor with the crowbar without provocation. Fourth. That the conductor remonstrated with Ickenroth for using improper language, whereupon the latter continued his profanity, and threatened to strike the conductor with the crowbar, who ejected him from the car without the use of unnecessary force. As all of those theories of the affray were deducible from the testimony, instructions on all of them were appropriate, in order to thoroughly advise the jury concerning the issues, and should have been granted if requested.

It may be seen by reading the third instruction given at plaintiff's request, as well as other given instructions, that the trial court ruled that, if the plaintiff raised a disturbance on the car, the conductor had the right to eject him, but could use lawfully only such force as was necessary to accomplish the ejection, and, if he used excessive force, plaintiff was entitled to damages for any injury inflicted on him thereby. Defendant contends this view of the case was erroneous, as authorizing a recovery on a cause of action not stated in the petition; that the petition states a cause based on a wrongful and unprovoked assault and battery; not one based on the employment of excessive force in doing what would have been otherwise lawful, namely, expelling plaintiff from the car for misconduct. To support this position defendant's counsel cites us to the case of *Chicago, etc., Ry. v. Bills*, 104 Ind. 13, 3 N. E. 611; *Id.*, 118 Ind. 221, 20 N. E. 775. The complaint in that action attempted to charge a wrongful expulsion of Bills, the plaintiff, from a train, and, as originally drawn, contained no averment of an assault or the use of excessive force. The opinion on the first appeal took up the complaint, scrutinized it, and ruled that, while it showed force was used to expel the plaintiff, it did not state or show that more was used

than was necessary. The decision was that, as the complaint failed to state facts showing either the use of excessive force by the train conductor or a wrongful ejection of the plaintiff, it stated no cause of action at all. After the reversal of the first judgment, an amended complaint was filed, which proceeded on the theory that, while the plaintiff may have been wrongfully on the train, he was ejected with needless violence and injured. On the second appeal this complaint was held good.

Ickenroth's case, as stated in his petition, is not for a tortious ejection from the car, but for a tortious battery while he was a passenger on it. The company answered, denying the tort, and in support of that denial endeavored to prove plaintiff so misbehaved as to justify the conductor in ejecting him from the car. Testimony was adduced from which the jury might have reasonably inferred that plaintiff was obstreperous and profane, thereby losing his right to passage; but that the conductor resorted to unreasonable violence, and inflicted uncalled for personal injury on the plaintiff in expelling him from the car. Violence to plaintiff's person when none was required to make him depart, or greater violence than was required for that purpose, was equivalent to an assault and battery; as was decided in the Indiana authority cited by the defendant. *Chicago, etc., Ry. v. Bills*, 118 Ind., loc. cit. 224, 20 N. E. 775. In a litigation in Maryland for an expulsion from a car with superfluous force and outrage the trial court instructed the jury that, if the railway company's servants ejected plaintiff with unnecessary violence, the verdict must be for the plaintiff; and carried the same theory into all the instructions. The controversy in the Supreme Court turned mainly on the question of exemplary damages, but it was held, *inter alia*, that proof of an excessive battery by the trainmen sufficed to avoid the defense of prior disorderly conduct on the part of the passenger, and that proof of excessive violence is a good reply to the plea of son assault demesne. *Phila., etc., Ry. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442.

There are home authorities in point. In *Perkins v. Railway*, 55 Mo. 201, the petition charged an unlawful ejection of plaintiff from a car with force and violence. The testimony went to prove Perkins refused to pay full fare, and for that reason was put off the train, but was roughly handled. The court instructed that, if he refused to pay his fare when requested, the conductor was justified in putting him off the train, using therein no more than the requisite force; that, if more than necessary force was used, the defendant was liable. That instruction was approved on appeal. *Brown v. Railway*, 66 Mo. 588; *Canfield v. Railway*, 59 Mo. App. 354. The doctrine that unnecessary or malicious personal violence perpetrated on a citizen by another in enforcing a legal right

constitutes an assault and battery ramifies various branches of the law. An officer may not use excessive violence to effect an arrest, or he will be guilty of an offense (*State v. Dierberger*, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380); nor may one use more force than is reasonably called for in taking his own property (*State v. Dooley*, 121 Mo. 591, 26 S. W. 558), or in overcoming a trespasser (*Low v. Elwell*, 121 Mass. 300, 23 Am. Rep. 272). And if a man uses excessive force in defending himself against personal attack, he commits an assault and battery. *O'Leary v. Rowan*, 31 Mo. 117; *State v. Stockton*, 61 Mo. 382. We see, therefore, that in those emergencies when it becomes necessary to employ physical energy against an antagonist to accomplish a righteous purpose, and when the law will excuse one for resorting to moderate violence, the force employed must be kept within bounds, and cannot exceed what is needed to effect the lawful end without rendering the actor guilty of a tort, or maybe a crime.

The petition in this case avers an assault and battery, which averment could be made good by proving needless violence was done to plaintiff's person in excluding him from the car for bad conduct. Evidence of that sort would tend directly toward establishing the cause of action presented. This was decided in *O'Leary v. Rowan*, *supra*. We therefore hold the instruction authorizing a verdict for the plaintiff, if he created a disturbance and was ejected from the car by the conductor with unreasonable harshness, did not broaden the issues beyond those tendered by the petition, but was consistent with them. The instruction would please us better had it informed the jury that the conductor had the right to compel the plaintiff to get off the car if the latter refused to desist from unseemly conduct or language, and had particularized the acts of violence which might, perchance, have been unnecessary—such as violently and needlessly striking or kicking the plaintiff. A kindred charge, which was more precise and instructive, may be read in *Perkins v. Railway*, *supra*.

Passengers on a street car must deport themselves with decency and decorum, must refrain from boisterous, vulgar, or profane language or rude behavior, and respect the rights and sensibilities of their fellow passengers, or the carmen may and ought to compel them to leave the car. It is the duty of the servants of a carrier in charge of a vehicle on which passengers are traveling to preserve order, suppress offensive action and language and protect passengers from annoyance, insult, and injury by rough and turbulent characters. *Sira v. Railway*, 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386; *Carrier v. Railway* (Mo. Sup.) 74 S. W. 1006; 4 Elliott, Railways, 1639, and citations. A street car may be rendered intolerable to women, and even to men, by the foul language or disorderly conduct of a passenger.

Not only for its own interest, but for the comfort of its patrons, a street railway company should use reasonable and necessary means to preserve good order on its cars. The trial judge did right to recognize these principles in charging the jury.

The sixth of defendant's refused instructions should have been given. There was positive testimony that plaintiff first assaulted the conductor, and struck him with a crowbar, besides brandishing it in a threatening manner. Said instruction declares that, if the plaintiff began the assault, the conductor had the right to defend himself, using no more force than was necessary. He had that right, and we find no other charge which directly said so. None of the given instructions informed the jury that, if the plaintiff first assaulted the conductor, the latter was justified in defending himself. All of those given proceeded on the assumption of the conductor's right to eject the plaintiff for bad conduct and defend himself from threatened harm, if the menace was of a character to afford reasonable cause to apprehend danger. It was proper to direct a verdict for the defendant if the conductor was actually assaulted, not merely threatened, and defended himself without using excessive violence; and we think error was committed in refusing a charge of that sort which was expressed in concise and fitting language.

While we would scarcely reverse the judgment for the refusal of the third refused instruction, as it was perhaps barely covered by those given, it might have been given, too, with propriety. It was a direct and pertinent charge that, if the plaintiff used violent, boisterous, and profane language or was guilty of disorderly conduct in the presence of other passengers, it was right for the conductor to remove him from the car. That is sound law, and we approve it. It would be well, if requested, to instruct in regard to the degree of force the conductor might have used to expel plaintiff, without transgressing the law, if the latter refused to leave the car or desist from bad conduct, and offered resistance to being put off. The question of when violence exerted in achieving a lawful end becomes excessive received the attention of the Supreme Court in a recent case, and instructions bearing on it were reviewed, and some approved. *Norris v. Whyte*, 158 Mo. 20, 57 S. W. 1037. Those furnish convenient models for imitation in cases where the same issue is to be determined.

If part of the testimony concerning the conductor's attack on the plaintiff was believed by the jury, exemplary damages might be assessed against the defendant as his responsible employer. *Malecek v. Railway*, 57 Mo. 17; *Doss v. Railway*, 59 Mo. 27, 21 Am. Rep. 371; *Travers v. Railway*, 63 Mo. 421; *Hicks v. Railway*, 68 Mo. 329; dissenting opinion, *Gill, J.*, in *Rouse v. Railway*, 41 Mo.

App. 296, approved by the Supreme Court in *Haehl v. Wabash Railway*, 119 Mo. 325, 24 S. W. 737. The assault was wanton and outrageous unless the plaintiff gave provocation by using profane language and disregarding the conductor's rebuke and command to desist.

The instruction on exemplary damages, after referring to another, which told the jury that, if they found the conductor assaulted plaintiff without any cause, the verdict should be for the plaintiff, told them, if they found such an assault was made with malice, they might assess exemplary damages. The term "malice" was then stated to mean not mere spite, hatred, or dislike, but that condition of mind which makes a person disregard the rights of others by doing an act without just cause or provocation. Legal or implied malice (as distinguished from ill will or malice in the vernacular sense of the word) is defined to be the intentional doing of a wrong act without just cause or excuse. *State v. Ellis*, 11 Mo. App. 587, 74 Mo. 207. The definition given by the court was therefore inaccurate.

The point is made by defendant's counsel that exemplary damages can be given for an assault only when the act was characterized by actual malevolence or brutality; but this proposition is disputed as one contrary to the decided law of this state. The point has perplexed us. It seems to be quite material in view of one possible ground of liability in the present case, namely, that the conductor was more violent in ejecting the plaintiff than, in reason, he ought to have been. It is doubtful if the essential condition on which the right to give exemplary damages depends in cases like this is intelligibly and fairly presented to the minds of a jury by telling them they must find the defendant acted maliciously, and then telling them that malice means only the intentional doing of a wrong act without just cause or excuse. Does not something further need to be said, calling attention to the inquiry whether the assault was wanton or brutal? It seems to us that, for the achievement of justice, such advice is of great moment. Malice is presumed from the intentional doing of a wrongful act, although the attendant circumstances may be such as to cleanse the act largely, if not altogether, of moral turpitude. A person may commit a trespass or other tort when no bad motive exists, and when he supposes he is acting inside the law. And there are decisions against the award of exemplary damages in those instances. *Engle v. Jones*, 51 Mo. 316; *Pruett v. Quarry Co.*, 33 Mo. App. 18. One may go too far, in the heat of passion, in resenting an assault, and malice be implied. In the case in hand the conductor may have been wrought up by Ickenroth's conduct and language, and by the resistance offered to a commendable attempt to make him leave the car, until the conductor in the ensuing struggle overstepped the limit of necessary force, and hurt

him too much. Plainly, there is a vast difference between such deeds as those mentioned and malicious trespasses or wanton and brutal assaults. Will a jury understand that the law concedes the difference, if nothing is said to enlighten them beyond stating the artificial definition of malice? The general theory of exemplary damages as expounded by text-writers and most of the judgments on the subject is that they are given not only by way of example, but to punish an evil intention or motive. 1 Sedgwick, Damages (8th Ed.) c. 11, § 347 et seq., and cases cited. The tenor of the decisions shows that barbarity and depravity of conduct weigh heavily with courts in authorizing punitive verdicts.

But the propriety of giving only the technical instruction as to what malice is has been considered and recognized by the appellate courts of this state, and must be accepted as the law. The question came up at an early day in *Goetz v. Ambs*, 27 Mo. 28—an action for assault like the present one. The lower court told the jury they might assess smart money in whatever sum they deemed right, considering all the facts. The defendant prayed a charge that in allowing or refusing smart money they should consider mainly the malicious intent and motive of the defendant. The refusal of that charge was indorsed by the Supreme Court, which held it to be unsound, as implying that ill will and hostility toward the defendant must be found as a prerequisite to giving exemplary damages; whereas, if the injury was intentionally inflicted, and did not ensue from a simple want of care, exemplary damages might be given. The further observation was made that legal malice meant no more than that the act was willful, which is undoubtedly true. The doubt is whether a jury may not be better informed by an ampler and more definite charge, by directing them to consider whether the defendant's tort was marked by wantonness, brutality, or other aggravating features.

In *Trauerman v. Lippincott*, 39 Mo. App. 478, the action was trespass, and the definition of malice given was the usual technical one—the intentional doing of a wrongful act without just cause or excuse. The court approved the instruction, and, in discussing the general question, harmonized the doctrine of *Goetz v. Ambs* with other cases in this state and elsewhere by emphasizing the force of the word "intentional," which was said to signify, when used in connection with the doing of a wrongful act, not only that the party intended to do the particular act, but to do it knowing at the time that it was wrongful. The reasoning of the court proceeds as follows: "Understood in this way, *Goetz v. Ambs* is not out of line with the foregoing decisions requiring the act to partake of wantonness or a reckless disregard of the rights of others; for if one intentionally does a wrongful act, and knows, at the

time that it is wrongful, then he does it 'wantonly,' by which word I understand is meant causelessly, without restraint and in reckless disregard of the rights of others. When one intentionally commits a wrong, he does it from an evil spirit and bad motive. Good motive or spirit does not impel the commission of willful wrong." That argumentation points to the conclusion that some effort is needed to make the technical rule square with the facts of human nature—an effort which juries are unlikely to make successfully. It enforces the opinion that they need plainer information than is given in the usual charge to enable them to decide the issue of punitive damages according to law. A different view of the question was taken in *Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508. The opinion in that case declares that exemplary damages are proper only when there are aggravating circumstances, citing *Cooley on Torts*, which eminent authority announces the law to be that motive is an element of the highest importance in mitigating or aggravating damages. See page 836 (2d Ed.). It is noteworthy that our statute giving an action for death caused by wrongful acts requires the jury, in assessing the damages, to have regard to the mitigating or aggravating circumstances. Rev. St. 1899, § 2806; *Owen v. Brockschmidt*, 54 Mo. 285. The existence of a distinction between legal and actual malice, and the need of proving the latter as a prerequisite for an award of punitive damages, has been repudiated in this state in actions for slander and libel. *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; *Fulkerson v. Murdock*, 53 Mo. App. 151; *Arnold v. Sayings Co.*, 76 Mo. App. 159. The reasoning in *Callahan v. Ingram* expands the same rule to include actions for other torts: "We may say, then, that malice, whether express or implied, means the same; the only difference being in the establishment of it. When malice is implied from the words spoken or published, the burden is on the defendant to prove lawful justification or excuse, or the absence of a malicious intent. On the other hand, if the words themselves do not imply malice, the burden rests upon the plaintiff to establish it. When malice exists, punitive damages may be given, and it cannot be seen why a distinction should be made when the evil intent existed, whether implied or proved. It is true a distinction is made by some courts, and it is held that, unless express malice is proved, exemplary damages should not be allowed. This line of decision was followed by the St. Louis Court of Appeals in *Nelson v. Wallace*, 48 Mo. App. 193, and *Fulkerson v. Murdock*, 53 Mo. App. 156. It is argued that punitive damages are only allowed in trespass and other actions for torts, when the offense is committed in a wanton, rude, and aggravated manner, indicating oppression or a desire to injure; and that no reason can be

seen for the application of a different rule in cases for slander or libel. We think the distinction does not in fact exist. Malice is implied in the willful doing of any wrongful act without justification or excuse, whereby injury is done to another, whether it be to his character, his person, or his property. Where such act is done maliciously, therefore, the injured person should be entitled to exemplary damages, and it would be immaterial whether malice was implied from the nature of the act itself or inferred as a fact from all the circumstances under which it was committed. The question is whether the wrong was done willfully and without lawful justification or excuse." The effect of that decision as we gather it, is not that an evil purpose, or desire to do needless harm, is no prerequisite for an award of exemplary damages, but that a desire of that sort may be implied from the tort itself, as well as from the circumstances of it. This leaves a jury free to consider facts of aggravation and their minds may be directed to them.

The law is that exemplary damages are given only when the evidence shows an unlawful act coupled with an intentional wrong, but facts showing oppression, wantonness, or outrage are always dwelt on. 1 Sedgwick, Damages, § 365; Kennedy v. Railway, 36 Mo. 351; Engle v. Jones, 51 Mo. 316; Perkins v. Railway, 55 Mo. 201; State v. Jungling, 116 Mo. 162, 22 S. W. 688; Dorsey v. Railway, 83 Mo. App. 528; Railway v. Quigley, 21 How. 202, 16 L. Ed. 73; 19 Am. & Eng. Ency. Law (2d Ed.) 624; 12 Am. & Eng. Ency. Law (2d Ed.) 24; Tanger v. Railway, 85 Mo. App. 28; Morgan v. Durfree, 69 Mo. 469, 33 Am. Rep. 508; Wamsanz v. Wolff, 86 Mo. App. 205; O'Brien v. Loomis, 43 Mo. App. 29. In actions for injuries inflicted by an assault and battery it has been customary to direct an allowance of punitive damages if the assault is found to have been of a wanton, malicious or brutal character. Johnson v. Bedford, 90 Mo. App. 43; Gildersleeve v. Overstolz, 90 Mo. App. 518; Hickey v. Welch, 91 Mo. App. 4; Trauerman v. Lippincott, 39 Mo. App. 478. We think it is still proper, if not essential, to charge a jury, when requested, to consider whether the assault was characterized by wanton or malicious violence, in determining the issue of exemplary damages; though it is not error to give the conventional definition of malice. It has been well said, we think, that such damages should only be assessed in cases of aggravated injury, to subserve a wholesome public example, and that the rule allowing them ought not to be extended. O'Brien v. Loomis, supra.

For the errors noted, the judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

SPARROW v. STATE EXCH. BANK OF MACON et al.*

(Court of Appeals at Kansas City, Mo. Nov. 9, 1903.)

BANKING—DEPOSITS—FORM OF ACCOUNT—DEPOSIT AS ADMINISTRATOR—NOTICE TO BANK.

1. A person who had transacted business with a bank for eight years maintained during that time but one account in his name "as administrator," and deposited to that account all the money, checks, etc., which he deposited, and drew all of his checks for all purposes, including his private debts, against this account. The bank had no knowledge that the account did not belong to the depositor individually. *Held* that, notwithstanding the fact that the account was in the depositor's name as administrator, the bank was justified, from his course of dealing, in supposing that it was his individual account, and therefore in drawing therefrom an amount sufficient to satisfy a personal note of the depositor, although in fact the money belonged to the estate of which the depositor was administrator.

2. The depositor collected money belonging to heirs of whom he was curator, and deposited it in the bank in his individual name; the bank, however, crediting the same to his account as administrator. Thereafter the depositor drew out a portion of this money, with knowledge that it had been placed to his account as administrator; and, after the account had been nearly exhausted, the bank drew therefrom an amount sufficient to pay a personal note of the depositor. *Held* that, as against the heirs, the bank was justified in treating the fund as belonging to the depositor individually, and applying a portion of it to the payment of his note.

Appeal from Circuit Court, Macon County; Nat M. Shelton, Judge.

Action by James D. Sparrow, as administrator of the estate of John Emdee, against the State Exchange Bank of Macon and others. From a judgment for plaintiff, defendants appeal. Reversed.

Web M. Rubey and Thos. N. Dysart, for appellants. R. S. Matthews & Son and B. E. Guthrie, for respondent.

SMITH, P. J. This is a suit in equity which was brought against the defendant State Exchange Bank, the object and purpose of which was to secure an accounting between it (the bank) and the estate of John Emdee, the plaintiff's intestate, and to recover \$152, etc.

The cause was submitted to the court on an agreed statement of facts, which was as follows:

"First. That Wm. J. Magee, defendant, was on the 30th day of April, 1902, the lawful administrator of the estate of John Emdee, deceased, and also curator of the Murphy heirs, whose present curator, the successor of said Magee, has been made a party defendant, and permitted to file her claim to the funds in controversy in this suit.

"Second. That said Magee has since the 16th day of May, 1902, been adjudged of un-

*Rehearing denied December 7, 1903.

sound mind, and the defendant John W. Gross appointed his curator. And by reason of Magee's insanity the plaintiff herein, James D. Sparrow, had been appointed and is now lawfully acting as administrator de bonis non with will annexed of the estate of said John Emdee, and that Lena Murphy, a party defendant in this case, has been appointed and is now lawfully acting curator of the aforesaid Murphy heirs.

"Third. That said Magee, as administrator of the estate of John Emdee, prior to April 30, 1902, sold some real estate belonging to said estate, and on the 30th day of April, 1902, deposited \$1,350 of the proceeds in the State Exchange Bank of Macon, one of the defendants in this suit, in the name of Wm. J. Magee, administrator.

"Fourth. That on the 10th day of May, 1902, said Magee, as curator of the said Murphy heirs, collected \$489 belonging to said heirs, and deposited same in said bank in the name of 'W. J. Magee,' but which sum was by the bank credited on its books to the account of 'W. J. Magee, Adm'r,' there being no account in said bank in name of 'W. J. Magee.'

"Fifth. That said Magee on the 1st day of May, 1902, commenced drawing upon said account of 'W. J. Magee, Adm'r,' signing the checks, 'W. J. Magee, Adm'r,' and by May 14, 1902, had drawn all of said account but \$152.18.

"Sixth. That on the 16th day of May, 1902, the defendant the State Exchange Bank of Macon drew from said account said balance of \$152.18, and gave credit therefor upon an overdue note held by said bank against W. J. Magee.

"Seventh. That said Magee has done business in said bank from 1894 to 1902 but had but one account, and that was kept in the name of 'W. J. Magee Administrator.' That to the credit of that account he deposited all money, checks, or drafts which he did from time to time deposit, no matter from what source received, and against said account he drew money for any and all purposes, including his private and personal debts, always signing checks, 'W. J. Magee, Adm'r.'

"Eighth. That the defendant the State Exchange Bank of Macon had no actual notice, knowledge, or information, either at the time that the aforesaid sums of \$1,350 and \$489 were deposited, or at the time it drew and used the \$152.18, that the same was other than the funds of W. J. Magee.

"Ninth. It is further admitted that Magee is indebted to the estate of John Emdee in the sum of \$1,699.40, as shown by final settlement made in the probate court of Macon county, Mo., by John W. Gross, curator of Magee, for the Emdee estate, and amount due is unpaid.

"Tenth. It is admitted that the estate of Wm. J. Magee is insolvent.

"Eleventh. It is further admitted that Magee, as curator, is indebted to the estate of

Geo. B. Murphy and Hugh A. Murphy, as alleged, in the sum of \$314, as shown by the final settlement made by Jno. W. Gross as curator of Wm. J. Magee in the probate court for the Murphy heirs."

The finding and decree were for plaintiff, and defendants appealed.

It is a well-settled principle that where a depositor in a bank is indebted to the bank by bill, note, or other indebtedness, the bank has the right to apply so much of the funds of the depositor to the payment of his matured indebtedness as may be necessary to discharge the same. *Morse on Banking*, § 559; *Bolles on Banking & Dep.* § 403. And so it has been expressly decided by the appellate courts of this state that where a discount has been made by a bank, and the note has matured so as to create an indebtedness from the depositor to the bank, all funds of the depositor which the bank has at the date of the maturity of the discounted note, or afterwards acquires in the course of business with him, may be applied to the discharge of his indebtedness. *Park Bank v. Schneldermeyer*, 62 Mo. App. 179; *Muench v. Bank*, 11 Mo. App. 144; *Ehlermann v. Bank*, 14 Mo. App. 591; *Bank v. Carson*, 32 Mo. 191.

Applying to the conceded facts, as set forth in the sixth paragraph of said statement of facts agreed, the rule first adverted to, and it is clear that the bank was authorized to apply any money belonging to Magee on deposit with it to the discharge of his overdue note to it. But it is contended that Magee had no funds on deposit with it, and that the fund applied by it was that of Emdee's estate, or else that of the Murphys. The vital question in the case is whether the deposit of the \$1,350 belonging to Emdee's estate to the credit of "W. J. Magee, Adm'r," was notice to the bank that the fund was held by him in a fiduciary capacity. It is conceded that the defendant bank had no actual notice or knowledge at the time of the deposit, or at the time of the application of the \$152 of the fund then on deposit to the discharge of its overdue note, that such funds belonged to any person other than Magee himself. *Eyerman v. Bank*, 18 Mo. App. 289, was a case where a draft payable to the order of "Herman Rechten, County School Treasurer," was by him indorsed and delivered to defendant bank, and by it collected and applied to the discharge of a past-due indebtedness of said Rechten to it. This fund was claimed by the plaintiffs, who had been subrogated to the rights of the county in the deposit. In the course of the opinion it was said by Judge Lewis, who delivered the opinion of the court, that "the fact that a man is county treasurer furnishes no presumption that money deposited by him in a bank is the property of the county. The bank, in receiving the deposit, becomes debtor to him as an individual. This relation between the parties is not changed by the addition of 'County Treasurer' to his name in the

bank account books, or in the checks drawn by him. It has been frequently held that such additions impart no notice that the fund is held in a fiduciary capacity, and that they have no legal significance beyond a description of the person. Thus, 'Herman Rechten, County Treasurer,' may be a form intended only to show that the person is not some other having the same name, who is not county treasurer. Every legal presumption, as between the parties, is in favor of the personal ownership of the fund by the depositor; and, if nothing more appears, the bank must be guided in all its transactions by these presumptions. The principle is the same that was recognized in *Powell v. Morrison*, 35 Mo. 244, though with a different application. There a promissory note given in the purchase of lands sold in partition was made payable to 'the order of James Castello, sheriff of St. Louis county.' The payee sold the note before maturity, and one of the partitioners sued the transferee for his share of the partition proceeds contained in the note. It was held that the words 'sheriff of St. Louis county' imparted no notice to the indorsee of the trust attached, but were merely descriptive of the payee, and the plaintiff could not recover. A like conclusion was reached in *Thornton v. Rankin*, 19 Mo. 193, 59 Am. Dec. 338, where, upon a sale of real estate belonging to certain minors, a note was made payable to their guardian by the description, 'Isaac J. Cooper, guardian, etc.,' and by him transferred to an indorsee without other notice of the facts. So, in *Fletcher v. Schaumburg*, 41 Mo. 501, it was held that a distributee in partition could not set up her distributive interest against her note given at the sale, and indorsed by the sheriff, with his official addition, to an innocent purchaser. It must be observed that in each of these cases the decision was founded squarely on the propositions that the *descriptio personæ* imparted no notice of the existing trust, and that the indorsee had in fact no notice thereof from any other source. They were entitled, therefore, to be treated as if no such trust existed." And this opinion was approved and adopted by the Supreme Court without qualification. *Eyerman v. Bank*, 84 Mo. 108. *Mayer v. Bank*, 86 Mo. App. 108, was where a note payable to "S. C. Palmer, curator," was indorsed and delivered by him to the bank as collateral security to a note given by him for a loan. Palmer was removed from the curatorship, and Mayer, his successor, brought replevin to recover of the bank possession of the note so held by it. The bank had no knowledge that the note was trust property, unless notice could be imputed to it from the fact that it was indorsed as just stated. In disposing of the bank's appeal, we held, through Mr. Justice Gill, speaking for the court, that, "notwithstanding there is some confusion in the decisions, we think the overwhelming trend of

authority favors the proposition that the mere addition of the words 'curator,' and the like, to the name of the payee and indorser, does not carry notice that negotiable paper so indorsed is trust property, and not that of the individual payee and indorser. Such words, when so appearing, are treated as mere *descriptio personæ*." Citing 2 Morse, B. & B. (3d Ed.) § 604; *Thornton v. Rankin*, 19 Mo. 193, 59 Am. Dec. 338; *Powell v. Morrison*, 35 Mo. 244; *Nickerson v. Gilliam*, 29 Mo. 456, 77 Am. Dec. 583; *Fletcher v. Schaumburg*, 41 Mo. 501; *Eyerman v. Bank*, 84 Mo. 408. *Mayer v. Bank*, 86 Mo. App. 422, was where the bank officers were told to credit the proceeds of a check payable to bearer to the credit of "S. C. Palmer, curator," but the credit was entered to his individual credit. The bank officers had no knowledge that the money was held by him as curator or in a fiduciary capacity. He subsequently drew his individual check against the fund so deposited in favor of the bank, to discharge his past-due indebtedness to it. In that case we held that the bank acquired no right to the fund, and the reason of the holding was expressed in this wise: That it is a well-settled rule of law that a bank cannot use a deposit to pay the individual debt of the depositor due to it, where it has knowledge that the deposit is held by the depositor in a fiduciary capacity, and does not belong to him. Citing *Johnson v. Bank*, 56 Mo. App. 257; *Clark v. Bank*, 57 Mo. App. 277; *Payne v. Bank*, 43 Mo. App. 377. And so in *Clark v. Bank*, supra, it was said that it is a rule deducible from many authorities that a bank cannot use a deposit to pay the individual debt of the depositor due to it, where it has knowledge that the deposit is held by the depositor in a fiduciary capacity, and does not belong to him personally. It was further said in the same case that the defendant contends that the word "receiver," which was added to the name of the payee in the notes, was no notice to the defendant bank that the defendant held them in a fiduciary capacity. It is true that this addendum alone would be insufficient to impart such notice, but it seems to us that this, in connection with the information which the receiver and Mr. Burney gave the president, was ample to apprise defendant of the fact that said notes, and the proceeds thereof, were held by the receiver in his fiduciary capacity. And an explicit recognition of this rule is contained in both the opinion and the dissent thereto which were delivered in *Lindsay v. Brooks*, 82 Mo. App. 301. We do not think there is anything in *Gregg v. Bank*, 80 Mo. 256, inconsistent with the ruling in *Eyerman v. Bank*, 84 Mo. 408, but, if so, the latter overthrows the former. Nor do we think that the latter case has been trencched upon by the ruling made in *Evangelical Synod, etc., v. Schoenelch*, 143 Mo. 652, 45 S. W. 647. It must be confessed that the rule declared by the Supreme Court of the United States

in *Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 603, and the cases in which it has been followed by that court, cannot be reconciled with that declared in the Missouri cases already alluded to. If the question here had not been authoritatively ruled by our own Supreme Court, we should be inclined to adopt that declared by the Supreme Court of the United States, since the reasoning in those cases by that great court in favor of the rule therein announced, it seems, are of the most cogent and persuasive nature.

It would therefore seem that as the defendant had no knowledge that the fund was held by Magee in a fiduciary capacity, and that the deposit, though to the credit of "Wm. J. Magee, Adm'r," must, under the circumstances stated in the facts agreed, be regarded as belonging to him in his individual capacity, and as creating the relation of debtor and creditor between him and the bank, and therefore it had the right to apply the said fund to the extinguishment of an overdue indebtedness of his to it. And the same reasoning applies, as we think, with much greater force, to the claim interposed to the fund by the Murphy heirs. The deposit made by Magee of the fund belonging to them to the credit of the same account affords no basis for a claim by them. If he directed the fund to be placed to his individual credit, or if he gave no directions whatever in respect to what account it should be credited, he afterwards made no objection to the action of the bank in crediting it to the only account he therein had. He drew this money out of the account to the credit of which it had been placed. He knew that unless this fund had been placed to the credit of the "Wm. J. Magee, Adm'r," account, his balance on that account was not equal to that of his several checks against it. He tacitly approved the action of the bank in placing the Murphy deposit to the credit of the only account he had in the bank. The bank had no knowledge that the fund belonged to the Murphy heirs. It had a right to presume it belonged to him individually. In view of the adjudicated cases in this state to which we have referred, we can perceive no ground upon which the latter can recover the fund so greatly in controversy in this case.

The decree was for the wrong party, and must be reversed. All concur.

STATE ex rel. GRAY v. ACTIVE BUILDING & LOAN ASS'N NO. 2 et al.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

RECEIVERSHIPS—RECEIVER'S COUNSEL—COMPENSATION—ALLOWANCE—SETTLEMENT OF ACCOUNT—SUBSEQUENT ALLOWANCE—JURISDICTION.

1. Under Rev. St. 1899, § 755, providing that the court shall allow a receiver such compensation for his services and expenses as may be just, and cause the same to be taxed as costs,

the services of the receiver's attorneys in the administration of the estate, may be allowed and taxed as costs.

2. Where the court, having jurisdiction of a receivership, approved a commissioner's report, ordered certain costs paid, and the declaration of a dividend, after which the receiver was to stand discharged, the court at a subsequent term not directly succeeding the term at which the order was made had authority to order an allowance of fees for the receiver's counsel.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Proceedings by the state, on the relation of Henry L. Gray, as supervisor of building and loan associations, against the Active Building & Loan Association No. 2. The defendant was adjudged insolvent. From an order refusing to allow compensation for services to the receiver's counsel, he appeals. Reversed.

Daniel Dillon, for appellant.

REYBURN, J. In October, 1897, in the above-entitled proceeding, the defendant building association was adjudged insolvent, and a receiver appointed to wind up its affairs. The receiver qualified, and in September, 1900, made application to the division of the circuit court of the city of St. Louis wherein the action was pending for an allowance on account of their respective services in the administration of the affairs of defendant to his counsel and himself, and \$150 was ordered paid to each from the funds then in custody of the receiver, amounting to about \$600. This application was accompanied by an itemized statement of the counsel detailing his professional services, with a total charge of \$385. The receivership appears to have remained inactive and dormant, until about February, 1902, the court made an order approving a commissioner's report, not exhibited in the record, and found a balance of \$808.67 in the hands of the receiver, from which it directed the receiver to pay the court costs, \$20.25, the commissioner, \$50, and a dividend of 10% per cent. upon the preferred claims, which dividend would aggregate \$732.14, and retain balance, \$6.18, to cover costs of payment of dividends; and upon filing vouchers showing compliance with above the receiver to stand discharged. The record next discloses that upon application of the corporation, the surety on bond of receiver in penal sum of \$1,000, October 7, 1902, the court ordered the receiver to show cause why he had not complied with prior order made in February above mentioned, and on October 17th the court made further order that, it appearing to the satisfaction of the court that the receiver would comply with order of February 1, 1902, the receiver was again directed to pay to the respective parties the allowances therein made, or pay same into court for their use, and on October 25th the receiver paid into court \$652.47 in obedience thereto. On October 24, 1902, appellant, counsel for

the receiver, filed a petition or motion setting forth that, excepting \$150, he had received no portion of his account for services, a bill of items of which was filed therewith, and of which a balance of \$285 remained due to him unpaid; that he had been first advised October 23d of the order of October 17th, and he asked the court to set aside said order and direct the receiver to hold the funds in his hands until the court should pass upon his rights, and to allow his claim and direct its payment by the receiver. On November 7th the court declined to hear any testimony in support of the appellant's application or to entertain it. November 7th appellant filed a motion to set aside order overruling his former motion, which the court, November 17th, overruled, and upon motion of a preferred claimant ordered the clerk to pay the latter from the fund in court a sum named. November 19th appellant filed further motion to set aside order directing payment of preferred creditor and for order requiring repayment of amount paid him and other amounts paid such creditors by the clerk of the court. November 24th the court sustained motion for rehearing, and ordered appellant's motion for allowance reinstated and submitted for further consideration, and again overruled both motions December 22d, and this appeal ensued.

The allowance for services of the counsel of the receiver is a part of the taxable costs in the proceeding, and such costs have a priority over all other demands against the funds in the receiver's hands. *Beach, Receivers*, § 753, p. 810. Our statute, affirming this general principle, has made provision in express terms for just and reasonable allowances to be made by the court in favor of a receiver for his services and expenses, and for such allowances to be taxed and paid as costs in the cause. *Rev. St. 1899, § 755*. A fair interpretation of this statute would comprehend as items of the receiver's expenses the services of his attorneys in the administration of the estate, the subject of the receivership. For the purposes of this proceeding it is needless to consider or determine whether the action of the court in ordering distribution in February, 1902, constituted a final judgment. If it be conceded, for argu-

ment's sake, that this order be regarded as a final judgment—which we do not decide—yet the court undoubtedly had the power at a term subsequent not directly succeeding to make an allowance of fees for receiver's counsel. In *Turner v. Butler*, 68 Mo. App. 380, a referee's fees were allowed and taxed at a term other than and after that at which judgment was rendered; and, considering the distinct objection made that the circuit court was without jurisdiction to make such allowance after lapse of the term at which final judgment was rendered, the Kansas City Court of Appeals sustained the trial court. Again, this court, in *Clark v. Hill*, 33 Mo. App. 116, in opinion rendered on motion for rehearing, says: "There is nothing in the statute which prevents this [in retaxing costs] being done at a subsequent term; on the contrary, as a matter of practice, it is almost always done at a subsequent term." In *State ex rel., etc., v. R. R.*, 78 Mo. 575, the court sustained a motion to retax costs so as to embrace an attorney's fee, after the judgment and costs as first taxed had been paid, and two years and more later. This case, also, while not in express terms overruling the case of *Ladd v. Cousins*, 52 Mo. 454, in which it was held that an allowance to a garnishee cannot be made at a term subsequent to that term at which final judgment was rendered, being subsequent, robs it of controlling authority. No reason can be perceived why the trial court was not empowered to allow such an item of taxable costs of the proceeding even at a term following that term of court at which final judgment had been held. Appellant was entitled to be heard upon his application presented, and any balance found justly due him for legal services rendered the receiver in the conduct of the administration of the estate should be allowed as part of the taxable costs of the proceeding, to be paid, as other court costs, from the funds in the custody of the court, prior to payment of any dividend to the secured creditors.

The judgment is accordingly reversed, and the cause remanded to be proceeded with in accordance with this opinion.

BLAND, P. J., and GOODE, J., concur.

STAGGENBORG et al. v. STAGGENBORG.
(Court of Appeals of Kentucky. Nov. 25,
1903.)

**WILL CONTEST—EVIDENCE—HARMLESS
ERROR.**

1. The jury having found the will invalid on the ground of testatrix's unsound mind alone, improper admission of evidence that the will was not read to the subscribing witnesses or to testatrix's daughter is harmless.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Probate appeal by Annie Staggenborg. From a judgment holding the will invalid, Alice Staggenborg and others appeal. Affirmed.

Sam C. Bailey, for appellants. Phil J. Ryan and Thos. Michie, for appellee.

BARKER, J. Mrs. Bridget Kelly, a widow, died testate, domiciled in Campbell county, Ky., in September, 1901. Appellee, Annie Staggenborg, is the only child of the decedent. The appellants, Alice Staggenborg, Helen Staggenborg, and Dorothy Staggenborg, are the infant children of appellee. The will was admitted to probate by order of the Campbell county court, from which judgment an appeal was prosecuted by appellee to the Campbell circuit court, where, upon trial by jury, the verdict was adverse to the will, and a judgment was rendered invalidating that instrument. From this judgment the three grandchildren, who were reversionary devisees, have prosecuted this appeal by their guardian ad litem.

By the instrument in question the decedent devised all of her property to her brother Frank Fox, in trust for the use and benefit of her daughter Annie Staggenborg during her life, with remainder over to her three infant granddaughters. The will was written a few days before the death of the decedent, who was in her sixty-ninth year at the time. Her death was caused by catarrhal pneumonia, a disease which produces at times high fever, often accompanied by delirium. The evidence shows that when the fever rises to 104 deg. and above delirium invariably occurs; when it diminishes below that point, the patient's mind may be, and usually is, lucid. In this case the patient's fever was usually low in the morning, rising towards midday to a point producing delirium. The will was written and acknowledged about 9 o'clock in the morning, but the evidence is conflicting as to the state of the testator's mind at the time her signature and acknowledgment took place.

The appellants urge two grounds for a reversal of the judgment: First, because upon the trial the lower court permitted witnesses for the contestant to testify that the will was not read to the subscribing witnesses or to Annie Staggenborg; and, second, "because the verdict of the jury is flagrantly against the evidence."

We are of opinion that it was error to ad-

mit evidence that the will was not read to the subscribing witnesses, or to the appellee, Annie Staggenborg, as it was not necessary for the witnesses to know the contents of the instrument they were attesting, nor for the appellee to know its provisions in advance of publication. The tendency of this evidence, under the circumstances, was to produce a suspicion in the minds of the jury that there was an unnatural secrecy or mystery surrounding the execution of the will, which might have influenced them on the issue of the undue influence of the trustee over the decedent; but, as the jury reached a verdict invalidating the will alone upon the ground of the unsoundness of the testator's mind, it is clear that the evidence complained of was not prejudicial to the appellants.

As before said, the evidence on the subject of the testator's mind at the time of the execution of the will was exceedingly conflicting. It was an issue peculiarly within the province of the jury to determine, and we are not able or willing to say that their verdict was flagrantly contrary to the weight of the evidence.

Perceiving no error in the record, the judgment is affirmed.

**DUNLAP v. FIBLE & CRABB DISTILLING
CO. et al.**

(Court of Appeals of Kentucky. Dec. 2, 1903.)
**ASSIGNMENT FOR BENEFIT OF CREDITORS—
COMPENSATION OF ASSIGNEE.**

1. A corporation of which C. was president, a firm of which he was a member, and C. himself, executed a joint deed of assignment for the benefit of creditors. The assignee began a suit to compel presentation of all claims in that action, and for instructions. The estates were complicated and in a state of great confusion, and he devoted the better part of two years to their untangling and general supervision. He advanced \$1,000 or \$1,200 for expenses. The property of the corporation sold for \$80,000, and about \$3,000 was realized from C.'s estate. Held, that the assignee was entitled to \$2,400 compensation.

2. Where a corporation and its president individually executed a joint deed of assignment, and the corporation's creditors claim all the assets of the individual estate on account of the president's indorsement of the company's paper, the compensation of the assignee may, as against them, be paid wholly out of the assets of the individual estate.

Appeal from Circuit Court, Henry County.
"Not to be officially reported."

Bill by John L. Dunlap, as assignee for the benefit of creditors of the Fible & Crabb Distilling Company and other assignors, against the Fible & Crabb Distilling Company and others. From a judgment allowing an inadequate compensation to the assignee, he appeals. Reversed.

W. S. Pryor, for appellant. W. D. Crabb, D. H. French, and Jno. D. Carroll, for appellees.

O'REAR, J. The Fible & Crabb Distilling Company, a corporation, W. L. Crabb, as

surviving partner of a firm of liquor dealers styled Fible & Crabb, and W. L. Crabb individually, executed a joint deed of assignment of all their property to appellant, John L. Dunlap, in 1887, for the benefit of their creditors generally, the assignors being insolvent. Appellant qualified as assignee of each of the estates, and entered upon the discharge of his duties. He immediately filed a petition in the Henry circuit court, setting up the deed of assignment, and alleged that the affairs of all the assignors were so intermingled with each other, and were so complicated and in such a state of confusion, that it was impossible for him to immediately render a statement thereof, but that they were all insolvent; that they had each indorsed for the others to such an extent that it was necessary to settle all the estates together to avoid costs, delay, and confusion. An injunction was sought and granted, requiring all the creditors to present their claims in the one action. The advice and direction of the chancellor in the manner of the administration of the estates was sought by the prayer in the petition. Numerous warehouse receipts had been issued by the distilling company of which W. L. Crabb was the president, some of which appear to have been duplicated, involving the estates and the title to the whisky in great confusion. The assignee devoted his time and labors for a considerable while—probably for the better part of two years—to the untangling of the involved conditions, and settling with the United States government, and collecting warehouse storage fees, paying taxes, and the general supervision of the estates. He advanced some money to pay expenses to the extent of ten or twelve hundred dollars. He moved for an allowance for his services before distribution, but the court allowed at that time only \$1,000 on account, and reserved the matter of further allowance. Later he moved again for an additional allowance, but it seems not to have been acted upon at the time. The court directed the disbursement of the proceeds of the liquor and of the sale of the distillery property, amounting to over \$60,000. At the winding up there was found to be about \$1,400 in the hands of the court's commissioner. Appellant asked that he be allowed \$2,000 additional for his services as assignee. This was objected to by a number of the larger creditors upon the ground that the \$1,400 in question had been derived exclusively from the estate of W. L. Crabb, which in the aggregate had netted less than \$3,000; that an allowance of \$2,000 for the settlement of that estate was unauthorized. A special circuit judge sustained the objection, and allowed appellant \$100 only.

Although appellees severely criticize appellant's management of the assigned estates as having been injudicious and wasteful, from the record before us the charge is not sustained. Furthermore, it appears from the

record that appellant made settlements from time to time, and reported fully his conduct of the affairs of the estates. These were all approved and confirmed by the court without exception by the creditors, all of whom had been made parties to the record. If appellant's management of the trust had been wasteful or negligent, or otherwise inefficient, it was the privilege of the creditors to have caused his removal by a showing to that effect. We are of opinion that appellant's services are shown to have been worth at least \$2,400; that is, \$1,400 more than the sum heretofore allowed to and paid him; that is, his services to all three of the estates are worth that much.

In view of the fact that the objecting creditors are the ones to whom about \$60,000 of the proceeds of the assigned estate of the distilling company have been paid as preferred creditors and holders of warehouse receipts for all the whisky, and that these same creditors are claiming the \$1,400 in question, or the greater part of it, as general creditors of W. L. Crabb, by reason of his indorsement of the distilling company's paper owing to them, the court might without impropriety direct the payment of the \$1,400 on hand to the assignee; or, if it should appear more equitable, and if there should appear any material indebtedness of W. L. Crabb which was not also an indebtedness of the Fible & Crabb Distilling Company, then the court should require the creditors of the Fible & Crabb Distilling Company, who have received all the assets of that concern, to pay back pro rata enough of the money which they have received to make \$1,000, and then appropriate \$400 of the money on hand of W. L. Crabb to the assignee, making \$1,400 additional to be paid to the assignee in full for his services. Although all the whisky was in lien to these creditors of the distilling company, yet as the services of the assignee were rendered in their behalf, were received by them without objection, and were presumably beneficial to them, in that they relieved them of a personal investigation and management and control in straightening out the affairs of the distilling company, it is only proper that they should pay for them. Fible & Crabb do not appear to have had any assets.

The judgment is reversed, and cause remanded for further proceedings consistent herewith.

GOODMAN'S ADM'R v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Dec. 1, 1903.)

RAILROADS—KILLING PERSON ON TRACK—NEGLIGENCE—EVIDENCE—SUFFICIENCY—LICENSEE.

1. A railroad company owes no duty to trespassers on its tracks at places not frequented

by the public by right or permission until their peril has been discovered.

2. In an action against a railroad company for the death of a child on its track in a cut 7 or 8 feet deep and about 230 yards from a crossing, evidence that it was possible for the engineer to have discovered the child when the train was at the crossing was insufficient to justify a finding that the engineer was negligent in not then discovering the child, where the brakeman testified that he was in the cab; that, after passing the crossing, he saw an object on the track about 150 yards ahead, which looked like a piece of paper, but that when the train had approached within 30 feet of the object he discovered that it was a child lying between the rails.

3. Where it was shown that a railroad track in a deep cut was fenced on both sides, and was inclosed by iron cattle guards at the crossings, evidence of the mere occasional passage of unauthorized pedestrians on the track there with the knowledge of the company was not sufficient to convert a trespasser there to a licensee.

Appeal from Circuit Court, Hart County.
"To be officially reported."

Action by Goodman's administrator against the Louisville & Nashville Railroad Company. From a judgment dismissing the action, plaintiff appeals. Affirmed.

McCandless & James, for appellant. J. A. Mitchell, Edward W. Hines, and B. D. Warfield, for appellee.

BURNAM, C. J. The appellant, J. M. Craddock, as administrator of Isaac Goodman, deceased, brought this suit to recover damages for the death of his intestate. The petition alleges that "on the 27th day of August, 1901, the defendant, its agents and servants, negligently and carelessly ran one of its freight trains over the body of the said Isaac Goodman, inflicting upon him injuries which instantly resulted in his death." Defendant, the Louisville & Nashville Railroad Company, denied the alleged negligence, and in a second paragraph pleaded that the death of plaintiff's intestate was the direct result of its own contributory negligence. The reply was a traverse of the plea of contributory negligence. The trial in the circuit court resulted in a peremptory instruction to find for the defendant and a judgment dismissing the action, from which this appeal is prosecuted.

It is complained that the trial court erred in the peremptory instruction, and also in rejecting competent evidence which was offered by the defendant. It appears from the bill of evidence that the decedent was run over and instantly killed by one of appellee's south-bound freight trains 2 miles north of Horse Cave station, and 230 yards south of a public road crossing, and about the same distance from a private crossing on the north, in a cut 7 or 8 feet deep. It is further shown that the deceased was an ordinarily intelligent boy, 11 years of age, and that he went upon the railroad right of way with a bag for the purpose of picking up pieces of coal which had fallen from the

tender of passing engines, and that he had been in the habit of doing this, and had been cautioned, both by his father and older brother, about the danger of passing trains. Robert Wilkerson, a brakeman in the employ of the railroad company, was the only witness to the accident who testified. He was called by plaintiff, and testified that he was sitting in the cab of the engine on the opposite side from the engineer, and gave the usual signals of the approach of the train to the public crossing; that the train was traveling at between 32 and 35 miles an hour, and consisted of 28 loaded freight cars; that after he had passed the public road crossing he saw an object on the track about 150 yards ahead, which looked like a piece of paper, but that when the engine had approached within about 30 feet of the object he discovered the deceased lying on the track between the rails; that the engineer immediately applied the brakes, and stopped the train after it had run about two car lengths farther than the length of the train (or, in other words, that the body of the boy was about two car lengths behind the caboose); and that it could not have been stopped any sooner, or in time to have avoided running over the deceased after it was discovered that the object upon the track was the deceased. The plaintiff introduced testimony tending to show that it was possible for the deceased to have been discovered by the engineer at the public crossing, which was about 230 yards from the point where he was lying at the time he was killed, and it is contended that this was sufficient evidence to have justified the jury in believing that decedent was seen by the defendant's agents in charge of the train in time to have avoided the accident; or that, in any event, it was sufficient evidence to have authorized the submission of the case to the jury. In response to this contention it may be said that this court has repeatedly held that a railroad company owes no duty to trespassers upon its track at places not frequented by the public by right or permission, until their peril has been discovered. And we do not understand that this well-grounded rule was changed by the decision in *Becker v. L. & N. R. R. Co.* (Ky.) 61 S. W. 997. That case was decided upon the ground that the testimony was sufficient to have authorized the belief that defendant's agents saw the children upon the bridge in ample time to have avoided injuring them, but negligently failed to take the necessary steps to do so, under the belief that the children upon the bridge had time to have crossed over before the arrival of the train. The appellant also cites the case of *C. N. O. & T. P. R. R. Co. v. Dickerson's Adm'r* (Ky.) 44 S. W. 99, as authority for the contention that a higher degree of care is required for railroad companies where the trespassers upon their tracks are infants of tender years than where such trespassers are adults. In that case a little girl, two years of age, was playing up-

on the railroad track; and, while the engineer testified that he did not see her until he was within 20 feet of her, and too late to avoid the injury, he admitted that he saw the mother of the child running towards the track, waving her hands, her hair streaming in the air, apparently greatly excited. It also appeared that there was a straight track and nothing to obstruct the view for about 800 yards from where the accident occurred. It was decided in that case that the motions and action of the infant's mother were sufficient to have apprised the engineer in charge of the train of the presence of some obstruction upon the track, and to have authorized the jury to believe that he actually became aware of the danger of the infant in time to have stopped the train before striking her. The facts in this case are not analogous to those in the Dickerson Case. Here deceased was entirely familiar with the danger of going upon the track of the railroad. He had been sent there frequently upon the same mission as that he was on when killed. He was old enough to appreciate the danger of the situation, and his view was unobstructed in both directions. He would have had ample time to have gotten off the track if he had been using ordinary care after he might have discovered an approaching train. In broad daylight he laid down between the rails, and it certainly cannot be said that it was negligence in the engineer in charge of the train not to have discovered his position of peril at the very first moment when it might have been discovered by one who went there for the express purpose of ascertaining whether such discovery was possible. Trains must be run on schedule time, and no duty is imposed upon those in charge to stop or slow up at the appearance upon the track of objects the nature of which is only discernible upon near approach. If the object seen by Robert Wilkerson had been at a highway crossing, or in the street of a town or city, where the presence of small children might be suspected, a different case would be presented, and a different standard of diligence could have been required. Appellee's engineer had no more reason to suppose an infant would be upon its track at the point where the accident in this case occurred than an adult, and owed no higher degree of diligence to him than to an adult. See *Paducah & Memphis R. R. Co. v. Hoehl*, 75 Ky. 49; *L. & N. R. R. Co. v. Hunt* (Ky.) 13 S. W. 275; *L. & N. R. R. Co. v. Webb* (Ky.) 35 S. W. 1117; *McDermott v. K. C. Ry. Co.*, 93 Ky. 408, 20 S. W. 380; 2 *Shearman & Redfield on Neg.* § 481a; *Roseberry's Adm'r v. N. N. & M. V. R. R. Co.* (Ky.) 39 S. W. 407.

It is also complained that the trial court erred in refusing to permit the plaintiff to prove that the railroad at the point where deceased was killed had been, with the knowledge of the company, used as a footway by pedestrians for many years, and that for this reason deceased could not be regard-

ed as a trespasser. The testimony shows that the railroad is fenced on both sides, and is inclosed by iron cattle guards at the two crossings. Besides, the point where the accident occurred was in a deep cut. There was no claim that the company had ever authorized the use of their roadbed at this point as a footway, and the mere occasional passage of unauthorized pedestrians at this point with the knowledge of the company was not sufficient to convert a trespasser into a licensee, or to change the degree of care due by the railroad company. Upon the whole case we have reached the conclusion that there was no evidence of negligence on the part of those in charge of the train, and that the trial court did not err in its peremptory instruction.

Judgment affirmed.

MERCHANTS' & FARMERS' BANK v. CLELAND et al.*

(Court of Appeals of Kentucky. Dec. 4, 1903.)

MISTAKE OF LAW—NOTES—PERSONAL LIABILITY.

1. In an action on a note secured by a mortgage, evidence examined, and held sufficient to show that the maker executed the note and mortgage under the belief, induced by representations of the payee, that she assumed thereby no personal responsibility.

2. Where the maker of a note secured by mortgage executed the same with the understanding, induced by representations of the payee's agent, that she was assuming no personal liability, the payee is not entitled, after foreclosing on the mortgage, to enforce the note against the maker personally.

Hobson and Paynter, JJ., dissenting.

"Not to be officially reported."

Former opinion withdrawn, and judgment below affirmed.

For former opinion, see 67 S. W. 386.

SETTLE, J. The former opinion in this case, which reversed the judgment of the lower court, was withdrawn, and a reargument allowed, which was made before the whole court, and a further consideration of the case by the court as thus constituted has resulted in the conclusions expressed in this opinion.

An agreement was made in the spring of 1896 between the husband of the appellee and the Interstate Cattle Company of Mississippi, whereby the latter was to increase its capital stock to \$25,000, and the former was to take \$7,000 of the increased stock, to be paid for in horses, which were to be appraised upon their removal to the ranch of the company, in Noxuba county, Miss., about January 1, 1897, and in addition he was to receive from the company \$40 per month for managing the ranch. The ranch contained about 1,000 acres of land, and constituted the principal part of the company's assets. About half of the horses were taken to the ranch in Mississippi at the time agreed upon.

*For dissenting opinion, see 77 S. W. 719.

but the others were left in Kentucky until the spring of 1897, for the reason, as appellee claims, that the cattle company failed to provide provender for them on the ranch as it had undertaken to do. But the company claimed that the horses that were left in Kentucky were too thin of flesh to be shipped at the time agreed upon, and were in fact unable to stand travel on the cars to Mississippi earlier than the spring of 1897, and that when they were finally taken to the ranch in that state they were still poor in flesh and feeble. It appears that appellee had to advance \$700 or \$800 to buy provender for the horses that were not shipped January 1st, in order to keep them alive while they remained in Kentucky. The horses were all of good stock, and some of them thoroughbreds. Between 20 and 30 of them died in a short time after they were placed on the ranch. It is claimed by the appellant that the horses died from the want of food and sheer poverty, and that they could not be sold or used for any purpose when they arrived in Mississippi, because of their bad condition. But appellee states that the horses were in good condition at that time. As her husband, by reason of his death, could not testify in the case, her statement as to the condition of the horses seems to be unsupported by any other witness. The horses do not seem to have been appraised after their arrival in Mississippi. The reason it was not done, as stated by the appellant's witnesses, is because appellee's husband refused to permit them to be appraised until they got in better condition. Upon the other hand, appellee testified that the cattle company refused to allow them to be appraised at all. It appears that the horses that died were killed by the disease known as "Texas fever," which they contracted upon the ranch in Mississippi from running on pasture land the company had permitted to be grazed in the summer of 1896 by a lot of Texas cattle, these cattle having left upon the land a tick called "Texas tick," thereby contaminating the soil and grass with deadly poison. This disease does not seem to affect Texas cattle, or stock that are acclimated, but produces death in a short time with unacclimated stock that may come in contact with it. Because of the death of so many of the horses, the husband of the appellee was unable to comply with his contract to take stock in the cattle company. Appellee had already invested some \$8,000 or \$10,000 of her own money in the horses, and had no further means with which to aid her husband. When it became apparent that the contract between appellee's husband and the cattle company would have to be abandoned because of the inability of the former to perform his part of it, the cattle company, through one Jones, who was its secretary, and had brought about the contract between appellee's husband and the company mentioned, procured her hus-

band to induce appellee to buy 640 acres of the company's land; and she did purchase and accept a deed of conveyance to that quantity of the land, for which she agreed to pay \$8,500, and for this sum, in conjunction with her husband, she executed four notes, bearing 8 per cent. interest from date. To secure the payment of these notes, she executed a deed of trust on the land purchased, and the horses that were then living, to one C. B. Ames, the lawyer of the cattle company, and of the appellant bank as well. The deed of trust contained the provision that if the interest was not paid, or any one of the notes, when due, was not paid, the whole amount should become due, and the trustee authorized to take possession of the land and proceed to sell it, and the equity of redemption therein, to the highest bidder, at the courthouse door, in Noxubee county, in satisfaction of the notes, first advertising it for 20 days; the trustee to execute and deliver a deed of conveyance to the purchaser, pay all attorneys' fees, etc. Soon after the deed of trust was made, two of the husband's creditors brought suit in the chancery court of Mississippi, attacking the same as fraudulent, and alleging that the horses conveyed thereby to C. B. Ames by appellee and her husband were fraudulently conveyed, and that they were the property of the husband, and liable to his debts; and in the lower court and the Supreme Court of Mississippi it was held that the deed of trust was fraudulent in so far as it attempted to convey the horses, and that they were subject to the debt sued on. As the horses were all taken under these judgments against the husband, the land purchased by appellee was all that remained of the security for the payment of the notes executed by her. The notes given by her for the land became the property of the appellant bank, as did all other assets of the cattle company; and this action was instituted upon the notes in the circuit court of Marion county, Ky., to which county and state appellee had removed after the death of her husband.

Appellee resisted the payment of the notes upon the following grounds: (1) That she executed the notes and deed of trust under an assurance from Jones, secretary of the cattle company, and the agent of appellant bank, that she did not thereby incur personal liability. (2) That she was entitled to have the contract reformed so as to express the true terms of the instrument, or to have the same rescinded. (3) That, if she could not thus be relieved, the notes should be credited with \$600, expenses paid by her for keeping the horses in Kentucky from January 1, 1897, until they were shipped to Mississippi; for the value of the horses that died in Mississippi; for the amount due for the pasturage of other persons' stock upon the company's land during the season of 1897; for the value of her husband's services as manager from January 1 to July 19, 1897. (4) That

the title to the land was defective, because five acres of it were in use for cemetery purposes.

The evidence is conflicting as to the right of appellee to the credits claimed by her, and the weight of the evidence seems to be against her right to some of them, but others of them might with propriety be allowed her without injustice to the appellant. We are not disposed, however, to enter upon an analysis of the evidence in regard to the credits, for what appellee may lose on that score can hardly exceed the loss sustained by the appellant in being deprived of its security, to the extent of the value of the horses embraced in the deed of trust, by their subjection to the debts of the creditors of appellee's husband. Moreover, if appellee's contention that she is not personally liable upon the notes sued on is sustained, she will have secured some measure of relief, as she will be protected against further loss; and this is evidently the view that was entertained by the chancellor when the case was before him, as the judgment rendered simply dismissed the petition, and allowed appellee her costs.

The further question to be determined, then, is, did the appellee, in executing the notes and deed of trust, assume any personal liability thereon? She was asked the question: "Before you signed the note and deed of trust, did you and Mr. Jones have any conversation as to the effect of your signing those papers?" To which she answered: "Yes; soon after Mr. Foote and Mr. Allen left, Mr. Jones came over and sat down by me; and I told him the horses were mine, and that I had put my money in them, and that was the reason I wanted the land deeded to me, and that I was willing to give a mortgage on the land and the horses, but I was not willing to be bound in any other way, and he assured me that I would not be. He then got up and went over and stood by Mr. Ames until he got through writing the paper." She was further asked: "When you executed the notes and deed of trust, did you have any idea that you were binding yourself to any greater extent than the property covered by the deed of trust?" To this question she answered: "No." She was further asked: "Would you have executed those papers if you had known or suspected that you were thereby binding yourself to a greater one?" To which her answer was: "I never would have signed them in the world if I had had any idea of it." Opposed to appellee's sworn statement that Jones assured her that she was assuming no personal liability by the execution of the notes and deed of trust, we have only the general denial of Jones himself that any officer of the bank or of the cattle company ever gave appellee any assurance that she would not be bound beyond the mortgaged property. On this point the interrogatory propounded to Jones was as follows: "State whether, at

the time of or before the execution of the land notes, any officer of the bank or of the cattle company said to Mrs. Cleland that she would not be responsible beyond the land and the stock included in the trust deed, or anything to induce her to believe that would be the extent of her liability? State fully all that was said, if anything, bearing upon the question of her personal liability on account of the land notes?" The witness' answer to this interrogatory was as follows: "No statement was made to Mrs. Cleland that in the purchase of the land, and the execution of the notes therefor, she would not be responsible on the notes beyond the land and the stock included in the trust deed; nor was there anything said to her to induce her to believe that that would be the extent of her liability. On the other hand, Mr. Cleland stated to me that Mrs. Cleland had outside resources from which she could make the payment in the event they were not able to do so in the ordinary course of business upon the farm." It appears from the record that Jones' deposition was given before appellee gave hers. It follows, therefore, that the attention of Jones was never called to the statements of appellee as to the conversation with him, and so he never did in fact deny that he had that conversation with her. The general statement on his part that "no statement was made to Mrs. Cleland" that she would not be liable beyond the land and stock included in the trust deed should not, in our opinion, be allowed to outweigh her positive statement that, at the time she executed the notes and trust deed, Jones assured her that she thereby assumed no personal liability. Appellee, in her deposition, gives the time, place, and details of the conversation with Jones, and he was never recalled, or his deposition retaken to contradict her. It must be borne in mind that every transaction of appellee and her husband with the cattle company and the bank was conducted with and through Jones, as the agent and representative of those corporations. Consequently it was perfectly natural that appellee should have communicated to Jones her purpose to not become personally liable on the notes or deed of trust; and it was also natural that he should have given her the assurance that she did not become personally liable by her execution of the same, and that she should have been satisfied with his assurance to that effect. The general statements of the witnesses Ames and Mahorner that no assurance was given appellee that she was incurring no personal liability did not amount to a specific corroboration of Jones, or to a contradiction of her statement that Jones had given her such an assurance, especially as the testimony of appellee as to her conversation with Jones shows that the other persons in the room could not have heard it; but, if the witnesses had been asked specifically whether they heard such conversations between appellee

and Jones as that to which she testified, they might have remembered it, if in fact they were in a position to hear. It is true that the language of the notes themselves imports personal liability upon the part of the appellee; but the representation made to her by Jones was as to the legal effect of the notes, and not that they should be made to show upon their face that she was not to be personally liable thereon. A person of business experience and sagacity, situated as was appellee, might have been expected to see to it that the notes should be made to express the agreement that he was not to be personally liable for their payment; but it can hardly be expected that a person with as little business capacity and experience as the appellee seems to possess would, under such circumstances, have understood the importance of inserting in the notes themselves such language as would express the agreement to that effect. It is true that appellee's husband was present at the time she executed the notes and deed of trust, but, as he is dead, and, if living, could not have testified after she had done so, her testimony is without support from him. We are of opinion that we can give to the notes sued on no other effect than that which the agent of the vendor of the land represented that they would have, and that appellee intended and understood they would have.

In 2 Pomeroy's Equity Jurisprudence, p. 311, it is said: "Whatever be the effect of a mistake, pure and simple (discussing a mistake of law), there is no doubt that equitable relief, affirmative and defensive, will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided, or accompanied by inequitable conduct of the other party. It is not necessary that such inequitable conduct should be intentionally misleading; much less, that it should be actual fraud. It is enough that the misapprehension of the law was the result of, or even aided or accompanied by, incorrect or misleading statements or acts of the other party." The same author (section 847) says: "A court of equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of law by the other which he knew of and did not correct." In *Jordan v. Stevens*, 81 Am. Dec. 556, the Supreme Court of Maine said: "If the party who himself knows the law should deceive another by misrepresenting the law to him, or, knowing him to be ignorant of it, should therein take advantage of him, relief would be granted on the ground of fraud." In the case of *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 123, the defendant relied upon a release signed by the plaintiff. Plaintiff replied that he had signed the release upon the faith of defendant's representation that it would have no effect upon

the pending suit. The court said: "The facts contained in this replication show that the maker of this release was induced to execute it upon the representation of him who now claims to profit by it that this was done when he could not conscientiously do it if it is to have the effect contended for; that the defendants, as well as the plaintiff, were aware of this; and that the plaintiff did not intend to do any act inconsistent with the rights of his assignee. What he did, then, was induced by a reliance upon the assertion of the defendants that this receipt would not have that effect, and yet they now use it for the very purpose of producing that effect. Unless the defendants can produce some authority recognizing such construction, this court are not disposed to introduce a precedent establishing fraud by law." In the case of *Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120, there was a contract for the sale of land, concluded with the following words: "In further confirmation of the said agreement, the parties bind themselves each to the other in the penal sum of \$1,000.00." The purchaser, Cathcart, claimed the right to surrender the land and pay the penalty of \$1,000; insisting that he understood when he entered into the contract that it gave him that right, and that Robinson, the vendor, knew that such was his understanding of the contract. The Supreme Court of the United States, in an opinion by Chief Justice Marshall, held that the defendant was entitled to have the contract enforced in accordance with his understanding of its effect at the time it was executed; the vendor knowing at the time that he understood the contract in that way. The court there said: "Had Mr. Robinson induced Mr. Cathcart to sign this agreement by suggesting that, in point of law, he might relieve himself from it by paying the penalty, a court of equity would not aid him in an attempt to avail himself of the imposition. The actual case is undoubtedly not of so strong a character. No untruth has been suggested, but if Mr. Robinson knew that Mr. Cathcart was mistaken—knew that he was entering into obligations much more onerous than he intended—that gentleman is not entirely exempt from the imputation of suppressing the proof. This is not a bill to set aside the contract. Mr. Cathcart does not ask the aid of equity. He asks that the parties may be left to their legal rights, or that the contract shall be enforced no farther than as avowedly understood at the time of its signatures."

In the case at bar, the appellee is only asking that the contract sued on be given the effect which the vendor permitted her to believe it would have; and, since the chancellor has given it that effect, this court will be loath to disturb his judgment, unless it be made to appear that it is against the weight of the evidence; and, in view of the

state of facts presented by the record, we are unable to say that the judgment is against the weight of the evidence. An affirmance in this case can only relieve the appellee of the payment of the \$6,400 claimed by the appellant to be yet due it on the notes sued on. It cannot restore to her the loss sustained in the death of her horses from the Texas fever, or the sum expended by her in feeding and caring for the horses that were left in Kentucky from January 1st until the spring of 1897, which losses may be attributed in part, if not altogether, to the negligence and wrongful conduct of the Interstate Cattle Company, or its assignee, the appellant. Upon the other hand, the appellant has gotten back its land, for it appears that after invoking the aid of a court in this state for the enforcement of its demands against the appellee, and while this action was yet pending and undecided, by its direction its agent and lawyer, Ames, who is likewise the trustee in the deed of trust, without notice to appellee, and for the evident purpose of concluding her right to assail the deed of trust, sold the land in controversy in Mississippi at public auction, the appellant itself becoming the purchaser thereof at the sum of \$2,100; and it now holds a deed to the land, and has attempted to give appellee credit for the \$2,100 on the notes sued on. Under these circumstances, we find no equity in the claim of appellant to the amount yet demanded by it of the appellee.

Wherefore the judgment is affirmed.

HOBSON and PAYNTER, JJ., dissent.

MALONE'S COMMITTEE v. LEBUS.

(Court of Appeals of Kentucky. Dec. 4, 1903.)

GIFTS—DELIVERY—ACCEPTANCE—VENDOR AND PURCHASER—RECORDED LIENS.

1. Where a deed recited that part of the consideration was a note, with interest payable annually, for the use of a certain person, during her life, there was a valid gift of the interest, though the note was not delivered to the donee.
2. Where the donee of a gift inter vivos is of unsound mind, the law will presume an acceptance.
3. Where a recorded deed showed that part of the consideration was a note, the interest on which was payable for the use of a certain person during her life, and a lien was reserved as security for the note, a subsequent purchaser was bound in the same manner as the first purchaser.

Appeal from Circuit Court, Harrison County.

"To be officially reported."

Action by P. P. Wyles, as committee of Nora Malone, against Lewis Lebus. From a judgment for defendant, plaintiff appeals. Reversed.

D. Bradley Shawhan, for appellant. Laferty & King, for appellee.

BURNAM, O. J. On the 30th day of April, 1872, Caleb Jones and wife conveyed by general warranty deed to Munroe D. Whitaker a small tract of land in the town of Cynthiana. The consideration therefor recited in the deed is as follows: "The said party of the first part for and in consideration of the sum of \$350.00, of which \$50.00 is in hand paid, and a promissory note for \$300.00 with interest at six per cent. per annum, payable annually from the first day of June, 1872, for the use of Nora Malone during her life, and at her death to Caleb Jones, but should she die within four years from this date the principal is not to be paid until the end of that time." And a lien was reserved on the lot as security for the payment of the \$300 note. On the 1st day of July, 1873, Munroe D. Whitaker and wife sold and conveyed this tract of land to James R. Curry by general warranty deed for the recited consideration of \$50 cash, and the surrender of Whitaker's note to Caleb Jones for \$300, dated June 1, 1872. On the same day Curry and wife sold and conveyed the land by general warranty deed to J. A. Fennell for the recited consideration of \$350, \$50 of which was paid in cash, and three notes, of \$100 each, payable to Caleb Jones in one, two, and five years, respectively, with interest from date, executed for the remainder; a lien being reserved to secure the payment of the unpaid purchase money. On the 9th of March, 1887, N. B. Wilson, as executor of A. Fennell, and Mrs. Mary Fennell, sold and conveyed this tract of land to L. F. Struve for the recited consideration of \$2,300, of which \$1,150 was paid in cash, and for the balance of the purchase money a note was executed, due one day after date, and a lien retained to secure its payment. This deed contains no reference to the lien for \$300 recited in the deed from Caleb Jones and wife to Munroe D. Whitaker. By a series of subsequent conveyances the appellee, Lewis Lebus, became the purchaser of this tract of land. On the 12th of July, 1902, the appellant, P. P. Wyles, as committee for Nora Malone, brought this action in the Harrison circuit court, in which he alleged that Nora Malone had been from her birth a deaf mute, wholly without mind, dependent upon the charity of her uncle Caleb Jones for her support and maintenance; that on the 17th day of August, 1898, she had been adjudged by the Harrison county court, on the verdict of a jury, to be an imbecile and of unsound mind; and that he had been duly appointed her committee, and accepted the trust. He also set out the various conveyances of the lot conveyed by Caleb Jones and wife to Whitaker in April, 1872, and alleged that none of the installments of interest on the \$300 note for which a lien was reserved in the conveyance of Jones and wife to Whitaker had been paid to Nora, or to any one for her use and benefit, and prayed that the deed to the appellee, Lewis Lebus, the last vendee of the tract of land,

should be corrected so as to set out the reservation in her favor contained in the deed from Jones to Whitaker, and for a judgment for \$18, the interest as of the 1st day of June of each year from 1873 to 1902, inclusive, with interest from their respective dates until paid. The defendant, Lebus, filed a general demurrer to the original and amended petitions, which was sustained, and plaintiff's petition dismissed, and he has appealed.

It is contended for appellee that as plaintiff failed to allege that the \$300 note was delivered to Nora Malone, or to any one for her use and benefit, or that Caleb Jones himself held it for her benefit, it was not a valid or enforceable gift, and that when the donor, Jones, surrendered this note, and accepted in lieu thereof three notes, of \$100 each, in which no interest was reserved for Nora Malone, all claim for interest on the \$300 note which she might have had terminated. It is also contended that the plaintiff's claim, if it ever existed, is barred by the lapse of time and the statute of limitations.

To constitute a valid gift *inter vivos* of personal property, the gift must be voluntary, gratuitous, and absolute, and take effect at once, and ordinarily must be accompanied by a delivery of the thing to the donee, or to some one for her use and benefit. But this is not always required. As said by this court in *Williamson v. Yager*, 91 Ky. 286, 15 S. W. 661, 34 Am. St. Rep. 184: "If one delivers possession of personal property to a trustee to hold as a gift for the donee, it is a valid gift; and if he expressly says, or does acts amounting to the same thing, that he constitutes himself a trustee to hold the property for the donee, we perceive no reason why this should not be as valid and binding as a delivery of the property to a third person to be held for the donee." And in *Krankel's Executrix v. Krankel's Executor*, etc., 104 Ky. 745, 47 S. W. 1084, it was said: "The general doctrine is well settled that a completed parol voluntary trust is enforceable, and, in order to render such a trust valid and enforceable, the donor need not use any technical words or language in express terms creating or declaring the trust, but must employ language which shows an unequivocal intention on his part to create or declare a trust in himself for the donor." The reservation in the deed from Jones to Whitaker of the interest on the \$300 note for the use of Nora Malone during her life is unequivocal, and sufficiently explicit to create a valid gift thereof to the beneficiary, Nora Malone; and, having been once made, it was beyond the power of Jones to thereafter revoke it without the consent of the donee. The note was not by its express terms to mature during the life of Nora Malone, and at her death it provided that the principal was to be paid to the donor. It was therefore natural and proper that he should have retained its possession. Besides,

if, as alleged, Nora Malone was an imbecile or a person of unsound mind at the date of the gift, no acceptance thereof by her was essential to render it valid, as the law will presume an acceptance on her part. See *Pennington v. Lawson* (Ky.) 65 S. W. 120, and *Bunnell v. Bunnell* (Ky.) 64 S. W. 420. A purchaser of real property must look to the records for evidence of title, and, when it is there shown to be incumbered with liens in favor of a third person, he is presumed to have purchased with such knowledge and subject to such conditions, and himself becomes a trustee for the beneficiary with respect to the property, and is bound in the same manner as the original trustee from whom he purchased. See *Jones on Liens*, §§ 1083, 1084; 2 *Pomeroy's Eq. Jur.* §§ 581, 688; and *Johnston v. Gwathmey*, 14 Ky. 317, 14 Am. Dec. 135. Nor is appellee's contention that appellant's claim is stale and barred by the statute of limitations maintainable—at least in so far as her claim to the annually accruing interest is not within the statute.

For reasons indicated, the judgment is reversed and cause remanded, with instructions to overrule the demurrer, and for further proceedings consistent with this opinion.

ALBIN CO. v. KUTTNER.

(Court of Appeals of Kentucky. Dec. 2, 1908.)

MASTER AND SERVANT—SALESMAN—ACTION FOR COMMISSIONS—CONTRACT—SUFFICIENCY OF EVIDENCE—PLEADING DEFECTIVE IN PART—DEMURRER TO WHOLE—WAIVER OF OBJECTIONS.

1. Evidence in an action by a salesman for commissions on sales made by subordinates held to show the making of a contract for such commissions by the defendant.

2. Where but one paragraph in a petition is defective, a demurrer to the whole is properly overruled.

3. In a suit for commissions a salesman alleged that he was entitled "to the further sum of \$—, due him as commissions at the rate of 2 per cent. on sales of defendant's goods made by certain of its employes," pursuant to a contract therefor, such employes being under plaintiff's supervision. These averments were specifically denied by the answer, and on the issues thus formed evidence was introduced without objection. Held, that it was too late on appeal to question the sufficiency of the petition.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by E. C. Kuttner against the Albin Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Matt O'Doherty, for appellant. B. H. Young and W. C. Owen, for appellee.

SETTLE, J. This action was instituted by appellee in the Jefferson circuit court, First Chancery Division, to recover certain commissions claimed to be due him from appellant under an alleged contract for services rendered it as a salesman of its mer-

¶ 2. See Pleading, vol. 39, Cent. Dig. § 486.

chandise in the cities of Louisville, New Albany, and Jeffersonville, and for sales of such merchandise made by other employes of appellant under appellee's control in the same territory. The petition contains two paragraphs. The first sets out an alleged contract between appellee and appellant, whereby the former undertook to sell for the latter its goods in the cities mentioned, and for his services he was to be paid by appellant a salary of \$12.50 per week and a commission of 3 per cent. on all sales made by him. It is averred that appellee under this contract served the appellant as a salesman of its goods from April 1, 1898, to November 11, 1899; that the salary of \$12.50 per week which he was to receive under said contract has been paid in full by the appellant, but that there is due him commission of 3 per cent. on sales made by him in person and between April 1 and November 11, 1898, the sum of \$337.84, which the appellant refused to pay him. In the second paragraph it is averred that appellee is entitled to the further sum of \$—— due him as commission at the rate of 2 per cent. on sales of appellant's goods made by certain of its employes named in the petition during the period mentioned, it being further averred that by the terms of the contract between appellee and appellant, the latter agreed to pay him 2 per cent. on all sales made by such employes, they being under the supervision of appellee in the territory mentioned. The appellant filed answer and counterclaim, in which it is admitted that it was to pay appellee \$12.50 per week and a commission of 3 per cent. on goods sold by appellee, but denied that there was \$337.84, or any other sum, yet due him as commissions under the contract, and also denied that there was \$——, or any sum, due the appellee as commissions on sales of its goods made by other of its employes, or that appellee was given supervision of such employes, or that appellant agreed to pay him 2 per cent. commission, or any sum, on sales made by such employes. It is further alleged in the answer and counterclaim that the appellee, while in the appellant's employment as salesman of its goods, entered into a fraudulent agreement of copartnership with one Green, a competitor in business of the appellant's, to divert to Green* appellant's trade, and that in pursuance of such agreement appellee, while in appellant's employment, did carry and divert to Green much of the trade and business of appellant, and upon quitting appellant's service did enter the store of and into business with Green, and that by his fraudulent agreement and business connection with Green, and his conduct in diverting the trade of appellant to the store of Green, appellant was damaged in the sum of \$——, for which it prayed judgment.

After the filing of appellee's reply controverting the material averments of the answer and counterclaim, the case was referred to a

commissioner for an auditing and settlement of the accounts between the parties, with directions to that officer to take proof, and to ascertain and report what amount, if any, was due from the appellant to the appellee. After taking proof as required by the order mentioned, the commissioner filed his report, which, after an elaborate review of the evidence, finds that the contract between appellee and appellant was made as claimed by the former, and that by it appellant agreed to pay appellee \$12.50 per week and 3 per cent. commission upon sales made by him, and to give appellee charge of all the outside men and pay him 2 per cent. commission upon all sales that they might make, except the sales made by a Mr. Dorsey. This contract was made in March, 1898, was to go into effect the 1st day of April, 1898, at which time it did go into effect, and appellee remained in appellant's service in the discharge of the duties of his employment under the contract mentioned from that time until November 11, 1898. Under this contract the other, or outside, salesmen in appellant's employ were to report to the appellee all sales made by them every evening after the day's work was completed, and it was the duty of appellee to direct and instruct them in the business of the appellant. The commissioner further found that there was due appellee as commissions at the rate of 2 per cent. on the sales of goods made by the other employes of appellant \$582.93 and commissions of 3 per cent. on sales made by appellee himself, amounting to \$337.84, making a total of \$920.77; but from this sum the commissioner deducted the following sums, which seem to have been advanced by appellant to appellee, viz., \$195 and \$51.32, leaving \$725.77. From the last-named sum the commissioner likewise deducted \$63.33, that amount being made up of what he calls "refunds" (meaning, we suppose, sums repaid to customers for errors in sales), thereby leaving due the appellee \$662.44. The commissioner also found that there was no proof to sustain the appellant's charge that appellee had entered into a fraudulent arrangement with Green for the purpose of diverting to him the trade of appellant, consequently he refused to allow appellant any part of the damages sought to be recovered on its counterclaim.

Appellee excepted to the report of the commissioner because it failed to allow him interest upon the several items going to make up the sum total of appellant's indebtedness to him as shown by the report, and appellant filed exceptions to the report upon the following grounds: First, that the commissioner erred in allowing appellee \$662.44, or any sum; second, in failing to sustain appellant's counterclaim; third, in finding that the appellee was entitled to 2 per cent. commission, or any commission, on sales made by other salesmen in appellant's service; fourth, in failing to deduct from the amount of commissions allowed appellee on sales made by

other employes of appellant the amount of "refunds" on forfeited and canceled sales; fifth, in failing to find that the appellee violated his trust in appellant's service by diverting trade to Green, appellant's competitor in business; sixth, in allowing himself \$100 for his services as commissioner in this case. Upon the submission of the cause on the exceptions filed to the commissioner's report, the court overruled the one exception filed by appellee, and exceptions 1, 2, 3, and 5 filed by appellant, but sustained exception No. 4 filed by appellant to the extent that it complained that appellant was not credited with "refunds" on forfeited or canceled sales, and also sustained appellant's exception No. 6, by which objection was made to the allowance of \$100 to the commissioner. But later, by permission of the court, proof was taken as to the allowance to the commissioner, which showed the amount thereof to be reasonable and proper, and it was thereupon allowed by the court.

In passing upon the exceptions to the commissioner's report, the court discovered an error in the computation of the commissioner; that is to say, it appears that the commission of 2 per cent. allowed appellee on sales made by other employes of appellant amounted to \$633.05, instead of \$582.93, as stated by the commissioner, which, added to the \$337.84 found to be due appellee as commission on sales made by him, makes a total of \$970.89, instead of \$920.77, as reported by the commissioner, and deducting from that sum the several amounts allowed as credits to the appellant by the commissioner, aggregating \$309.65, there was left due the appellee \$661.24, instead of \$662.44, as shown by the report. It appears from the record that appellant was given credit by the rebate claimed by it in exception No. 4, which was sustained by the court as before stated, and for the sum remaining, viz., \$579.10, and the costs of the action, appellee was given judgment, of which the appellant now complains.

We find no difficulty in reaching the conclusion that the judgment is sustained by the weight of the evidence. It appears that appellee had been in appellant's service for some time. He seemed to be thoroughly conversant with appellant's business, and was alert and attentive to its interests. Prior to April 1, 1898, he worked for appellant at a salary of \$10 per week and 3 per cent. commission on sales made by him and 2 per cent. on outside sales made with his assistance. Shortly before April 1st appellee received an offer for his services of \$12 per week and 5 per cent. on sales, of which he informed Albin, the principal member of the appellant company, at the same time telling him that he did not wish to leave his service, but would do so unless he received an increase of salary. After some further negotiations with Albin, he accepted the offer of the latter to pay him \$12.50 per week,

8 per cent. on his own sales, and 2 per cent. on those made by appellant's other salesmen. Only he and Albin were present when this contract was made, but appellee's version of the contract is supported by the fact that from that time his work was enlarged; that he was made superintendent of all appellant's salesmen there can be no doubt; that fact was shown not only by the enlarged scope of his work and duties, but also by the testimony of McGruder, Bohannon, Wells, and Nail, present or former employes of appellant, all of whom stated that the other salesmen of appellant reported to and were supervised by appellee after April 1st, and as long as he was in appellant's service. Even Ward and Purdy, members of the appellant company, in some measure corroborate appellee as to much of the service that was performed by him in directing the other salesmen and in assisting them in making sales. The fact that the books of appellant fail to credit appellee with 2 per cent. commissions on sales made by the other salesmen does not, in our opinion, militate against his right thereto, as he could get, and in fact did get, from the statements made out at different times by the other salesmen the amount of the sales made by them, from which it was easy to arrive at the commission due him. It is, however, insisted for the appellant that the averments of the petition do not authorize a judgment in appellee's behalf for the 2 per cent. commission claimed on sales made by other employes of appellant, and that the demurrer to the petition should have been sustained. The claim of appellee to the commission on sales made by other employes of appellant is found in the second paragraph of the petition, and the cause of action in regard thereto is, it is true, defectively stated, and would doubtless have been held by the lower court insufficient on a demurrer to that paragraph alone; but the demurrer interposed by appellant went to the petition as a whole, and, as there was certainly a good cause of action stated in the first paragraph, the demurrer was properly overruled. It is shown by the record that the averments of the second paragraph, insufficient though they were, were specifically denied by the answer, and upon the issues thus formed evidence was introduced by the parties without objection to its competency, in view of all which it is now too late to raise any question in this court as to the insufficiency of the petition. We entirely agree with the chancellor and his commissioner in the conclusion that the counterclaim of the appellant is without support from the evidence. The contention of appellant that appellee entered into an arrangement with Green to divert to him appellant's trade is, it seems to us, based upon suspicion, rather than fact, and the slight evidence that was introduced on that point shows nothing more than one or two incidental manifestations of friend-

ship on the part of appellee toward Green which were not inconsistent with his duty to appellant, and resulted in no injury to its business.

Finding no cause for disagreeing with the conclusions of law or fact reached by the chancellor or his commissioner, the judgment is hereby affirmed.

WILLIAMS v. WILLIAMS' EX'R.

(Court of Appeals of Kentucky. Dec. 1, 1903.)

"Not to be officially reported."

On petition for modification. Modified.

For former opinion, see 76 S. W. 418.

HOBSON, J. As the facts in regard to sale of the 62-acre tract of land are not clearly shown in the record on the return of the case to the circuit court, a reasonable opportunity will be given the parties to offer further proof on this matter, and, if it shall appear that the sale and conveyance of this land was made more than 15 years before the filing of appellant's answer and cross-petition herein, the judgment of the circuit court as to the said 62 acres will not be disturbed.

The opinion heretofore delivered is, to this extent, modified.

BOWMAN et al. v. MOSS.

(Court of Appeals of Kentucky. Dec. 3, 1903.)

APPEAL—RECORD—EJECTMENT.

1. On appeal from a judgment for defendant in an action of ejectment in which none of the title papers introduced on the trial are copied in the record, and there is nothing in the transcript to show plaintiff's title to the property, the verdict for defendant cannot be disturbed.

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action by W. L. Bowman and others against M. J. Moss. From a judgment for defendant, plaintiffs appeal. Affirmed.

N. J. Weller, for appellants. Cook & Jones, for appellee.

HOBSON, J. This was a common-law action of ejectment, brought by appellants against appellee. The defendant traversed the allegations of the petition as to the ownership of the property, and in the second paragraph of his answer alleged that he was the owner of it. The thing in controversy was lot 4 in block 10 of the Hull and Barclay Addition to Pineville. The jury found for the defendant, and the plaintiffs appeal.

None of the title papers introduced on the trial before the jury are copied in the record. The parol testimony heard on the trial and the maps introduced before the jury are brought up, but there being nothing in the transcript to show plaintiffs' title to the prop-

erty the verdict cannot be disturbed. It appears from the parol evidence that the dispute was as to what is lot 4 in block 10 of Hull's Addition to Pineville, and arose in this way: Both the plaintiffs and the defendant claim title under a commissioner's sale, at which the commissioner held in his hand a printed map, and sold the lots as indicated on this map, pointing them out on the ground as the sale progressed. Plaintiffs bought lot 4 at this sale, but insist that the lot they bought is not lot 4 on the printed map used by the commissioner in selling the property, but lot 4 on the recorded map of the town. The recorded map of the town is lost, and only a tracing of it was introduced in evidence. There is some question made as to the correctness of this tracing, but, in the absence of the record of the case in which the sale was made and the deed made by the court pursuant to the commissioner's report, we must presume that the verdict of the jury is correct. The parol evidence tends to show that the lot plaintiffs now claim is not in fact the lot they bought at the sale, and the verdict of the jury seems to be in accord with the real equity of the case.

Judgment affirmed.

JONES v. COMER et al.

(Court of Appeals of Kentucky. Dec. 2, 1903.)

CONTRACT TO REAR MINOR—BREACH BY MINOR—DEFENSE—STATUTE OF FRAUDS.

1. Where a third person agrees with a mother to rear her minor child and pay him a gratuity on his arriving at adult age, the fact that the minor voluntarily left such person's house is a matter of defense to an action on the contract.

2. Where a third person agrees orally with a mother to rear her minor child, pursuant to which the mother surrenders the child, the fact that the minor leaves such person's house because driven away by him, and ceases to render services, does not destroy the part performance by the mother and child, relied on to take the contract out of the statute of frauds.

"Not to be officially reported."

On petition for rehearing. Petition overruled.

For former opinion, see 76 S. W. 392.

O'REAR, J. If appellant voluntarily left Comer's house, and absented himself therefrom permanently, that is a matter of defense. On the other hand, if, as is alleged in the petition, Comer drove appellant away after he and his mother had performed their part of the contract to the extent as alleged, these facts take the contract out of the operation of the statute of frauds; and that appellant did not reside in and render service to Comer's family thereafter would be because of Comer's fault (if the petition is true), which Comer and his estate will not be permitted to take advantage of.

Petition overruled.

DAVISS COUNTY et al. v. GOODWIN.

(Court of Appeals of Kentucky. Dec. 1, 1903.)

PUBLIC HIGHWAYS—SUPERVISORS—COUNTY JUDGE—ELIGIBILITY TO OFFICE—TAXPAYER'S SUIT—RIGHT TO MAINTAIN.

1. Ky. St. 1899, §§ 4306-4339, relative to roads, vest the control of roads in the fiscal court. The general scheme there provided is for the appointment of a supervisor, whose duty it is to report to the county judge under whose immediate control he is placed, and in whose court he must execute bond, and from whose court warrants may issue for violations of duties by the supervisor. In many instances the concurrent action of the county judge and supervisor is required, and in case of a vacancy in the supervisor's office the county judge may appoint some one to fill it until the next term of the fiscal court. *Held*, that it was contemplated by the statute that the county judge and supervisor should be different persons, although, under section 4315, it is provided that the fiscal court, instead of appointing the supervisor, may authorize the county judge to let out the working of roads, the other duties of the office being discharged by road overseers, in which case, however, the county judge acts as judge, and not as supervisor, and is entitled to no additional compensation for his services.

2. The fiscal court is a body of limited authority, and its action in appointing a county judge as supervisor of roads is void, and vests in the judge no right to the office.

3. A citizen and taxpayer of a county suing for himself and all other taxpayers may, as such, maintain an action to prevent the payment to the county judge of a salary as supervisor of roads, to which office he was illegally appointed by the fiscal court.

Appeal from Circuit Court, Daviess County.

"To be officially reported."

Action by William Goodwin against Daviess County and others. From a judgment for plaintiff, defendant H. M. Haskins appeals. Affirmed.

C. S. Walker and La Vega Clements, for appellant. W. Scott Morrison, for appellees.

HOBSON, J. Appellant, H. M. Haskins, was elected county judge of Daviess county at the regular election in November, 1901, and at the January term, 1902, of the fiscal court, his salary was fixed at \$1,000 per year. At its April term, 1903, the fiscal court made an order appointing him also county supervisor of the public roads and bridges of Daviess county, and fixed his salary as supervisor at the sum of \$900 per year. Appellee, William Goodwin, a citizen and taxpayer of Daviess county, thereupon filed this suit to enjoin the treasurer from paying Haskins the \$900 per year as supervisor, and, the circuit court having granted the relief prayed, the county judge appeals.

The ground of the judgment of the circuit court is that under the statute the county judge cannot fill the office of road supervisor, and that the fiscal court is without authority to appoint the county judge to the office. It is earnestly insisted that the circuit court erred. By section 4306, Ky. St. 1899, the public roads shall be maintained either by

taxation or by hands allotted to work thereon (or both), in the discretion of the fiscal court. By section 4312, in counties where the roads are worked by taxation, it is the duty of the overseer to report promptly to the supervisor all obstructions to travel, and to report to the county judge all failures of the contractors to comply with their contracts, and all violations or neglect of duty of the supervisor with regard to the road. By section 4313 the supervisor is to be appointed by the fiscal court, and in case of a vacancy in the office it is the duty of the county judge to fill it till the next regular term of the fiscal court. By section 4314 the supervisor must execute bond at the next regular term of the county court after his appointment, with sureties to be approved by it. By section 4315 it is the duty of the supervisor to report in writing to the county judge all failures of contractors to comply with their contracts. With the consent of the county judge, he may designate certain roads not to be let out, but kept in repair by special contract made privately, or by hands and teams hired by him or by delinquent taxpayers, or by persons sentenced to labor; "provided, however, that the fiscal court of any county wherein roads are worked by taxation may, instead of appointing a supervisor, authorize the county judge to so let out the working of the roads and the building or repairing of bridges and to take and approve the bonds hereinbefore required. In such cases the other power herein conferred and the duties imposed upon the supervisor shall be exercised and discharged by the road overseers in their respective precincts." By section 4317, for any violation of duty by the supervisor a warrant in the name of the commonwealth may be issued by and returned before the county judge, and it is the duty of the judge to issue the warrant upon his own knowledge or upon information of another upon oath. By section 4318 the supervisor may, on the order of the county judge entered of record, hire wagons, scrapers, and teams, and procure forage for them, and either hire or purchase such tools and implements as may be necessary. By section 4335 penalties are provided for injury to the roads, tools, or implements, and it is the duty of the supervisor to report promptly to the county judge or some justice of the peace all violations of the act. By section 4338 no money shall be paid out, "except upon the order of the supervisor [specifying what for] with the indorsement thereon of the county judge of his approval or when no supervisor, upon order of the overseer or commissioner having charge so endorsed." By section 4339 the supervisor, upon the order of the county judge entered on the order book of his court, may let out by written contract the grading or cutting down of hills upon the public road, and give an order for the money, which order is to be indorsed "Approved" by the judge. These

provisions do not contemplate that the supervisor and the county judge may be the same person. On the contrary, they contemplate that the county judge is to hold the supervisor to a strict responsibility, and that, to protect the interests of the county, there must be the concurrent judgment of both the county judge and the supervisor in important matters. It is true that under section 4315 the fiscal court, instead of appointing a supervisor, may authorize the county judge to let out the working of the roads; but in that event he acts as county judge, and not as supervisor, and is entitled to no additional compensation for his services, the other duties imposed upon the supervisor being in that event discharged by the road overseers in their respective precincts. If the county judge may act as supervisor, the purpose of the statute in providing for both a supervisor and a county judge to protect the interests of the county, would be entirely defeated. The fiscal court is a body of limited authority. It is without power under the statute to appoint the county judge as supervisor. Its action was therefore nugatory. The authorities relied on for appellant as to the acceptance of an incompatible office have no application, as the order of the fiscal court appointing the county judge as supervisor was void, and vested in him no right to the office.

The appellee, Goodwin, is a citizen and taxpayer of the county suing for himself and all other taxpayers, and may as such maintain the action to prevent a misappropriation of the county's funds, for, if the money of the county is wrongfully expended, taxes must be levied to supply its place in the treasury, and thus an additional burden will be cast on the taxpayer.

Judgment affirmed.

COMMONWEALTH v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. Dec. 3, 1903.)
TAXATION—CORPORATE STOCK—SITUS—RESIDENCE OF OWNER—RAILROADS—
BAILEES OF STOCK.

1. A railroad corporation is not a bailee in possession of its capital stock, within the meaning of Ky. St. 1899, § 4023, providing that the bailee in possession of property on a certain date shall be liable for taxes thereon; and an allegation, in proceedings by the sheriff to list such property, that the corporation is such a bailee, is a mere conclusion of law.

2. Ky. St. 1899, § 4053, requiring the taxpayer to list in his schedule the amount of stock in joint-stock companies or associations of the state not paid in by the company or association, shows conclusively that stock in corporations is to be listed for assessment by the individual stockholder in the county in which he gives in his assessment, and not by the corporation.

Appeal from Circuit Court, Greenup County.

"To be officially reported."

Action by the commonwealth, by Samuel T. Bailey, sheriff of Greenup county, against

the Chesapeake & Ohio Railway Company. From a judgment of the circuit court, on appeal from the county court, for defendant, plaintiff appeals. Affirmed.

W. T. Cole and A. E. Cole & Son, for appellant. W. H. Wadsworth and E. L. Worthington, for appellee.

BARKER, J. Samuel T. Bailey, the sheriff of Greenup county, Ky., instituted this proceeding in the county court of Greenup, under section 4241 of the Kentucky Statutes of 1899, authorizing the sheriff to list omitted property. The proceeding was commenced by filing in the Greenup county court a statement, in the form of a petition, which sets forth substantially the following: That the Chesapeake & Ohio Railroad Company consists of three corporations: First, a corporation created by the laws of the state of Virginia; second, a corporation created by the laws of the state of West Virginia; and, third, a corporation created and existing under, and by virtue of the compliance with, the first two sections (194 and 211) of the Kentucky Constitution, and sections 571 and 841 of the Kentucky Statutes of 1899. That these corporations have one or more places of business in Greenup county, with an authorized agent or agents thereat, upon whom process can be served; and, by their compliance with the Constitution and statutes of Kentucky, they, as well as the stockholders, agreed and undertook to submit to the laws of this commonwealth, and especially that the situs of the stock in the corporations should be for the purpose of taxation within this commonwealth. That these three corporations jointly own and possess and operate a line of railway beginning at Covington, and running along the Ohio river, through Greenup county, to Ashland, Ky., and through the state of West Virginia to Newport News, in the state of Virginia. That on or about the 1st of January, 1899, the Virginia and West Virginia corporations entered into a written contract with the Maysville & Big Sandy Railroad Company, by which they leased its line of road, extending from Covington, through Greenup county, to Ashland, Ky., for a term of 99 years, with the right of perpetual renewal. That neither of these corporations, or any one for them, has ever listed this lease for taxation, and it has been entirely omitted by the assessor of Greenup county, and the assessor of every other county in this state, and by all other officers whose duty it is to list the property or assess it, including the Railroad Commission and the Board of Valuation and Assessment for the state. That neither of these corporations has ever paid any taxes to the commonwealth on this lease. That they have, since the — day of —, 1893, and prior thereto, exercised a franchise continuously within this commonwealth, and neither of them has ever reported to the Railroad Com-

mission, or the Board of Valuation and Assessment, or any one else, the value of this franchise or franchises for taxation, and they have been wholly omitted by the Board of Valuation and Assessment, the Railroad Commission, and every other officer whose duty it is to attend to these matters. Nor has any taxation been paid to the commonwealth by any of the corporations on their franchises, although these franchises are of the value of \$20,000,000 in the open market, and the lease is of the value of \$15,000,000 in the open market. That the capital stock of each corporation has been at all times of the value of \$62,525,000, divided into shares of the par value of \$100 each, and that this stock has always been worth par value in the open market. That this stock has been owned and held by divers and sundry persons, whose names appellant has not been able to ascertain, but which are all well known to the appellee. That, by reason of the failure of the corporations to pay taxes on their corporate property, the stockholders therein should have listed their stock for assessment and taxation, but they have wholly failed and refused to do so, and the stock has been wholly omitted by the assessor of Greenup county, the Board of Valuation and Assessment, the Railroad Commission, and every other officer in this state whose duty it is to cause it to be listed, and no taxation has ever been paid thereon to the commonwealth. That the capital stock, surplus, reserve fund, franchises, good will, and business opportunities and possibilities of the corporations which represent the stock belonging to the stockholders have at all times been in the possession, physical control, and keeping of the corporations, as bailees of the stockholders thereof, and that therefore the different corporations are liable to the commonwealth on account of taxes due from their stockholders on their stock for the years from 1892 to 1902, inclusive. Wherefore it was prayed that the defendant corporations be compelled to list in their own name, as bailees in possession, the stock of their stockholders, and that it be assessed against the corporations, as bailees in possession, for each and every year, beginning with 1892, up to and including the year 1902. A demurrer was filed by appellee, which was sustained by the judge of the county court, and the petition dismissed, whereupon appellant prayed an appeal to the circuit court, where a demurrer was again filed and sustained, and the petition dismissed, from which judgment this appeal is prosecuted.

It is the theory of appellant that, because the corporations have failed to list and pay taxes due upon the corporate property, therefore all of the individual stock held by the stockholders in the corporations becomes at once liable for taxation in Greenup county, Ky., without reference to the residence of the owner. This theory is based upon sec-

tions 4020 and 4068 of the Kentucky Statutes of 1899, which are as follows:

"Sec. 4020. All real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, * * * shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair value estimated at the price it would bring at a fair voluntary sale."

"Sec. 4068. The individual stockholders of the corporation which are, by this article, required to report and pay taxes upon its corporate franchises, shall not be required to list their shares in such companies, so long as the corporation pays the taxes on the corporate property and franchises, as herein provided."

By these sections it is contended that the stock of the individual stockholders, upon the failure of the corporation to pay its just taxes, at once becomes liable to taxation in any county through which the road runs, and in which it has an agent upon whom process can be served.

Sections 4077 to 4086, inclusive, of the Kentucky Statutes, contain an elaborate and thorough system for the assessment and collection of taxes from a large class of the important corporations of the state, including railroads, both foreign and domestic. By this system the Board of Valuation and Assessment is established, whose duty it is, upon information obtained in the manner therein set out, to assess the franchises of these corporations, and to certify to the various counties, municipalities, and taxing districts the amounts liable to them, respectively, for local taxation. Conceding it to be true, for the purposes of this case, that by section 4088 the stock of the individual stockholders of a railroad corporation becomes liable to taxation if the corporation itself fails to pay the taxes on its corporate property and franchises, it does not follow that this stock is taxable anywhere else than the residence of the owner. Section 4052 is as follows: "All taxable estate shall be assessed and valued as of the fifteenth of September in the year listed, and the person owning or possessing the same on that day shall list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same." Section 4023: "The holder of the legal title, and the holder of the equitable title, and the claimant or bailee in possession of the property, on the fifteenth of September of the year the assessment is made, shall be liable for taxes thereon; but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment." The corporations in question are not the bailees in possession of

the individual stock, within the meaning of the sections of the statute above quoted, and the allegation of the petition to that effect is a mere conclusion of law. On this subject the petition states: "Plaintiff states that the capital stock, surplus, reserve fund, franchises, good will, and business opportunities and possibilities of said corporations which represent the stock belonging to the stockholders of said corporations have at all times herein mentioned been in the possession, physical control, and keeping of the defendant corporations, as bailees of the stock of said stockholders, and by virtue thereof said defendants are liable to this commonwealth on account of taxes due from the said stockholders in said corporation on their stock from the year 1892 up to and including the year 1902." It will be observed that the allegation is that the corporate property "has been in the possession, physical control, and keeping of the defendant corporations as bailees of the stock of said stockholders." Undoubtedly the corporate property has been in the possession and control of the corporation, but not as bailees of the stockholders. The corporate property belongs to the corporation, and is, of course, rightfully in the possession of its owner. The shares of stock belonging to the stockholders are mere certificates showing the respective interests of the various holders in the corporate property; but it is well settled that the capital stock of a corporation, and the shares of stock held by the stockholders, for the purpose of taxation, may be, and generally are, entirely distinct property. Shares of stock are personal property belonging to the shareholder, and, as such, it is taxable, if taxed at all, at the residence of its owner. In the case of *Wren v. Boske, Sheriff*, 72 S. W. 279, on the subject of the situs of personal property for taxation, this court said: "We are referred to a number of decisions holding that personal property of nonresidents of the state, which has obtained a situs in the state, may, if the Legislature so provides, be taxed in that state, and the same rule no doubt would apply between the different counties of the same state if the Legislature so provided. But the question after all is one of Legislative intent. By our statute land shall be listed in the county in which it is located. Ky. St., § 4025. The assessor calls on the taxpayers, and takes their lists. Ky. St., § 4044. Personal property of every kind must be stated and valued separately from real estate. Section 4050. All taxable estate shall be assessed as of September 15th, and the person owning or possessing it on that day shall list it with the assessor. Section 4052. The assessor, before returning any one as delinquent, must apply at his residence. Section 4065. There is no provision in the statute anywhere for the assessment of personal property in the county in which it is situated, although there are such provisions as to the

assessment of land; and, taking the whole statute together, we think it reasonably clear that the Legislature contemplated that personal property was to be given in by the taxpayers in the county of their residence. In *Jones v. Commonwealth*, 53 Ky. 2, this court said: 'By the general law, the owners of property subject to taxation are called on and give in their lists in the county in which they reside, though the property may be in other counties.' Again, in *Gates v. Barrett*, 79 Ky. 296, the court said: 'In general, movable property is to be assessed for taxation at the place of the owner's residence.' Also *Boske, Sheriff, v. Security Trust & Safety Vault Co.* (Ky.) [56 S. W. 524]; *Covington v. Wayne* (Ky.) [58 S. W. 776]." In the case of *Langdon-Creasy Co. v. Trustees of Owenton Common School District* (opinion filed Oct. 28, 1903) 76 S. W. 381, it was held that the personal property of a corporation which had branch houses in several counties of the commonwealth was taxable, not where the branch business was carried on, but in the county where the corporation had its residence and principal place of business; in other words, that the situs of the personal property for taxation was the residence of the owner. All doubt on the question involved in this action seems to be set at rest by the fact that the schedule required by section 4058 to be furnished the taxpayer for the purpose of listing his property provides for the listing of stock in corporations which have not paid the taxes due by them. Item 10 of the schedule is as follows: "Amount of stock in joint stock companies or associations of this state not paid on by the company or association." This shows, conclusively, that the stock in the corporation is to be listed for assessment by the individual stockholder in the county where he gives in his assessment. The statute authorizing the assessment and taxation of personal property in the hands of the bailee in possession refers to personal property held by one person for the use of another. This is not true in the case at bar. The shares of stock are in the possession and under the control of the individual stockholders, and not in the hands of the corporation, at all. The stock sought to be taxed in this case in Greenup county is perhaps scattered throughout the commercial centers of the world. It is being bought and sold day by day on the stock exchanges of New York, London, Paris, Berlin, and other cities. It is constantly changing hands, and cannot, therefore, be considered, in any sense, in the possession of the corporation. It would be a strange rule of fiscal law which would authorize the taxation of \$62,525,000 of stock in this large corporation in Greenup county, when it does not appear that one share of it is owned by a resident of that county. As said in the case of *City of Louisville v. Sherley*, 80 Ky. 71: "The proper place to list personal property in this state,

or, rather, its value under the equalization law, is in the county where the owner lives."

As this was the conclusion reached by the trial judge, the judgment is affirmed.

CHESAPEAKE & O. RY. CO. v. BOARD.

(Court of Appeals of Kentucky. Dec. 2, 1903.)

MASTER AND SERVANT—INJURIES—NEGLIGENCE OF FOREMAN—INSTRUCTIONS—GROSS NEGLIGENCE.

1. While a servant was at work in a trench, the foreman of the gang, knowing of his presence there, ordered another workman to let a large timber into the trench, whereupon he dropped it in, causing an injury to the servant in the trench. It was shown that it required at least two men to properly handle the timber. *Held*, that the foreman was negligent.

2. Where gross negligence is an element of a suit, an instruction that gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal danger, was not erroneous.

Appeal from Circuit Court, Mason County.

"Not to be officially reported."

Action by Ben W. Board against the Chesapeake & Ohio Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. H. Wadsworth and E. L. Worthington, for appellant. A. D. Cole, for appellee.

O'REAR, J. Appellee, a member of a crew of workmen on appellant's railroad track, was injured while at his work. It was his duty to clear the dirt away from the bottom of a partly filled trench some four or five feet deep, and beneath the railroad track. The object of the excavation was to admit a post as a support to the track. The post was of pine, about 12 inches square and 3 feet long. It weighed probably 100 pounds. While appellee was stooping over his work, the foreman of the gang, one Bullo, who knew of the presence of appellee and was directing the work, ordered another workman to let the timber down into the hole. The workman dropped it into the hole, whereby appellee was injured. Appellant claims that the negligent act of dropping the timber was that of appellee's fellow workman. Even if this be true, the actionable negligence of the foreman, which, in our opinion, makes the company liable for this injury, was twofold: First, in not giving appellee timely warning that the timber was to be let down into the hole where he was at work; and, second, in not providing adequate force to handle the timber with due care to the safety of the workman below, it having been shown that it required at least two men to properly handle the piece of timber at that juncture.

In defining gross negligence, the court instructed the jury that "gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person

or life under circumstances of equal or similar danger to the plaintiff on the occasion under consideration." While it is admitted by appellant that this instruction conforms strictly to the definition given by this court in the McCoy Case, 81 Ky. 403, it is urged that appellee was not engaged in that class of work which was subject to such extraordinary hazard as to justify it. It is insisted instead that the definition, to wit, "gross negligence is the want of slight care" (1 Shearman & Redfield Neg. [5th Ed.] § 49), should have been used. It may be doubted if there is an appreciable practical difference between the two. And whatever the hazard of the particular employment may be, whether upon a railroad or elsewhere, the degree of care is required to correspond with the danger of the situation. The definition given by the court, or its equivalent, should be applied in all cases where gross negligence is an element of the suit. Under it the jury will find whether the proper degree of care necessitated by the particular circumstances of the case has been shown.

The verdict of \$450 for a very painful injury to the leg, disabling the man totally or partially for several months, is not excessive.

Judgment affirmed.

ROBERTSON v. DAVIESS GRAVEL ROAD CO.

(Court of Appeals of Kentucky. Dec. 2, 1903.)

WATERS AND WATER COURSES—SURFACE WATERS—RIGHTS OF DOMINANT OWNERS—ACQUISITION OF EASEMENT—EXTENT.

1. The right of the owner of property naturally draining on a road to have the surface water flow over the road extends no further than to burden the road with the natural flow of surface water, and does not entitle such owner to collect the water from his and other lands into a ditch, and discharge it on the road at a certain point, and compel the proprietor of the road to there receive it and provide for its disposal.

2. In an action against the proprietor of a road for allowing a ditch which had carried off surface water from plaintiff's ditch to become filled up, a complaint stating that the county, prior to defendant's acquisition of the road, had kept the ditch clean, but which did not state that it had continued such custom for a sufficient length of time to constitute an easement, nor that defendant or the county had for any length of time suffered the water from plaintiff's ditch to run over the road, shows an easement, if at all, merely to use the ditch alongside defendant's road to receive the water from plaintiff's ditch, and not an easement to have the ditch kept open by defendant.

Appeal from Circuit Court, Daviess County.

"To be officially reported."

Action by Sarah M. Robertson against the Daviess Gravel Road Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Eli H. Brown, for appellant. Sweeney, Ellis & Sweeney, for appellee.

O'REAR, J. Appellant is the owner of a tract of land lying adjacent to appellee's gravel road near Owensboro. The land in that immediate neighborhood is low, and nearly level, but it lays so that its surface drainage is naturally toward the gravel road. More than 15 years before this suit her land and other lands lying back of it were drained by a ditch through her land, which emptied into another ditch running alongside the road. She alleges that before appellee acquired the road, and while it was operated as a public highway by Davless county, the county kept the latter ditch open so as to accommodate the water drawn off by her ditch. Her complaint then continues: "Plaintiff states that defendant has reconstructed said road in front of her land, and has raised the roadbed to a higher grade than the grade which was maintained and existed while the same was in control of Davless county as a public road, so as to render it impossible for the water falling on her and the Hathaway lands and flowing into her ditch above mentioned to drain over said road as reconstructed by defendant, and so as to cut off all escape for the water thus accumulating in her said ditch, except as the defendant might have opened and kept open at all times a sufficient ditch running parallel with its said reconstructed road of sufficient width and depth to have carried off said water. This the defendant could have done. * * * That within the last five years the defendant has failed and refused to construct, keep, or maintain along or across its said road in front of her land any drainage sufficient to carry off and discharge the accumulations of water in her ditch above mentioned, which flows to and against defendant's said road, but, instead of doing this, as it was its duty to do, it wrongfully, unlawfully, and against plaintiff's protest suffered and permitted such inadequate drainage as exists along its roadway to become filled up and so obstructed as to cause the water flowing in time of rains from her own and said Hathaway land to overflow her ditch above mentioned, and to back up so as to overflow her house, yard," etc. A demurrer was sustained to appellant's petition, and it was dismissed.

Although appellant was entitled to have the natural drainage of the surface water from her land and the lands lying back of and above it to flow off and over appellee's land, as was held by this court in *Stith v. L. & N. R. R. Co.*, 109 Ky. 174, 58 S. W. 600, this right did not extend further than to burden the lower estate with the surface water of the upper as nature had done it. Appellant's contention is that she has the right to collect not only the surface water from her own land, but that from adjacent land which would otherwise flow over hers, into an artificial channel, and then to thereby carry it in its accumulated quantity and accelerated force and cast it all upon the lower land of appellee at one point, requiring ap-

pellee to there receive it, and to provide for its subsequent disposal so that it would not damage her property. The only authority cited in support of the proposition is *Stith's Case*, supra, which does not at all warrant the deduction. This case is much nearer like *Grinstead v. Sanders* (Ky.) 58 S. W. 665, where the right was denied. But appellant claims that she had so maintained and used her ditch for 15 years, and that by such user she had acquired the right to so gather and precipitate all the surface water from her land at the point named. Though this be so, it does not follow that the owner of the lower estate was bound to keep open a ditch to receive the water, even if he had done so for a period. The gravamen of the complaint is not that appellee has raised its roadbed, but that it has suffered a ditch alongside its road to fill up so that it will not accommodate the flow from appellant's ditch in rainy seasons. Although it is alleged that the county, prior to appellee's acquisition of the road, did keep the ditch clean, it is not charged that this was done for such length of time as would constitute an easement in favor of appellant's estate. Nor is it charged that appellee or the county had suffered the water from appellant's ditch to run over the road for any length of time. If any easement whatever has been acquired by appellant over appellee's property under the facts stated in her petition, it is merely to use the ditch alongside its road to receive the water from her ditch. If one acquires the right to use a passway over another's land, the owner of this right must repair the way, in the absence of contract to the contrary. That which the owner of the dominant estate acquires is the right to use the servient estate for a designated purpose appurtenant to the dominant. The owner of the servient estate cannot interfere with the enjoyment of the right. But this right applies only to the realty, and not to the personal service of the owner of the servient estate. If appellant has acquired the right by prescription to use the ditch alongside appellee's road, to that extent, and as an appurtenant to her land, it is her ditch, and she may clean it when necessary for its proper enjoyment. It is not claimed that she has been denied this right.

Wherefore the judgment must be affirmed.

BROOKS v. PAINE.

(Court of Appeals of Kentucky. Dec. 8, 1903.)

BANKRUPTCY — DISCHARGE — SUBSEQUENT PROMISE TO PAY — EFFECT OF PROMISE — CONDITIONAL PROMISE — EVIDENCE — SUFFICIENCY.

1. The fact that one discharged in bankruptcy has made conditional promises to pay a debt included in the discharge, or merely expressed an intention to pay, cannot prevent a recovery on a clear and unequivocal promise to pay.

2. In an action against one who had been discharged in bankruptcy to recover a claim which had been included in the discharge, plaintiff and another testified that defendant promised to pay the debt, which he denied; but another

person testified that defendant told him that he intended to pay, and that he had promised so to do. *Held* to show an unconditional promise to pay the debt.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by Dan Brooks against F. G. Paine. From a judgment in favor of defendant, plaintiff appeals. Reversed.

O'Neal & O'Neal, for appellant. Samuel Avritt, for appellee.

PAYNTER, J. The appellee, while indebted to the appellant in a sum greater than \$3,000, obtained a discharge in bankruptcy. Claiming that appellee had subsequent to his discharge in bankruptcy promised to pay the debt, this action was brought by appellant on the promise. Under the adjudications of this court, such an action can be maintained on a promise made under such circumstances. The question here is, was the promise made? The appellant, Brooks, testified that appellee had repeatedly made the promise. In detailing what appellee said on some occasions, it is evident that there were conditions in the promises, and on such promises no action could be maintained, unless the plaintiff pleaded and proved the occurrence of the conditions. The mere expression of an intention to pay is not sufficient to enable the debtor to maintain the action, as the promise to pay must be clear, distinct, and unequivocal. The fact that the bankrupt made promises with conditions attached, or merely expressed an intention to pay, would not operate to prevent a recovery on a clear, distinct, and unequivocal promise to pay the debt. We are of the opinion that such a promise was made. The appellant and Joseph J. Brooks testified that on one occasion the appellee promised to pay the debt. Paine testified that he had never, since receiving his discharge in bankruptcy, promised the appellant, conditionally or otherwise, to pay the debt. W. P. Adams testified that appellee told him he intended to pay Brooks his debt, and that he had promised to pay it. The testimony of Adams tends to contradict Paine's statement that he had not made any promise to pay the debt. We are forced to the conclusion that appellee promised unconditionally to pay the appellant's debt.

The judgment is reversed for proceedings consistent with this opinion.

MURPHY v. METZ et al.

(Court of Appeals of Kentucky. Dec. 3, 1903.)
CLOUD ON TITLE—CONVEYANCES—RIGHT TO REMOVAL.

1. Subsequent to the conveyance of a parcel of land to plaintiffs as school trustees, for school purposes, the grantor conveyed to defendant a tract including the parcel previously conveyed to plaintiffs; and thereafter defendant gave plaintiffs, who were not aware of their rights, a deed of the parcel previously conveyed to them, which recited that, in consideration of

the conveyance, plaintiffs agreed to keep the property fenced in on all sides, and that, if at any time the property should be abandoned or cease to be used for school purposes, title and possession should revert to defendant. *Held*, that such conveyance was a cloud on the title of plaintiffs, and they were entitled to have it removed.

Appeal from Circuit Court, Jefferson County Chancery Division.

"Not to be officially reported."

Suit by Phillip Metz and others, as trustees of School District No. 21, Jefferson county, Ky., against S. A. Murphy. From a decree in favor of complainants, defendant appeals. Affirmed.

D. R. Castleman, Pryor & Sapinsky, and Wm. S. Pryor, for appellant. Lane & Harrison, for appellees.

PAYNTER, J. This action was brought by the appellees, as trustees of School District No. 21 of Jefferson county, Ky., to remove a cloud from the title of about 2 acres of land, upon which a schoolhouse is situated, and which is in the possession of appellees. On the 29th day of August, 1850, James Stinson, the owner, conveyed the land to Benjamin Williams, Preston Zenor, and David Arnold, as trustees of the school. The 2 acres seem to have been a part of a farm of about 120 acres. After Stinson conveyed the property to the school trustees, he conveyed the farm, and did not except from the deed the 2 acres. The farm, by subsequent deeds, was conveyed to others, and in none of which were the two acres excepted. Finally it was conveyed to the appellant by the same character of deed. In 1901 the question arose as to whether the school trustees had the title to the property. After some consultation the appellant executed and delivered to the trustees of the district a deed for the lot, which was placed upon record. There was a recitation in the deed as follows: "The parties of the second part agreeing, and it is hereby made a condition of this conveyance, in consideration of these presents to keep the said property aforesaid fenced in on all sides. It is made a further condition herein that at any time the property conveyed herein shall be abandoned or cease to be used for school purposes, both the title and possession shall revert to the first party hereof." The trustees, not being aware of the rights of the district when this deed was made, but subsequently being advised that they had title to the property by virtue of the Stinson deed, instituted this action to remove the cloud cast upon the title by the deed made by the appellant. There was nothing in the Stinson deed which imposed the burden upon the trustees to fence the property, nor did the Stinson deed provide that the property should revert to him. If the appellant had any interest in the property, it was no greater than that which remained in Stinson after his deed to the trustees. If any right remained in him,

and was vested in the appellant, she did not attempt to convey such right to the trustees of the district. Instead of her deed vesting the district with any rights, the purpose of it seems to have been, and the effect of it was, to restrict or limit their rights in the property. Its terms were prejudicial to their rights, and cast a cloud upon their title to the property, and the court properly adjudged that it should be removed. If the property is ever abandoned for school purposes, the question can then be determined whether the Stinson deed vested the trustees of the school with the fee-simple title to the property.

The judgment is affirmed.

HARDIN & RIEHM v. CHENAULT.

(Court of Appeals of Kentucky. Dec. 1, 1903.)
AGENCY—EXISTENCE OF RELATION—PRINCIPAL AND SURETY—FRAUD—NOTICE.

1. An agent, having wrongfully used money belonging to his principal, agreed to give security therefor; and a friend of the agent agreed to send the principal the agent's note when the latter got a surety thereon, and to vouch for the genuineness of it. The agent procured a surety, representing to him in the friend's presence that the note was given for the price of goods which were still in his hands, and which he could sell, and pay the notes; and it was agreed that the proceeds of the sale should be turned over to the friend, to be sent to the principal. These representations were false, to the friend's knowledge. *Held*, that the friend was not the agent of the principal, so as to charge the principal with knowledge that the surety's signature was obtained by fraud.

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by Hardin & Riehm against D. M. Chenault. From a judgment for defendant, plaintiffs appeal. Reversed.

J. A. Sullivan, for appellant. R. H. Crooke, for appellee.

HOBSON, J. H. G. Kent was agent for Hardin & Riehm at Richmond, Ky., for the sale of pianos and organs. In November, 1899, he sent them a check for \$550, the proceeds of goods which he had sold. The check was protested by the bank on which it was given, and then, at the request of Hardin & Riehm, Kent went to Louisville to see them. L. E. Lane, who was a jeweler, occupying the front part of the storeroom used by Kent, went with him. When they got together, Hardin & Riehm complained bitterly of Kent's spending their money. He admitted having wasted it, but finally said that he would give security for it. Hardin & Riehm were in a bad humor with Kent, and Lane said that he had come along simply as Kent's friend, and that he would sign the note if Kent could get no one else. Lane then agreed that, when Kent got his surety on the note, he would send it in to Hardin & Riehm, and that they need have no doubt of the genuineness of the signa-

tures. Some talk was also had about Kent's continuing the agency, and selling the pianos and organs he still had at Richmond. Lane agreed that he would collect the money as the instruments were sold, and remit it to the house, so that no further loss would fall on Hardin & Riehm. Lane and Kent then returned to Richmond, and Kent procured D. M. Chenault to sign his notes for the \$550 due Hardin & Riehm; assuring Chenault that the amount was the price of the instruments then in the house, which he would sell, and pay the notes. This was in the presence of Lane; and Chenault then said to Kent in the presence of Lane, that Lane would have to keep track of the sales, and whenever a sale was made the money would have to be turned over to Lane or to him, and Lane was to send it in to the house, to be applied on the notes. After Chenault had signed the notes, and before Lane sent them in to the house, Lane told Kent, after Chenault went out, that he would not send the notes in to the house unless Kent told Chenault the truth. Kent went up to see Chenault, and came back and said that he had told him about it, and everything was all right. Lane then sent the notes in to the house. Kent did not in fact tell Chenault, and when Chenault found out the truth he refused to pay the notes, and defended the suit brought upon them upon the ground that his signature to the notes had been obtained by fraud on the part of Kent, with the knowledge of Lane, and that Lane was the plaintiffs' agent in the transaction. The circuit court sustained the defense, and the plaintiffs appeal.

Hardin & Riehm acted in entire good faith. They had no knowledge of any fraud in the obtaining of Chenault's signature to the notes, and accepted them on the idea that they were all right. The proof leaves no doubt that Kent practiced a fraud on Chenault, and, if the plaintiffs are affected by the knowledge of Lane, the judgment of the circuit court is right. But if Lane was not their agent, then the loss must fall on Chenault, who trusted Kent, and signed the notes for him as his surety. The proof is clear that Lane went to Louisville with Kent simply as his friend to help him out of the trouble he was in, from sympathy he had for him. He was not agent in any sense for Hardin & Riehm in the interview in Louisville, but was simply there as Kent's friend. He told Hardin & Riehm that he would send the notes in, so that they would know the signatures were genuine, in order to get them to agree to Kent's proposition, they being unwilling to trust Kent. He was not their agent to accept the notes, or to do anything for them. He was simply a third person agreed on between them and Kent to vouch for the genuineness of the signatures to the notes, which would be executed at Richmond and forwarded to Louisville, so that, when the notes reached Louisville, Har-

din & Riehm might rely on the authenticity of the signatures. The fact that Lane was to send in the money for sales which Kent thereafter made would constitute him an agent for Hardin & Riehm as to any money paid over to him, so that, if he failed to pay it over, the loss would fall on them, and not on Kent. But this was a different matter from the execution of the notes. He had no power to act in any way on behalf of Hardin & Riehm in regard to the notes. In undertaking to send in the money collected by Kent, Lane simply acted for accommodation. The rule is that one who deals with an agent must know the extent of his authority. In the case of a special agent, the principal is not bound beyond the scope of the authority conferred. Lane not being an agent for Hardin & Riehm in the obtaining of the notes, but only agreed witness to show the validity of the signatures, Hardin & Riehm are not affected by his knowledge that Kent was perpetrating a fraud on Chenault, or by his failure to know himself that Kent had undeceived Chenault before sending the notes in to the house.

Judgment reversed, and cause remanded for a judgment in favor of the plaintiffs.

WILSON v. SULLIVAN et al.

(Court of Appeals of Kentucky. Dec. 2, 1903.)

FERRY COMPANIES—TRESPASS—INJUNCTION—ILLEGAL COMBINATION.

1. Ky. St. 1899, § 1808, subsec. 3, provides that, when sale is made of a ferry right or lease thereof it must be with leave of court, and the purchaser or lessee must execute a covenant in lieu of the former covenant, etc., and that upon failure to comply with any requirement the court shall revoke the grant, the party having been first summoned, etc. *Held*, in a suit by a ferry company to enjoin trespass on its lands, that the fact that the company had not complied with the statute was no defense.

2. As Ky. St. §§ 3917-3919, fix the penalties and provide the methods by which section 3915, prohibiting pools and combinations, may be enforced, the fact that a ferry company is engaged in such an illegal pool and combination is no defense in an action by it to enjoin trespass on its lands.

Appeal from Circuit Court, Lewis County.
"Not to be officially reported."

Suit by John Sullivan and others against Herbert Wilson for injunction. From a decree granting the writ, defendant appeals. *Affirmed*.

A. D. Cole, for appellant. W. H. Wadsworth and E. L. Worthington, for appellees.

NUNN, J. The appellee John Sullivan, for the benefit of the Maysville & Big Sandy Railroad Company, instituted proceedings in the Lewis county court, and succeeded in condemning for ferry purposes two acres of land belonging to the appellant on the Kentucky shore opposite Manchester, in the state of Ohio; and the court also granted them a right or franchise to operate a ferry from this land on the Kentucky shore to

Manchester, Ohio, for the term of 20 years from the date of condemnation, to wit, November 11, 1897. On the 14th day of March, 1898, the appellees George and H. C. Brown took possession of this ferry right and franchise under a lease duly executed and delivered to them by their co-appellees, and they have since last date been in the possession of this landing, privileges, and franchises, and operating the ferry. The jury, on the trial of the writ of *ad quod damnum*, awarded appellant \$3,000 for the use of these two acres of land for 20 years, which sum was paid to him in the year 1898. Some time after this appellant conceived the idea that appellees were using more than two acres of his land, upon or against which they landed their ferry boat, and he set posts in the ground, as he claimed, on his own land, outside of the two acres condemned, to prevent their landing against and injuring it. Appellees, contending that the posts were placed on the two acres condemned, took them up. Appellant replaced the posts, and soon after that high water washed them away, and appellant was about to replace them, when appellees brought this action to enjoin him, claiming that they were on their land, for which they had paid appellant, and that the point where the posts were set was the only place they could land their ferry boat when the water was high in the river. There were many depositions, deeds, and other evidence introduced on the trial, and the lower court adjudged that the posts set by appellant were within the boundary of the two acres for which appellant had been paid, and enjoined him from resetting the posts, or otherwise interfering with appellees' free use and occupancy of these two acres for ferry privileges.

Appellant contends that the court decided the case against the evidence, and also erred in not sustaining his demurrer to the petition; that appellees failed to allege in their petition that they ever acquired or had an exclusive ferry privilege; and refers to the case of *Owens Bros. v. Lockwood*, 83 Ky. 287, to sustain his contention. In that case, Owens Bros. sued Lockwood for damages, alleging that they were in possession and the owners of a ferry privilege from the city of Paducah to the Illinois shore, and had the right to collect tolls therefor as stated in the lease of the city of Paducah of the ferry privilege to V. Owens, to the exclusion of every other person, etc. A demurrer was sustained to this petition, and this court on appeal affirmed the case, stating, in substance, that as Owens Bros. claimed to own the ferry privileges by lease from the city of Paducah, it was indispensable for them to allege and show that the city of Paducah was the owner of the franchise. In the case at bar it is alleged in the petition and shown by the proof that appellee Sullivan was by the county court of Lewis county granted this franchise for the benefit of the

appellee company, and that appellees Brown were, as lessees, in possession of this landing, right, privilege, and franchise, and operating the ferry from this landing, all under a lease duly executed and delivered by co-appellees. In the *Owens v. Lockwood Case*, supra, Owens Bros. were attempting to recover damages from a person running a rival ferry without right. They could therefore only recover by showing that they rightfully held the exclusive ferry privilege. There was no alleged trespass upon the lands of Owens Bros. in that case.

The appellant also contends that the petition was defective in failing to allege compliance with subsection 3 of section 1808, Ky. St. 1899, in that they failed to allege that the lease to the Browns was by "leave of court," and that the lessees had executed covenant with surety in lieu of the former covenant. This language is found in the subsection named: "Upon failure to comply with any requisition of this subsection, the court [meaning the county court] shall revoke the grant, the party having been first summoned, or, if a nonresident, warned by an order posted at the courthouse door," etc. Thus it will be seen that the statute designates the method by which a ferry license may be revoked. A party cannot justify trespasses committed upon the land of another by showing that the owner and possessor has failed to comply with some provision of the Statutes. If the appellant has failed to comply with the requirements of subsection 3 of section 1808, Ky. St. 1899, or violated the provisions of section 1812, Id., let the county court, the grantor of the ferry right, or the public, or some member thereof, take the necessary steps to have this ferry right revoked by the county court.

Another contention of appellant is that the judgment should be reversed because the court sustained a demurrer to his answer, in which he alleged that the appellee the Maysville & Big Sandy Railroad Company, in connection with the appellees Brown, had obtained this ferry franchise in furtherance of a combination and conspiracy to control the ferry business between Covington and Ashland, Ky., on the Ohio river, whereby prices had been raised, competition had been shut out, except in accordance with the will of appellee corporation, and that they had violated, by reason of this conspiracy, pool, and combination, section 3915 of the Kentucky Statutes of 1899. If this be true, the Statutes (sections 3917-3919) fix the penalties and the methods by which they can be enforced. If appellees violated these statutes, we are of the opinion that it would be no defense for trespass committed by him on the lands of appellees. We are, however, at a loss to understand how a combination, pool, or trust could be formed, and in pursuance thereof the prices of ferriage could be raised or lowered to the detriment of individuals or the public, when it is the duty of the coun-

ty court from time to time to fix, by an order of court, the rate of tolls to be charged, and a penalty for an overcharge is fixed by the Statutes. See sections 1813, 1814, Ky. St.

Perceiving no error prejudicial to the substantial rights of the appellant, the judgment of the lower court is affirmed.

BROWN & BRO. v. LAPP.

(Court of Appeals of Kentucky. Dec. 8, 1908.)

BROKER—ACTION FOR COMMISSIONS—EVIDENCE—SUFFICIENCY—INTEREST.

1. Evidence that defendants employed plaintiff, who was a whisky broker, as their sole agent in a city for the sale of certain whisky, and agreed to pay him 50 cents on every barrel sold by him or them or any one else in such city, and that defendants sold a quantity of such whisky, and that plaintiff sold a good deal of the same, together with evidence as to the payment of commissions to plaintiff on other sales, and that the business was done in the name of defendants, and correspondence carried on in their name, was sufficient to warrant a verdict for plaintiff for commissions.

2. In an action by an agent for his commissions, where the petition sought interest, the filing thereof was a demand, and interest was properly allowed from the date of the filing.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by Abe Lapp against Brown & Bro. From a judgment for plaintiff, defendants appeal. Affirmed.

E. E. McKay, for appellants. Norten L. Goldsmith, for appellee.

HOBSON, J. Appellee, Lapp, filed this suit against appellants, alleging that they employed him as their sole agent in the city of Louisville for the sale of a brand of whisky known as "The Queen of Nelson," and agreed to pay him for his services 50 cents on every barrel of the whisky sold by him or them or any other person in Louisville. He alleged that the defendants sold to Collins & Co. 960 barrels of the whisky, on which his commissions would amount to \$480, and refused to pay him the commission they had promised to pay him. The defendants traversed the allegations of the petition, and, there having been a verdict and judgment for the plaintiff, they appeal.

The testimony of Lapp established the contract set up in his petition; also the sale of the whisky by the defendants as therein alleged. Lapp is a whisky broker, and sold a good deal of the whisky. Lapp's testimony also showed that the whisky belonged to Brown & Bro. The testimony of Brown & Bro. contradicted Lapp as to the contract and as to the ownership of the whisky; but the questions of fact were fairly submitted to the jury by the instructions, and there was sufficient evidence to warrant the submission of the case to the jury. In view of the facts brought out in the evidence as to the payment of commissions on other sales to Lapp, and that the business appears to have been

done in the name of Brown & Bro., and that the correspondence was carried on in this name, we cannot say that the verdict of the jury was not warranted by the evidence. The court properly instructed the jury to allow interest from the filing of the suit. The petition sought interest. The filing of the suit was a demand for the money, and the rule is to allow interest from the filing of the petition in cases of this sort.

Judgment affirmed.

HOSKINS v. MORTON.

(Court of Appeals of Kentucky. Dec. 2, 1903.)
PRINCIPAL AND AGENT—BREACH OF TRUST—
ACTIONS—DECREE.

1. In an action against an agent based on his wrongful act in taking to himself a conveyance of land which he had sold for his principal, on nonpayment by the vendee of the notes given for the purchase price, where the agent conceded in his answer his principal's right to the land, and prayed merely for an accounting with his principal, judgment for a specific sum claimed against her, and a lien on the lands for that sum, it was not error to direct a conveyance of the land to the principal, and retain the questions of settlement of accounts and liens for further adjudication.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by R. J. Morton against R. H. Hoskins. From a judgment for plaintiff, defendant appeals. Affirmed.

Lane & Harrison, for appellant. George L. Burton, for appellee.

NUNN, J. Appellee, in the month of March, 1901, sued appellants, and alleged that for more than 20 years last past the appellant, R. H. Hoskins, had been acting as her agent in receiving money, holding same at interest, collecting rents from her real estate, etc., and that during all of this time she had placed entire confidence in his integrity and ability, and believed him to be an honest man, and trusted him implicitly in the management of her affairs. She alleged in her petition that among other property she owned a tract of land of 24 acres, situated on the Poplar Level Road, near the city of Louisville, Ky., and that her agent, under and by virtue of a power of attorney from her, sold and conveyed this land to one Dominic Kruiger at the price of \$4,936.25. Five hundred dollars of this sum was paid in cash, and Kruiger executed eight notes of \$500 each and one note for \$436.25, due yearly thereafter. It appears from the petition that in a trade between her and appellant Hoskins he became the owner of the last one of the series of \$500 notes. (About this matter appellee complains in her petition, but it is not necessary to consider it on this appeal.) When the last note against Kruiger became due, the appellant, Hoskins, brought a suit in his own name on all the unpaid notes, there being six of them. Hoskins in-

dorsed appellee's name without her knowledge or consent upon the back of each of said notes, and alleged in the petition which he filed against Kruiger, that he was the owner of all of the notes. He obtained judgment thereon, and soon after obtaining the judgment made some arrangement by which Kruiger conveyed to him this 24 acres of land, all of which was without the knowledge or consent of appellee. She claims that this was in violation of his duty as her agent, and that the title to this property should have been conveyed to her, and asked the court to compel the conveyance thereof by him to her. Appellant answered, and denied that this action against Kruiger and the conveyance to himself of this land was without the knowledge or consent of appellee, and says that a part of the consideration for which the Kruiger land was sold was this \$500 note that had been assigned to him by appellee, and that he was entitled to the deed therefor. He filed with his answer a statement of account of the transactions between himself as agent and the appellee from the beginning of his agency to the time of the filing of this action, and in that account he charges appellee with this \$500 note and its interest, amounting to \$452.50, and in the prayer of his answer he asked that the action be referred to the commissioner to settle his accounts as such agent, and that he have judgment against the plaintiff for the sum that may be found to be due him by the commissioner's report, and that he be adjudged to have a lien upon this tract of 24 acres of land to secure same. He also alleged in his answer that in the arrangement with Kruiger, by which he obtained the deed, in addition to the amount of all the unpaid notes of Kruiger, with their interest, he paid to Kruiger \$541 in money, for which he has a lien. Appellee replied to this answer, and alleged that at the time appellant caused this deed to be executed to himself he then had in his hands of her means more than enough to satisfy this \$500, with its interest, and that by reason of said note he had no interest in the land, nor has he any lien thereon. Upon affidavits filed and upon the state of the pleadings the court, on the 23d day of December, 1902, made an order, which is in part as follows: "This action having been further heard upon the motion made herein on December 20, 1902, to require defendants to execute to the plaintiff a deed, and both plaintiff and defendants being represented and being heard by counsel, and the action having been submitted upon the motion and the record herein, and the court being advised, the defendants R. H. Hoskins and Mary F. Hoskins, his wife, are hereby ordered to execute and deliver to the plaintiff Mrs. E. J. Morton within ten days from December 20, 1902, a deed conveying to the plaintiff a fee-simple title to the property on the Poplar Level Road in Jefferson county, Kentucky, owned by said

plaintiff, as is admitted by defendants in the pleadings herein, and which said R. H. Hoskins caused to be conveyed to himself by deed from Dominic Krueger, etc., in the year 1895. * * * Said conveyance to be free from all interest or lien in favor of defendants, or either of them, except in so far as this court may hereafter adjudge in this action an interest or lien, if any, in favor of the defendants, or either of them, in or against said property; and this action is retained for the purpose of determining the accounts between plaintiff and defendant R. H. Hoskins, and the lien, if any, in favor of said defendants against said property." Appellant appeals from this judgment.

The only question to be determined now is whether or not the court erred in directing this conveyance to be made. We are of opinion the court did not err. From the pleadings in this case it is evident that appellant perpetrated a wrong upon appellee in having the title to this land conveyed to him, and it is evident from his answer that he concedes appellee's right to the title, and only asks that a lien be declared in his favor for the sums set forth in his answer, and charges appellee in his accounts with this identical \$500 note, and asks judgment against her for that sum. The court, by its order, retained the matter of settlement of accounts between the parties and the question of liens for future adjudication. As many questions involved between these parties are unsettled, we refrain from discussing on this appeal the conduct of the parties in these various transactions.

Perceiving no error in the circuit court on the question involved, the judgment is affirmed.

SHINKLE v. McCULLOUGH.

(Court of Appeals of Kentucky. Dec. 3. 1903.)

HIGHWAYS—NEGLIGENCE—AUTOMOBILES— FRIGHTENING HORSES—EXCESSIVE SPEED—INSTRUCTIONS.

1. In an action for injuries sustained by plaintiff by his horse having been frightened by defendant's automobile, which it was alleged was running at an excessive speed, defendant and another witness testified that the operation of the machine was always accompanied by noise. The court instructed that if defendant was operating the automobile at a high rate of speed, and because thereof, or because of such speed together with the noise, the horse became frightened, and defendant's conduct in operating the automobile at such speed was negligence, plaintiff was entitled to recover. *Held*, that if there was any error in the instruction, in that it authorized the jury to find for plaintiff if they believed the horse became frightened either at the speed or the noise, while fright by the noise was not pleaded, it was not prejudicial.

2. In an action for injuries sustained by plaintiff because of his horse having been frightened by defendant's automobile, which was running at an excessive speed, evidence of a statement alleged to have been made by defendant on the trial in justice court in an action for repairs to the buggy injured in the accident complained of, to the effect that he considered himself re-

sponsible for the accident, was admissible as tending to contradict defendant's testimony on the trial to the effect that he had not been guilty of negligence.

3. Where one operating an automobile on a public highway knew, or by the exercise of ordinary care could have known, that the machine had so far excited a horse as to render him unmanageable, it was his duty to stop and take steps such as prudence might suggest.

4. Where, in an action for injuries sustained by plaintiff by his horse having been frightened by defendant's automobile, the testimony showed that, in addition to superficial bruises, the vision of one of plaintiff's eyes had been permanently and seriously impaired, a verdict for \$1,020 was not excessive.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by William T. McCullough against Clifford Shinkle. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. A. Price, for appellant. John W. Henner and M. H. McLean, for appellee.

BURNAM, C. J. Whilst the appellee, W. T. McCullough, was driving along a public highway leading from the city of Covington on the 29th of August, 1901, with two companions, he met the appellant, Clifford Shinkle, riding in an automobile. Appellee's horse became frightened at the automobile, and upset his vehicle, throwing him upon the turnpike road, inflicting injuries to his clothing and person, and permanently impairing the vision in one eye. For these alleged injuries he instituted this action for damages, and alleged that the defendant, while in sight and approaching him, had recklessly and negligently propelled his automobile at a rapid and dangerous rate of speed up to and within 25 feet of his horse, notwithstanding the fact that he saw, or could have seen, that plaintiff's horse had become frightened, and in disregard of repeated warnings to slacken his speed, and that by reason of defendant's refusal to heed these warnings his horse became frightened, and, in his efforts to escape, turned over his buggy, inflicting the injuries complained of. The defendant, in his answer, denied all the allegations of negligence recited in the petition, and pleaded contributory negligence. Upon the trial of the case before a jury, the testimony introduced by the plaintiff was to the effect that the defendant was traveling at a very high rate of speed (some of the witnesses put it at as high as 20 miles an hour); that the motive power was gasoline mixed with air, which made a noise, when the machine was in operation, which could be heard at a distance of about 200 feet; that as soon as the plaintiff's horse heard this noise it began to take fright, and plaintiff and those with him at once began to shout and signal to the defendant to slacken his speed, but that he failed and refused to do so until he had driven the automobile to within 30 or 40 feet of plaintiff, by which time his horse became so unmanageable as to upset the buggy; that the defendant saw

that the horse was frightened, and the plaintiff's peril. The testimony on the other hand was that the defendant saw the plaintiff for about 200 feet driving along, apparently paying no attention to the approach of the automobile, the horse being apparently perfectly quiet; that, when he got within about 100 feet of the plaintiff, the horse suddenly shied, upsetting the buggy in the middle of the road; and that the defendant immediately slowed down his automobile, alighted therefrom, and went to assist the plaintiff. He also testified that the customary signal to slacken speed, by holding up the hand, was not given, and that as soon as he discovered the peril of plaintiff he stopped his machine, and that he was not going at exceeding 6 or 7 miles an hour. The trial resulted in a verdict and judgment for the plaintiff for \$1,020, and the plaintiff has appealed. He asks a reversal, first, for alleged errors in the second instruction, and also in the instruction defining the measure of damages.

Instruction No. 2 is as follows: "If the jury believe from all the evidence that, at the time and place of injury to plaintiff, the defendant was operating said automobile at a high rate of speed, and that because of said rate of speed, or because of said rate of speed together with the noise emanating from said automobile, the horse of plaintiff became frightened, and caused the injury to plaintiff, and if the jury further believe that the act of defendant in operating said automobile at a high rate of speed, if he did so operate it, was an act of negligence on the part of the defendant, the jury should find a verdict for the plaintiff." The complaint of this instruction is that it authorized the jury to find for the plaintiff if they believed that his horse became frightened either at the speed of the automobile, or at the speed and noise emanating therefrom; it being nowhere alleged in the pleadings that the horse was frightened by any noise. This instruction only authorized a recovery in the event the jury found from the evidence that the automobile had been operated at a high rate of speed, although the horse may have been alarmed not only by the high rate of speed at which the machine approached, but also at the noise emanating therefrom. Besides, appellant himself testified that the operation of the machine was always accompanied by noise, and upon cross-examination the witness Hanauer testified to the same effect; and the only noise spoken of in the instruction was that which was incident to the running of the automobile. The error in the instruction, if it was in fact an error, was not, in our opinion, prejudicial to the defendant.

The instruction defining the measure of damage is not objectionable. In fact, it has been approved by this court in substantially the form in which it was given in this case in numerous cases.

Appellant also complains that the trial

court erred in permitting appellee to prove a statement alleged to have been made by him upon the trial in a justice's court in an action on account for repairs to the buggy injured in this accident, to the effect that he considered himself responsible for the accident. To support this contention, we are referred to the note to section 44 of 1 Greenleaf on Evidence, in which the editor says that: "Opinion evidence of this character is only allowed when from the nature of the case the facts cannot be stated or described to the jury in such manner as to enable them to form an accurate judgment thereof, and no better evidence than such opinions is attainable." The author, in the section referred to, was discussing the competency of expert testimony. We think this testimony was competent as an admission of defendant, because it tended to contradict the testimony of the defendant given upon the trial of the case to the effect that he had not been guilty of any negligence which superinduced the accident complained of.

While automobiles are a lawful means of conveyance, and have equal rights upon the public roads with horses and carriages, their use should be accompanied with that degree of prudence in management, and consideration for the rights of others, which is consistent with their safety. If, as the jury found by their verdict, appellant knew, or could have known by the exercise of ordinary care, that the machine in his possession and under his control had so far excited appellee's horse as to render him dangerous and unmanageable, it was his duty to have stopped his automobile, and taken such other steps for appellee's safety as ordinary prudence might suggest.

Appellant also complains that the verdict is excessive. The testimony shows that, in addition to the mere superficial bruises received by appellant, there has been a permanent and serious loss in the vision of one of his eyes, as the result of a severe cut and bruise immediately over it, received at the time of the accident. It is impossible for us to determine the extent of pecuniary loss which may accrue to appellee from an injury of this character, not to speak of the pain and suffering and inconvenience resulting therefrom. This was a question for the jury, and there was abundant testimony on this point to support their finding.

For reasons indicated, the judgment is affirmed.

HOGAN et al. v. TUCKER et al.

(Court of Appeals of Kentucky. Dec. 2, 1903.)

SALES—WARRANTY OF QUALITY—BREACH OF WARRANTY—RESCISSIOn—TIME—RELIEF—PECUNIARY COMPENSATION.

1. In an action by the purchasers of a mill against the sellers on the ground of fraud in representations as to the condition of the mill, it appeared that plaintiffs discovered the fraud

very shortly after they took possession, but that they continued to use the property, and accepted a written promise from one of the sellers to repair the boiler and engine, or furnish new ones; that the repairs were attempted to be made, but were ineffectual; and that the engine was changed for another, and other minor changes made in the mill, after which plaintiffs continued to run it for about six months, defendants in the meantime having disposed of the property which they had received for the mill at a price \$650 less than they had allowed plaintiffs for the same. *Held*, that it was error to allow a rescission of the contract, but that plaintiffs should have been awarded pecuniary compensation.

Appeal from Circuit Court, Taylor County.
"To be officially reported."

Suit by B. W. Tucker and others against Wayne Hogan and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Denton & Robinson, for appellants. Wood & Rice, Jeff Henry, and S. A. Russell, for appellees.

NUNN, J. It appears that appellants, Wayne Hogan and J. P. Gaddie, were the owners of a flour mill, and site, in the town of Wickliffe, Ballard county, Ky.; that they sold this property to appellees on or about the 8th day of April, 1901, for the sum of \$3,300. Appellees, by their contract, agreed to pay \$2,300 in cash, or its equivalent, and executed their four notes, of \$1,000 each, due in one, two, three, and four years. Appellants made and executed a deed to appellees for this property on the terms stated, and delivered same to appellees on the 15th day of April, 1901, and agreed to, and did, accept from appellees, in lieu of the cash payment of \$2,300, a small tract of land, at the price of \$700, and a traction engine, a boiler, a saw rig, and threshing machine, at the price of \$1,200. For the balance of the \$2,300, to wit, \$400, the appellants accepted appellees' note. Appellees took possession of the mill at Wickliffe, and commenced to operate it, and found the mill in bad condition—the boiler and engine almost worthless, and the sifters and bran dusters worn and in bad condition. Within a few weeks they notified Wayne Hogan of the condition of the mill, and he promised to repair it. Nothing was done in the way of repairs until the 10th day of August, 1901, when Wayne Hogan, one of the appellants, made and executed the following writing: "This is to show that I will, and do hereby and herein promise and agree, immediately to repair and make good as new the engine and boiler of the mill sold to B. W. Tucker & Son, this year, in Ballard county, Kentucky, and when repaired and fully tested by said Tucker and Hogan, if said boiler or engine fail to do as good work as if they were new, then in that event I will at once purchase new ones and put in the said mill instead of the old ones, and do this at my own expense and cost. This August 10th, 1901. [Signed] W. Hogan." Ap-

pellant Hogan sent George Stephenson, a millwright, from Taylor county to Ballard, to repair the engine and boiler. Stephenson arrived there about the 15th of August, 1901, and worked on the boiler about 13 days, but did not succeed in making it a good one. He found the engine in such bad condition that he did not attempt to repair it. G. W. Tucker, after consultation with Stephenson, exchanged the engines for another one, and changed the position of the boiler, and made other changes of minor consequence; and in this condition appellees attempted to run the mill until about the 1st of March, 1902, when they abandoned or ceased to operate it, and tendered it to appellants, and demanded the return of the amount they had paid on the mill. Appellants refused to rescind. Appellees on the 13th day of March, 1902, brought this action in the Taylor circuit court. In their petition they made two paragraphs: (1) They alleged fraud on the part of appellants, and made the necessary allegations with reference thereto; (2) they alleged that appellants warranted the mill in all particulars to be as good as new, and that it was worthless, and that they had been damaged in the sum of \$4,000, and other sums. In their prayer they asked for a rescission, and, if that could not be had, then a judgment for damages upon the warranty. The court, on motion of appellants, compelled appellees to elect which paragraph they would prosecute—the first, for rescission on the grounds of fraud, or on the warranty—and appellees elected to prosecute the action under the first paragraph. The case was prepared and tried, and the lower court adjudged that the contract be rescinded, and that appellees recover of the appellants the sum of \$1,900, with interest from the date of the trade, to wit, 8th of April, 1901. Appellants complain of this judgment, and say that they did not deceive, or commit any fraud upon, appellees, in making the sale of this property to them, but, if they did, the appellees failed to ask for a rescission within a reasonable time after the discovery of the fraud, and that appellees had used the property for 10 or 11 months, had exchanged the engine for another, had changed the situation of the boiler, and had made other minor changes in the property; that, before the appellees asked for a rescission, they (appellants) had sold the land and machinery which they had received in part pay for a much less sum than they had allowed appellees in the trade, to wit, the land at \$650, for which they had allowed appellees \$700, and the machinery at \$600, for which they had allowed appellees \$1,200.

We are of the opinion, from the facts as shown by the record, that appellees were deceived in the trade, and that they were and are entitled to relief. It is shown that appellants represented the mill and machinery to be all right in every respect, and as good as new, and that at the time the engine and

boiler and other minor parts were damaged and almost worthless. J. P. Gaddie must have known these facts, as he was at the mill and in charge at the time the damage occurred. But it is not made clear that Hogan, the partner, and the other appellant, on whose statement appellees alleged they relied, was acquainted with the injured condition of the mill, as he resides in Taylor county, and did not visit the mill often. But in view of all the facts and circumstances proven, this court would not feel inclined to disturb the finding of the lower court in rescinding the trade on the ground of fraud and deception practiced by appellants, provided the rescission would have placed the parties in statu quo, or nearly so.

The question then to be determined is, did appellants elect to rescind within a reasonable time after the discovery of the fraud practiced upon them? If so, the judgment should be affirmed; otherwise reversed. In the case of *Hoggins v. Becraft*, 1 Dana, 31, the court said: "The law has not defined 'reasonable time.' It cannot be defined by any prescribed rule. What is reasonable in one case may be unreasonable in another case. What is reasonable in any case must be ascertained by the application of reason to the facts which characterize the particular case. Delay for one week after full discovery may be unreasonable in some cases. A much longer delay may in other cases be reasonable. The injured party should observe ordinary vigilance and good faith. He should not, by culpable negligence or by design, subject the other party to unnecessary inconvenience, loss, or hazard; and, whenever he offers to return the property, it should be in as good condition as it was when he might have first returned it after full discovery of its defectiveness, so as to place both parties as nearly as possible in statu quo. All this may appear in a supposable or possible case, even though months may have interlapsed. It may not appear in another possible case in which one week had evolved. Time, in the abstract, is not essential. It is material so far only as, when associated with other circumstances, it may produce injurious or unjust consequences. The great object of the rule of law on this subject is to prevent injury or wrong to the vendor; and the main question in every such case should be, has he any just cause to object to the rescission of the contract; has he been trifled with; will he have suffered by unnecessary and improper delay?" In the case of *Colyer v. Thompson & Johnson*, 2 T. B. Mon. 18, the court said: "Nor will a court of equity in every case set aside a contract on the ground of fraud. Where the injured party, within a reasonable time after he has discovered the fraud, makes his election to disaffirm the contract, and offers to restore the property, a court of equity will, at his instance, interpose and set it aside.

But if, after discovering the fraud, he still retains the property, and uses it as his own, and makes no offer to restore it, or does not otherwise evince a determination to avoid the contract, a court of equity will not set it aside." And in such case he must get relief in damages. The case of *Ruffner, etc., v. Ridley, etc.*, 81 Ky. 169, was where a party sought relief from a contract obtained by fraud, and the court said: "A court of equity will rescind if the circumstances are such that the parties can be put in the condition they were in at the time of the execution of the contract, but, if these elements do not concur, the chancellor will decree compensation if the fraud is proved, and a substantial injury has resulted therefrom. Whenever there is fraud, with a resulting injury of a substantial character, a court of equity will give relief, either by rescission or pecuniary compensation." In the case of *Bernard Leas Mfg. Co. v. Waller (Ky.)* 36 S. W. 531, the court said: "He might have, within a reasonable time after discovering the breach of warranty or worthlessness of the machine, offered to return the machine, and, if his cause of action was well founded, he would have been relieved from any liability for the price or value of the same, and might have had such other relief as he showed himself entitled to; but, not having done so, the judgment, etc., should not be allowed to stand." In 1 *Bigelow on the Law of Fraud* (Ed. 1888) 436, the author says: "The defrauded party to a contract has but one election to rescind the same. If he once determine his election, it is determined forever. Hence if it be shown that he has at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, his election is irrevocable. Nor has the injured party power to keep the question of election open so long as he will. The rule of law upon this point is this: So long as the defrauded person has made no election, he retains the right to determine it either way, provided that, in the interval while he is deliberating, an innocent third party has not acquired an interest in the property, or that in consequence of his delay the position of the wrongdoer himself has not been substantially affected."

The appellees prove that they discovered the fraud in a few days after May 1, 1901; they kept and used the property; accepted a written promise from appellant Hogan to repair boiler and engine, or furnish new ones; the repairs were attempted to be made, the engine was exchanged for another, and other changes made in the mill; and then appellees continued to run the mill until about the 1st of March, 1902. In the meantime, appellants disposed of the property which they took from appellees at the price of \$650 less than they had allowed appellees for same. Under these circumstances, the

court should not have rescinded the contract, but should have granted appellees relief by giving them pecuniary compensation.

The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

GRAY v. UNITED STATES SAVINGS & LOAN CO.

(Court of Appeals of Kentucky. Dec. 3, 1903.)

BUILDING AND LOAN ASSOCIATIONS—COMPROMISE WITH BORROWING MEMBER—PLEADINGS—ADMISSIONS—DENIALS.

1. In the absence of a rejoinder, all the well-pleaded facts in the reply are taken as true, and, in the absence of evidence, the allegations in the answer which are denied by the reply are taken as untrue.

2. A contract between a Minnesota building association and a borrowing member by which they settled the matter of usury contained in the debt, and agreed on the amount due, was valid, where the association in good faith claimed that the debt was not tainted with usury under the laws of Minnesota, which should govern, and several circuit courts of Kentucky had so decided, and where the borrowing member contended that the debt was tainted with usury, and was about to prosecute an appeal to the Court of Appeals for the determination by that court of that question, and which that court subsequently settled against the contention of the association.

Appeal from Circuit Court, Clark County.

"To be officially reported."

Action by the United States Savings & Loan Company against George Gray. From a judgment for plaintiff, defendant appeals. Affirmed.

D. L. Pendleton and Hazelrigg & Chenault, for appellant. Beckner & Jouett, for appellee.

BARKER, J. In the year 1894, the appellee, the United States Savings & Loan Company, which was a going concern, with its head office at St. Paul, Minn., instituted an action against appellant to recover judgment against him on two notes—one for \$500, and the other for \$400—and to enforce a mortgage lien by which their payment was secured. On the 24th day of May, 1894, a judgment was entered as prayed for in the petition. The judgment rendered, with the accrued interest and costs, amounted, in round numbers, to \$1,300. Appellant, although summoned, made no defense to this action, but, on the contrary, his counsel consented that it should be entered. Afterwards, on the 27th day of August, 1894, he entered into an agreement with appellee, by which, in discharge of the judgment against him, he executed and delivered to it his note, with Betty Gray as surety, for \$1,050, payable on or before June 1, 1895; and, to secure its payment, they executed a mortgage on property belonging to them in Winchester, Ky. There were, after this compromise was

made, a number of payments, the aggregate amount of which is in dispute, but which appellee admits to have been as much as \$271.50. Appellant failed to pay any further upon his note, and this action was instituted by appellee to recover judgment for the balance due thereon, and to enforce the mortgage lien given to secure it. To this action appellant filed an answer, alleging much larger payments on the note than the amount of the credits given in the petition, and that the claim against him contained a large amount of usury, and also charging fraud and covin in the obtention of the original judgment against him, and in the compromise by which he executed and delivered his note for \$1,050 in its discharge. To this answer appellee filed a reply, controverting all of its material allegations of fact inconsistent with those of the petition, and then affirmatively setting forth the following state of facts: That, after the rendition of the original judgment against appellant, he was about to prosecute an appeal therefrom to the Court of Appeals, contending that the judgment against him embraced a large amount of usury; that at that time appellee contended that it was a Minnesota corporation, and that its contract with appellant was a Minnesota contract; that, under and by virtue of the laws of Minnesota, it was valid and binding, and that the amount adjudged in its favor against appellant was properly recoverable under the contract, as construed and enforced by the laws of the state of Minnesota; that the question of the validity of this contract had not at that time been decided by this court, but, on the contrary, had been decided by the circuit court of Clark county, and various other circuit courts throughout the state of Kentucky, to be a Minnesota contract, and enforceable as such here; that this controversy between appellant and appellee was bona fide, and involved the question of whether or not the judgment in favor of appellee contained usury; that, with this condition of affairs existing, appellee and appellant, in person, and with the aid and guidance of his attorney, Rodney Haggard, an able and efficient counselor, in good faith, and for the purpose of settling and adjusting the differences between the parties, entered into the contract by which the note sued on was executed and delivered by appellant to appellee; that this contract of settlement and compromise was made in the office of Rodney Haggard, appellant's counsel, with his aid, assistance, and advice, both he and appellant being present at the time; that all of its terms were fully understood, approved, and urged by appellant in person and by his counsel; that it was made and accepted in good faith by appellee, who at once stopped the sale of the property, which was advertised for that day, and thereafter, in good faith, abandoned and released all claims of any sort under the judgment. No rejoinder was made to this

¶ 1. See Pleading, vol. 39, Cent. Dig. § 396.

pleading, and no proof adduced by appellant to establish the allegations of payment and fraud, which were placed in issue by the denials of the reply. The case being submitted on the pleadings, a judgment was rendered as prayed for in the petition.

In the absence of a rejoinder, all of the well-pleaded allegations of fact in the reply are to be taken as true; and, in the absence of evidence to support them, all of the allegations of payment and fraud in the answer which were controverted by the reply must be taken as untrue. The question, then, for adjudication, is whether or not the compromise made between the parties litigant, as set forth in the reply, can be upheld. There is a wide difference between a compromise by which a debtor agrees to pay in settlement of his debt a less amount of usury than that claimed by the creditor, where there is no dispute between the parties as to the usurious character of their contract, and a compromise by a debtor of a contract which he claims contains usury, but the usurious nature of which the creditor in good faith disputes. The crucial question in such matters is always whether there is in good faith a controversy between the parties. The line between these two classes of cases sometimes becomes exceedingly fine, but it is none the less real for that reason. In the case of *Taylor v. Patrick*, 1 Bibb, 168, it is said: "The compromise of a doubtful right is a good consideration to found a contract on; and it is immaterial on whose side the right ultimately turns out to be, as it must be on one side or the other, because there can be but one good right to the same piece of property." In the case of *Fisher v. May's Heirs*, 2 Bibb, 448, 5 Am. Dec. 626, in which one party undertook to dispute and uproot a settlement made with the other, for reasons set forth, the court said: "This is certainly no ground for relief. There can be but one superior and equitable right. If, therefore, the solemn compromise of the parties about property of doubtful title is made to depend on the question whether the parties have so settled their dispute as the law would have done, then it may be truly said that a compromise is an unavailing and idle act, which questions even the power of the parties to bind themselves." In the case of *Creutz v. Hell*, 89 Ky. 429, 12 S. W. 926, the following admirable rule governing the question under discussion was laid down: "It seems that the inquiry is whether the party relying on the agreement had reasonable and proper cause for believing that the question was doubtful, and that the right might ultimately prove to be with him. In other words, it is sufficient that there was an honest claim on his part, asserted without fraud, and that there was a real ground for dispute. If the point is so clear that it can only be answered in one way, the compromise would be invalid, as wanting a consideration to uphold it. The adequacy of the consideration cannot be

inquired into, but the want of any consideration whatever may be inquired into. The verdict of a jury or the decision of a court depends in a greater or less degree upon the human understanding as to what is right and equitable in a given state of case; but when the given state of case has received such judicial interpretation as to admit of no question, supposing that the judicial mind will continue to run in the same channel (and such supposition should always be indulged in), then there can arise, in a legal and equitable sense, no consideration for a compromise of such matter. It is only in reference to such matters as counsel learned in the law or courts might differ, although the right ultimately turns out to be wholly on one side, that constitutes a valid consideration for compromising such matters. The question of such consideration cannot be measured; hence its adequacy will not be inquired into."

The admitted facts show that, at the time the compromise under consideration was entered into, there was a bona fide controversy between the parties litigant; that at that time the contract between them had been upheld by the circuit court in which it was then depending as valid and binding; that the other circuit courts had so held, and this court at that time had made no ruling adverse to that position. It may be said, therefore, that there was a real controversy between the parties, the ultimate outcome of which, if carried to this court, could not then be known. This was evidently believed by the counsel for appellant, who was a man of high rank and standing in his profession, or he would not have advised his client to make the compromise. There is no more reason why a contract as to the usurious nature of which there is a genuine dispute should not be compromised, than if it related to any other question of disputed legal right. In the case of *Cynthiana Loan & Building Association v. Florence* (Ky.) 55 S. W. 207, where there was a dispute between the borrowing member and the corporation, and they had settled and adjusted their differences, the court, in upholding the settlement, said: "The parties, to avoid litigation, had a clear right to agree on what this amount was; and a compromise of such matter, if made, as alleged in the answer, fairly, deliberately, and with the advice of counsel, cannot be disregarded. By the arrangement appellees not only had their note canceled and the mortgage on the land released, but got rid of all liability as stockholders in the association, and terminated all connection with it, or liability to it or to its creditors thereafter. The law delights to uphold compromises, because they keep down strife and prevent litigation. The reasons which allow usury paid upon a compromise to be recovered have no application to a compromise, made in good faith, of other matters not tainted with usury, and for which a legal liability existed." In the

case of United States Building & Loan Association (Ky.) 66 S. W. 622, it was said: "The court is of the opinion that the contract between the association and its borrowing member, by which they settled the matter of usury contained in its debt against him, and in which they agreed upon the price to be paid by the association for appellee's stock in it, and allowed as a credit upon the debt, was a meeting of the minds of the parties competent to contract about those matters. The controversy existing between them, and the problematical value of the stock, were sufficient consideration to support the agreement. It was a contract in every essential. It was such a contract that, had the value of the stock of appellee been greater than was allowed in his settlement, he would have been compelled to accept the settlement, and to have specifically performed it." In the case of Latham v. Glasscock, 10 Ky. Law Rep. 77, in an opinion by the superior court, it was said: "As the issue was made as to the usury in the note sued on, and the parties, after the issues were joined, compromised the matters involved in the action, whereby it was agreed that the judgment should be rendered for plaintiff for a certain amount, which was considerably less than the amount claimed, and the judgment was so entered, this judgment as effectually disposed of the question of usury as if the court had, upon the trial of the issues joined, rendered judgment for the same amount." The case of Cynthiana Building & Savings Association v. Ecklar (Ky.) 65 S. W. 335, is not inconsistent with the cases here cited. In that case there was no dispute on the question of usury. It was a mere compromise, which had the effect of causing the creditors to remit a part of the usury, and the debtor agreeing to pay the balance, together with the principal debt. There is no magic in the word "usury" which forbids a question as to its existence being settled between the parties, the same as any other disputed and doubtful claim. In the case at bar, at the time the compromise was made, it was doubtful as to what would be the ultimate outcome of the claim on the part of the corporation that its contract was a Minnesota contract, valid and binding by the laws of that state, and which should be valid and binding here. This court had made no ruling upon that question, and at that time the judicial utterance of the circuit court was in favor of the contention of appellee. Subsequently this court has settled the question adversely to the contention of appellee, but this does not render nugatory the settlement between the parties. There is no more reason now to upset the settlement, in favor of appellant, because this court has finally decided adversely to the claim of the appellee, than there would have been to upset it in favor of the appellee, so as to permit it to collect the full amount of the judgment originally rendered, if this court had adjudged the

contract to have been a Minnesota contract, enforceable by the laws of this state. As has been well said, it does not matter upon which side the right ultimately appears to have been, if at the time the settlement was made there was a bona fide controversy between the parties, about which lawyers and courts might differ.

For these reasons, the judgment of the circuit court is affirmed.

SOUTH COVINGTON & C. ST. RY. CO. v. McHUGH.

(Court of Appeals of Kentucky. Dec. 2, 1903.)

STREET RAILWAYS—COLLISIONS WITH CARRIAGES—DUTY OF COMPANY—FAILURE TO WATCH AND WARN—ACTIONS FOR INJURIES—EVIDENCE—OFFER OF SETTLEMENT—GROSS NEGLIGENCE—DAMAGES—APPEAL—HARMLESS ERROR.

1. In an action against a street railway company for injury to a hack and death of a horse, testimony of plaintiff that immediately before the accident his hack was worth \$1,100 or \$1,000; that, after spending over \$200 in repairs, it was not worth more than \$500 or \$600; that the horse was worth \$80, and the harness destroyed, \$80—supports a verdict for \$800.

2. Statement in an offer by plaintiff to settle with a street railway company for damages done to his horse and hack, to the effect that he had expended \$207 in repairs of the hack, and wanted that, with \$100 for his horse and harness, in full for his claim, is not conclusive on plaintiff as to the amount of his damage.

3. In an action against a street railway for damages to a horse and hack, the admission of evidence as to the time plaintiff was deprived of the use of the hack, and of the value of the lost use for that time, was not prejudicial, where the evidence was later withdrawn from the jury by a written instruction and admonition of the court, and the verdict showed that the jury obeyed such instruction.

4. In an action against a street railway for injuries to a hack, evidence that the track was on a much-traveled highway in an incorporated town, and that the place of the injury was on a down grade, and where the view to the approach was obstructed, and that the car was being run at a speed of 20 miles an hour, without any signal of its approach, was sufficient to submit to the jury the question of gross negligence.

5. Drivers and pedestrians on a highway are not trespassers, but have an equal right with street cars to use the highways; and, if the car driver fails to keep a proper lookout for their presence and give them timely warning of his approach, the company will be liable for a resulting injury, although the car was running at a reasonable rate of speed, and although, after the driver actually discovered the peril of the person on the track, he unavailingly used every means at his command to avert the injury.

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by Thomas J. McHugh against the South Covington & Cincinnati Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Simrall & Galoin, for appellant. M. L. Harbeson, for appellee.

O'REAR, J. One of appellant's motor cars collided with appellee's hack, killing one of the horses, demolishing the hack so as to re-

quire extensive repairs, and destroying the harness. In this suit to recover damages, the jury awarded appellee \$800.

Appellant's first complaint is that the verdict was excessive. The only evidence before the jury on that subject was the testimony of appellee. He said that immediately before the accident his hack was worth "about \$1,100 or \$1,000," and that, after spending over \$200 in having it repaired after the injury, it was worth not exceeding \$500 or \$600. The horse that was killed was worth \$80, and the harness destroyed was worth \$60. If the jury took the minimum of \$1,000 as the value of the hack immediately before it was injured, and \$500 as its value when repaired, after an expenditure of \$200, the net value immediately after the injury would have been \$300, which, deducted from the \$1,000, would have shown the damage to the hack at \$700. Adding the value of the horse at \$50, and of the harness at \$50 (which appellee had offered to appellant to take in settlement of those two items directly after the occurrence), the verdict of the jury is accounted for, and is fully warranted by the uncontradicted testimony.

It was shown on appellee's cross-examination that, in an effort to settle his loss with appellant, he made a statement that he had expended \$207 in having the hack repaired, and that he wanted that sum, and \$100 for his horse and harness, in full for his claim. He testified that after the vehicle was repaired it was not as good or as valuable as before the injury. Appellant declined to settle. It is now argued for it that appellee's statement as to the amount of his damage should be taken as conclusive. It seems that appellee based his loss upon an erroneous measure of damages. But whether he did or not, his statement was in no sense an estoppel. It was properly admitted to go before the jury, who were at liberty, as it was their duty, to give appellee a greater sum, if fully warranted by the evidence, under a correct measure, as fixed by the court, viz., the difference in the value of the vehicle immediately before and immediately after its injury.

The court admitted evidence, over appellant's objection, as to the time appellee was deprived of the use of the hack, and of the value of the lost use for that time. Later this evidence was withdrawn from the jury's consideration by a written instruction and admonition of the court. It is argued for appellant that the harmful effect of this irrelevant matter remained in the minds of the jury, notwithstanding, and that a new trial should have been granted. The jury's verdict, as above indicated, shows, in our opinion, that they obeyed the court's instructions on this point. The action and ruling of the court do not appear to us to have been prejudicial to appellant.

The court gave the jury an instruction allowing them to award punitive damages if appellant's agent in control of the car was

grossly negligent at the time of the collision, defining properly to the jury what constituted gross negligence. It is complained that there was no evidence of gross negligence. We think there was. The railway track was upon and near the margin of a much-traveled public highway, and within the limits of an incorporated town. The grade of the track was downward at this point. The carriage was emerging from a gate opening from a driveway, flanked by trees and bushes in foliage. Appellee's evidence was that the car was being run at a speed of 20 miles an hour, and without ringing of gong, or other signal of its approach. We think it proper to submit to the jury whether such a high rate of speed on a down grade, at a point on a much-used highway in a town where carriages and pedestrians had the right to be, and might reasonably be expected at any time, and where a view of their approach was obstructed, was not such gross negligence as evinced a reckless disregard of life and property.

Appellant asked, but the court refused, an instruction telling the jury that if appellant's car was being run at a reasonable rate of speed, and that the car could not have been stopped by the motorman, with the means at hand, after discovering appellee's peril, without endangering the lives of his passengers, the company was not liable. This instruction made appellant's duty to the carriage and its occupants begin only upon the discovery of their jeopardy from the car. This is not the law as to street cars using a public highway. Drivers and pedestrians on the highway are not trespassers. They have an equal right to use the highways with the street cars. The car driver must keep a proper lookout for their presence, and give them timely warning of his approach. If he fails to keep such lookout and give such warning, his master will be liable for a resulting injury, although the car was running at a reasonable rate of speed, and although after the driver actually discovered the peril of the person on the track he unavailingly used every means at his command to avert the injury.

Perceiving no error prejudicial to appellant's substantial rights, the judgment is affirmed, with damages.

WYMOND et al. v. BARBER ASPHALT PAV. CO.

(Court of Appeals of Kentucky. Dec. 3, 1903.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ORIGINAL CONSTRUCTION—ASSESSMENT—APPORTIONMENT.

1. Where a portion of an old turnpike road was by the extension of city limits included therein, and became a public way of the city, and as such had repairs made upon it, such repairs did not constitute an original construction, so as to relieve the owners of abutting property from liability for a subsequent improvement.

2. A street on which improvements were made was paralleled on the east by a street of

equal length, while the street next west remained parallel with it only in part; and, in apportioning the cost of the improvement to adjacent property, the council treated the street on the west as running parallel to the improved street the entire distance. Held that, though this method resulted in the territory to be taxed on the east side of the improved street being wider than that on the west side, nevertheless, as, under the law, the territory would have been taxed in the manner determined by the council if the street on the west side actually ran parallel the entire distance, the method adopted by the council was proper.

8. Where a street which was to be improved had been improved along part of its distance by original construction, the action of the city authorities in paying for the construction of this portion of it with funds of the city was not prejudicial to the property owners.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by the Barber Asphalt Paving Company against L. H. Wymond and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Carroll & Carroll and Lane & Harrison, for appellants. William Furlong, for appellee.

PAYNTER, J. This appeal involves the question of the validity of apportionment warrants for street improvement. The general council of the city of Louisville, by appropriate resolution, ordered the improvement of Park Place by original construction. The territory embracing Park Place was taken into the city many years ago. At that time Park Place was the old National Turnpike Road. Some years previous to the passage of the resolution here under consideration the city expended about \$400, and at another time about \$800, in repairing the road and in placing metal on it. As the turnpike road had been constructed before the territory which it traverses was brought into the city, and as the city made the repairs mentioned, and thereafter used it as a street, it is contended the assessment of the property owners with the cost of the improvement in question is illegal, because as they claim the improvement is not by original construction. If their contention be correct, that it is not an improvement by original construction, they are not liable for the cost of it, under the charter of the city of Louisville. The construction of the road before the territory through which it runs was annexed did not make it, in the meaning of the charter, an improvement by original construction. It seems to the court that the repairs which the city made on it cannot be regarded as a construction of the road, in any sense; much less, be regarded as an improvement by original construction. Until the street was improved as provided by the resolution of the general council, and for which the property owners are charged, there was no original construction of the street. *McHenry v. Selva*, etc., 99 Ky. 232, 35 S. W. 645.

East of Park Place is Third street, run-

ning parallel therewith. On the west is Fourth street, which parallels it only in part. In making the apportionment, the general council treated Fourth street as paralleling Park Place the entire distance. In making the apportionment, the territory to be taxed on the east side of Park Place was defined by a midway line between Park Place and Third street. The territory on the west side was defined by a midway line between Park Place and Fourth street and Fourth street extended. It results from this that the territory to be taxed on the east side of Park Place is wider than that on the west side of it. The general council deemed it proper to treat the territory, in making the apportionment, as if it was defined into squares by principal streets. If Fourth street had been actually extended, and the territory defined by principal streets, the law would have taxed the territory in the manner attempted to be done by the general council. It was the duty of the general council to define the territory to be taxed, and we are of the opinion that it did so in an equitable and just way. We think this apportionment is sustained by *Dumesnil*, etc., v. *Shanks*, etc., 97 Ky. 354, 30 S. W. 654, 31 S. W. 864, and *Cooper v. Nevin*, 90 Ky. 88, 13 S. W. 841.

It appears that about 140 feet of the distance to be improved near the Confederate Monument had been improved by original construction. The city authorities recognized that the property owners along the improvement should not, under the charter, be required to pay for the improvement of that part of the street. The city paid for the construction of that part of it; hence the property owners were not made to pay that cost. We do not think that this was prejudicial to the property owners.

The judgment is affirmed.

AULBACH'S EX'R v. READ et al.

(Court of Appeals of Kentucky. Dec. 3, 1903.)
EXECUTORS—PURCHASE OF PROPERTY WITH ASSETS OF ESTATE—EVIDENCE—JUDGMENTS—SETTING ASIDE—MOTION FOR NEW TRIAL.

1. A motion to set aside a judgment in an equitable case, made within 15 days after the rendition of the judgment, was in fact a motion for a new trial, suspending the judgment until the motion was acted upon, so that the court had power at any time pending the motion to set aside the judgment, though more than 60 days had elapsed since it was rendered.

2. Where an executor foreclosed a mortgage belonging to the estate, and purchased at the sale for the debt due the estate, the purchase was in his representative capacity, and he held the property as trustee, and not individually.

3. In an action by an administrator with the will annexed to compel the executor of a will formerly probated to turn over the proceeds of the sale of property alleged to have been purchased with assets of the estate, evidence considered, and held to show that the property was purchased by the defendant as executor, and not in his individual capacity.

¶ 2. See *Executors and Administrators*, vol. 22, Cent. Dig. § 623.

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by Frank Fehr, executor of Theresa Aulbach, against Adelheide Dickman, in which John B. Read, as administrator with the will annexed of the same decedent, intervened. From a judgment for intervener, plaintiff appeals. Affirmed.

O. P. Schmidt, for appellant. W. A. Byrne, for appellees.

BARKER, J. Theresa Aulbach died domiciled in Hamilton county, Ohio, leaving two wills. The first of these was admitted to probate, and by it the testator, after the payment of her just debts, devised all of her property to the appellant, and nominated him as her executor, without bond. Among the assets of the estate, there came into the hands of appellant a note of John E. Hamilton for the sum of \$1,500, the payment of which was secured by a mortgage on a farm in Kenton county, Ky. This note appellant prosecuted to a judgment, enforcing the mortgage, and, at the commissioner's sale, purchased the farm for the debt due the estate. This action was prosecuted in the name of Frank Fehr, executor of Theresa Aulbach, and the deed of the commissioner was so made to him. Afterwards he seems to have charged himself, in his accounts as executor, with the \$1,500 note. Subsequently he sold the farm to Mrs. Adelheide Dickman for the sum of \$1,500, \$400 of which was paid cash, and for the balance the purchaser executed six notes, secured by a lien on the property. The last four of these notes amounted, in the aggregate, to \$1,000; and, not being paid at maturity, appellant instituted an action in the Kenton circuit court for a judgment and enforcement of his lien. In the meantime another will of Theresa Aulbach had been admitted to probate in the proper court in Hamilton county, Ohio, which was altogether different from the one first probated. By it the decedent left her property to her relatives. The order admitting this second will to probate, and setting aside the order of probate of the first will, was appealed by appellant to the Supreme Court of Ohio, where it was finally affirmed, and the question of the validity of the two wills was decided adversely to appellant, whereupon a copy of the second will was admitted to probate in the county court of Kenton county, and John B. Read, the appellee, was appointed administrator with the will annexed. When this was done, the appellee, as administrator with the will annexed of Theresa Aulbach, intervened in the action of Frank Fehr, Executor, v. Adelheide Dickman, by filing a petition to be made a party, which substantially set up the facts as herein stated; praying that the assets arising from the enforcement of the mortgage lien be paid over to him, instead of to appellant, who had then ceased to be executor. This claim was disputed by appel-

lant, who alleged that he had purchased the farm in his individual capacity, and that it thereby became his property; that the notes and their proceeds belonged to him individually; and this is the real question in this case. Adelheide Dickman paid into the court the sum of \$1,223.50, being the full amount of the balance due from her as purchaser of the farm in question, and from that time ceased to be interested in the litigation, leaving the appellant and appellee to contest over the money. The issues having been made up between the parties litigant, the case was finally submitted to the court, and a judgment rendered in favor of appellant. This judgment, upon motion of appellee, was set aside, in order to permit him to file a necessary pleading which he had overlooked. Afterwards, upon a resubmission of the case, the court again decided in favor of appellant, whereupon appellee again moved to set aside the judgment. This motion was made within 15 days after the adverse judgment was entered against him. The court took the matter under consideration, and, after the expiration of about 5 months, set aside the former judgment, and entered a judgment in favor of appellee, of which appellant is now complaining.

The first proposition urged by appellant is that the court, at the time it set aside the judgment in his favor, had lost jurisdiction to do so, because of the expiration of more than 60 days from its rendition. This contention is founded upon the theory that the motion of appellee, made within 15 days after the rendition of the judgment, was not a motion for a new trial; and, in support of this, appellant relies upon the case of *Williams v. Williams* (Ky.) 54 S. W. 716. To this we cannot agree. In our opinion, this being an equitable case, the motion to set aside the judgment within 15 days after its rendition was for all purposes a motion for a new trial. The opinion in the case of *Williams v. Williams* turned upon the fact that the motion was not made within 15 days after the judgment, and it was therefore held that it could not operate as a motion for a new trial, and that the court lost jurisdiction after the expiration of 60 days to set aside its judgment. The point relied upon by appellant was held adversely in the case of *Trapp v. Aldrich, Receiver* (Ky.) 67 S. W. 834, in which the question under discussion was elaborately argued, and *Williams v. Williams* and other cases explained and limited as herein set out. We think the motion to set the judgment aside, having been made within 15 days after its rendition, was a motion for a new trial; and, being such, it suspended the judgment until it was disposed of. *Commonwealth v. Bavarian Brewing Co.* (Ky.) 72 S. W. 18.

On the merits, appellant contends that he purchased the farm in his individual capacity, and that the words in the deed by which it was conveyed to him as executor of Theresa Aulbach were merely descriptive persona.

This contention cannot be upheld. The note from Hamilton was the property of the decedent, and the purchase of the farm at the judicial sale was a purchase with the assets of the estate. Being such, appellant held the farm as trustee, and not individually. Longest, Adm'r, v. Tyler's Executor, 1 Duv. 192; Moore v. Moore, 5 Dana, 464; Handlin v. Davis, 81 Ky. 34; Clayton v. Clayton's Exec'r (Ky.) 12 S. W. 312; and Bartlett's Adm'r v. Gray, 4 Ky. Law Rep. 615.

Independent of the law of the case, however, as a question of fact, it was clearly shown that appellant purchased the farm as executor, and not in his individual capacity. A statement of the estate of Theresa Aulbach filed with his pleading shows that he charged the estate with \$60 taxes on the farm; \$55 for clover seed; \$55 for timothy seed; \$135 for a new fence, material, and labor; \$625 for 125 trips to Covington and the farm; and \$30 for the expense of selling it. An affidavit made by him in reference to the estate, and which was put in evidence, contains the following: "Frank Fehr, being first duly sworn, makes oath and says that, as to some of the items or credits in his account filed as executor of said estate, he is unable at this time to produce vouchers for the various reasons hereinafter stated as to the various items: Voucher No. 2. This item is for taxes paid on a farm which he bought in as executor at the sale of John E. Hamilton, assignee, who was a mortgagor to deceased. That he actually paid this amount, it being for two years' taxes, and had a receipt therefor, but, to the best of his knowledge and recollection, said receipts were handed over to Mrs. Dickman, who purchased said farm from him. * * * Voucher No. 5. This amount was paid to Mr. Stauffenberg, who resides on a farm adjoining the farm purchased by him as executor, and was paid for pruning the trees on said farm. Voucher No. 6. This was paid out to various persons for labor and material used in the construction of a fence around the farm, but affiant is able to produce only the receipt for the barb wire and locks used for said fence, amounting to \$31. Voucher No. 22. This amount was paid to the master commissioner, who prepared the deed from himself to affiant as executor, affiant receiving no receipt therefor. Voucher No. 24. The amount represented by this voucher was paid to Mr. Herzog, a real estate agent in Covington, as commissions for the sale of the farm. [Signed] Frank Fehr, Ex." (Sworn to before a notary.) Appellant did not testify in the case, and offered no evidence to contradict or explain away the statements in his account and affidavit. This shows conclusively that his claim to have purchased the property individually was an afterthought to meet the emergency arising upon the probate of the second will. The fact that he charged himself with the \$1,500 is immaterial; he did not pay out this money; and, when the real rep-

resentative of the estate receives the funds now in court, appellant's accounts as executor can be corrected so as to do him justice.

For these reasons, the judgment is affirmed.

WHITNEY v. WHITNEY.

(Court of Appeals of Kentucky. Dec. 4, 1903.)

PARTNERSHIP—DISSOLUTION—SETTLEMENT —SALE OF PROPERTY.

1. In an action to settle a partnership, in which it appeared from the petition and evidence that the firm property was of such a character as to require its sale in order to make a settlement, and it was not shown that any injury or loss would result, but it appeared that a sale would hasten settlement of the affairs of the firm, a judgment directing the sale of the property on motion of plaintiff in the case was not erroneous as premature.

Appeal from Circuit Court, Kenton County. "Not to be officially reported."

Action by John Whitney against H. A. Whitney. From a judgment for plaintiff, defendant appeals. Affirmed.

See 74 S. W. 194.

B. F. Graziani, for appellant. W. A. Byrne, for appellee.

SETTLE, J. This action was brought by appellee in the court below to settle a partnership that had long existed between the appellant and himself in the insurance business. The petition sets forth the dissolution of the partnership, the inability of the parties to agree upon a basis of settlement, and, further, that there are partnership assets consisting of \$5,000 on deposit in two of the banks of Covington, some real estate, an office lease yet unexpired, and personal property consisting of office furniture and certain stocks of value, and also that the firm owed some debts which should be paid out of its assets, and that there are due it certain debts from others. A settlement of the partnership is asked as between the partners and as between them and all others, and to that end that a commissioner be appointed to take charge of the property and assets, and that he be ordered to collect what is due the firm, and pay its indebtedness, and make final settlement of its affairs as prayed. It further appears from the averments of the petition as well as from the evidence that the property, real and personal, belonging to the partnership, is of such a character as to require its sale in order to make a settlement of the affairs of the partnership, and in this view of the case the lower court, on appellee's motion, entered the judgment appealed from, which directed the sale of the real and personal estate described therein.

Appellant complains that the judgment was premature. It is not denied, however, that such a sale of the real and personal property of the partnership will be necessary to a settlement of its affairs. We are of opinion that the judgment of sale was proper. No reason is shown why the sale of

the partnership property should be postponed, and it is admitted that no settlement of the partnership can be made without such a sale. The judgment makes no disposition of the proceeds of sale. So the proceeds will be held by the commissioner subject to the order of the court, and may be applied as hereafter adjudged, either in paying the indebtedness of the partnership or by dividing it between the partners themselves. It is not shown that any injury or loss will result to the firm, its members or creditors, by such a sale of its property as is contemplated by the judgment, but, upon the contrary, it would seem that such a sale will serve to hasten the settlement of the affairs of the partnership, which is apparently desired by each of the partners.

Wherefore the judgment is affirmed.

SOUTHERN RY. IN KENTUCKY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 1, 1903.)

RAILROADS—FREIGHT RATES—DISCRIMINATION—THROUGH SHIPMENT.

1. Const. § 215, providing that all railway companies shall transport freight of the same class for all persons from and to the same points and upon the same conditions, in the same manner, and for the same charges, does not prohibit a railway company from charging a through rate which is less than the sum of the local rates between the two points.

2. A railroad company issued a bill of lading agreeing to transport freight to a point which was several miles from the nearest station on its line. At this station a person who had always made it a practice to carry freight between the station and the point to which the goods in question were consigned took charge of the goods, and carried them to the consignee, with whom he had a special contract as to the price to be charged for carrying such goods. Deducting this price from the through rate charged by the company, the remainder was less than the local rate from the point of shipment to the station. Const. § 215, provides that all railways shall transport freight of the same class from and to the same points for the same charges. *Held* that, notwithstanding the railroad company had no express contract with the person who carried the goods from the railroad station to their destination, nevertheless it was a through shipment, for which the railroad company was entitled to charge a sum less than the sum of the local rates.

Appeal from Circuit Court, Mercer County.
"To be officially reported."

Action by the commonwealth of Kentucky against the Southern Railway in Kentucky. From a judgment for plaintiff, defendant appeals. Reversed.

Humphrey, Burnett & Humphrey and E. H. Gaither, for appellant. Hazelrigg & Chénault and J. S. Owsley, for appellee.

HOBSON, J. The grand jury of Mercer county returned an indictment on February 6, 1902, charging that appellant, within 12 months before the finding of the indictment, transported a barrel of gasoline for Henry

E. Samuels from Louisville to Harrodsburg, Ky., for the price of 26 cents per 100 pounds, and contemporaneously therewith transported between the same points a barrel of gasoline of the same class and kind of freight for Wallace Green for the price of 21 cents per 100 pounds; that this was done willfully and knowingly, with intent to discriminate in favor of Green and against Samuels, in violation of section 215 of the Constitution of Kentucky: "All railway, transfer, belt lines, or railway bridge companies shall receive, load, unload, transport, haul, deliver, and handle freight of the same class for all persons, associations, or corporations, from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment." Section 217 of the Constitution, which fixes the penalty for a violation of section 215, is as follows: "Any person, association, or corporation, willfully or knowingly violating any of the provisions of sections two hundred and thirteen, two hundred and fourteen, two hundred and fifteen, or two hundred and sixteen, shall, upon conviction by a court of competent jurisdiction, for the first offense be fined two thousand dollars; for the second offense, five thousand dollars, and for the third offense shall thereupon, ipso facto, forfeit its franchises, privileges or charter rights; and if such delinquent be a foreign corporation, it shall, ipso facto, forfeit its rights to do business in this state; and the Attorney-General of the commonwealth shall forthwith, upon notice of the violation of any of said provisions, institute proceedings to enforce the provisions of the aforesaid sections." The proof on the trial showed that Samuels lived at Harrodsburg, a point on appellant's line of railroad, but that Green lived at Perryville, which was 10 miles away from appellant's road. Twenty-six cents per 100 pounds were charged Samuels for the barrel of gasoline shipped to him, which was billed to him at Harrodsburg. The barrel of gasoline shipped to Green was billed to him at Perryville, and was shipped at the rate of 36 cents per 100 pounds from Louisville to Perryville. When the gasoline reached Harrodsburg, it was delivered to a man named Erwin, who ran a wagon daily from Harrodsburg through Perryville to Mitchellsburg, carrying the United States mail; also persons and property. He took the gasoline to Green, collecting the charges going to the railroad, which were 21 cents per 100 pounds, and paid the amount to the company. Green paid Erwin 50 cents for bringing the barrel over, which was 10 cents less than was coming to Erwin on the basis of 15 cents per 100 pounds. There was an arrangement between Green and Erwin that Erwin would haul gasoline over at 50 cents a barrel. This arrangement seems to have grown out of the fact that there is a station on the Louisville & Nashville Rail-

road four miles from Perryville, from which also goods were hauled to Perryville, and Erwin was underbidding to get the hauling on his route. The railroad had for a number of years a published tariff on this class of goods by which the rate was fixed to Harrodsburg at 26 cents and to Perryville at 36 cents. When the rate was first made, about the year 1889, a man named James was running the wagon line, and the rate of 15 cents for the wagon line was then agreed on between him and the railroad company. After three years he sold out to a man named Tatum, and subsequently Erwin came in under Tatum; but the railroad company had no agreement with Erwin. It simply billed the goods to Perryville as before. Erwin received them at Harrodsburg and delivered them at Perryville. The railroad company did not know that Erwin was making any reduction on the 15 cents per 100 pounds allowed for his part of the haul. The goods were not delivered to the consignees at Harrodsburg, but were required to be carried over by the wagon line and delivered at Perryville. The wagon line hauled for everybody that applied, and also carried for a time the express matter, each owner as he came in succeeding to all the rights and privileges of his predecessors. The proof leaves no doubt that the operator of the wagon line was a common carrier. *Robertson v. Kennedy*, 2 Dana, 431, 26 Am. Dec. 466; *Cayo v. Pool* (Ky.) 55 S. W. 887, 49 L. R. A. 251; *Chevallier v. Straham*, 47 Am. Dec. 639. If there had been a railroad operated by another company running from Harrodsburg through Perryville to Mitchellsburg, and the barrel of gasoline had been taken by appellant to Harrodsburg, and by the other company to Perryville, appellant receiving 21 cents per 100 pounds for carrying it, and the other company 12½ cents, it could not be maintained that this would have been a violation of section 215 of the Constitution; for it is well settled that a through rate can be made less than the sum of the local rates between the two points. Were it otherwise, all through freight would have to be hauled at the local rates. *Railroad Company v. Osborne*, 52 Fed. 912, 3 C. C. A. 347; *Tozer v. U. S. (C. C.)* 52 Fed. 918; *Interstate Com-*

merce Commission v. B. & O. R. R., 145 U. S. 276, 12 Sup. Ct. 844, 36 L. Ed. 699; *Parsons v. Chicago, etc., R. R. Co.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231. The fact that the connecting carrier took the goods on a vehicle pulled by horses and not by steam, is not relied on as changing the principle; but it is urged that Erwin had no contract with the railroad company, and that, therefore, he took the goods simply as the agent of the consignee, Green. Without considering whether a contract should be implied from the fact that he came in under James, who made the contract with the railroad company, we rest our judgment on the ground that appellant had received the goods consigned to Perryville, and had, by its bill of lading, agreed for 36 cents per 100 pounds to transport them to Perryville. This was not a shipment to Harrodsburg. There was in such a shipment and the shipment to Samuels at Harrodsburg no discrimination between shippers of the same class of freight between the same points. Appellant had the right to charge less for part of the through haul than the local rate to that point. When it received the goods and undertook to carry them to Perryville, it was its duty to see that they got to Perryville. Its obligations under such a contract were different from those under a contract to carry goods to Harrodsburg. It was a through shipment from Louisville to Perryville. Erwin came in under it, and whether there was any contract, express or implied, between it and Erwin, there was an express contract between it and the shipper that it would transport the goods from Louisville to Perryville. We are therefore of opinion that the facts shown establish no violation of the constitutional provision quoted. If there were anything in the evidence indicating an evasion of the constitutional provision by the billing of the goods to Perryville and the delivery of them at Harrodsburg to the consignee in order to discriminate between shippers, a different question would be presented. But the facts show perfect good faith, and also show that only in this way can appellant carry goods to Perryville.

Judgment reversed, and cause remanded, with directions to dismiss the indictment.

GIDDINGS v. FISCHER.

(Supreme Court of Texas. Dec. 3, 1903.)

APPEAL BOND — CONSTRUCTION — JUDGMENT FOR LAND—PLEA OF LIMITATIONS—DESCRIPTION OF LAND.

1. An appeal bond conditioned that appellant will pay all costs that have accrued in the district court or which may accrue in the Court of Appeals or the Supreme Court should be construed as binding appellant to pay all the costs—those below and those on appeal; this construction making it valid.

2. A judgment for land giving certain surveys as the boundaries, and calling for 160 acres, is erroneous, the north and south boundary surveys not extending as far west as the survey called for as the west boundary, and more than 200 acres being included even if a north and south line be drawn, as the western boundary, from the western points of such north and south surveys.

3. A plea of limitations for 160 acres only of the land sued for, this being claimed on a naked possession, is insufficient, as not describing the land, when it only gives the east and south boundaries.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by D. C. Giddings against F. W. A. Fischer. A judgment for plaintiff was reversed by the Court of Civil Appeals (74 S. W. 85), and he brings error. Reversed.

Searcy & Garrett, for plaintiff in error.
B. L. Aycock, for defendant in error.

GAINES, C. J. This was an action of trespass to try title, brought by the plaintiff in error to recover of defendant in error a tract of land of 524 acres lying in Hardin county, the field notes of which, as set out in the petition, are as follows: "Beginning at the N. E. cor. of a sur. made for F. Bridge of 640 acres; thence W. 1,200 vrs. the S. E. cor. T. & N. O. R. R. sur. No. 297; thence N. 1,041 vrs. stake on E. line of same; thence E. 385 vrs. Kuykendall's N. W. cor.; thence S. 950 vrs. his S. W. cor.; thence E. 1,428 vrs. his S. E. cor.; thence S. 195 vrs. stake on N. line; thence W. 535 vrs. N. W. cor. of same; thence S. 950 vrs. S. W. cor. of same; thence E. 950 vrs. the S. E. cor. of same; thence N. 950 vrs. on the N. E. cor. of same; thence W. 415 vrs. to stake; thence N. 195 vrs. Kuykendall's S. E. corner at 332 vrs. the S. W. cor. B. B. B. & C. R. R. sur.; thence E. 926 vrs. stake an ell corner No. 371; thence S. 1,588 vrs. the S. W. cor. of Q. Shaw sur.; thence E. 950 vrs. S. E. cor. of same; thence N. 110 vrs. S. W. cor. of section No. 372; thence E. 1,067 vrs. stake the S. Laird W. line; thence S. 536 vrs. N. E. cor. of B. Mancha; thence W. 1,860 vrs. stake on Burke's E. line; thence N. 375 vrs. his N. E. cor.; thence W. 1,696 vrs. stake on F. Bridge's E. line; thence N. 1,413 vrs. to the beginning." The defendant in error disclaimed as to all the land sued for, except as to a tract alleged to consist of 160 acres, which is described in his answer as follows: "Bounded on the north by State School Section No. — and

the Q. Shaw survey, on the east by the S. Laird survey, on the south by Benino Mancha, or J. H. Collett survey No. 411 of 951 acres, on the west by I. Bridges Survey No. 1 of 640 acres, which was mistaken for a survey called D. C. Giddings in defendants' deed from W. G. Parker, and the deed from Phillip Cotton, and the deed from Nancy Parker, and the deed from W. D. Laird, and deed from A. S. Fountain to deft. in defendant's chain of title." As to the land so described he pleaded not guilty and the statutes of limitations of five years and of ten years. He also pleaded 10 years' limitation as to "160 acres of land bounded on the east by the S. Laird survey, south by survey No. 411, containing 937 acres, made for J. H. Collett," not otherwise describing it. Upon the trial the plaintiff introduced in evidence a patent from the state of Texas to him for the land described in his petition, and rested his case. Thereupon the defendant introduced the following testimony in support of his pleas of limitation. One George B. Jordan testified as follows: "I am acquainted with the land in controversy, and have lived near it about 27 years. The first man that went into possession of it was one McMeans, and the next man that lived on it was Phillip Cotton. Cotton was followed by W. G. Parker, who sold the land to Laird, and Laird sold the land to A. S. Fountain, and Fountain to the defendant. There is a small improvement on the land—two log houses and four or five acres in cultivation. The improvements were not worth much." The defendant, being sworn in his own behalf, gave testimony as follows: "I am the defendant. I bought the land in controversy from Fountain in 1898. I paid two hundred and forty (\$240.00) for the 160 acres of land. I let Tobe McKinney live on the place the first year after I bought it, and I lived there ever since. I paid the taxes every year after I bought it on the land purchased from Fountain, including the year 1900." Witness, being shown his tax receipts for 1898, 1899, 1900, and redemption receipt for the years 1896 and 1897, paid by witness August 2, 1898, on 160 acres under head of Phillip Cotton, "original grantee," testified that the taxes so paid were paid on the 160 acres he bought from Fountain. Witness testified: On being shown the county map, to point out the land, said he did not know how to find it, or point it out on the map, so as to identify the 160 acres. Witness further testified that A. S. Fountain was in possession when he bought it from him, and Fountain told him that he had had the land in possession from the year 1889. This was all the testimony upon the issue. No map was offered in evidence. The court, after hearing the evidence, instructed the jury to find a verdict for plaintiff "for all the land sued for except five acres," and to "find the five acres for defendant, to include his improvements"; and a verdict was returned in accordance

with that instruction. A judgment also was entered in accordance with the verdict.

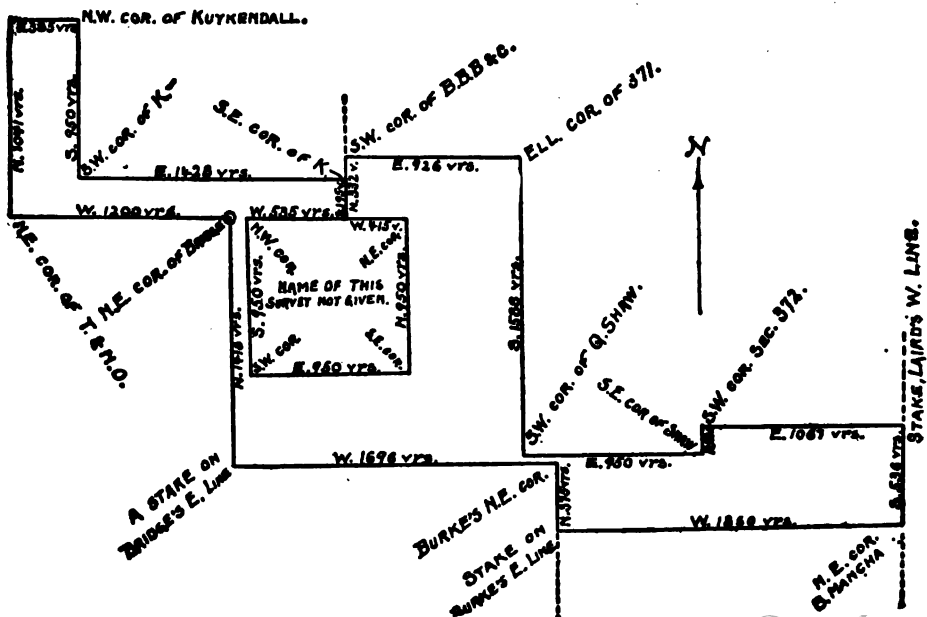
The defendant appealed to the Court of Civil Appeals, and the plaintiff moved to dismiss the appeal for want of a sufficient bond. The motion to dismiss was overruled, and the court proceeded to reverse the judgment of the trial court, and to render judgment for the defendant for "the following described tract of 160 acres of land and all improvements thereon: Situated on the waters of Pine Island Bayou in Hardin county, and known as a part of survey No. 373, bounded on the north by State school section No. — and the Q. Shaw survey; on the east by the Laird survey; and on the south by the Benino Mancha or J. H. Collett survey No. 411, of 951 acres; on the west by F. Bridge's survey No. 1 of 640 acres."

The plaintiff in error first assigns as error the action of the Court of Civil Appeals in overruling his motion to dismiss the appeal. The motion was based upon an alleged defect in the appeal bond. The condition of the obligation was "that said F. W. A. Fischer shall prosecute his appeal with effect, and shall pay all costs that have accrued herein in the district court or which may accrue in the Court of Civil Appeals or the Supreme Court." The condition of the bond in such cases is prescribed by the statute in the following language: "Conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect, and shall pay all the costs which have accrued in the court below, and which may accrue in the Court of Civil Appeals and the Supreme Court." Rev. St. 1895, art. 1400. It is insisted that the use of the word "or" in the place of "and" makes the condition substantially different from that of the bond required by the statute, and that, therefore,

the bond is not sufficient to support the appeal. But we do not concur in the proposition. The condition in the bond is capable of the construction that the obligors bind themselves to "pay all the costs"—as well those which have accrued in the district court as those which may accrue either in the Court of Civil Appeals or the Supreme Court—and may mean the same thing as if the conjunctive conjunction had been used in place of the disjunctive. The condition of the bond being susceptible of the construction that it includes the costs already incurred as well as those which may be thereafter incurred in the appellate courts, and that construction rendering the bond valid, we are of opinion that it should prevail.

No map was offered in evidence, but in order to elucidate the case, we insert a sketch of the land sued for as described by the field notes, given in the petition.

We think the Court of Civil Appeals erred in rendering judgment for the land described or attempted to be described therein. A reference to the sketch inserted in this opinion will show that the land which is bounded on the north by the Shaw and the survey which lies east of the Shaw's survey, on the east by the Laird, and on the south by the Mancha, is bounded on the west for nearly the whole distance by the Burke survey. In order to reach the Bridges, it is necessary to run through a narrow neck about 200 varas in length, and thence about 1,500 varas to his west line. After passing Burke's northeast corner, the land is bounded on the south by his survey. So, after passing Shaw's southwest corner, we have no north boundary given. If the length of the north and of the south boundary lines had been stated, then it may be that the call for the west line may have



been disregarded. But the length of neither of these lines is given. Nor does the call for 160 acres aid the description. The land embraced between the Shaw and the section of the north, the Laird on the east, and the Mancha on the south includes very nearly 200 acres, and, if the Bridge survey be reached, it embraces very much more. The attempted description in the judgment does not fix with any degree of certainty the west line of the land adjudged to the defendant in error, and the judgment is therefore erroneous. In this connection we remark that the defendant's plea of limitation is also insufficient, because it does not describe the land claimed by him. This especially applies to the plea under which he sought to hold 160 acres as a naked possessor. The attempted description in that plea gives only the east and south boundaries of the 160 acres, and leaves it wholly uncertain as to the location of the other boundaries of the tract so claimed. When a party is in possession of land, of which he has held adverse possession for 10 years, and claims under no muniment of title or color of title which fixes the boundaries of his claim, he may, under our statute, assert title to 160 acres without showing actual occupancy of the whole, provided that the tract so claimed embrace the land of which he has had actual possession, and provided further that he describe in his pleading the 160 acres to which he asserts title, and that he prove upon the trial that, while occupying a part, he claimed the whole. Not having described the land in any of his pleas, it seems to us that the defendant has no standing in court. But, at all events, the testimony did not identify the land any more clearly than did the pleas of the defendant. Two witnesses gave testimony for the defendant—one Jordan and himself—and both speak of the land merely as "the land in controversy." But since the defendant disclaimed as to all the land except a part, and failed to describe that part in his answer, neither the court nor jury could know what was the land in controversy.

We may remark further that the testimony as to the continuity of the possession for the 10 years is of a very unsatisfactory character. Jordan merely gives the names of the several occupants, without saying that the occupancy of either was continuous, or that there was no interval between the time one went out of and the other came into possession. The defendant testified as to his own continuous occupancy, but the time of his possession was not sufficient to bar a recovery. This was supplied by the declarations of his vendor, to which no objection was made, but which ought to have been excluded had the proper objection been interposed.

On account of the unsatisfactory character of the evidence we thought the Court of Civil Appeals erred in not remanding the

cause for a new trial. But we find that that is not assigned as error in the petition for the writ of error. But it is assigned that the court erred in rendering the judgment for the 160 acres as described therein, and we concur in that view.

The judgment of the Court of Civil Appeals is therefore reversed, and the cause remanded.

Ex parte McRAE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

CONTEMPT—INFORMATION AS TO JUROR—INVESTIGATION.

1. A mere effort to secure the service of a party to find out how a juror stands in reference to a case then on trial does not authorize punishment for contempt, where the party so employed neither makes an effort to tamper with the juror, nor holds out any inducement to the jury to decide one way or the other, nor talks with the juror about the case.

Habeas corpus on relation of W. H. McRae to secure his release from custody for contempt. Relator discharged.

Bell & McAskill, for relator. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Hon. J. L. Camp, judge presiding of the Forty-Fifth Judicial District, fined relator, McRae, \$100, and ordered him to be confined in jail for three days for contempt of court. Relator sued out a writ of habeas corpus, which was granted by Presiding Judge Davidson in vacation, and made returnable before the court in October. From the agreed statement of facts it is made to appear that on the morning of June 23, 1903, the case of Kraus v. San Antonio & Aransas Pass Railroad Company was called for trial in Judge Camp's court in the city of San Antonio, and the jury was impaneled about 11 o'clock of that morning, and that Thomas and Fowler were jurors in that case, and lived at Elmendorf. J. C. Hopwood testified: That he was constable at Elmendorf, and had known relator, McRae, about 15 years. That he met McRae on Tuesday morning about 9 o'clock, and passed the time of day. That "McRae told me there was an Elmendorf man up here on the jury. Did not tell me his name. He did not ask me any other questions at that time. * * * I next saw McRae between 11 and 12 o'clock that same day, in the corridor of the courthouse, by the side of the elevator. * * * I said to McRae there are two men from Elmendorf on the jury. I had been in the courtroom, and saw Fowler and Thomas on the jury. * * * I said to McRae, 'Well, Will, there are two men on the jury from Elmendorf,' and he said: 'What kind of men are they? Do you think they would give a big verdict against a railroad just because it was a railroad?' And I told him I didn't think they would. I told him they were good, straight

men, and would do what they thought was right. And I told him I would be willing to take either one or both of them on any case against me, either civil or criminal. McRae asked me how I was getting along—what I was making out of my office—and I told him there was but little in it, and commenced talking about the railroad again. He told me there was a man up there asking for damages, and he did not believe he was entitled to any because he did not believe he was hurt; and he said, 'Do you believe they would give him a verdict because he was a poor man?' And I said, 'I don't think they would;' and I told him I thought many times the railroad did get gouged, but that they had always treated me very well, and gave me a pass between Elmendorf station and San Antonio; and Mr. Stevens had just told me they settled for a horse all right without any trouble, and I thought sometimes they got imposed upon. I agreed with him that some time they had been imposed upon. He said this man [Kraus] was trying to impose upon the railroad. He further said that maybe he could help me out with the railroad company. He might get me a pass good from one end of the road to the other, and, if he could do so, he would, and might help me out a little financially. It might not be very much per month, but might be enough to help me out. He said, 'You are living right there, and you might be able to help the company out a little in these claims when they have anything at stake, by calling on the witnesses.' There was nothing else said between McRae and myself at this time. This was about 12 o'clock on Tuesday. I did not see McRae again that day. The next time I saw him was on the 24th, near John Dolan's saloon, about dinner time. * * * I asked him, 'Are they through with that case up there yet?' and he said: 'I do not know. No, I think it will take them all the evening. They are off for dinner.' And he said: 'You see those two jurors from Elmendorf; keep your ears open, and see how they stand, and find out all you can, and let me know. I will see you at two o'clock.' There was no other conversation between myself and McRae at that time. I saw these two jurors after that. I was sitting in those chairs in front of the Southern Hotel, and there were three chairs pretty close together, and I sat down in one chair that was empty, and Mr. Austin White was sitting in another, and a gentleman in the other, I didn't know. Somebody touched me on the back. It was Mr. Fowler, and he said, 'Hello, what are you doing up here, smoking cigars?' And I said, 'I guess you can smoke cigars, just so you smoke Mexican cigars.' That was the Mr. Fowler on the jury. He also inquired about the health of a lady here. He never mentioned the case on trial to me, and I never mentioned it to him. I asked him when he was going home, and he said he thought he would be here a week. * * *

I did not see McRae at 2 o'clock, but saw him after 2. Before I saw him I had been up in the courtroom, and reported this conversation to Judge Camp. I saw McRae after that, and he said it was reported that I had accused him of trying to get me to tamper with jurors; and he said: 'You know I didn't do that. I just told you to keep your ears open. I just told you that as a friend.' Relator, McRae, testified: That he was in the employ of Capt. Napier, of the San Antonio Traction Company, as a sort of private detective around the courthouse watching cases on trial and "boosters," and sometimes "by request of McCluskey would watch a little for the Southern Pacific," etc. That he was around the courtroom off and on during the trial of Kraus v. San Antonio & Aransas Pass Railway. He testified: "I met Hopwood three or four times Monday and Tuesday. Met him in passing. I never stopped at any time to engage him in conversation. I met him the first time in the aisle down by the elevator, on Tuesday, I believe. The next time I met him to speak with him was Tuesday about 12 o'clock, in front of Dolan's saloon. I was in conversation with a couple of friends, and Hopwood walked up, and said, 'Hello, Will;' and I said 'Howdy, Joe, are you here yet?' And he says, 'I don't know when I will get off.' And I says, 'Is that case still going on?' And he said, 'They have not finished it; it will possibly consume all the afternoon.' I said: 'What do you think about it, Joe? I have seen you up there a good deal sitting around listening to all the evidence.' And he said, 'I have not heard it all, and don't know what to think about it.' And I said: 'Can you count on these two men from Elmendorf? Are they honest men and reliable men?' I says, 'While you are standing around here, keep your ears open, and see what you can hear.' And I turned around to go home, and my brother came by about that time and asked me if I was ready to go; and I said, 'Not for a few minutes,' and I started to walk off, and he says, 'What time are you coming back?'—Hopwood says to me, as I started to walk off, 'What time are you coming back?' And I said, 'I don't know; possibly two or three o'clock;' and my friends and I walked off. * * * When Hopwood made the statement to me that these men were both good men, I said, 'That is all the railroad wants is honest men.' * * * I did not ask Hopwood to meet me at 2 o'clock. * * * I did not state to Hopwood in the corridor of the courthouse that I could help him down at Elmendorf, or get the company to help him, by looking after their witnesses and claims, and it would be some little money for him every month. I noticed he came back and forth quite frequently, and I said, 'Do you have to pay fare over the road?' And he says, 'No, I have a pass;' and I says, 'Well, that's good; that saves you a right smart on the many trips you have to make;' and I said there might

be several little things around the depot at Elmendorf, such as Mexicans on their property, and 'you could kind of watch out for it, and possibly they would compensate you for anything you did.' I had reference to the San Antonio and Aransas Pass. I was not a representative of that Aransas Pass, and had no connection with them whatever. * * * I said to Hopwood, 'While you are around, keep your ears open, and see if you hear anything.' I thought possibly some of them would go around talking—some of these 'agents'—and if he was standing around he could hear if any attempt was made or any proposition made to influence them, and, if he heard any improper question or remarks, he could inform me—I mean either to these two jurors or any of them." We do not think this testimony legally authorized the court to find relator for contempt. We do not understand the authorities go to the extent of holding that the bare effort on the part of relator to secure the service of a party to find out how a juror stands in reference to a case then on trial would per se authorize punishment for contempt, unless the party so employed by relator should make some effort to tamper with the juror, or hold out some inducement to the jury to decide one way or the other, or should talk with the juror about the case with the view of ascertaining what position he occupied in reference to the testimony. It must be conceded that the conduct of relator was reprehensible, but we cannot find any decision of any court of last resort authorizing the punishment of relator for contempt of court. We commend the trial court in the diligent effort he has manifested to maintain the purity of the administration of justice, and now enter our hearty disapprobation of the conduct of the relator, and of similar efforts to in any way interfere with the due, decent, and orderly administration of the laws of this state.

Because the conduct of relator does not bring him within any of the known rules authorizing this court to remand him for contempt, he is hereby ordered discharged from custody.

REYS v. STATE

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

On motion for rehearing. Motion overruled.

For former opinion, see 76 S. W. 457.

T. L. Johnson and H. E. Short, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. This case was affirmed at a previous day of the term, and now comes before us on rehearing. In the original opinion we were in error in stating that

the statement of facts as appearing in the record did not have the approval of the judge. *Reys v. State*, 76 S. W. 457. We find on inspection that the judge approved the same, and that said statement of facts is a part of the record in this case. We discussed the questions of law presented in the record, and these were preserved by bills of exception which did not involve a reference to the statement of facts. However, we would observe, as we did in the original opinion, that the statement of facts cannot be looked to to help out a defective bill of exceptions. Consequently the bill of exceptions with reference to the competency of the witness Maria Reys stands exactly where it did before. As said in the original opinion, the bill fails to show that she testified to any fact detrimental to appellant, and the question of her competency or incompetency is therefore immaterial. We have examined the statement of facts carefully as to whether or not the facts are sufficient to sustain the conviction, and, in our opinion, they are ample. The motion for rehearing is accordingly overruled.

CARLISLE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

ASSAULT WITH INTENT TO KILL—AGGRAVATED ASSAULT—EVIDENCE.

1. Evidence of defendant, on trial for assault with intent to kill, that she went to the scene of the difficulty because she was told that assaulted was beating her child; that when she arrived there the child was being beaten; that assaulted came at her with a chair; that she became excited, and thereupon, to protect herself, and with no other intent than to inflict a wound on the arm, she cut assaulted, who had the chair raised with intent to strike—authorized a charge for defendant on aggravated assault, for, if defendant was laboring under such a degree of anger or terror as not to be capable of cool reflection when she stabbed assaulted, her offense could not be of a higher grade.

Appeal from District Court, Galveston County; J. K. P. Gillaspie, Judge.

Juliette Carlisle was convicted of assault with intent to murder, and appeals. Reversed.

John Grotghar, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of assault with intent to murder, and her punishment assessed at confinement in the penitentiary for a term of two years.

The evidence for the state makes out a case of assault with intent to murder. Appellant's testimony is substantially as follows: "On March 27th I cut Mrs. Foshet twice with a knife. The way the difficulty came up was this: Johnny Green called me to go over to Mrs. Foshet's—that they were beating my little girl. I went over there, and asked Mrs. Foshet what they were beating my

little girl for. Mrs. Foshet had the little girl by the back of the neck, dragging her downstairs; and, when I came in through the barroom, I said: 'Please go upstairs and get that ten cents they owe my little girl.' Mrs. Foshet said to me: 'You get out of here, you damned black bitch! You can take that ten cents out of what you owe me.' At this time I was excited, because they had been beating and pulling my little girl around. She is my sister's child, and I had raised her from infancy, and had worked for different women around the house, and I never heard any complaint about her. At that time Mrs. Foshet said to me, 'You get out of here, you damned black nigger bitch!' and came at me with a chair raised, and that is the time I cut Mrs. Foshet. I was down in the barroom, coming out, when Mrs. Foshet was coming at me with a chair. When I went over there I didn't have time to put on my shoes—just slipped on a pair of toe slippers—and one of them come off as I came out. The knife never fell out of my hands. The knife shown me by counsel is the knife I used—the large blade. The blade is sharp. I was excited at the time, though I never had any trouble with Mrs. Foshet before. I did not try to cut Mrs. Foshet at any place else than on the arms, because she had the chair raised up to hit me with it, and I cut her to protect myself. I saw marks on the back of the neck of my little girl. When I went over to Mrs. Foshet's house, the parties assaulted me, and then Mrs. Foshet assaulted me with a chair." Appellant, in her motion for new trial, insists that the court should have charged on aggravated assault. We are of opinion the testimony detailed authorizes such a charge. If appellant was laboring under such degree of anger, rage, resentment, or terror as rendered her mind incapable of cool reflection, and under such condition of mind she stabbed the injured party, it could not be a higher grade of offense than aggravated assault. The court erred in failing to so charge.

For the error pointed out, the judgment is reversed, and the cause remanded.

REDD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

INTOXICATING LIQUORS—ILLEGAL SALE—INSTRUCTIONS—MODIFICATION—APPEAL—EXCEPTIONS.

1. A conviction in a criminal case will not be reversed because the court called the case out of its regular order unless the bill of exceptions shows an abuse of discretion.

2. Alleged error in admission of evidence cannot be reviewed in the absence of a bill of exceptions thereto.

3. In a prosecution for violation of the local option law, in which there was evidence that witness and others made up a purse to buy

whisky of defendant, a request to charge that if the money was paid by another than the person alleged in the indictment to have made the purchase, and the liquor was also turned over to another person, the jury should acquit, was properly qualified by requiring that the jury should also find that the person to whom the sale was alleged to have been made did not pay any money to defendant.

Appeal from Smith County Court; S. A. Lindsay, Judge.

John Redd was convicted of violating the local option law, and appeals. Affirmed.

T. O. Woldert, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail.

The first bill of exceptions complains that the court erred in calling this case out of its regular order. The bill is quite voluminous, but a careful inspection of the same does not show that the trial court abused his discretion. Unless the bill shows this abuse, this court is not authorized to reverse on that account. *Goodwin v. State* (Tex. Cr. App.) 73 S. W. 804.

Bill No. 2 embodies a motion for postponement on the part of appellant for want of the testimony of a witness by the name of Etheridge. The application does not show any diligence, as required by law; nor was Etheridge summoned as a witness.

The sixth ground of the motion for new trial complains that the court erred in not permitting W. B. Beachum to testify that Wilson told him that he hid Shipp during the time he was hiding. There is no bill reserved, and hence this cannot be revised.

Appellant requested the following charge to be given to the jury, to wit: "The court charges you that the indictment charges that the sale was made to Wesley Shipp, and if you believe from the evidence that the money was paid by Erwin Etheridge, and the liquor was turned over to Doc Gurley by defendant, you will acquit defendant." Which charge the court gave with this qualification: "If you also find that Wesley Shipp did not pay any money to defendant for any part of the whisky." This charge, though not accurately worded, is correct, in view of the testimony. Prosecuting witness Shipp testified that he and other parties made up a purse to buy some whisky from appellant, and that he gave appellant 85 cents of the amount required. Under this testimony, the qualification to the charge was proper.

The evidence supports the verdict of the jury. The judgment is affirmed.

On Rehearing.

(Dec. 18, 1903.)

The judgment was affirmed at a previous day of this term, and is now before us on rehearing. Appellant insists that the court erred in holding the trial court properly overruled

¶ 2. See Criminal Law, vol. 15, Cent. Dig. §§ 2662, 2816.

his motion for postponement on account of the absence of Etheridge, in stating he was not "summoned as a witness," because as a matter of fact the record shows the witness was summoned. The motion for postponement is lengthy, and in reading it we find we were in error in the original opinion in stating he was not summoned. However, in view of the evidence adduced on the trial, we do not believe the testimony of the absent witness, Etheridge, as contained in the motion for postponement, is probably true. The evidence clearly establishes the sale on the part of appellant to prosecuting witness, and, if the witness were present and would testify to the conversation as insisted by appellant, we do not think it would be probably true, or that it would have affected the trial. This being the condition of the record, there was no error in the court's action refusing the postponement, and the conclusion reached in the original opinion is correct. We have again reviewed appellant's other assignments, and find no error in the record.

The motion for rehearing is overruled.

DANIELS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

COUNTY ATTORNEY PRO TEM.—MISDEMEANOR —ELECTION.

1. Under the direct provisions of Code Cr. Proc. 1895, art. 38, a county attorney pro tem. may be appointed.

2. In a prosecution for a misdemeanor, the state cannot be compelled to elect upon which count of the information it will proceed.

Appeal from Smith County Court; S. A. Lindsay, Judge.

Dock Daniels was convicted of an aggravated assault, and appeals. Affirmed.

N. A. Gentry, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an aggravated assault, the penalty assessed being a fine of \$25.

The first ground of the motion contends that the court erred in refusing to quash the affidavit and information on the ground that J. W. Baird, as county attorney pro tem., instituted and presented the affidavit and information. Appellant insists that there is no law authorizing a county attorney pro tem. The action of the county attorney pro tem. was clearly authorized by article 38, Code Cr. Proc. 1895. See, also, *State v. Lackey*, 35 Tex. 357; *State v. Gonzales*, 26 Tex. 197.

Appellant also insists that the court erred in refusing to require the state to elect upon which count it would seek conviction. This is a misdemeanor, and such election was not required. *Stebbins and McFarland v. State*, 31 Tex. Cr. R. 296, 20 S. W. 552.

It is also urged that the court erred in charging the jury "that an assault becomes aggravated if committed by the use of a dangerous weapon, or the semblance thereof, in an angry or threatening manner." The court did not so charge, but instructed the jury that, under such circumstances, appellant would be guilty of a simple assault.

The evidence is sufficient to support the verdict of the jury. The judgment is affirmed.

WILLIAMS v. STATE.*

(Court of Criminal Appeals of Texas. Oct. 28, 1903.)

INTOXICATING LIQUORS — VIOLATION OF LOCAL OPTION LAW—INTENT—KNOWLEDGE—INSTRUCTIONS.

1. The sale of intoxicating liquors in a local option district, except on prescription or for sacramental purposes, is a violation of the law, regardless of the intent of the person making the sale.

2. On a prosecution for the sale of intoxicating liquors, evidence that defendant had no knowledge that the liquors sold would intoxicate was inadmissible, defendant's intent being immaterial.

3. An instruction on a prosecution for selling intoxicating liquors is not defective for failing to define a sale.

4. An instruction on a prosecution for the sale of intoxicating liquors which stated that defendant stood charged by indictment with the offense of selling intoxicating liquors is not bad for failing to make defendant's guilt depend on his having unlawfully sold intoxicating liquors, the indictment alleging that the sale was unlawful.

5. An instruction on a prosecution for the sale of intoxicating liquors that if the jury believed that defendant, on or about a specified date, or at any time within two years of a specified date, sold intoxicating liquors, they should find him guilty, was not an instruction on the weight of the evidence.

6. An instruction on a prosecution for the sale of intoxicating liquors in violation of the local option law is not defective for failing to explain to the jury what constitutes a violation of the law.

Appeal from Delta County Court; John R. Hatcher, Judge.

G. W. Williams was convicted of violating the local option law, and appeals. Affirmed.

Norman Phillips, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail.

Appellant requested the court to charge the jury as follows: "No mistake of fact excuses one committing an offense, but, if a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of no offense. The mistake as to fact which will excuse under the preceding article must be such

*Rehearing denied December 9, 1903.

¶ 2. See *Indictment and Information*, vol. 27, Cent. Dig. § 435.

¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 161.

that the person so acting under a mistake would have been excusable had his conjecture as to the fact been correct, and must also be such mistake as does not arise from a want of proper care on the part of the person committing the offense." This is a substantial copy of articles 46, 47, Pen. Code 1895. But we have held that the sale of intoxicating liquor in a local option district, except upon prescription or for sacramental purposes, is a violation of the law, regardless of the intent or purpose for which it was sold, and the intent of defendant is irrelevant and immaterial. *Petteway v. State*, 36 Tex. Cr. R. 97, 35 S. W. 646; *Pike v. State*, 40 Tex. Cr. R. 613, 51 S. W. 395; *Allen v. State*, 1 Tex. Ct. Rep. 105, 59 S. W. 264; *McDaniel v. State*, 3 Tex. Ct. Rep. 783, 65 S. W. 1068.

Bill of exceptions No. 1 complains that, "while defendant was testifying as a witness in his own behalf, defendant's counsel asked this question: 'At the time you bought the ginger and pepsin which you sold Tony Click, or at any time before you sold it to E. E. Click, as testified to by him, had you any knowledge that the same would intoxicate, or that it was in violation of the law to sell it?' And defendant would have answered that he had not." Upon objection being made by the state, this testimony was excluded by the court. Under the above authorities, the ruling of the court was correct.

The second bill complains that, "while defendant was testifying, counsel asked him, 'When you sold Tony Click the ginger and pepsin, had you heard of any one being intoxicated from the use of it?' The witness would have answered that he had not." The state objected, and the court sustained the objection. In this there was no error, under the authorities cited above.

The court charged the jury as follows: "You are instructed that G. W. Williams stands charged by indictment with the offense of selling intoxicating liquors to E. E. Click on or about the 1st day of December, 1901, in Delta county, Texas, said indictment being returned and filed on the 18th day of January, 1902, to which the defendant pleads 'Not guilty.' Defendant is presumed to be innocent until his guilt is established by legal evidence, and, in case the jury have a reasonable doubt as to the defendant's guilt, you will acquit him. Now, if you believe from the evidence, beyond a reasonable doubt, that G. W. Williams did, in Delta county, Texas, on or about the 1st day of December, 1901, or at any time within two years prior to the 15th day of January, 1902, and on or before the 1st day of December, 1901, sell to E. E. Click intoxicating liquor, as charged in the indictment, you will find the defendant guilty." To which charge defendant excepted (1) because it does not define to the jury what constitutes a sale; (2) because it does not tell the jury that defendant stands charged with any offense against the law, and in not defining to the

jury the offense defendant is charged with. It is not necessary that the charge should define a sale, unless that matter becomes an issue under the facts, and in misdemeanors such charge must be asked. Neither is the objection well taken. Appellant also insists that the charge is erroneous because it does not make defendant's guilt depend upon his having "unlawfully" sold intoxicating liquor. The charge says "that he is charged with selling intoxicating liquors, as charged in the indictment." The indictment makes said allegations. We do not think the charge is upon the weight of the evidence. Nor is there any error because it fails to define or in any manner explain to the jury what constitutes a violation of the local option law.

The fifth bill of exceptions insists that the court erred in not permitting defendant to prove by Dickason that the Paris Medicine Company, of Paris, Tex., is a reputable firm. The bill does not show in what way this would be germane to the prosecution against appellant.

No error appearing in the record, the judgment is affirmed.

GIPSON v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1903.)

SLANDER — EVIDENCE — DECLARATIONS — ARGUMENT OF COUNSEL—VARIANCE.

1. Admission of evidence, on a trial for slander, as to how prosecutrix was treated and received in society at the time of the trial, is error.

2. Witness may not testify that he made certain declarations, defendant not having been present.

3. Argument of state's counsel that prosecutrix stood well with the good people, notwithstanding the slanderous report, is error; evidence of such standing having been erroneously admitted.

4. Defendant's counsel having gone outside the record in argument, the state's attorney, especially with the consent of defendant's attorney to say what he pleased, may go outside the record in replying.

5. There is no material variance between an indictment charging that defendant stated he had intercourse with prosecutrix, and evidence that he said he and another had intercourse with her.

Appeal from Coleman County Court; B. F. Rose, Judge.

Dock Gipson was convicted of slander, and appeals. Reversed.

F. L. Snodgrass and T. R. Austin, for appellant. Woodward & Baker and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of slander, and his punishment assessed at a fine of \$100, and 30 days' confinement in the county jail. This is a companion case to that of *Will Bowers v. State* (decided at the present term) 75 S. W. 299. Several of the questions raised by appellant were pass-

¶ 4. See Criminal Law, vol. 22, Cent. Dig. § 1681.

ed upon by us in that case, and will not be again reviewed here.

While the witness Robe Cope was on the stand for the state, he was asked what was the general reputation of Willie Conner, prosecutrix, at this time, notwithstanding the slanderous reports that had been circulated. Appellant objected on the ground that the same was not competent, in that the general reputation should be confined to the time of the alleged slander and prior thereto; that to permit the answer would be placing before the jury the opinion of the community upon the alleged slander. Thereupon the state asked said witness the following question: "How the said Will Conner was treated and received by the best people in the community at this time?" Witness answered that prosecutrix was received in the best society in that community at this time; was received into his family as a visitor and guest, and the family of his son Early Oope; and that they visited the said Willie Conner. This testimony should not have been admitted. *Bowers v. State*, supra. The same character of testimony was elicited from the witness Milt Woodward.

While the witness Will Bowers was on the stand, the state was permitted to ask him, "Is it not a fact that, in talking to Walter Burroughs about the reports concerning Willie Conner, that you said, in substance, to Walter Burroughs, 'Dock ought not to have told it,' and that 'old man Conner ought to shoot your heads off,' or, if you were old man Conner, you 'would shoot your heads off'?" Witness stated that he said something in substance to that effect. Appellant objected to this testimony on the ground that defendant was not present, it was hearsay, and not binding on defendant, etc. These objections are well taken.

Appellant also objected to the argument of the state's counsel, J. K. Baker, Esq., urging the fact before the jury that prosecutrix stood well with the good people of the community, notwithstanding such slanderous reports. Exception was properly reserved. Clearly, this was error, inasmuch as the testimony upon which the argument was predicated was improperly admitted.

The ninth bill of exceptions insists that the private prosecutor, J. O. Woodward, Esq., "in closing the argument to the jury, and in answering the argument of defendant's counsel with reference to the refusal of Willie Conner, prosecutrix, to submit to an examination by the physician, which refusal defendant's attorney had insisted was made because she was afraid of such examination, and that the same would prove she was not virtuous, said Woodward, among other things, said to the jury that, when the motion was made to have her examined, he talked to Willie Conner, and she, with tears in her eyes, said to him, 'If the jury cannot believe me without an examination, I will not submit to an examination.'" The court

appends to the bill this explanation: "Attorneys for defendant had a great deal to say to the jury, why did not Miss Willie Conner consent to be examined? I challenge these gentlemen to explain to the jury why she would not be examined; and the attorney J. O. Woodward, before he began his argument to the jury, and while the attorneys were arguing the question before the jury of Miss Willie Conner not submitting to an examination, arose and stated to the court that the question of why the examination was not allowed had been passed on by the court, and was not a matter for the jury; but, if the attorneys for defendant were permitted to go outside of the record in their argument in the matter, he, the said Woodward, claimed the right to answer their argument, to which counsel for defendant said: 'All right. Just answer and talk as much as you please.'" In view of this explanation, we are of opinion that the attorney for the state had a right to answer the argument made by appellant's counsel. It is a well-known rule that appellant's counsel cannot go out of the record, and the state be precluded from answering such argument.

We do not deem it necessary to pass upon the other questions raised. For the errors discussed, the judgment is reversed, and the cause remanded.

On Rehearing.

(Dec. 9, 1903.)

The judgment was reversed at the Austin term, and now comes before us on appellant's motion for rehearing. He calls our attention to the fourth bill of exceptions, to the effect that, after witness Walter Burroughs had testified for the state, defendant moved the court, in writing, to exclude certain portions of his testimony, to wit, that defendant had told him, in talking about Willie Conner, "he and Will Bowers had fucked and friggd her." His objections were that said alleged proved slander is a variance from the slander alleged in the indictment, and is a different slander, in material respects, from that alleged, and is in different language to that alleged and imputed in the information. The information charges that "Dock Gipson did then and there orally, falsely, and maliciously and falsely and wantonly impute to one Willie Conner * * * a want of chastity, in this: he, the said Dock Gipson, did then and there, in the presence and hearing of Walter Burroughs and divers other persons, falsely, maliciously, and wantonly say of and concerning the said Willie Conner that he, Dock Gipson, had friggd and fucked her, the said Willie Conner," etc. There is no variance between the allegations in the information and the proof. The mere fact that witness testified that defendant imputed to the female a want of chastity by having intercourse with appellant and Will Bowers would not be

a variance from the information, charging that appellant imputed a want of chastity to the female by having intercourse with himself alone. The information charges that appellant said he had said intercourse. The proof is that he stated that he and Will Bowers had said intercourse, as shown by this bill of exceptions. Certainly this would not constitute a variance, since the statement of the witness corresponds with the allegations of the information, and, in addition, shows that appellant said that Bowers also had such intercourse. It is not different language—is not a different slander. Therefore the court did not err in refusing to exclude the testimony. Of course, as appellant insists, where a certain slander is alleged in the information, the proof must show that particular character of slander, or else there would be a fatal variance, but such is not the case here.

Appellant insists that the court should pass upon the language employed by the prosecuting attorney. We did not then nor now deem it necessary to do so, in view of the disposition of the case, as it will not occur on another trial. It is not proper for the prosecuting attorney to state facts in argument that are not in the record, and, under a long line of authorities discussing this matter, it has been so held.

The motion for rehearing is overruled.

ALLEN v. STATE.*

(Court of Criminal Appeals of Texas. Nov. 11, 1903.)

MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.
1. Evidence in a prosecution for homicide held to sustain a conviction of manslaughter.

Appeal from District Court, Shelby County; Tom C. Davis, Judge.

Will Allen was convicted of manslaughter, and appeals. Affirmed.

D. M. Short & Sons, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of five years.

On the night of July 10, 1903, about 12 or 1 o'clock, appellant was at his home, when deceased, with other parties, came to his house. Appellant shot at the crowd, and killed deceased. Odum testified for the state that defendant told him he shot deceased. He stated that the night before, about 12 or 1 o'clock, several boys came near his house and were talking, and he walked out, and asked them what they were doing, and they replied, "It is none of your business;" that defendant said to them, "I will see whether it is any of my business," and went into the house and got his shotgun, came

back, and shot into the crowd, and they broke to run, and he shot at one of them having on a white shirt. Witness asked defendant if the boys were doing anything to him, and he said, "Doing nothing, but standing there talking to each other." This witness found the deceased lying on his back, dead, at a distance about 50 yards from the house of defendant. He was shot in the back of the head and in the back. Defendant, after being duly warned, made a statement of the killing to Hart Winn, stating that three or four parties were standing out near his house talking, and he asked them what they wanted. They replied, if he did not make the women in his house get out of the house they would go in there and drive them out, "and they started on me, and I ran in the house and got my gun, and came and fired at them." He did not tell witness Winn about the shooting of the second shot. Defendant said this occurred about midnight, after all his people had gone to bed. He also stated that his wife and sister and another woman were in the house at the time. The other circumstances of the case clearly show and corroborate the confession of defendant that he was the party who did the shooting. The charge of the court is very voluminous, presenting both phases of murder, manslaughter, and self-defense, and defendant's right to defend against the contemplated invasion of his home. The latter charge is repeated, as appellant insists, in perhaps more than two instances in the charge. But the charge, when taken as a whole, in our opinion, is a proper presentation of the law of this case. Appellant's assignments of error have been carefully reviewed seriatim, and in the light of the charge of the court we do not think any of them are well taken. The evidence, as indicated by the first witness, would authorize the jury to find the verdict against appellant for manslaughter. They have seen fit to do so, and we will not disturb their finding.

No error appearing in the record, the judgment is affirmed.

MATHEWS v. STATE.*

(Court of Criminal Appeals of Texas. Nov. 11, 1903.)

MURDER—ADMISSIBILITY OF EVIDENCE—DYING DECLARATIONS—LETTER—IDENTIFICATION—APPEAL—BILL OF EXCEPTIONS—NEW TRIAL—CUMULATIVE EVIDENCE.

1. A bill of exceptions in a murder case, showing that the state's counsel offered a calendar to show on what day of the week a certain day of the month fell, and an objection that "it was a leading question, irrelevant, tended to prove no issue in the case, and calculated to mislead the jury," presents no error, the grounds of the objection not being shown.

2. The evidence of state's counsel in a murder prosecution as to a dying declaration of de-

*Rehearing denied December 9, 1903.

*Rehearing denied December 9, 1903.

cedent made a few moments after the infliction of the fatal wound, when decedent was conscious of approaching death, and not in answer to any question of the witness, is admissible in a murder prosecution.

3. In a murder case, a letter written by defendant to decedent, and identified as being in defendant's handwriting, signed and posted by him on the day of its date, is sufficiently identified to be admissible.

4. In the absence of a bill of exceptions the action of the court in permitting a juror to remain, who is prejudiced against accused, cannot be reviewed.

5. The propriety of admitting dying declarations in a murder case cannot be reviewed in the absence of a bill of exceptions.

6. Newly discovered cumulative evidence of defendant's insanity does not require the granting of a new trial of a murder case.

Appeal from District Court, Lamar County; Ben H. Denton, Judge.

G. W. Mathews was convicted of murder in the first degree, and appeals. Affirmed.

R. P. Lewis, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life.

Appellant's first bill of exceptions is that the court erred in permitting state's counsel to offer a calendar for the inspection of the jury to show what day of the week the 3d and 7th days of February came. The objection to this was that it was a leading question, irrelevant, tended to prove no issue in the case, and calculated to mislead the minds of the jury. We can readily see that the calendar could be proper testimony, and the objections of appellant are not statements of the existence of facts. There is nothing in the bill to show that the question was leading or was irrelevant, or that it did not prove an issue.

Bill No. 2 complains that while R. L. Lattimore was on the stand he was asked if he saw deceased before her death, and if he asked her any questions, and if she made any statements to him in reference to how she was wounded. Witness answered: "Yes; he attended Ila May Mathews in Dr. Lindsay's office the day she was wounded, and he questioned her concerning how she got stabbed. Deceased told him that defendant stabbed her once in the back and once in the breast, and that she was going to die." To this bill the court appends the following explanation: "Counsel for the state, Lattimore, asked deceased no question, but heard her statement, which was that she knew that she was going to die, and talked about dying, and was perfectly conscious of approaching death, and the statement made by her was not in answer to any question propounded to her, and the facts showed it was only about four to six minutes after deceased was cut until the statement was made." The explanation

clearly shows that the statement is admissible.

The third bill complains that the state offered in evidence a letter purporting to have been written by defendant to deceased prior to the tragedy. Appellant objected because the letter has never been identified as the letter written by defendant to deceased; that it had never been proven who wrote it; that it was irrelevant, and, if admitted, would prejudice the minds of the jury against defendant. This bill is qualified by the court stating "that the letter was positively identified as being the handwriting of defendant, was signed by him, and the facts further showed defendant had posted the letter at Atlas on the day it was dated." The testimony was clearly admissible.

Appellant insists in his motion for new trial that the verdict of the jury is contrary to the law and the evidence; and that Frank Baker was permitted to remain with the jury, said Baker being prejudiced against defendant. We think the evidence is amply sufficient to support the verdict. There is no bill of exceptions reserved to the action of the court permitting Frank Baker to remain with the jury, and in the absence of the bill or affidavits we cannot review this question. Appellant also complains of the admission of dying declarations, which cannot be considered in the absence of bill of exceptions.

Appellant further insists that the court erred in refusing to grant a new trial on the ground of newly discovered testimony, which he proposed to show by Maud Parish and Wiley Mays, both living at Hugo, Ind. T., W. T. Scruggs, of Lamar county, and J. M. Turner, of Delta county. Attached to the motion is the affidavit of Turner, who states that he will swear appellant is crazy and is of unsound mind. Scruggs states in his affidavit that he has known appellant, and has had opportunity to see his conduct for the last three years; that he was with appellant just before the day of the killing, at his home in Lamar county; that defendant acted very strange, would ask foolish questions, would sit and repeat the same words, etc. Wiley Mays makes affidavit that she was well acquainted with defendant, had known him for 30 years, and had seen him often within the last 12 months; that she believes him insane; that he came to her house at Hugo, Ind. T., early in the day of February 3, 1903, and looked wild out of his eyes; that he did not seem to know witness; that he had been roaming around in the woods, lost, and did not know where he was; said he wanted to see witness' husband. Witness saw defendant and her husband talking together a few minutes before he (defendant) came to where she was. Maud Parish files an affidavit that she had known defendant for about 20 years, and had frequent opportunities to observe his conduct for the last 5 years; that she believed him crazy, and

¶ See Criminal Law, vol. 15, Cent. Dig. § 2323.

a man of unsound mind, etc. Various and sundry witnesses testified to insanity of defendant on the trial of this case, and this testimony would be merely cumulative of that adduced upon the trial, and, being cumulative, it would be no ground for granting a new trial on account of newly discovered evidence.

The verdict of the jury is supported by the evidence, and, no error appearing in the record, the judgment is affirmed.

LEACH v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

RAPE—INSTRUCTIONS ASKED—FEIGNED RESISTANCE—APPLICABILITY TO ISSUES—CRIMINAL LAW—CONTINUANCE—ABSENT WITNESSES.

1. In a prosecution for rape an application for a continuance on the ground of absent witnesses, who were to show an alibi, was properly denied where, by defendant's own witnesses, two of the absent ones were shown not to be cognizant of the facts set up to show the alibi, and the statements of the others were of too general a character to merit consideration.

2. In a prosecution for rape, evidence showed that prosecutrix was about 19 years of age, weighed about 95 pounds, and was sickly. Defendant was a strong and robust man. Prosecutrix testified that she used all resistance in her power; that she screamed until defendant threw her down and stopped her mouth. She informed her mother as soon as she reached home. A physician, who examined her next morning, testified that copulation could not have been with consent. The court charged, defining necessary force under the statute, and that, unless such force was used, the jury should acquit, and gave defendant the benefit of reasonable doubt in that connection. *Held*, that under Code Cr. Proc. art. 723, providing that judgment shall not be reversed except for prejudicial error, the refusal to instruct on feigned resistance was not ground for reversal.

Appeal from District Court, Harrison County; Richard B. Levy, Judge.

Wesley Leach was convicted of rape, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for rape, the penalty assessed being five years in the penitentiary.

The only evidence in the record in regard to the rape was introduced by the state. Appellant's evidence was to establish an alibi. In support of this theory he asked for a continuance on account of the absence of several witnesses, two of whom, to wit, Adeline Young and Sallie Thomas, are shown by his own witnesses not to be cognizant of the facts set up to show alibi. The statements of the remaining witnesses are of too general character to be considered. There was no error in the court overruling the application for continuance.

Appellant requested charges submitting the issue of feigned resistance on the part of prosecutrix. This is not suggested by the

testimony. The girl was about 19 years of age, and weighed about 95 pounds, and was sickly. Defendant was a strong, vigorous, robust man. She testified that she used all resistance in her power; that she screamed until appellant threw her down and placed his hand over her mouth, thus preventing any further exclamation. She further testified to using all resistance she could. The physician who examined the girl the following morning testified that from his examination the copulation could not have occurred with consent, stating the reasons therefor. As soon as the girl reached home, she informed her mother, and the arrest of appellant followed. The court properly defined the necessary force required by the statute, and instructed the jury, unless they believed this, they should acquit, and gave defendant the benefit of a reasonable doubt in this connection. Taking all the circumstances of the case and the charges given, we do not believe error occurred by reason of the court's failure to give special charges requested. Article 723, Code Cr. Proc.; *Barnett v. State*, 42 Tex. Cr. R. 302, 62 S. W. 765.

The judgment is affirmed.

LOWE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

HOMICIDE—CIRCUMSTANTIAL EVIDENCE—DEGREE REQUIRED.

1. To sustain a conviction of murder on circumstantial evidence, the evidence must be of that conclusive character which excludes every other reasonable hypothesis than defendant's guilt.

Appeal from District Court, McLennan County; Sam R. Scott, Judge.

Ike Lowe was convicted of murder in the first degree, and appeals. Reversed.

Rice & Bartlett, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death. The only ground of the motion for new trial that we deem necessary to review is the alleged insufficiency of the evidence to sustain this conviction. The evidence tending to establish the guilt of appellant is purely circumstantial, and, in our opinion, the same is not sufficient to authorize the conviction. Where the evidence is circumstantial, it must be of that conclusive character which excludes every other reasonable hypothesis than the guilt of appellant. The evidence before us in this record does not do so, but shows as strong a circumstantial case against Isaiah Granger as it does against this appellant. Therefore we hold that the evidence, not excluding every other reasonable hypothesis than the guilt

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1261.

of appellant, and not being of that conclusive character required by the rules of circumstantial evidence, is wholly insufficient, and the judgment is accordingly reversed, and the cause remanded.

GOLDWATER v. STATE.*

(Court of Criminal Appeals of Texas. Nov. 11, 1903.)

LOCAL OPTION LAW—VIOLATION—SUFFICIENCY OF EVIDENCE—WITNESS CALLED BY COURT—BINDING CHARACTER OF TESTIMONY.

1. A court trying a prosecution for violation of the local option law is not bound by the testimony of a witness called by itself, who contradicts the testimony of a previous witness testifying to an illegal sale, but may still pronounce a conviction.

2. Evidence in a prosecution for violation of the local option law held sufficient to sustain a conviction, though the witness, having furnished the money for the purchase, witnessed the transaction from a distance.

Appeal from Smith County Court; S. A. Lindsay, Judge.

Frank Goldwater was convicted of violating the local option law, and appeals. Affirmed.

F. J. McCord, B. B. Beaird, and N. A. Gentry for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail; hence this appeal.

The only question presented is as to the sufficiency of the evidence to sustain the conviction. The case was tried by the court without the intervention of a jury. Two witnesses were introduced. Will Shelton testified substantially that he and Claude Story were going to the country in a buggy. When near appellant's place, which is in the suburbs of Tyler, he says that Story asked him to give him 50 cents with which to get some whisky; that he gave him the money, and stopped the buggy near the front of appellant's store. Story got out and went into the store, and witness saw him talking to appellant and buying some things from him, but could not hear what he said. Saw Story give appellant some money, and then Story came back, and brought four half pints of whisky, some apples, oranges, bananas, candy, cigars, and smoking tobacco. That witness was in view of the store, and saw no one in there except Story and appellant. The latter was watching the store. That he saw Story pay defendant the money and get his packages. He then brought them out to the buggy, the bottles being in a paper sack. The things were put into the buggy, and he and Story afterwards drank the whisky. The record shows that after this witness

had testified, being placed on the stand by the county attorney, the court, of its own motion, called Story to the stand; that Story stated substantially that he stopped at Goldwater's, and bought some apples, oranges, bananas, candy, cigars, and smoking tobacco, the whole costing \$1.25 or \$1.50; that he brought these packages to the buggy, and then went back to get some more smoking tobacco, and he asked Goldwater if he could tell him where he could get some whisky; that he wanted some, and that he had ordered some from Mineola, but that it had not come. Then appellant told him he had a little, and would divide what he had with him, and that he gave him some whisky; that he did not know whether appellant put the whisky in one bottle or two, that he knew he did not give him four bottles. He further admitted that he had made a written statement to the county attorney concerning the transaction, but if he said therein that he paid anything for the whisky that he made a mistake; that he paid nothing for it. Appellant contends that the court was bound by the testimony of the last witness, he being introduced by the court, and that his evidence negated a sale. There is no bill of exceptions to this action of the court. His testimony was before the court as that of any other witness; and the court, like the jury, was authorized to believe either witness, and, if the testimony of Shelton is sufficient to sustain the verdict, the conviction must stand. We think the evidence of Shelton establishes a sale. He furnished the money with which to purchase the whisky. He witnessed from a short distance the transaction between appellant and Story, which ultimated in Story bringing the whisky, as he states, to the buggy, with the other bundles of fruits and confectionery. Story admits getting the whisky, but he claims appellant gave it to him on his suggestion that he had some whisky at Mineola. As a most material fact bearing on the transaction and tending to support the veracity of the witness Shelton, Story makes no account of his possession of the money he had from Shelton. If he did not pay money out for the whisky, we would certainly expect to find him, as an honest man, explaining the matter to his comrade, and return the money to him. This he did not do. The circumstances, as narrated by Shelton, in our opinion unquestionably establish a sale. Hartgraves v. State (Tex. Cr. App.) 39 S. W. 661.

The judgment is affirmed.

TAYLOR v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION LAW—PROSECUTION—INSTRUCTIONS—AGENCY—SALE—EVIDENCE—SUFFICIENCY.

1. In a prosecution for violating the local option law, a charge that the jury must believe beyond a reasonable doubt that defendant sold

*Rehearing denied December 9, 1903.

the whisky before they could convict, and then, after charging on the defense of agency for the purchaser, that, if they had a reasonable doubt as to defendant's guilt, they would acquit, sufficiently presented the question of agency and reasonable doubt in connection therewith.

2. In a prosecution for violating the local option law, evidence as to the sale examined, and held sufficient to sustain a conviction.

3. That defendant bought whisky from A. prior to an application to him from B. to get the whisky, and that defendant let B. have the whisky in consideration of money paid him, is evidence of a sale by defendant to B.

Appeal from Smith County Court; S. A. Lindsay, Judge.

Otto Taylor was convicted of violating the local option law, and appeals. Affirmed.

N. T. Gentry, B. B. Beaird, and F. J. McCord, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$40 and 30 days' confinement in the county jail.

Appellant contends that the court committed an error in refusing his requested charge on agency; that is, to the effect that, if the jury believed appellant in the sale of the whisky acted as the agent of the purchaser merely, to acquit him. An examination of the court's charge we believe shows that this question was sufficiently presented to the jury, and it was not necessary to give the requested instructions. The only difference we see in respect to the two charges is that in the requested charge the reasonable doubt was coupled directly with it, while this was not so with reference to the court's charge. However, the court did charge that the jury must believe beyond a reasonable doubt that appellant made a sale of the whisky before they could convict him, and then, after charging his defensive matter of agency, he instructed the jury, if they had a reasonable doubt as to defendant's guilt, they would acquit him. This was adequate. The court's charge with reference to the alleged sale is also criticised. An examination of the charge shows that, if the money was received in pursuance of an agreement that defendant would furnish the whisky to the purchaser, and he did so furnish it, he would be guilty unless the jury believed that he acted solely in the matter for the purchaser. These were the only two theories presented by the testimony; that is, appellant only claimed his exemption from liability on the ground of purchase for the prosecutor, Fortner, and the court correctly submitted that; and also, if he furnished the whisky for the money on the agreement, to find him guilty, unless the jury believed he acted as the agent of the purchaser.

A review of the evidence shows beyond question that it is sufficient to sustain the conviction. The state showed by its wit-

nesses that application was made to appellant to purchase whisky from him; that \$2.50 was given to him for that purpose by the prosecutor, and that appellant went off, and brought and delivered to him two quarts of whisky. Appellant says that he got this whisky from one Berry; that, before application was made to him, he had made arrangements with Berry to get two quarts of whisky from him; and this was the whisky that he got from Berry. Now, if appellant bought the whisky from Berry prior to the application from prosecutor to him to get the whisky, and he let prosecutor have this whisky in consideration of the money paid him, this would be evidence of a sale. However, Berry is brought on the stand, and contradicts this; testifying that he did not sell appellant any whisky.

No error is made manifest in this record, and the judgment is affirmed.

Ex parte TRIPP.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

HABEAS CORPUS—REMANDING OF RELATOR—APPEAL—INDICTMENT—DISMISSAL.

1. On appeal by relator in habeas corpus from a judgment remanding him to custody under a warrant, it appearing that subsequent to the appeal he has been indicted for the crime, and is held under a capias, the appeal will be dismissed.

Appeal from District Court, Cooke County; D. E. Barrett, Judge.

Habeas corpus on the relation of J. J. Tripp to secure his release from custody under a warrant charging murder. From a judgment remanding him to custody, he appeals. Appeal dismissed.

Eldridge & Midkiff, Culp & Giddings, Davis & Garnett, and C. L. Potter, for appellant. Stuart & Bell, R. V. Bell, and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Relator was committed to jail under a warrant charging him with the murder of Lem Clark. He applied for the writ of habeas corpus before Hon. D. F. Barrett, judge of the Sixteenth Judicial District of Texas, and was remanded to jail, without bail, upon the hearing thereof, and prosecuted his appeal to this court. The Assistant Attorney General has filed a motion to dismiss the appeal on the ground that since the appeal has been prosecuted the grand jury of Cooke county has convened, and returned indictment against relator charging him with the murder of Lem Clark, and that he is now held by capias issued thereon; and proper evidence is offered of these facts. The motion is well taken under Ex parte Cannon, 41 Tex. Cr. R. 76, 51 S. W. 914. The appeal is accordingly dismissed.

¶ 1. See Habeas Corpus, vol. 25, Cent. Dig. § 112.

JACKSON v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1903.)

CRIMINAL LIBEL—INFORMATION—FAILURE TO SINGLE OUT LIBELOUS MATTER.

1. Where an article is lengthy, and contains matter that is libelous with much that is not, an information setting out the article in full, and charging criminal libel against the publisher, is insufficient unless the libelous matter is singled out and the prosecution based thereon.

Brooks, J., dissenting.

Appeal from Travis County Court; Geo. Calhoun, Judge.

R. S. Jackson was convicted of criminal libel, and appeals. Reversed.

Walton & Walton and A. S. Phelps, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was prosecuted upon an information charging that he did wickedly and maliciously make, write, print, publish, sell, and circulate a malicious statement and defamatory libel affecting the reputation of G. A. Bahn. This allegation in the information is followed by a literal copy of the article published in the paper owned by appellant in the city of Austin. Among other things appearing in said article, and upon which the state appears to rely as libelous, are the following: "He commences his simian criticisms by first telling us his measly troubles like a half-cracked dope-fiend." And again: "We would like to know if G. A. Bahn does not receive from his extra Shyllock trade in diamonds a profit which is at least commensurate with the extra taxes?" Again: "Reader, listen to what he says in the next paragraph. It sounds like the mutterings of a drunken hobo." Again: "Any employer who delights to dictate to his employees in everything, and concede them nothing, and takes the stand that every time he speaks to his employé that that employé should jump as if he was shot, would, if we had the slavery of antebellum days, make a first-class professional 'nigger whipper.' We all know what kind of 'white trash' they were." These excerpts are taken from the article in which G. A. Bahn was held up to contempt and ridicule for refusing to close his jewelry store at 6 o'clock, in compliance with the request of the clerks' union; it appearing from said article that all jewelers in the city of Austin had so agreed except Bahn. The insistence is made by appellant that the excerpts above copied are not libelous *per se*, but that the same should contain innuendo averments showing how and where-in they were libelous. It is not necessary to have an innuendo averment of an allegation intelligible on its face, and these excerpts are intelligible on their face, without reference to the other portions of the libelous article; but clearly, when read in the light of said article, are extremely libelous within

the contemplation of our libel law. Nor is it necessary, under the authority of *Mankins v. State* (Tex. Cr. App.) 57 S. W. 950, to say under what clause of the libel statute the libel in question would fail.

This case was tried before the court without a jury. The proof shows that appellant was the owner of the paper, and, while he did not write the article, he saw the same after it was in type, and before its circulation and publication. Appellant himself admits this. As we understand it, this would clearly make out the charge in the information of selling and circulating a malicious statement. However, appellant insists that the court erred in permitting the introduction of the paper containing said libel, on the ground that various articles on other topics are printed on the converse side of the paper, claiming this would be a variance between the allegation in the information, such as precludes the introduction of the paper. The articles on the converse side of the paper have relation to other and different matters than the one under consideration, and could not possibly constitute any character of variance. If appellant's contention be correct, then a paper could never be introduced as libelous, because parts of the paper usually relate to other matters than the libel.

Appellant also insists that it is not proper to place the entire article in the information, and charge libel on the entire article. This, we think, is proper pleading, so as to show the relevancy and pertinency and to make manifest the purpose and intent of the person publishing the libel. This exact question was decided by us in *McArthur v. State*, 41 Tex. Cr. R. 635, 57 S. W. 847. However, the opinion in that case does not exactly state the facts in reference to this matter. *McArthur* was prosecuted for circulating a pamphlet containing over 70 pages of printed matter, and we held the indictment was sufficient.

The evidence supports the finding of the court, and the judgment is affirmed.

HENDERSON, J., dissentia.

On Rehearing.

(Dec. 9, 1903.)

HENDERSON, J. The judgment was affirmed at the recent Austin term by a majority of this court, and comes before us now on motion for rehearing. In the original opinion my Brethren held the information was valid as charging an offense. The information set out in *hæc verba* an article alleged to have appeared in the *Austin Statesman*, which covers some four pages of the transcript. Nowhere did the pleader single out any expression alleged to be of a libelous character; nor did he use any explanatory or innuendo averments in regard to said article, or any portions thereof, but

left the court to grope its way through all these pages and single out certain sentences or expressions claimed to be libelous. Under the rules of pleading the state should have pointed out in appropriate allegations the portions of said article claimed to be libelous, and have based the prosecution thereon, and, if such expressions needed explanatory averments, to make plain the meaning of such allegations; or, if they required innuendo averments to give point to them, these should have been used in that connection. We understand the authorities, both in the civil and criminal pleading, to require this. *Mankins v. State*, 41 Tex. Cr. R. 662, 57 S. W. 950; *McArthur v. State*, 41 Tex. Cr. R. 635, 57 S. W. 847. Of course, we are not holding here that there are not expressions in the article of a libelous character, but much of the article is not of a libelous character; nor are we holding that the entire article could not be set out as an exhibit, or that it would not be admissible in evidence. We are simply holding that, where the article is lengthy, and contains matter that is libelous with much that is not, the libelous matter should be singled out, and the prosecution based thereon. Because the information is defective in this respect, the judgment is reversed, and the prosecution ordered dismissed.

BROOKS, J., dissents.

JENKINS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

CRIMINAL PROCEDURE—INCREASE OF BAIL.

1. White's Ann. Code Cr. Proc. 1895, art. 295, authorizing a district court to require additional bail in criminal cases where that taken is insufficient, applies only to preliminary or examining trials, and does not authorize such a requirement after indictment found.

Appeal from District Court, Bexar County; John H. Clark, Judge.

John Jenkins was indicted for crime, and from an order increasing his bail after indictment he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. This is a companion case to *Jenkins v. State* (No. 2,817; decided at the present term) 76 S. W. 464. Relator appealed from the action of the court increasing the amount of his bail after indictment found, and after bail had previously been fixed by the court. Appellant contends that the court had no authority to do this; and on the other hand, the state insists that under article 295, White's Ann. Code Cr. Proc. 1895, it was competent for the district judge, on the showing made that bail was insufficient, to increase it. The article in question is found in the chapter on procedure in preliminary or examining tri-

als, and, in our opinion, is applicable alone to such trials, and does not apply after indictment found in the district court, and where, on habeas corpus or otherwise, the bail has been fixed under said indictment. While the provision referred to is comprehensive enough in its terms to include all cases of bail, still, considering the chapter in which it is found, and other provisions of the Code regulating bail in the district court, we do not think it was intended to apply other than to preliminary or examining trials.

The judgment is reversed, and the cause remanded, with instructions to the lower court to allow appellant to go at large on his previous bail, unless in the district court it shall be quashed for some defect or informality.

NEWPORT v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

DRIVING CATTLE FROM RANGE—EVIDENCE.

1. Evidence held insufficient to support a conviction under Pen. Code 1895, art. 913, for willfully driving cattle from their accustomed range.

Appeal from District Court, Galveston County; J. K. P. Gillaspie, Judge.

Pat Newport was convicted of willfully driving cattle from their accustomed range, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was indicted under article 913, Pen. Code 1895, for willfully driving cattle from their accustomed range. It is uncontroverted that defendant and Franklin drove the cattle. It is disclosed by the statement of facts that the cattle were running on about 4,200 acres of land belonging to the North Galveston Improvement Company, which seems to be only partially enclosed since the storm of 1900 which broke said fence. This was under the control of Mrs. M. B. Smith, who, seeing the cattle of the alleged owner as well as quite a number of others ranging on this land, ordered her employes, appellant and Franklin, to drive them away, instructing them not to disturb the milch cows. While driving the cattle, the alleged owner intercepted appellant and Franklin, and forbade them driving the cattle away. They informed him if they had any milch cows in there he could cut them out, but this was not done, and the cattle were driven off the company's land, across the railroad track, about four miles from starting point. Several witnesses testify, but this is the substance of the evidence. We do not believe this evidence supports the conviction under article 913, Pen. Code 1895, for willfully driving cattle from their accustomed range.

The judgment is reversed, and the cause remanded.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

INTOXICATING LIQUORS—VIOLATION OF LOCAL OPTION LAW—SUFFICIENCY OF EVIDENCE.

1. Where a prosecuting witness swore that she met defendant, and asked if he could get her some whisky, and he said he did not know, but would try, whereupon she handed him 50 cents, which was the customary price of a pint, and he went up the street, and was gone about 10 minutes, and returned, and gave her a pint of whisky, the evidence was sufficient to sustain a conviction for violating the local option law.

Appeal from Smith County Court; S. A. Lindsay, Judge.

Gabe Johnson was convicted of violating the local option law, and appeals. Affirmed.

N. A. Gentry and F. J. McCord, for appellant. Howard Martin, Asst. Atty. Gen., and W. H. Hanson, Co. Atty., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, the penalty assessed being a fine of \$25 and 20 days' confinement in the county jail.

The only ground of the motion for new trial that we deem necessary to be reviewed is the contention that the verdict of the jury is contrary to the law and the evidence. The prosecuting witness, Julia Reagan, testified: "I went on the public square, south side, in Tyler, and met defendant, and asked him if he could get me some whisky; that I was sick. He stated he did not know, but would try. I handed him 50 cents, and he went off up the street west, and was gone about ten minutes, and returned, and gave me a pint of whisky. Fifty cents was the usual and customary price of a pint of whisky. This occurred in Smith county, about 11 o'clock on March 28, 1903. I paid fifty cents one time and sixty cents at another time for a pint." In our opinion, the evidence is sufficient, under the authority of *Sebastian v. State* (Tex. Cr. App.) 72 S. W. 849; *Latham v. State*, 6 Tex. Ct. Rep. 782, 72 S. W. 182.

No error appearing in the record, the judgment is affirmed.

ELGIN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

CRIMINAL LAW—APPEAL—ABSENCE OF STATEMENT OF FACTS—QUESTIONS REVIEWABLE.

1. The action of the court on the application for a continuance in a criminal case cannot be revised in the absence of the facts.

2. In the absence of the facts it cannot be determined that accused was injured by the introduction of the evidence complained of by him.

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

77 S.W.—15

Turner Elgin, alias Turner Eldridge, was convicted of burglary, and appeals. Affirmed.

Howth & Adams, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary. The record is without a statement of the facts. The application for continuance cannot be revised in the absence of the facts, nor can it be determined that appellant was injured by the introduction of the evidence complained of in the second bill, without the facts. The charge of the court is applicable to a state of facts provable under the indictment.

No error appearing in the record, the judgment is affirmed.

Ex parte HERNAN.*

(Court of Criminal Appeals of Texas. Nov. 11, 1903.)

STATUTES—TITLE—SUFFICIENCY—SUBJECTS EMBRACED—CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—GAMING—PUNISHMENT PRESCRIBED.

1. Act 28th Leg. p. 68, c. 50, entitled "An act to prohibit the buying and selling of pools or receiving or making bets on horse racing," is not repugnant to Const. art. 3, § 35, prohibiting bills from containing more than one "subject," to be expressed in the title, in that it prohibits "book making" in the body thereof, and does not mention it by that name in the title.

2. Laws 28th Leg. p. 68, c. 50, § 3, which prohibits owners or lessees of property from permitting the same to be used as places for the sale of pools, book making, or wagering on horse races, even if construed so as to allow the owner of such premises to use them for the purpose for which he is forbidden to let others use them, is not in violation of Const. U. S. Amend. 14, guarantying equal protection of the laws, as the discrimination would be between classes, and not between members of a class.

3. Laws 28th Leg. p. 68, c. 50, § 1, which prohibits engaging or assisting in pool selling, under a certain penalty, and section 2 of which prohibits buying, pooling, or wagering anything under a different penalty, is not open to the objection of providing different punishments for the same offense, for section 1 refers solely to engaging in the business, and rightfully imposes a heavier penalty therefor, while section 2 refers to the individual better.

Original application for a writ of habeas corpus on the relation of Mike Hernan. Denied.

Newton & Ward, W. A. Hanger, Cecil Smith, and Wm. P. Ellison, for relator. O'Brien, John & O'Brien and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Valid information was filed against relator in the county court of Bexar county, charging him with violating what is ordinarily known as the "Anti-Poolroom Law," adopted by the Twenty-Eighth Legis-

*Rehearing denied December 9, 1903.

lature. See Gen. Laws 28th Leg. p. 68, c. 50. The relator sued out the writ of habeas corpus, and, being refused by the county judge, it was presented to the presiding judge of this court, and the writ was granted; being made returnable before the court at its present sitting. Under the agreed statement of facts filed herein, it is admitted that relator violated all of the various provisions of the act in question. The only insistence of relator is that the act is unconstitutional for the reasons which we will proceed to notice.

The act of the Legislature, in full, is as follows:

"An act to prohibit the buying and selling of pools or receiving or making bets on horse racing; to prohibit leasing of premises for pool rooms, and to provide a penalty for its violation.

"Section 1. Be it enacted by the Legislature of the state of Texas: If any person shall engage or assist in pool selling, book making, taking or accepting any bet on any horse race, he shall be punished by a fine of not less than two hundred nor more than five hundred dollars, and imprisonment in the county jail for not less than thirty nor more than ninety days.

"Sec. 2. If any person shall buy, pool or otherwise wager anything of value on any horse race at any time or place, he shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars.

"Sec. 3. If any owner or lessee of any property in this state shall permit the same to be used as a place for the sale of pools, book making or wagering on any horse race to be had in this or any other state he shall be punished by a fine of not less than two hundred nor more than five hundred dollars, and imprisonment in the county jail for not less than thirty days nor more than ninety days, and each and every day that the provisions of this article are violated shall constitute a separate offense. It being the intention in the foregoing article to prohibit pool rooms or other places where persons may congregate for buying and selling pools or otherwise wagering anything of value on horse racing."

Relator, in his first proposition, insists, that the caption of the bill, in referring specifically to a method of gaming or betting upon horse races, does not mention that species of betting on horse races known as "book making," while sections 1 and 2 of the act itself seek to punish the selling and buying, or the tendering or accepting, of that particular kind of betting upon horse races; that therefore the act is broader than the caption, and for that reason is unconstitutional. Many of the questions urged by relator as to the constitutionality of this act were treated by this court in construing a similar statute in *Fahey v. State*, 27 Tex. App. 146, 11 S. W. 106, 11 Am. St. Rep. 182.

Article 3, § 35, of the Constitution, reads: "No bill * * * shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." In the former Constitution, the word "object" was used instead of the word "subject," as contained in the article just quoted. "Judge Bonner, in *Stone v. Brown*, 54 Tex. 341, observes that it may be presumed that the convention had some reason for substituting a different word from that which had been so long in use in this connection, and that, in the light of judicial expressions, the word 'subject' may have been thus substituted as less restrictive than 'object.' In *People v. Lawrence*, 36 Barb. 192, the Supreme Court of New York say: 'It must not be overlooked that the Constitution demands that the title of an act shall express the subject, not the object, of the act. It is the matter to which the statute relates, and with which it deals, and not what it proposes to do, which is to be found in the title. It is no constitutional objection to a statute that its title is vague or unmeaning as to its purpose, if it be sufficiently distinct as to the matter to which it refers.' *Fahey v. State*, supra. Now, referring to relator's objection that the fact that the preamble does not, *eo nomine*, mention that peculiar character of betting on horse racing, and therefore renders that clause of the article unconstitutional, we say this contention is without merit. Book making is a mere species of betting on horse racing, and the preamble above quoted sufficiently apprises all mankind of the fact that all species and character of betting on horse racing could or might be embodied in the act itself, since the subject is the same. As indicated in *Stone v. Brown*, quoted above, the Constitution clearly intended a broader construction, by changing the word "object" to "subject." One "subject" may contain many "objects." *Giddings v. San Antonio*, 47 Tex. 548, 26 Am. Rep. 321; *State v. Parker*, 61 Tex. 267; *Nichols v. State*, 32 Tex. Cr. R. 404, 23 S. W. 680. As we understand the constitutional provision under consideration, where a preamble states the subject of legislation, any article may be placed under said preamble by the Legislature which is subsidiary to, connected with, and necessarily incidental and germane to the main subject involved. To hold otherwise would necessarily embarrass legislation, and would require that the title should be as full as the bill itself. Counsel for relator, in their able brief, draw a marked distinction in the method of selling pools and selling bets on horse races through the method of book making. However accurately this distinction may be drawn in practice, there is necessarily a betting on a horse race; and it would be a strained construction for this court to hold relator's contention that be-

cause the species of betting on horse racing was not mentioned, *eo nomine*, in the preamble, the act would therefore be void. Relator cites a Virginia case (*Lescallett v. Commonwealth*, 17 S. E. 546); but, in our opinion, this case is not applicable to the question now under consideration, since the Virginia Constitution provides that the preamble must state the "object" of the legislation, and hence is not as broad as the provisions of our own Constitution above quoted.

Relator's second proposition is that the act itself, or at least section 3 of the act, would, under the construction given it by relator, permit the owner to use his premises for the purpose of selling pools, etc., on horse racing, but would punish him if he permitted another to so use premises owned or leased by him, and for that reason would exempt a certain class from the provisions of said act, while others would be punished, and therefore is in violation of the fourteenth amendment to the Constitution of the United States. If it be conceded that relator's statement is correct, this would not render the act unconstitutional, because all persons in the same class are amenable to the law, and there is no discrimination in the act against persons of the same class. We know of no constitutional inhibition preventing the Legislature from prescribing different penalties for different acts, or different classes of the same act. This question is thoroughly discussed in *Searcy v. State* (Tex. Cr. App.) 51 S. W. 1119, and also *Fahey v. State*, *supra*.

Relator's third proposition is that sections 1 and 2 of said act, in any event, are unconstitutional, because the identical act prohibited in section 1 is also prohibited in section 2, while the punishment is of a different degree. Section 1 provides, if any person shall engage or assist in pool selling, etc., his punishment shall not be less than a fine of \$200 nor more than \$500, and imprisonment in the county jail for not less than 30 nor more than 100 days. This, as we understand, means if any one shall engage in the business or occupy himself with the business of selling pools, etc., he shall be fined and imprisoned as indicated. Whereas, section 2 provides, if any person shall buy, pool, or otherwise wager anything of value on any horse race, etc., he shall be fined not less than \$25 nor more than \$100. It is clearly within the constitutional power of the Legislature to make the penalty for engaging in the prohibited business more onerous than a betting. This, as we understand, is all the Legislature has attempted to do. We do not think it necessary to go into a further discussion as to whether wagering and betting are one and the same thing, as, in our view, it is immaterial. For the sake of argument, it may be conceded that they are not one and the same. Section 1 prescribes the penalty for pursuing the business, and section 2 prescribes the penalty for betting on a horse race.

In view of the disposition made of relator's various contentions above, we do not deem it necessary to pass upon other objections to the constitutionality of the act in question. Suffice it to say that we believe the preamble of the act covers all the subject-matter embraced in the act, and there is no variance between the preamble and the act; nor is the act unconstitutional on the ground that it violates the fourteenth amendment to the Constitution of the United States. We therefore hold that the whole act of the Legislature under consideration is constitutional.

The relator is accordingly remanded to the custody of the officer until he gives bond as provided by law.

DYER et al. v. WINSTON.

(Court of Civil Appeals of Texas. Nov. 5, 1903.)

CONTRACTS—SALE OF REAL ESTATE—COMMISSION—EXECUTORS—AGENCY—EVIDENCE—VERIFICATION OF PLEA—DISCRETION OF COURT—AFFIDAVIT—SUFFICIENCY—APPEAL.

1. A contract describing a tract of land which plaintiff therein agreed to purchase from defendant for other parties stipulated that when the sale was completed defendant was to pay plaintiff \$530. *Held*, that such contract evidenced an agreement to pay the amount named as a commission to plaintiff.

2. A contract for the sale of real estate described it as "a tract of land known as the 'Triangle' or 'Cut Off Pasture,' now occupied by F." *Held*, that the land was sufficiently described.

3. A contract for the sale of real estate is not within the statute of frauds because not signed by the person agreeing to purchase.

4. A contract for the sale of land is not deficient in execution for omitting to embrace the selling price.

5. The purchase price of land, which is omitted from a contract for the sale thereof, otherwise sufficient, may be shown by parol.

6. A contract by which plaintiff undertook to pay the defendant \$10 an acre for land, therein fully described, if within 30 days she furnished a good title, stipulating that for the fulfillment thereof plaintiff had deposited a forfeit of \$500, and obligating defendant to convey the land to plaintiff or to any one whom he might direct, evidences an agreement for the sale of the land by the defendant to the plaintiff and a conveyance thereof to him or to any one he might direct.

7. Such contract is not inconsistent with a previous one in reference to the same land, agreeing to pay the plaintiff a commission for the sale.

8. An executrix has authority to incur reasonable and proper expense in the management and disposition of the estate in accordance with the terms of the will.

9. An executrix has authority to employ an agent to find a purchaser for land, and to agree to pay a commission therefor.

10. An executrix cannot delegate to an agent, employed to find a purchaser for land, discretion as to the terms of sale.

11. An executrix cannot delegate to an agent, employed to find a purchaser for land, authority to agree, at his discretion, with a subagent, on

† 3. See *Frauds*, Statute of, vol. 23, Cent. Dig. § 245.

the amount of commission the latter should receive.

12. A petition in an action to recover commission for the sale of real estate, alleging that a certain person had authority to act as agent of defendant, an executrix, and that such agent had agreed with plaintiff for the payment of a commission, and that defendant was liable to plaintiff for the commission sued for, is insufficient, as against a special exception, to show that such person had authority to agree to pay plaintiff the stipulated compensation.

13. An executrix has authority to specially authorize an agent to contract for payment of a commission for the sale of land for an amount fixed by her.

14. An executrix has power to ratify and adopt as her own agreement one made by a person assuming to act for her in contracting for the payment of a commission for the sale of land.

15. Declarations of an agent are not admissible to prove his agency.

16. Agency cannot be established by proof of general reputation.

17. Where, under a plea, because not sworn to, evidence in denial of agency would be inadmissible, it is within the discretion of the court to grant leave to have the plea sworn to and hear the evidence.

18. The sufficiency of an affidavit to a plea denying agency as having been made by defendant's attorney cannot be raised for the first time on appeal.

Appeal from Ft. Bend County Court; William Masterson, Judge.

Action by S. J. Winston against Isabella M. T. Dyer and another. From a judgment for plaintiff, defendants appeal. Reversed.

Spencer C. Russell, for appellants. L. M. Williamson, for appellee.

GARRETT, C. J. This action was brought by S. J. Winston against I. M. T. Dyer and R. F. Dyer to recover the sum of \$530 alleged to be due the plaintiff as a commission for the sale of 1,060 acres of land. Judgment was rendered in favor of R. F. Dyer on demurrer, and there is no appeal from that judgment. I. M. T. Dyer was sued both individually and in her capacity as executrix of J. E. Dyer, deceased. The plaintiff alleged in his petition that he had entered into a contract in writing with the defendant, who acted by her agent, R. F. Dyer, individually and as executrix of J. E. Dyer, deceased, by which she agreed to pay him the sum of \$530 for the sale within a reasonable time of the land described in Exhibit A attached to the petition, for the sum of \$10 an acre, either by purchase himself or sale to other parties. The contract attached as Exhibit A, omitting date line and signatures, was as follows: "This contract entered into this the 6th day of September, 1902, between S. J. Winston and Mrs. I. M. T. Dyer, that said Winston contracts to purchase from Mrs. Dyer a tract of land in Fort Bend county, Texas, known as the Triangle or Cut Off Pasture, now leased and occupied by F. I. Booth, for other parties, and when the sale is completed Mrs. Dyer is to pay to said Winston \$530.00, five hundred and thirty dollars." It was entered into on September 6, 1902, and was signed: "Mrs. I. M. T.

Dyer, Individually and as Executrix of Will of J. E. Dyer, Deceased. By R. F. Dyer, Agent." It was not signed by the plaintiff. It was further alleged that afterwards, on November 8, 1902, the plaintiff and the defendant entered into a contract in writing for the sale of the land to the plaintiff, which said written contract was marked "Exhibit B," and attached to the petition. It appeared therefrom that the plaintiff undertook to pay the defendant \$10 an acre for the land, which was fully described by metes and bounds, if within 30 days she furnished a good title, for which the plaintiff had deposited a forfeit of \$500; and that the defendant obligated herself to convey the land to the plaintiff, or to any one whom he might direct. The plaintiff averred that he had fully complied with said contract of purchase and sale by procuring Davis & George to take the land, and that the defendant had executed to them a deed therefor in compliance with said contract. There were further allegations that the said R. F. Dyer had authority to act as the agent of the defendant, and that the defendant was liable for the commission sued for. Demurrers to the petition were overruled by the court, and, after a motion for continuance had been overruled, there was a trial to a jury, which resulted in a verdict and judgment in favor of the plaintiff.

It was shown by the evidence that R. F. Dyer, assuming to act as the agent of the defendant, made the agreement with the plaintiff attached to the petition as Exhibit A, and that he concluded with the plaintiff the agreement for purchase and sale, which, by the advice of counsel, was signed by the defendant in person. The defendant was not aware of the previous agreement expressed by Exhibit A when she signed the contract to sell the land to plaintiff. She had told R. F. Dyer to find a purchaser for the land if he could, but had given him no express authority to pay a commission to any one to find a purchaser or to purchase or sell the same. It appeared from the evidence that R. F. Dyer is the son of the defendant, and had represented her generally in many business transactions, especially in dealing with cattle, but that he had never represented her in the sale of land. Evidence was admitted, over the objection of the defendant, of declarations on the part of R. F. Dyer that he was the agent of the defendant in making the agreement, and of general reputation as to such agency.

We do not think that there was any error in overruling the demurrers, except as to the special exception hereinafter referred to. The agreements attached as exhibits to the petition are not inconsistent with each other, or with the allegations of the petition. Exhibit A evidences an unambiguous contract for the payment of a commission of \$530 to the plaintiff for the sale of the land which he contracts to purchase for other parties. The

land is sufficiently identified. The contract, even if it should be held as one for the sale of land, and not merely for the payment of a commission, is signed by the party to be charged therewith, and does not come within the statute of frauds on account of the fact that it was not signed by the plaintiff. It was not necessary that it should have embraced all the terms of the contract, such as the price for which the land was to be sold. That might be shown by parol. The Exhibit B evidences a contract for the sale of the land by the defendant to the plaintiff, and a conveyance thereof to him, or to any one he might direct. It is altogether consistent with the first agreement to pay the commission. As independent executrix of J. E. Dyer, the defendant had the authority to incur reasonable and proper expenses in the management and disposition of the estate in accordance with the terms of the will, and to employ an agent to find a purchaser for the land, and to pay him an agreed commission therefor; but she could not delegate to him a discretion as to terms of sale, nor could she give R. F. Dyer authority to agree at his discretion with the plaintiff, as subagent, upon the amount of commission he should receive. Mechem on Agency, §§ 189, 193. As against a special exception, the petition did not show that R. F. Dyer had authority to agree to pay the plaintiff the stipulated compensation. The executrix could have specially authorized R. F. Dyer to sign an agreement for an amount fixed by her, or she could have subsequently ratified and adopted as her own the agreement entered into. So the charge that, if the defendant had authorized or ratified the agreement, the plaintiff could recover, was correct, for the objection urged in the brief that an executrix could not authorize an agent to bind the estate in any such manner or ratify his acts; but it is doubtful if the evidence warranted the charge. There is no proof that the defendant knew anything about the agreement until long after it was made, or ever gave any specific instructions as to the commissions to be paid.

The motion for a continuance appealed strongly to the discretion of the court, but, in view of the fact that the judgment must be reversed, it will not receive consideration. It was error to allow the plaintiff to testify to the declaration of R. F. Dyer that he was the agent of the defendant. Evidence of the statements or admissions of an agent are not admissible to prove his agency. Mechem on Agency, § 100. It was also error to receive the evidence of the plaintiff and of the witness Davis to establish the agency by general reputation. *Id.* § 101. But it is urged by the plaintiff that no proof could be heard in denial of the agency of R. F. Dyer, because the defendant had not filed a sufficient plea under oath as a predicate therefor. The agency was denied by the answer of the defendant; but when the testimony was offered the plea had not been sworn to,

and the court was about to sustain an objection to the evidence on that ground, when the counsel for the defendant asked and obtained leave to swear to the plea then. Leave was granted, the plea was sworn to, and the evidence was received. It is within the discretion of the court to grant the leave and hear the evidence. It is further urged here, however, for the first time, that the affidavit is not sufficient. It is: "Now comes Spencer O. Russell, as attorney for Mrs. I. M. T. Dyer, and upon oath states that to the best of his knowledge and belief Mrs. Dyer did not execute the contract marked 'Exhibit A' to plaintiff's petition, and that she did not give R. F. Dyer authority to execute it." Without passing upon the sufficiency of the affidavit further than to say that it may be made by an attorney (Rev. St. 1895, art. 5), we hold that it is too late to present the objection now. *Adcock v. Creighton*, 65 S. W. 42, 3 Tex. Ct. Rep. 282. The judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

STEPHENS et al. v. HEWITT et al.*

(Court of Civil Appeals of Texas. Oct. 28, 1903.)

TENANT IN COMMON — ADVERSE HOLDING— LIABILITY FOR RENT—JUDGMENT AGAINST MINOR—VACATING.

1. A defendant holding land adversely and in hostility to the rights of plaintiff as tenant in common thereof is properly charged with the value of the use of the premises during such adverse occupancy.

2. The mere knowledge of a minor of the pendency of a suit against her does not preclude her from thereafter attacking the judgment rendered in the suit.

Error from District Court, Bell County; R. L. Penn, Special Judge.

Action by A. J. Hewitt and others against S. H. Stephens and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

A. M. Monteith, for plaintiffs in error. A. L. Curtis and W. W. Hair, for defendants in error.

FISHER, C. J. A statement of this case, with the principal issues involved, will be found in the report of the former appeal of this case (22 Civ. App. 304, 54 S. W. 301); and the facts, with some slight additional testimony, are substantially the same in this case as stated in the opinion referred to. In this record there is some evidence tending to show that Mrs. Hewitt, during the time of her minority, knew of the pendency of the former suit, but upon this question there is a conflict of evidence. Upon a trial of the case, judgment was in favor of the defendants in error for an undivided one-sixth interest in the land described in the plaintiffs'

*Rehearing denied December 9, 1903, and writ of error denied by Supreme Court.

petition, one-third of which interest was made subject to the life estate of C. S. Midkiff. The judgment also settled the differences between the parties on the issue of improvements and rents. It is clear from the evidence in the record before us, in accordance with the principles of law decided on the former appeal, that the plaintiffs were entitled to recover, unless Mrs. Hewitt consented to the bringing of the suit, and her joinder in it, wherein the plaintiffs in error recovered judgment on their pleas of limitation. This last question was the only issue submitted to the jury by the charge of the court, other than the question of rents and improvements. The evidence supports the verdict of the jury upon these questions.

There are a number of assignments of errors complaining of the ruling of the trial court in overruling demurrers of the plaintiffs in error. The questions raised by these demurrers were practically decided in the former appeal adversely to the contention of the plaintiffs in error.

There was no error in the ruling of the court in excluding the testimony offered bearing on the question of partition, which is stated under plaintiffs in error's 24th, 9th, 26th, 27th, and 28th assignments of error. The court that rendered the partition proceeding did not have jurisdiction, and that proceeding, together with what occurred thereafter was not binding upon Mrs. Hewitt during her minority. She was not guilty of any delay after her marriage in instituting proceedings in this case to recover the land in controversy; nor is the evidence offered sufficient to estop her, or to show a ratification such as would preclude her from asserting the right insisted upon in this case.

It is insisted under plaintiff in error's 13th and 16th assignments of error that the plaintiffs in error ought not to be held responsible for the value of the use of the premises, as they were tenants in common with the defendant in error Mrs. Hewitt. The evidence in the record clearly shows that the plaintiffs in error were, all during the time of their possession and occupancy, holding the land in question adversely and in hostility to the rights of the defendants in error. This being the case, we are of the opinion that they were properly charged with the amount of rents as determined by the judgment of the trial court; and, in this connection, we take occasion to say that we are of the opinion that the assignments of error that complain of the judgment on the subject of rents and improvements are not well taken.

It is also contended that the court erred in refusing to charge the jury that if the defendant in error Mrs. Hewitt knew of the pendency of the former suit, and raised no objection to her being a party, the judgment rendered in that case is binding upon her, and that therefore she ought not be permitted to set it aside. We are of the opin-

ion that, under the facts, the court gave all the charge that was required upon this subject. The mere knowledge of the minor of the pendency of the suit would not be sufficient to preclude her from thereafter attacking the judgment rendered in that cause.

We have examined into all the questions raised by the various assignments of error, and conclude that no reversible error is shown. **Affirmed.**

TEXAS & P. RY. CO. v. TEMS.*

(Court of Civil Appeals of Texas. Nov. 21, 1903.)

CARRIERS — PASSENGERS — EJECTION FROM TRAIN—EVIDENCE—INSTRUCTIONS—SUFFICIENCY.

1. In an action against a railroad, the complaint alleged that plaintiff, having purchased a ticket, entered a train, and was forcibly ejected by defendant's servants, who would not give him an opportunity to exhibit his ticket. The answer alleged that plaintiff attempted to board the train after it was in motion, and fell by his own negligence. Plaintiff testified that he succeeded in boarding the train, and was starting into a coach, when he was thrown off by the conductor, who gave him no time to exhibit a ticket, and did not ask for one. The court charged that if plaintiff, having a ticket, boarded the train, and was pushed off by the conductor, he was entitled to recover. *Held*, that the instruction was not open to the criticism that it was erroneous because the evidence showed that plaintiff never entered the car, but remained on the platform until ejected about 600 yards from the depot, and because he failed to state that he had a ticket, and because it failed to state that plaintiff must have been in the exercise of ordinary care to protect himself, and must have been in his proper place.

2. In an action against a railroad for injuries alleged to have been sustained by plaintiff by being thrown from one of defendant's trains by the conductor, without opportunity to exhibit his ticket, the evidence showed that the train was the last one running between the point at which he boarded it and his alleged destination on the day of the injury. When found where he said he fell from the train, he had in his pocket a ticket from the place where he boarded the train to his alleged destination, stamped as of the day of the injury, which stamp was placed there by the selling agent. Physicians testified that his injuries were such as could follow from a fall at the place where he said he fell. Plaintiff, being confronted with the conductor, testified that he thought he saw him on the train, but that, at any rate, the man who threw him off was of about the same appearance. The conductor testified that he did not see plaintiff on the night of the alleged injury, and that he had no trouble with any one. Two porters testified that they were in a position to have seen if there was any trouble as claimed, and that there was none. *Held*, that the question whether plaintiff was ejected from the train as claimed was for the jury.

Appeal from District Court, Marion County; J. M. Talbot, Judge.

Action by J. M. Tems against the Texas & Pacific Railway Company and another. From a judgment in favor of plaintiff, defendant Texas & Pacific Railway Company appeals. **Affirmed.**

*Rehearing denied December 5, 1903, and writ of error denied by Supreme Court.

This is a suit by appellee against the appellant and the Pullman Palace Car Company for damages for personal injuries claimed to have been received on July 9, 1900, by appellee having been forcibly ejected from a passenger train of appellant, while in motion, by appellant's and the Pullman Palace Car Company's servants and employes who were in charge of said train and the sleeping car thereto attached. There was a trial by a jury, and a verdict rendered in favor of appellee against appellant for \$1,000; and, its motion for a new trial having been overruled, it prosecuted this appeal. A verdict for the Pullman Palace Car Company was rendered under the instruction of the court.

F. J. Freeman and W. T. Armistead, for appellant. L. S. Schluter, for appellee.

BOOKHOUT, J. (after stating the facts). The first assignment of error complains of the first paragraph of the charge, which is, in effect, that if plaintiff purchased his ticket, and boarded one of defendant's passenger trains, and was pushed or kicked off the same by the conductor in charge thereof, and by reason thereof plaintiff was caused to fall from said train to the ground, and injured, as alleged in his petition, to find for plaintiff, because the evidence shows that plaintiff never entered the coach, but remained on the platform until ejected, about 600 yards from the depot, which was a much more dangerous position than inside the coach, and because plaintiff failed and refused to tell that he had a ticket, and because the charge should have been qualified to the effect that the plaintiff at the time was using ordinary care to protect himself and be in his proper place. The plaintiff, in his pleadings, alleged that he purchased and held a ticket entitling him to passage over defendant's road from Jefferson to Marshall; that he entered upon one of defendant's passenger trains at Jefferson for the purpose of taking passage thereon to Marshall; that the train had proceeded only a short distance when he was negligently, willfully, wrongfully, and forcibly ejected therefrom by defendant's servants and employes; that they pushed and kicked him off, and would not give him time or opportunity to exhibit his ticket. The defendant specially answered that "the plaintiff was hurt, if at all, by his own negligence and contributory negligence, in this: that he never remained at the depot at Jefferson, and did not board the train while it remained stationary at the Jefferson station, and that after the train had started, and was running at from two to four miles per hour, and gaining in speed continually, the plaintiff came running towards and after the moving train, and had not caught it or got on it before they (the plaintiff and said train No. 3) had passed beyond the sight of those standing and being at the depot aforesaid, and that he caught hold of the train

while in motion, and never got on it, and, in his attempt to board it, he fell by his own act and negligence, and without any fault or negligence on the part of the defendant or its operatives." The appellee testified: That on July 9, 1900, he was in the employ of Mr. Rembert, near Lodi, in Cass county, Tex., running an engine at his mill. That he came to Jefferson, Tex., and on the evening of that day he purchased a ticket from the agent of the Texas & Pacific Railway Company at Jefferson, from Jefferson to Marshall, Tex., for 50 cents, to be used on the train that would pass through Jefferson, Tex., between the hours of 11 and 12 o'clock that night. That when the train arrived at the depot he was in the water-closet, with his clothes down. He put them up, and ran to catch the train, and caught it and got on as it started. He boarded the train, and started into a coach, and was met by a man dressed in a conductor's uniform, with a cap, coming out of the car. He asked appellee where he was going. He told him, "To Marshall." The conductor said: "Not on this train. Get off here." And then he shoved and kicked him off the train. The conductor did not ask him if he had a ticket, and gave him no time to exhibit one. This was while the train was in motion, and soon after leaving the depot at Jefferson. The pleadings and evidence raised the issue submitted in the first paragraph of the court's charge. The fact that plaintiff had not actually entered the coach, but was upon the platform, and about to enter, could not, under the pleadings and evidence, have affected the question of negligence upon the part of the employes in kicking plaintiff off. Plaintiff pleaded that he boarded the train. The defendant alleged that plaintiff did not get on the train, but was injured in trying to board a moving train. These were the issues as presented by the pleadings. Plaintiff testified that he got on the platform upon the east side—the side upon which the depot is located—and fell off on the west side. The defendant did not ask a special charge to have the charge qualified to the effect that plaintiff must use ordinary care to protect himself, and be in his proper place. The court, in its main charge, submitted the reverse of the proposition complained of in the following charge: "If, on the other hand, you believe from the evidence that the conductor of said defendant railway company in charge of said train did not push and kick the plaintiff, causing him to fall from said train, or if you find from the evidence that some person other than said conductor of said defendant railway company in charge of said train pushed and kicked the plaintiff after the plaintiff had boarded said train, and thereby caused him to fall from said train, then in either such event you will find for the defendant the Texas & Pacific Railway Company." The charge, taken as a whole, fairly submitted the issues, and the

first paragraph is not subject to the criticism made thereto.

It is insisted that the verdict is against the great weight and preponderance of the testimony. The only direct evidence that the plaintiff was ejected from the train was his own testimony. He was strongly supported by circumstances; when found, had in his pocket a ticket entitling him to one first-class passage from Jefferson to Marshall over defendant's railroad, and stamped on the back, "Jefferson, Texas, July 9th, 1900." The train which he says he boarded was the last train between those points on June 9, 1900. There is testimony by some of the physicians who treated plaintiff that the injuries they found on his person were such as could follow from a fall of the kind plaintiff testified he sustained. He was found at the place where he says he fell, on the west side of the track, the next morning, and removed to the house of Mr. Proctor. Mr. Cain, the conductor of the train on the night of the accident, was in the courtroom while plaintiff was testifying, and was asked to stand up, and the plaintiff was asked if he ever saw him before. He answered: "I think I saw him on the train that night. If he ain't the man who hit me and pushed me off, he has got a brother that favors him mightily, that did the work. He was about the same size and shape, and had a sort of heavy mustache." The conductor testified that he did not see the plaintiff on the night he claims to have been injured; that he had no altercation with him or any one else on the platform of the train on the night in question at Jefferson, and did not shove or kick him off the train. He says the first time he heard of the matter was the next afternoon, when he was asked by the superintendent of the road to make out a statement of the matter. He says he was in the front coach of the train as they left Jefferson on the evening in question, and remained there until they passed the point where the plaintiff claims to have been injured. Curry, a car porter, testified that he rode on the engine on the night in question as they left Jefferson until the train passed the crossing; that he there entered the smoking car, and found the conductor in there; that he did not hear or see him have any altercation with any one on the platform that night. William Mims, the chair car porter, testified that he was in the smoking car, looking for a gentleman, to rent him a pillow; that the conductor was in the same car, waiting for Curry to get on at the crossing; that the conductor did not have any trouble with a man at either end of the car while he was there. Never heard of the matter until next day. It was shown that first-class railroad fare from Jefferson to Marshall was 50 cents, and that the date stamped on the back of the ticket is put there by the agent selling the same, and represents the day of sale. The evidence was sufficient to raise the is-

sue, and it was the duty of the jury, from all the evidence, to determine the same; and, in deference to their verdict, we find that plaintiff was injured as alleged by him, and that he has sustained damage in the amount of the verdict.

Finding no error in the record, the judgment is affirmed. Affirmed.

MISSOURI, K. & T. RY. CO. v. McCUTCHEON.*

(Court of Civil Appeals of Texas. Nov. 21, 1903.)

RAILROADS—DEPOTS—WAITING ROOMS—DUTY TO PROVIDE—EVIDENCE—LEADING QUESTIONS—DISCRETION OF COURT.

1. The court, in permitting a leading question to be asked a woman as to whether her suffering was connected with her menstruation, simply to relieve the witness from using the language, did not abuse its discretion in permitting leading questions.

2. Where the complaint alleged that plaintiff, from exposure to the cold in defendant's depot while waiting for a train, contracted a severe cold, which produced inflammation of the ovaries, proof was admissible to show what effect such diseased condition would naturally produce on other organs of the body.

3. It is the duty of a railroad company to furnish comfortable waiting rooms at its depots, and the custom of the agent in charge of a depot to invite passengers, when the weather was disagreeable, to come into the office in the depot, does not relieve it from liability for failing to maintain a proper waiting room.

4. In an action for injuries sustained by exposure to the cold while in defendant's depot waiting for delayed trains, evidence of the custom of the depot agent to invite persons waiting for trains to come into the office when the weather was cold was not admissible as tending to show the state of weather at the times complained of by plaintiff; the office not being intended by defendant for a waiting room.

5. The error in excluding evidence which is subsequently admitted is harmless.

Appeal from District Court, Hopkins County; H. C. Conner, Judge.

Action by Mrs. Dora McCutcheon against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. S. Miller and Perkins, Craddock & Wall, for appellant. Crosby & Dinsmore, for appellee.

RAINEY, C. J. Suit by appellee to recover damages for personal injuries alleged to have been caused to her by the default of appellant. The petition alleged "that about the 1st and 15th of October and the 2d and 20th of November, 1901, and the 8th of January, 1902, appellee, being in Cumby, and desiring to go to Sulphur Springs, went to appellant's depot on each of said occasions, the train upon which she desired to take passage being behind time on each of said times from thirty minutes to an hour and a half; that she was compelled to wait

*Rehearing denied December 5, 1903.

at the depot at each of said times; that the waiting room in the depot at Cumby was insufficient to protect passengers waiting therein from the rigors of the weather; that it was built of boards, and was open, having cracks between the boards, the windows not closed, and the room not heated so as to protect and make comfortable passengers therein; that, because of her being compelled to remain in the waiting room, she was exposed to extreme cold and to the rigors of winter, and wherefrom she suffered at the time great discomfort and pain, contracted a severe cold, which proved aggravated, and which settled on her womb and ovaries, and produced extreme inflammation of said organs, and disease therein, which is incurable, and wherefrom the appellee has continuously suffered, and will continue to suffer as long as she shall live, extreme pain, and from which she is, and will continue to be, incapacitated from pursuing her business as teacher of music." Appellant answered by general and special exceptions and general denial. Trial before a jury resulted in a judgment for appellee for \$1,000.

On the trial, plaintiff, after testifying as to sickness in October, was asked by her attorney: "Where was the suffering? Was it in any way connected with your menstruation?" To which defendant objected because it was leading, which objection was overruled, and plaintiff answered, "Yes, sir." Defendant excepted. The court appended to the bill the following: "Approved, with the following explanation: This was a white woman, and this was a very delicate question. There was no effort on the part of counsel of plaintiff to lead the witness to say anything, but a number of questions had been asked, and the witness failed to answer, because of her modesty, and the question and answer were permitted simply to relieve the witness from using the language." "When and under what circumstances a leading question may be put is a matter resting in the sound discretion of the court." Greenleaf, Ev. (16th Ed.) § 435. We are of the opinion that this discretion was not abused in this instance.

Plaintiff having testified, in reference to her menses, that, since the injury complained of, the flow was more free than formerly, she was asked by her attorney, "Since that time have any other organs of your body been affected—your liver, lungs, or head?" This was objected to by defendant "because there is no allegation in the petition that those organs had been affected as a reason of her exposure, or sickness following thereon, and because the same was leading." The objections were overruled, and she answered, "My health has been bad generally since January, 1902, particularly in the region of the ovaries—general weakness and nervousness, and pain in the back of my head." This is assigned as error. Appellant's proposition under this assignment

is, in effect, that the evidence was incompetent because plaintiff had not pleaded injury to said organs. The plaintiff further testified that she had not had any trouble with her liver. There was testimony by a physician to the effect that pains in the back of the head would naturally flow from diseased ovaries. If the ovaries became diseased by reason of plaintiff's exposure, as alleged, proof would be admissible to show what effect such diseased condition would naturally have and produce upon other organs of the body, though there be no allegations as to the effect upon such other organs. Ry. Co. v. Edling, 18 Tex. Civ. App. 171, 45 S. W. 406.

Complaint is made of the exclusion of the testimony of one Green, offered by appellant, as shown by the following bill of exception, to wit: "Be it remembered that while M. M. Green, witness for defendant, testified on direct examination, and having testified that he had lived at Cumby since 1854; that he knew plaintiff, and had seen her at defendant's depot at that place frequently; that he was about the depot frequently; that he was well acquainted with E. W. Harris, who was then defendant's agent, and had observed his conduct in the treatment of passengers frequently—he was asked this question by defendant's attorney: 'What was his treatment to passengers?' To which plaintiff objected because the same was immaterial and irrelevant, which said objection was by the court sustained. Whereas, if permitted to answer, witness would have stated that the said Harris was very attentive to the wants and inquiries of passengers, and it was his universal custom to invite ladies and the public generally in the office, where the stove was, whenever the weather was inclement. To which ruling the defendant excepted, and tenders this his bill of exception and asks that the same be approved and made a part of the record." Appellant's claim is that said testimony was "material as a circumstance tending to show that the weather was not cold or disagreeable on the occasion when appellee was a passenger, and in rebuttal of the evidence tending to show that the passengers were not permitted in the office." There was no error in excluding this testimony. It clearly appears from the evidence that the office was not fitted up for, nor intended by the company to be used by, passengers. A waiting room adjoining the office was provided for that purpose. The window panes were out, no stove was placed therein, and it afforded but scant protection from cold and disagreeable weather. It was shown that no invitation was extended to plaintiff to enter the office on the occasions of which she complains. It was the duty of the appellant to furnish a comfortable waiting room, and the custom of the agent would not relieve it of this duty. Said testimony did not tend to show the state of the weather, nor was it in-

cumbent upon plaintiff, under the circumstances, to enter the office.

A bill of exceptions shows that Harris, depot agent at Cumby, was asked a question for the purpose of showing his custom in inviting lady passengers into the office, which was excluded. The statement of facts, however, shows that Harris did testify, in effect, what is here complained of as having been excluded; hence, if it be conceded that the court erred in this particular, no harm resulted to appellant.

The evidence was sufficient to establish the material allegations of plaintiff's petition. We find no reversible error in the record, and the judgment is affirmed.

GALVESTON, H. & S. A. RY. CO. v. FALES et ux.*

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

RAILROADS—LOSS OF BAGGAGE—VALUE—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. A woman's jewelry and all articles pertaining to her wardrobe that may be necessary or convenient to her while traveling are baggage.

2. In the absence of legislative enactment, the law does not prescribe any definite limit to the value of baggage, beyond which a carrier is not liable.

3. What is a reasonable quantity of baggage for which a carrier should be held liable, under all the circumstances, is a question of fact for the jury.

4. A common carrier is liable for baggage which it receives from a passenger for transportation, and which is never delivered, though the owner does not inform the carrier of the specific articles the baggage contains.

5. An assignment of error complaining of two different rulings not related to each other cannot be considered.

6. The statute prohibiting common carriers from limiting their liability by stipulations in a bill of lading is valid, as applied to contracts for interstate transportation of property.

7. The measure of damage for the loss of baggage by the initial carrier is the value of the articles at their point of destination, and not at the point where the initial carrier's line connects with the terminal carrier's.

8. In determining the value of baggage lost by a railroad company, the value of the wearing apparel and articles of daily use carried on the journey are not determinable by the market value of such articles.

9. In an action against a railroad company for personal injuries caused by the wrecking of a train, an instruction that if the train was wrecked, and this was the proximate cause of the injuries, plaintiff was entitled to recover, was erroneous, because giving conclusive effect to the mere fact that the train was wrecked.

10. In an action against a railroad company for injuries caused by the train on which plaintiff was a passenger being derailed and wrecked, plaintiff proved that the train was so wrecked, and defendant offered no evidence in explanation of the occurrence. *Held*, that as the wrecking of the train created a fair presumption of negligence, which defendant offered no evidence to rebut, the giving of an instruction to find for plaintiff if the train was wrecked, and this caused plaintiff's injuries, though erroneous, was harmless to defendant.

*Rehearing denied December 9, 1903, and writ of error denied by Supreme Court.

* 2. See Carriers, vol. 9, Cent. Dig. § 1568.

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by W. E. Fales and wife against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Beall & Kemp, for appellant. Richard F. Burges, for appellees.

NEILL, J. This is an action to recover damages for personal injuries to Mrs. W. E. Fales, and loss of baggage of appellees, caused by the alleged negligence of appellant. It was alleged in appellees' petition that on the 6th day of May, 1902, they were passengers on one of appellant's cars from San Antonio to El Paso, and thence to California; that "said train was, through the negligence and carelessness of defendant's agents and employes, derailed and thrown from the track"; and that the accident resulted in serious and permanent personal injuries to Mrs. Fales, and the destruction of their baggage, of the value of \$2,689.95. The appellant answered by special demurrers, some of which were sustained and some overruled, pleas of not guilty and general denial, inevitable accident, unreasonable and improper items of baggage, and by pleading a special contract limiting the baggage to wearing apparel not exceeding in value \$100. The case was tried before a jury, and the trial resulted in a judgment for appellees for \$10,000 for personal injuries to Mrs. Fales, and \$1,000 for loss of baggage, and \$1,000 for loss of services and time of his wife to Mr. Fales.

Conclusions of Fact.

On the 6th day of March, 1902, W. E. Fales bought two tickets in San Antonio from appellant company, which were stamped, "G. H. & S. A. Ry. San Antonio, March 6, 1902, City office." Each ticket bore the following words: "Issued by the Galveston, Harrisburg & San Antonio Railway Company, good for one second-class passage to point on Southern Pacific Company, Pacific system, designated on coupon attached, when officially stamped, subject to the following contract: In selling this ticket this Company acts only as agent, and is not responsible beyond its own line. * * * (5) Baggage liability is limited to wearing apparel not exceeding \$100.00 in value." The contract part of the tickets upon one was signed by Mrs. W. E. Fales, and the other by Mr. W. E. Fales. The point designated in the coupon attached to the ticket as the destination of the passengers was San Francisco, Cal. On the same day, by virtue of said tickets, they took passage at San Antonio on one of appellant's trains for San Francisco. The train on which they were riding, and in which their baggage was carried, was derailed, wrecked, and burned near Maxon Springs, Tex., on March 7, 1902. The following testimony taken from the record is all it contains in regard to the

catastrophe: "At the time of the accident, appellees were riding in one of the tourist sleeping cars. The train, with the exception of one of the standard Pullman sleepers, was derailed, wrecked, and burned near Maxon Springs, Texas, about 3:30 a. m. on the 7th day of March, 1902. Some time prior to the derailment Mr. Fales was awakened in his berth by the fast running of the train and swaying of the car, and thought it was running about 50 or 60 miles an hour when it struck the curve where the derailment occurred. The engine, tender, baggage, mail, and all the other cars, with the exception of the Pullman mentioned, were derailed, thrown one upon the other, wrecked, and burned. About five minutes after the derailment occurred, Mr. Fales found and carried his wife from the wreck. She was for about fifteen minutes thereafter unconscious, and, when she recovered consciousness, complained of pains in her head and back."

Since the disaster Mrs. Fales has suffered continuous mental and physical pain from the injuries inflicted, has required the constant care and attention of her husband, has been unable to discharge her household duties or render him any service, and her physical and nervous condition has continued to grow worse; and the evidence is sufficient to warrant the conclusion that she will remain a helpless, suffering invalid for life.

The two trunks containing appellees' baggage were received by appellant, and placed on the same train upon which they took passage. The trunks or their contents have never been delivered to appellees, but were destroyed by fire in the wreck near Maxon Springs. The value of said baggage at its place of destination—San Francisco—was \$1,000.

From the evidence, we conclude that the derailment and wreck of the train, the consequent injuries to Mrs. Fales, the loss of her time and services, and the destruction of appellees' baggage, were proximately caused by the negligence of appellant, and that by reason thereof appellees have been damaged to the extent found by the jury.

Conclusions of Law.

1. It is complained that "the court erred in overruling defendant's exception to that part of plaintiff's petition claiming loss of baggage, because the value claimed is greatly in excess of what would be customary, fair, and reasonable in respect to travelers' baggage, and because the number of articles claimed as baggage is grossly unreasonable in amount, and in excess of what is usually carried by travelers upon a journey." It cannot be determined from this assignment, nor from the proposition and statement under it, what items claimed by appellees as baggage should, under appellant's contention, have been excluded. The court did sustain the exception to some of the items—for instance, "specimens of gold quartz, package of legal

documents, insurance papers, mining stocks, inventories, will, report of estate of deceased, family pictures, marriage certificate, etc., solid silverware, and old coins." As the items to which the exception was not sustained are not referred to either in the assignment, proposition, or statement under it, it is not incumbent upon us to enumerate them. They seem to us, however, to only include such articles of personal convenience or necessity as are usually carried by passengers for their personal use. A woman's jewelry, and every article pertaining to her wardrobe that may be necessary or convenient to her traveling, is regarded, in law, as baggage. In the absence of legislation, limiting the responsibility of carriers, it cannot be assumed that the general law prescribes any definite, fixed limit to the value of baggage, beyond which the carrier is not liable. *Hutch. on Carriers*, § 681a. What is a reasonable quantity of baggage, for which a carrier should be held liable under the circumstances, is a question of fact for the jury. *Hutch. on Carriers*, § 688; *Jones v. Priestester*, 1 White & W. Civ. Cas. Ct. App. §§ 613, 614. In order to fix the liability upon a common carrier for the loss of its passenger's baggage, it is not necessary that the owner should have, when the baggage is delivered for transportation, informed the carrier of the specific articles constituting it. If it is in fact baggage, is received by the common carrier for transportation, and is never delivered to the passenger, the liability is fixed. We conclude, therefore, that the court did not err in overruling the exceptions to appellees' petition, as is complained of in appellant's second, third, and fourth assignments.

2. The fifth assignment of error complains of two distinct rulings of the court, not related to each other, but presents and raises two separate and distinct questions. It is therefore not entitled to consideration. *T. & P. Ry. Co. v. Donovan*, 86 Tex. 379, 25 S. W. 10; *Cammack v. Rogers* (Tex. Sup.) 73 S. W. 795.

3. There was no error in the court's refusal to instruct the jury, at appellant's request, "that the stipulations contained in appellees' tickets limiting appellant's liability for loss of baggage to \$100 to the holder of each ticket, it being an interstate shipment, is valid and binding, except as against negligence of the railway company." The provision of our statute which prohibits common carriers from limiting their liability as it exists at common law by stipulations in the bill of lading is valid, as applied to contracts for interstate transportation of property. *Armstrong v. Railway*, 92 Tex. 117, 46 S. W. 33, citing *Railway v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Railway v. Dwyer*, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926; *Railway v. Carter* (Tex. Civ. App.) 29 S. W. 565; *Railway v. Withers* (Tex. Civ. App.) 40 S. W. 1073; *Railway v. Eddins* (Tex. Civ.

App.) 26 S. W. 162; Mexican Nat. Ry. v. Ware (Tex. Civ. App.) 60 S. W. 343. State statutes prohibiting common carriers from limiting their common-law liability by stipulations in the contracts of shipment are not in themselves regulations of interstate commerce, though they control in some degree the conduct and liability of those engaged in such commerce; and, so long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of commerce. *Railway v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688. Hence it is held that a ticket limiting liability for loss of passenger's baggage to \$100 does not relieve the road receiving the baggage from its common-law liability when the property is lost on its line. *Railway v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. 541; *Railway v. Schafermeyer* (Tex. Civ. App.) 72 S. W. 1037.

4. The court did not err in excluding testimony offered by appellant to show the market value at El Paso of the class and kind of the articles of appellees' baggage, nor in instructing the jury "that the measure of plaintiffs' damage for lost baggage would be the reasonable value of such baggage in San Francisco." The measure of damages for the loss of baggage is its reasonable value at point of destination, not at an intermediate point, though it be where the initial carrier's line connects with the terminal carrier's. 3 *Sutherland on Damages*, § 932; *M., K. & T. Ry. v. Cook* (Tex. Civ. App.) 27 S. W. 771. Some of the articles lost were shown to be personal wearing apparel of appellees, and others of daily use, carried on the journey, the value of which is not determinable by the market. *Wells-Fargo Exp. Co. v. Williams* (Tex. Civ. App.) 71 S. W. 314; *Railway v. Nicholson*, 61 Tex. 550. It was therefore not essential to the admissibility of Mr. Fales' testimony as to value that he should be acquainted with the market value of the articles in San Francisco.

Having thus disposed of all the questions affecting appellant's liability as to the baggage, we will now consider those relating to the personal injuries of appellees.

5. In the fourth paragraph of its charge, the court instructed the jury as follows:

"If you believe from a preponderance of the evidence that the said plaintiff Mrs. W. E. Fales was injured while a passenger on one of defendant's passenger trains, as alleged by plaintiffs, and that said passenger train was derailed and wrecked, and that the derailment and wrecking of said train was the proximate cause of the said Mrs. W. E. Fales' injury, if any, then in that event you will find for the plaintiffs as to their claim for damages for the personal injuries so sustained by Mrs. Fales, if any personal injuries you believe from the evidence she suffered thereby." It is urged as an objection to this paragraph that, "in the absence of a provision of law giving a con-

clusive effect to a particular fact, it is error for the court to instruct what effect should be given it." Under the authorities in this state, the charge is undoubtedly obnoxious to this objection. *Lauchheimer v. Saunders* (Tex. Civ. App.) 65 S. W. 500; *Mex. Cent. Ry. v. Lauricella*, 87 Tex. 279, 28 S. W. 277, 47 Am. St. Rep. 103. But in view of the undisputed evidence as to the derailment and wreck of the train—no attempt having been made by appellant to explain the cause of the occurrence of the catastrophe, and show that it was due to a cause for which it was not answerable—the question presents itself, was the appellant prejudiced by the error? In the case last cited, in which a similar error was presented by the charge, it is said by the Supreme Court: "It does not follow, however, as we think, that the judgment should be reversed. 'Where an accident happens upon a railway, from which a passenger sustains an injury by the breaking down of the carriage, or by the running off of the train, or the spreading or breaking of the rails, the very nature of the occurrence will be prima facie evidence of the negligence of the company or its servants.' *Hutch. on Carr.* § 800. The rule thus stated by the eminent author cited is very generally recognized." Accordingly, when the derailment of a train or car results in the injury to a passenger, the burden is on the carrier to show that the accident was not caused by defective cars or roadbed, or by the negligence of an employé. *Montgomery, etc., Ry. Co. v. Mallette*, 92 Ala. 216, 9 South. 365; *Alabama, etc., Ry. Co. v. Hill*, 93 Ala. 521, 9 South. 725, 30 Am. St. Rep. 71; *St. Louis, etc., Ry. Co. v. Mitchell*, 57 Ark. 421, 21 S. W. 884; *Kansas, etc., Ry. Co. v. Miller*, 2 Colo. 453; *Pittsburgh, etc., R. Co. v. Williams*, 74 Ind. 466; *Southern Kansas Ry. Co. v. Walsh*, 45 Kan. 659, 26 Pac. 47; *Louisville, etc., R. Co. v. Smith*, 2 Duv. 558; *Stevens v. Railway Co.*, 66 Me. 77; *Baltimore, etc., R. Co. v. Worthington*, 21 Md. 283, 290, 83 Am. Dec. 580, 587; *Wilson v. Northern Pac. R. Co.*, 26 Minn. 280, 3 N. W. 334; *Spellman v. Lincoln, etc., Co.*, 36 Neb. 896, 55 N. W. 271, 20 L. R. A. 319, 38 Am. St. Rep. 757; *Taylor v. Grand Trunk Ry. Co.*, 48 N. H. 314, 2 Am. Rep. 233; *Texas & P. Ry. Co. v. Gardner*, 114 Fed. 186, 52 C. O. A. 142; *Brimmer v. Illinois Cent. R. Co.*, 101 Ill. App. 198. It was upon this principle the Supreme Court, despite the error in the charge, affirmed the judgment in the *Lauricella* Case. To have done otherwise would have been to smother the soul and spirit of the law beneath the weight of a strict and rigid formula. It is not right to stifle justice that way. Sir Frederick Pollock, in his work on Torts, illustrates the distinction between cases of tort in which there is no contract, and where there is, thus: "A coach runs against a cart, the cart is damaged, the coach is upset, and a passenger in the coach hurt. The owner of the cart must prove that the driver of the

coach was in fault. But the passenger in the coach can say to the owner: 'You promised, for gain and reward, to bring me safely to my journey's end, so far as reasonable care and skill could attain it. Here am I, thrown out on the road with a broken head. Your contract is not performed. It is for you to show that the misadventure is due to a cause for which you are not answerable.' Continuing, he says in note D: "In other words, the obligation does not become greater if we regard the liability as *ex delicto*. Instead of *ex contractu*; but neither does it become less." Webb's *Pollock on Torts*, 549. The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence sufficient to rebut this presumption. *Shear. & Redf. Neg.* § 58. Appellees' evidence in this case, which is undisputed, raised a "fair presumption of negligence." No evidence was offered by appellant to rebut this presumption. Therefore, having proved the resulting injury, they were entitled to recover. What harm, then, is done by the court not leaving it to the jury to say whether the derailment of the train was negligence? Had such an issue been submitted, the jury would have been bound to find on it in favor of appellees. For the undisputed evidence raised a fair presumption of negligence. Had the charge been free from the error complained of, and a verdict been rendered upon the issue of negligence in favor of appellant, it would have been the bounden duty of the court to set it aside, for such a verdict in case of the fair presumption that arises from the undisputed evidence could not stand. Therefore, in our opinion, the appellant was not prejudiced by the error complained of.

6. The remaining assignments of error are predicated upon Mrs. Fales being joined as a party plaintiff—questions raised for the first time in this court. Improper joinder of the wife as plaintiff cannot be raised for the first time in an appellate court, and, where no injury is shown to have resulted, a judgment will not be reversed, even where the exception to the joinder of the wife with the husband has been overruled. *G., H. & S. A. Ry. Co. v. Baumgarten* (Tex. Civ. App.) 72 S. W. 80.

There is no error in the judgment which requires its reversal, and it is affirmed.

MARSHALL NAT. BANK v. SMITH et al.*
(Court of Civil Appeals of Texas, Nov. 21, 1903.)

NOTES—LIABILITY OF PERSON SIGNING HIS NAME ON THE BACK OF NOTE—PROMISOR—SURETY—EVIDENCE—EXTENSION OF TIME—RELEASE OF SURETY.

1. Where a person not the payee of a note signs his name on the back at the time of its in-

ception without any words to express the nature of his undertaking, he is liable as original promisor or surety, and it is competent for him to show by parol or other evidence that he is a mere surety.

2. Where the holder of a note, with knowledge that a person who signed his name on the back of the note was a surety merely, extended the time of payment for a valuable consideration, without the knowledge or consent of the surety, the surety was relieved from liability.

Appeal from District Court, Harrison County; Richard B. Levy, Judge.

Action by the Marshall National Bank against George Smith and J. W. Furr. From a judgment for defendant Furr, plaintiff appeals. Affirmed.

Chas. C. Carter, for appellant. John M. Gardner and F. H. Prendergast, for appellees.

RAINEY, C. J. This is an ordinary action for debt to recover on a promissory note brought by appellant against George Smith and J. W. Furr. Smith made no defense. Furr pleaded that he was a surety, and that the time of payment of the note was extended for a valuable consideration without his knowledge or consent. This plea was sustained, and appellant only recovered against Smith. The appeal is from the judgment in favor of Furr.

The facts show that in July, 1900, Smith desired to borrow \$1,000 from appellant bank. The bank agreed to let him have it if he would get appellee J. W. Furr to sign the note with him. A note (the one sued on) was executed by Smith signing on its face at the bottom, and Furr indorsed his name on the back. The bank loaned Smith the money on this note. Furr received none of the money obtained on the note. He signed only as surety for Smith, and this was known to the bank at the time the money was loaned. The time of payment of the note was extended seven times by the bank. The first four extensions were made with Furr's consent, and the last three extensions were made without his knowledge or consent. Smith paid interest in advance on said extensions. On the trial the court admitted parol evidence over appellant's objection to show that Furr was only a surety for Smith. The contention of appellant is that, Furr having indorsed his name on the back of the note at its inception, made him liable as an original principal, and that such is the legal import of his signature, and that parol evidence is not admissible to vary such import. This contention is contrary to the holdings of the courts of this state. As early as the case of *Cook v. Southwick*, 9 Tex. 615, 60 Am. Dec. 181, it was held that "when a person not the payee of a note signs his name upon the back at the time of its inception, without any words to express the nature of his undertaking, he is liable as an original promisor or surety," and "it is com-

*Rehearing denied December 5, 1903, and writ of error denied by Supreme Court.

¶ 3. See *Principal and Surety*, vol. 40, Cent. Dig. § 188.

petent for the person so signing to show by oral or other evidence the real obligation intended to be assumed at the time of signing." This holding, as far as we are aware, has never been overruled by any decision of the courts of this state. On the other hand, it has been approved and followed up to this time. *Latham v. Flour Mills*, 68 Tex. 127, 8 S. W. 462; *Huesake v. Broussard*, 55 Tex. 201; *Wybrants v. Lutch*, 24 Tex. 309; *Barton v. Bank*, 8 Tex. Civ. App. 223, 29 S. W. 210; *Zapalac v. Zapp* (Tex. Civ. App.) 54 S. W. 938. The same principle is recognized in *Burke v. Cruger*, 8 Tex. 66, 59 Am. Dec. 102. It is well settled that the extension of time of payment of a note for a valuable consideration without the consent of a surety will relieve the surety of liability thereon. The evidence showing Furr to be a surety, which was known to the bank, and the extension being made for value, and without his knowledge or consent, the trial court did not err in holding that he was not liable.

Judgment affirmed.

McCOLPIN et al. v. McCOLPIN'S ESTATE.
(Court of Civil Appeals of Texas. Nov. 25, 1903.)

DESCENT—INHERITANCE BY ADOPTED CHILD—PROPERTY OUTSIDE THE STATE.

1. The adoption of a child in one state in accordance with the laws thereof will entitle such child to inherit property left by the adopter in another state.

On rehearing.

For former opinion, see 75 S. W. 824.

KEY, J. While we have found no case in which the question has been decided in this state, the weight of authority seems to support the doctrine that the adoption of a child in one state, in accordance with the laws thereof, will entitle such child to inherit property left by the adopter in another state. 1 Am. & Eng. Ency. Law (2d Ed.) p. 733, and cases there cited. *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321, is the leading case on the subject, and holds that adoption, like marriage, fixes a status, and establishes the fact that the person adopted is, in law, as to the subject of inheritance, a child of the adopter. While there are authorities to the contrary, we accept that doctrine.

In the case at bar the appellee pleaded title by heirship through adoption by M. McColpin in the state of Kentucky. The trial court made no direct finding on that issue. It is stated in the findings of fact that "McColpin repeatedly declared that said Savannah was his adopted daughter," and that McColpin promised to execute and return to the Louisville Baptist Orphans' Home a contract of adoption, "but there is no evidence that said contract was ever executed and returned to said home, and there is no record

of its having been returned to the same." The statute authorizing the adoption required the contract to be signed by the president of the home and the person adopting the child, and recorded in the office of the clerk of the county court of Jefferson county, Ky. And as the court made no specific finding that the contract of adoption was or was not executed in the manner required by law, we now think that issue should be left open, and the case remanded for trial thereon; and the judgment heretofore rendered by this court will be changed so as to accomplish that result.

In all other respects, the motion for rehearing is overruled.

MEINEKE et al. v. EDMUNDSON et al.*
(Court of Civil Appeals of Texas. Nov. 13, 1903.)

COVERTURE—PROOF—SPECIAL PLEADING.

1. Failure to plead coverture in order to defeat the defense of limitation of action renders evidence of coverture inadmissible.

Appeal from District Court, Brazoria County; Wells Thompson, Judge.

Action by Harriet M. Meineke and others against W. L. Edmundson and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

George H. Breaker, for appellants. L. R. Bryan and Searcy & Garrett, for appellees.

GARRETT, C. J. This was an action of trespass to try title, brought by Harriet M. Meineke and her husband, Theodore Meineke, Mary H. Charwane and her husband, Martin Charwane, and G. H. Herman, against W. L. Edmundson, Ada H. Edmundson and her husband, J. W. Edmundson, and John Carlisle, for the recovery of an undivided one-half of 320 acres of land originally granted to W. H. Snyder, in Brazoria county. The defendant John Carlisle was not made a party by the original petition, which was filed March 25, 1901, but was first brought into the case by the amended original petition upon which it went to trial, filed February 11, 1903. The defendants pleaded not guilty, improvements in good faith, and the statutes of five and ten years' limitation. No plea of coverture was filed in replication, and, the case having been submitted to the court without a jury, there was judgment generally in favor of the defendants, and upon his plea in reconvention in favor of the defendant John Carlisle for the recovery of the land. The plaintiffs have appealed.

The plaintiffs showed title to the land sued for, and were entitled to recover unless defeated by the defense of five years' limitation. The defendants had had and held

*Rehearing denied, and writ of error denied by Supreme Court.

†1. See Limitation of Actions, vol. 33, Cent. Dig. § 707.

†1. See Adoption, vol. 1, Cent. Dig. § 87.

open and adverse possession of the land under deeds duly recorded, paying taxes thereon, continuously from July 23, 1891, until the suit was filed, and until Carlisle was brought in. The plaintiffs Harriet Meineke and Mary Charwane were married women during all of said time. The defendant Carlisle purchased said land from the defendant W. L. Edmundson April 9, 1901, before the said Edmundson had been served with process, without actual notice of the pendency of the suit or of any adverse claim. The land had been conveyed to W. L. Edmundson by the said Ada Edmundson and her husband before the suit was filed. The defendants were purchasers in good faith, and had put valuable improvements on the land, worth \$6,100. Coverture as a defense to the statute of limitations did not cease to be the law until one year from and after the passage of the act of April 1, 1895 (Laws 1895, p. 35, c. 30), amending Rev. St. 1895, art. 3201, and it is insisted by the plaintiffs that six years did not elapse between the passage of the act and the institution of the suit and the service of citation on W. L. Edmundson. On the other hand, it is contended that, as Carlisle bought before service of process on W. L. Edmundson, and was not a party to the suit until the filing of the amended original petition and his appearance therein, he was not a purchaser lis pendens, and that limitation, which began to run on the passage of the act, was not suspended as to him until after the bar was complete. In view of the fact that coverture was not pleaded by the plaintiffs in reply to the defense of limitation, it is unnecessary to consider other questions that might arise. Coverture not having been pleaded, evidence showing it will not be considered. *Harvey v. Cummings*, 68 Tex. 607, 5 S. W. 513.

The judgment will be affirmed. Affirmed.

BRUMMER v. CITY OF GALVESTON.

(Court of Civil Appeals of Texas. Nov. 21, 1903.)

EVIDENCE—RECORDS—CERTIFIED COPIES—ADMISSIBILITY.

1. Under Rev. St. 1895, art. 2305, authorizing the introduction of certified copies of records where the originals would be admissible, the admission of a certified copy of parts of an assessment roll was proper where pertinent to matter in controversy.

Appeal from District Court, Galveston County; Wm. H. Stewart, Judge.

Suit by the city of Galveston against Caroline Brummer. From a judgment for plaintiff, defendant appeals. Affirmed.

L. E. Trezevant, for appellant. P. A. Drouilhet, for appellee.

GILL, J. This is a suit brought by the appellee, city of Galveston, for the recovery of municipal and school taxes due upon prop-

erty of appellant for the years 1900 and 1901. The appeal is from a judgment in favor of the city for the sum sued for with foreclosure of tax liens. We find that the evidence sustains the judgment. Inasmuch as the questions made by appellant are purely of law, a fuller statement of the facts is unnecessary.

The question presented by the first assignment of error was certified by us to the Supreme Court, and the answer (76 S. W. 428, 8 Tex. Ct. R. 313) declares the position of appellant untenable. We refer to that certificate for a general statement of plaintiff's pleading.

Under the second assignment appellant seeks to secure a reversal of the judgment because, over her objection, a certified copy of parts of the assessment rolls pertinent to the matter in controversy was admitted in evidence. The objections urged are (1) the original, and not a copy, should have been offered; and (2) no allegations were made that the assessment rolls were authorized by ordinance. We think the copy admissible against the first objection, because it was a duly certified copy of a public record, under articles 2305 of the Revised Statutes of 1895, authorizing the introduction of such copies in all cases where the originals would be admissible. The pleadings of plaintiff are not open to the criticism involved in the second objection.

The objection to the petition presented by the third assignment, to the effect that it does not set out an ordinance authorizing the assessor to publish notice requiring rendition of property for taxes, is equally without merit for the reasons given for overruling the second objection above.

The fourth assignment is of the same general nature, and is disposed of by what has already been said.

Finding no error in the record, we order that the judgment in all things be affirmed. Affirmed.

COMMERCIAL NAT. BANK OF BEEVILLE v. FIRST NAT. BANK OF CUERO.*

(Court of Civil Appeals of Texas. Oct. 28, 1903.)

DECEIT—PETITION—SUFFICIENCY OF ALLEGATIONS—RESONSIBILITY—ASSUMPTION OF KNOWLEDGE—VENUE—PARTIES.

1. A petition which alleged that plaintiff entrusted defendant with a note, to procure the signatures of S. and R.; that defendant undertook to do so, and returned the note to plaintiff with the representation that it had been signed by S. and R.; that R.'s signature was a forgery; that plaintiff relied on the representation, and advanced money to S.; and that by reason of the false representation, and plaintiff's reliance thereon, defendant became liable—was not bad, as against a general demurrer, for failing to allege that defendant knew that the representation was false.

*Rehearing denied.

¶ 1. See *Fraud*, vol. 23, Cent. Dig. § 40.

2. Where, in an action on a note, instituted against the makers, one of them pleaded that his signature to the note was a forgery, it was not improper to join as defendant a third person, who undertook to procure the signatures of the makers to the note, and who represented to plaintiff that the makers had signed it.

3. Under the express provisions of Rev. St. 1895, art. 1194, subd. 23, an action by the payee of a note against a bank for falsely representing that third persons had signed a note, while the signature of one of them was a forgery, being an action for deceit, may be instituted in the county where the payee received the bank's letter containing the representations, and where the payee, relying on the representations, advanced money on the note.

4. A bank was requested by the payee of a note to hand it to R. for signature by himself and S. R. was an officer of the bank. The bank delivered the note to S. to procure the signature of R. S. returned the note to the bank with the signatures, but the signature of R. was a forgery. The bank sent the note to the payee, together with a statement that it had been properly signed, and the payee thereupon advanced money to S. Held, that the false assumption of knowledge on the part of the bank that the note had been signed by R. was sufficient to sustain an action for deceit.

Appeal from District Court, De Witt County; James C. Wilson, Judge.

Action by the First National Bank of Cuero, Tex., against W. H. Smith and another and the Commercial National Bank of Beeville, Tex. From a judgment in favor of plaintiff against defendant bank, it appeals. Affirmed.

John C. Beasley, for appellant. Davidson & Bailey and Lockey & Lewright, for appellee.

GARRETT, C. J. This action was brought in the district court of De Witt county by the appellee against W. H. Smith and J. F. Ray to recover upon a promissory note for the sum of \$2,066.66, dated November 27, 1901, payable at Cuero, Tex., and alleged to have been executed by them to the appellee. The appellee also made the appellant a party to the suit, and sought to recover against it; alleging that the appellant had undertaken, as the agent of appellee, to have the note sued on signed by Smith and Ray, and had sent the same to appellee with the representation that it had been so signed, and that appellee had acted on such representation, and had advanced the sum of \$2,000 on the note to Smith, against whom no recovery could be had, on account of his insolvency; that Ray was solvent, but claimed that the note, as to him, was a forgery; and that, in the event the note was a forgery, appellant was liable to appellee for the amount so advanced by it to Smith on account of its deceitful representations. Defendant Smith filed no answer. Defendant Ray answered under oath, denying the execution of the note by him. The appellant pleaded in abatement to the venue of the suit, asserting its privilege to be sued in Bee county, where it had its domicile. It also pleaded the general demurrer, a special demurrer to the venue, a special demurrer raising the ques-

tion of misjoinder, and in bar the general denial. The pleas to the venue and the general demurrers were overruled by the court, and afterwards the cause was submitted for trial to the court without a jury, and resulted in a judgment in favor of the appellee for the amount of the note and costs against Smith and the appellant, and in favor of the defendant Ray. The questions presented to this court on appeal are (1) the sufficiency of the petition to show a cause of action for deceit against the appellant; (2) the misjoinder of parties defendant; (3) venue of the suit as to the appellant; (4) the sufficiency of the facts to show that the appellant is liable. The facts upon which the suit is founded transpired in the making of a loan of \$2,000 by the First National Bank of Cuero, Tex., to W. H. Smith. Smith, who resided at Mineral City, in Bee county, wrote to the bank at Cuero, requesting the loan, and offered as surety James F. Ray, who was a wealthy stockman of Bee county, and resided at Pattus, in that county. Ray was vice president and director of the appellant bank, and an uncle by marriage of Smith. The Cuero bank wrote to the First National Bank of Beeville, in Bee county—its correspondent—stating that Smith had applied for the loan, and had offered Ray as surety, and that it was unacquainted with them, and asked about their responsibility. The First National Bank of Beeville replied in due course of mail, saying that the parties were good for the amount of money; that Smith was a merchant in good standing; that Ray was a man of property, and an official of the Commercial National Bank; that Smith was a former patron of that bank; and that it was acquainted with their signatures. The Cuero bank then prepared for signature the note sued on, in Cuero, and mailed it with a letter to the Commercial National Bank, saying: "A few days since we had a letter from Wm. H. Smith of Mineral City, Texas, making application for a loan of \$2,000.00 and offering as security James F. Ray, vice president of your bank. Will you do the kindness to hand the enclosed note to Mr. Ray for signature by himself and Mr. Smith? Thanking you in advance," etc. Upon receipt of this letter and the note, the appellant, by its president, John W. Flournoy, mailed the note in a letter to Wm. H. Smith, at Mineral City, requesting him to get Mr. Ray's signature and return to the writer. A letter was received, returning the note as follows: "Pettus, Texas, 11—30—01. The Commercial National Bank of Beeville, Beeville, Texas—Dear Sirs: Enclosed find note as per request. You will please forward to the Cuero bank and tell them to place to my credit. Respectfully, Wm. H. Smith." The letter was opened by Flournoy in presence of the bookkeeper of the appellant bank, and the signatures to the note were examined and pronounced genuine by both of them. Flournoy at once wrote a letter from Bee-

ville to the appellee, at Cuero, in which he inclosed the note and mailed it. The letter was as follows: "Commercial National Bank of Beeville, Beeville, Texas, 12-2-01. First National Bank of Cuero, Cuero, Texas—Dear Sirs: Enclosed you will find note of Wm. H. Smith, properly signed up. He wants the proceeds of said note placed to his credit. Yours truly, John W. Flournoy, President." The note was received, and the money was advanced by the appellee to Smith. The signature of Ray to the note was found to be a forgery, but was pronounced to be a most clever one. Both Flournoy and the bookkeeper, Miller, testified that, "if the signature of Ray to this note is a forgery, then it is a most expert and adroit one, and calculated to deceive the most careful, and greatly did deceive this witness." Smith belonged to a family of people who stood high in Bee county, well known for probity and honesty, and who had occupied positions of public honor and trust. Wm. H. Smith himself had been a young man of excellent habits, and at the time of this transaction and for a number of years prior thereto he was engaged in a mercantile business in Mineral City, in Bee county, a small village about 17 miles northwest of Beeville. His standing and credit among business men were of the highest order. His business seemed to be successful and profitable and of large volume, and for some years he had done business with the appellant; his transactions amounting in the year 1900 to \$70,000. He had the confidence of the officers of the bank, and it carried him without security sometimes for as much as \$10,000. Not long before this transaction the bank had loaned him \$500, with Ray as surety; and the note for the money was prepared and mailed to him at Mineral City, with request to sign and get Ray's signature, and then return to the bank, and the money was paid to Smith on return of the note by him. Ray lived at the little village of Petrus, about 16 miles north of Beeville, and did business with the appellant bank, and was personally and intimately known to the officers of the bank. The correspondence of Smith and Ray with the bank had been voluminous, and Flournoy and Miller had seen them write, and both testified that they were familiar with and knew their signatures, and that they had no reason or ground to suspect that either of them was forged, but believed they were genuine. The Cuero bank was not acquainted with Smith or Ray, and did not know their signatures. It trusted the appellant bank to get the note signed, and believed its representation that it had been properly signed, and on that account alone let Smith have the money. Appellee would not have loaned the money on Smith's signature alone. No charge was made by the appellant for the service it rendered, and the appellee did not offer or expect to pay for it, but would have done so if required.

77 S.W.—16

The appellant is a national bank duly incorporated under the national banking act of Congress (Act June 20, 1874, c. 343, 18 Stat. 123 [U. S. Comp. St. 1901, p. 3454]), with its domicile at Beeville, in Bee county, Tex.; and the appellee is also a national bank duly incorporated under the national banking act, with its domicile at Cuero, in De Witt county, Tex.

1. The petition was good on general demurrer, since the facts were substantially set forth showing that the appellee had intrusted the appellant with the note to procure the signatures of Smith and Ray, and that the appellant undertook to do so, and returned the note to appellee with the representation that it had been signed by them; that the appellee relied upon the representation as true, and advanced the money to Smith; and that by reason of such false representation, and the appellee's reliance thereon, the appellant became liable. The alleged defect in the petition, in not containing an allegation that the appellant knew that the representation was false, or other averment equivalent thereto, should have been pointed out by special exception. The allegation, in the absence of a special exception, will be supplied by intendment.

2. The liability of the appellant depended upon the fact that the signature of J. F. Ray to the note was a forgery. It was therefore not improper to join it in the suit upon the note in which Ray had pleaded the issue of forgery upon an allegation of facts that would render the appellant liable in case the signature of Ray had been forged. *Railway v. Browne* (Tex. Civ. App.) 66 S. W. 341; *Love v. Keowne*, 58 Tex. 191.

3. There has been a disposition by the parties to treat the transaction as one of breach of contract. But it should rather be regarded as an action for deceit. It was for the false representation, carelessly made, that Ray had in fact signed the note by which the appellee was induced to pay the money, and not for the failure of the appellant to perform an implied agreement to procure the signature. As an action for deceit, a part of the cause of action arose in De Witt county, and a very material part thereof, because the letter mailed to the Cuero bank procured at Cuero the payment of the money to the credit of Smith as fully as though Smith had gone in person to Cuero, furnished with a letter of credit by the appellant. A part of the cause of action having arisen in De Witt county, the appellant, as a private corporation, was suable in that county. Rev. St. 1895, art. 1194, subd. 23.

4. While the statement that Ray had signed the note was false, it was not knowingly false, and not made with a fraudulent intent; and, as a general rule, in such case the bank would not be liable in an action of deceit. 14 Am. & Eng. Ency. Law, 86. The trial court held, however, that although the officer of the appellant bank had acted in good

faith, and performed the service requested without pay, it was, under the circumstances, guilty of gross negligence in intrusting the procuring of Ray's signature wholly to Smith, and that it would be liable as for such negligence. But it is not necessary that the facts should have amounted to gross negligence, unless impliedly so, if the appellee was caused to pay the money upon a false assumption of knowledge by appellant that the note had been signed by Ray. The appellant was requested to hand the note to Ray for signature by himself and Smith. It returned the note to the appellee with the statement that it had been properly signed up, and the money was paid. Here was a false assumption of knowledge that will sustain an action of deceit. 14 Am. & Eng. Ency. Law, pp. 86, 99. Knowledge of such falsity has been held not necessary. Id. pp. 90, 92. The letter written by the appellant to the bank at Cuero, inclosing the note to it, with the statement that it had been properly signed up, in view of the request to hand it to Ray for signature, and of the fact that Ray was the vice president and a director of the bank, had the effect to procure for Smith the payment of the money, which was advanced upon the representation that the note had been signed by Ray. The representation was a false statement, which, under the circumstances, cannot be relieved against by ordinary care in procuring the signatures.

The judgment of the court below will be affirmed. Affirmed.

BEAN et al. v. DOVE et al.*

(Court of Civil Appeals of Texas. Oct. 31, 1903.)

SUBSTITUTED SERVICE—JUDGMENT—SETTING ASIDE—NEW TRIAL—MOTION FOR—STATUTORY LIMITATION—PARTIES—ADVERSE CLAIMANTS.

1. Under Rev. St. 1895, art. 1375, providing that where judgment has been rendered on service by publication, when the defendant has not appeared, new trial may be granted upon the application of the defendant, for good cause shown, supported by affidavit, within two years after the rendition of the judgment, the right to open up a judgment after the adjournment of the term at which it was rendered must be availed of within the time limited.

2. Under Rev. St. 1895, art. 1375, an application to open a judgment determining heirship and distributing an estate, and for a new trial, made within the time limited, does not inure to the benefit of others intervening during the pendency of the application, but not within such time, claiming adversely to all the parties to the original suit for partition, and also to the applicants for the new trial, and under a different line of ancestry—no privity of estate or community of interest being alleged as existing between them and said applicants—and suspend the running of the limitation as to such interveners.

Appeal from Grayson County Court; Rice Maxey, Judge.

Action by Sarah A. Dove and others against M. F. Bean and others. From a

judgment for plaintiffs, defendants appeal. Affirmed.

Don A. Bliss, for appellants. W. M. Walton and C. L. Galloway, for appellees.

TALBOT, J. Thomas C. Bean died in Fannin county, Tex., in the month of July, 1887, leaving a large and valuable estate, consisting principally of lands situated in various counties in this state. It appears that he had never been married, and that his father and mother and brothers and sisters, if he had any sisters, were all dead. Administration was taken out on his estate in the county court of Fannin county, Tex., and, while pending in said court, Sarah A. Dove and others filed an application for the partition and distribution of said estate. The usual citation in such cases was issued and published, notifying Jacob H. Brennerman and about 38 other named persons, who were alleged to be nonresidents of the state of Texas, that Sarah A. Dove, a resident of the city of Washington, in the District of Columbia, and Jane Murray and Mary E. Murray, residents of Fairfax county, state of Virginia, as heirs of Thomas C. Bean, deceased, had filed in the county court of Fannin county, Tex., an application for the partition and distribution of the estate of said Thomas C. Bean. The said nonresidents were notified by said citation that said application would be heard at a regular term of the county court of Fannin county, Tex., on the third Monday in January, 1892 (it being the 18th day of said month), at the courthouse in the town of Bonham, and that at such time they, as well as all other persons interested in said decedent's estate, might appear and show cause why such partition and distribution should not be made. This citation was issued on the 8th day of December, A. D. 1891, and the return of the officer shows that it was duly published in the Bonham News, a newspaper published in Fannin county, Tex., for four consecutive weeks prior to the return day thereof. During the pendency of this application a number of parties intervened, and caused citation to issue to the unknown heirs of said Thomas C. Bean, which was served by the usual publication thereof in a newspaper. Afterwards said administration, together with said application for partition of said estate, was transferred to the district court of Fannin county, Tex., on account of the disqualification of the county judge, and thereafter transferred to the district court of Grayson county, Tex. Thomas P. Steger and Ed D. Steger, attorneys at law, were appointed by the court, after the perfection of service by publication issued at the instance of interveners, to represent the unknown heirs of Thomas C. Bean in the matter of said application for distribution, and they filed an answer for such heirs solely by virtue of said appointment. The said unknown heirs did not appear, either in person, or by any

*Writ of error denied by Supreme Court.

one authorized by them to represent them. In the matter of said application and distribution, issue was joined between the parties thereto as to heirship and ownership of said Thomas C. Bean's estate; and a trial by jury on the 25th day of January, 1896, in the district court of Grayson county, Tex., resulted in a verdict and judgment in favor of Sarah A. Dove and others against all parties adversely interested, declaring them (the said Sarah A. Dove and others) to be the sole heirs of the said Bean, deceased, and entitled to said estate. Commissioners were duly appointed by the judgment of the court to make partition, who made their report; and on the 16th day of July, 1896, the court entered a final decree partitioning and distributing the estate among said parties in accordance with said report. There was no appeal taken from this judgment, but on the 21st day of July, 1897, Samuel Ashmore and others, who had not theretofore appeared, filed in said district court of Grayson county a petition for a new trial of said cause, claiming that they were "unknown heirs" of the said Thomas C. Bean, deceased, referred to in the original suit for partition, and asking that all parties to said judgment, including the unknown heirs of said Bean, deceased, be made parties defendant to their said suit for a new trial. All the parties to said judgment and decree of partition were duly cited in said application or suit filed by Ashmore and others for new trial, except the unknown heirs of said Bean. They were never cited therein, and no effort seems to have been made to secure service on them. This suit of Ashmore and others for a new trial seems to have been continued from time to time until the third Monday in September, 1902. On this day the cause was called for trial, and for the first time the appellants herein, Merrill F. Bean and others, appeared and filed a petition of intervention in said Ashmore and others' bill of review for new trial. Appellants in their said petition of intervention claimed to be the heirs of the said Thomas C. Bean, deceased, and entitled to his estate. They claimed adversely to all the parties to the original suit for partition, and to all the parties to the application for a new trial. There was no privacy of estate or community of interest alleged as existing between them, or either of them, and the said Ashmore and others, or either of them. They claimed through an entirely different line of ancestry to that of any of the other parties to the said original partition suit, or the said application for new trial. To Ashmore and others' petition for a new trial appellees demurred generally and by special exceptions, and to the intervention of the appellants they filed a general demurrer and general denial. All demurrers, exceptions, and motions of appellees were by the court overruled. A trial on the intervention of Ashmore and others and of appellants was had before a jury on the 30th day of

September, 1902, resulting in a verdict in favor of appellees, and M. F. Bean and others alone appeal.

The record in this cause, and cross-assignments of error filed by appellees, raise and present a question for our decision, which, from our view of the law, disposes of the appeal and case without reference to the merits of appellants' claim, and errors assigned by them.

By appellees' ninth cross-assignment of error, they present the proposition that the court below was without authority of law to entertain and determine appellants' application for a new trial or bill of review, because the same was filed more than two years after the rendition of the judgment of partition and distribution in the original suit of Sarah A. Dove et al. v. H. P. Howard et al., and no sufficient cause for not filing sooner shown. Said assignment is, in substance, as follows: "The court erred in overruling defendants' general demurrer to the pleadings filed by Merrill F. Bean and others, because said petition of intervention showed upon its face that it had been filed as much as six years after the judgment was rendered in the case of Sarah A. Dove et al. v. H. P. Howard et al., and the statute requires that such motion or application shall be filed within two years after the rendition of said judgment, and, if not so filed, the court has no jurisdiction to hear the same, and hence in this case appellants' petition of intervention and for a new trial of said original cause should have been dismissed." The application of Ashmore and others and of the appellants to set aside the judgment and decree entered in the case of Sarah A. Dove et al. v. H. P. Howard et al., and to have a new trial of said cause, was based upon article 1375, Rev. St. 1895, which reads as follows: "In cases in which judgment has been rendered on service of process by publication when the defendant has not appeared in person or by an attorney of his own selection, a new trial may be granted by the court upon the application of the defendant for good cause shown, supported by affidavit, filed within two years after the rendition of said judgment." The plea that appellants had not filed their application for a new trial of said cause within two years after the rendition of the judgment and final decree therein was not interposed by appellees in the trial court, either by special exception or by way of defense, and appellants contend that such plea cannot now be presented and urged, because they say the statute relied on by appellees is one of limitation; that the rule of pleading and practice in reference to such statute must be observed, and, unless pleaded in the court below, either by exception or as a defense, in bar of appellants' right to recover, they cannot avail themselves of the provisions of said statute in this court. Appellants further contend that such a plea would have availed appellees nothing if it

had been pleaded in the court below, because they say that the application for a new trial of Samuel Ashmore and others was filed within the time prescribed by the statute, and inured to the benefit of appellants, if they are the real heirs of Thomas C. Bean. We do not concur in this contention. If the intervention of appellants, setting up that they were the heirs of Thomas C. Bean, and asking that the judgment and decree entered in the original suit be set aside, and a new trial awarded them, was not filed within two years after said decree was rendered (and that it was not is not a controverted issue in the case), and if the application of Ashmore and others did not inure to the benefit of the appellants, and stop the running of limitations as to them, then we regard the failure of the trial court to sustain appellees' demurrer, or, at the suggestion of appellees, or upon its own motion, to dismiss appellants' intervention, fundamental error, which can be taken advantage of and urged in this court. The right to open up the judgment after the adjournment of the term at which it was rendered by application of this character is statutory, and not a right given at common law, and, if the right was not availed of within the period fixed by the statute, the remedy and right were lost. The question then is, did the filing of the intervention of Ashmore and others within the time prescribed by law, asking that said judgment and decree be set aside and a new trial granted, inure to the benefit of appellants, and suspend the running of limitation as to them? We think not. There is no privity of estate or community of interest between appellants and appellees with respect to the property sought to be recovered. There was no such estate or interest with respect to said property existing between appellants and Samuel C. Ashmore and those who joined with him in filing his intervention asking for a new trial of said original suit. Ashmore and others, in their intervention, claimed adversely to appellants and all others, asserting that they were the heirs of Thomas C. Bean. They did not allege that there were any heirs, known or unknown, who were interested in, and owned jointly with them, said estate, or any part of it, and hence necessary parties to their suit for a new trial. They allege the names of certain parties claimed to be adversely interested to them, and pray that they and the unknown heirs of Thomas C. Bean be served with citation; but their prayer that the unknown heirs of Thomas C. Bean be served with process to appear and answer in said suit was manifestly insincere, and made with no intention to have such process issued. They took no steps, so far as the record shows, aside from the prayer, to have it issued, notwithstanding their application was pending more than six years before a trial was had.

The precise question before us has not, to

our knowledge, been decided by any of the courts of this state. Strongly analogous cases, however, in our opinion, may be found. It is settled law in our courts and in the courts of many other states, though the contrary is held in some of the states, that a tenant in common may sue for and recover lands, as against a stranger or trespasser, on behalf of himself and his co-tenant; and yet it seems that such suit would not stop the running of the statute of limitations as against the interest of the co-tenant not suing. *Baldwin v. Johnson*, 95 Tex. 85, 65 S. W. 171; *Ney v. Mumme*, 66 Tex. 268, 17 S. W. 407; *Davidson v. Wallingford*, 88 Tex. 619, 32 S. W. 1030. The case of *Stovall v. Carmichael*, 52 Tex. 389, was an action of trespass to try title; and Judge Gould, delivering the opinion of the court, said: "Our opinion is that the institution by James T. Stovall of an ordinary suit of trespass to try title, there being nothing to indicate that the suit was brought on behalf of any other part owner, did not operate to stop the running of limitation against others than himself. Such was the rule recognized and enforced by this court in *Burleson v. Burleson*, 28 Tex. 383." Proceeding, he says: "A somewhat analogous case is when one of two tenants in common is under disability which prevents the running of limitation against him. The rule seems to be that, if the other tenant in common might have sued alone (as doubtless he might in this state), he is not protected from the effects of limitation, and that in such case the party under disability and not barred can recover only his moiety. [Citing *Frum on Co-Ten.* § 377; *Ang. on Lim.* § 484.] As between him and other joint owners, his beneficiary acts will inure, not to his exclusive benefit, but to the benefit of all. But it is also true that by the institution of an unsuccessful suit he binds no one but himself. Other joint owners are not estopped by a judgment against him." See, also, *Johnson v. Schumacher*, 72 Tex. 334, 12 S. W. 207. In *Burleson v. Burleson*, 28 Tex. 385, it appears that two of the plaintiffs had conveyed their interest in the land in controversy before the institution of the suit. Their vendees were not joined as original plaintiffs, but they subsequently intervened and asserted their rights. "Held that, as to their interest, if the statute of limitation began to run before suit, it did not cease to run against them until they intervened. Before that time their interests were not in litigation." Again, it has been held "that a defendant claiming land in controversy against his co-defendant will not be considered as having filed his action, so as to stop limitation, until his claim is set up by answer or cross-bill limitation, as to his interest, is not stopped by the original suit against his codefendants." *Grigsby v. May*, 84 Tex. 241, 19 S. W. 343. *Paschal v. Owen*, 77 Tex. 583, 14 S. W. 203, is a case where the surviving wife and mother sued for the unlawful and ma-

licious killing of her husband; and by amended petition, filed more than one year after her husband's death, the surviving children of the deceased joined in said suit. The court charged that the children could not recover, and on appeal it was held that the charge was correct, their rights being barred.

There is no pretense in the present suit that Ashmore and others and appellants have any joint interest whatever in the property to which they seek to establish title and ownership. On the contrary, their respective claims, if any they have, are entirely separate, distinct, and adverse.

The decree of partition and distribution of the estate of Thomas C. Bean, deceased, not having been set aside or appealed from, became final at the expiration of the term of the court at which it was rendered; and jurisdiction over the parties and subject-matter of the litigation could only be conferred upon said court and called into exercise thereafter by filing therein, within the time prescribed by article 1375 of the Revised Statutes of 1895, a bill of review or application for new trial. The time prescribed within which such bill or application may be filed is two years. Appellants' bill or application for new trial in this case was not filed until more than six years had elapsed. We believe that appellants, by the lapse of time, lost any right they may have had to ask that the judgment rendered in the case of Sarah A. Dove et al. v. H. P. Howard et al. be set aside, and an opportunity afforded them to contest their right to the property distributed among said parties; and, having reached this conclusion, and the judgment of the district court being that appellants take nothing by their suit, we believe the proper disposition to make of this appeal is to affirm the judgment of that court, and it is so ordered.

On Motion for Rehearing.

(Dec. 12, 1903.)

Appellants have filed a motion for rehearing in this cause, in which, among other things, they complain of the action of this court in calling their appearance and pleading in the case an intervention. When Ashmore and others filed their petition for review or new trial, they prayed that the unknown heirs of T. C. Bean be made parties. No citation, however, was issued; and on the 16th day of September, 1902, appellants voluntarily appeared and filed what is indorsed and called an "original answer." In this pleading they say "they are unknown heirs of T. C. Bean, heretofore made parties to this suit, and against whom Samuel Ashmore et al., plaintiffs in the suit for new trial in this cause, seek a recovery, and enter their appearance in this cause in answer to the petition for a new trial filed by said Samuel Ashmore et al., and for such answer show the court that they, together with Darius May, who resides in the Province of Quebec, in

the Dominion of Canada, Harriett Glover, whose husband is — Glover, and who resides in Orleans county, in the state of Vermont, and Esther Morgan, who resides in the city of Waltham, in the state of Massachusetts, were the unknown heirs of T. C. Bean, heretofore made parties to this suit, as set forth in the said petition of said Samuel Ashmore and others; that these defendants, together with the said persons named in the immediately preceding paragraph of this answer, were at the time of the rendition of the judgment described in the said petition of Samuel Ashmore et al., and are now, the sole heirs of said T. C. Bean." They further alleged that the "parties in whose favor said judgments were rendered were not heirs of the said T. C. Bean, and are not and were not entitled to the property belonging to the said T. C. Bean, left at his death; that, at the time of the rendition of said judgments, these defendants, and the persons hereinbefore named as coheirs with them of the said T. C. Bean, were the sole heirs of the said T. C. Bean, and now are his sole heirs, and were then and are now entitled to all the property belonging to the estate of the said T. C. Bean. They deny that plaintiffs in the suit for a new trial herein, to wit, Samuel Ashmore et al., are heirs of the said T. C. Bean, and deny that said Samuel Ashmore et al., or any of them, are entitled to any of said property." Said pleading, among other things, further alleged the interest claimed by each of appellants and said coheirs, and prayed that said alleged coheirs, Darius May, Harriett Glover, and Esther Morgan, be made parties, and be cited to answer herein, and, upon final hearing, that judgment be rendered setting aside the said judgments heretofore rendered, and adjudging appellants and said alleged coheirs to be the sole heirs of said T. C. Bean, and that all the property belonging to the estate of the said T. C. Bean be distributed among them in accordance with their several interests, for partition, for costs, and for general relief. Tested by these averments, we believe appellants, although nominating themselves defendants, are practically and in effect interveners, and that their appearance and pleading herein has been properly characterized by us an intervention.

We adhere to the views expressed in our original opinion, and the motion for rehearing is overruled.

BRIDGE v. CARTER.

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

DISTRICT COURTS—JURISDICTION—LIENS ON LAND—LOSS OF JURISDICTION—WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED.

1. Where a suit was brought in the district court, in good faith, to recover on notes and

enforce a lien on land, the fact that it appeared on the trial that there was no lien did not deprive the court of the jurisdiction which had attached, under Const. art. 5, § 8, and it could proceed to enter judgment on the notes.

2. Defendant to a suit between himself and the guardian of the minor heirs of a decedent, who was not called by plaintiff to testify as to any transaction with decedent, is not a competent witness against such minor heir as to any such transactions.

Appeal from District Court, Colorado County; M. Kennon, Judge.

Action by Mollie Carter, guardian of the estate of Earl Carter, a minor, against W. E. Bridge. From a judgment for plaintiff, defendant appeals. Affirmed.

Adkins & Green, for appellant. Foard, Thompson & Townsend, for appellee.

GARRETT, C. J. Mollie Carter, as guardian of the estate of Earl Carter, a minor, brought this suit against W. E. Bridge to recover upon two promissory notes for the sum of \$250, each, bearing interest at the rate of 8 per cent. per annum, and providing for 10 per cent. attorney's fees. The plaintiff alleged that the notes were secured by a vendor's lien upon certain land which was fully described in the petition. Payments amounting to \$224.32 were pleaded by the defendant. The cause was tried by the court without a jury, and resulted in a judgment in favor of the plaintiff against the defendant for the sum of \$429.45. The evidence did not show a vendor's lien, and none was allowed or foreclosed. All of the defendant's credits except two—one for \$20 and the other for \$10—were allowed by the court. In her petition plaintiff allowed no credits. The facts support the judgment.

It is contended here that the court below, upon the facts that were developed in the evidence, should have rendered judgment dismissing the cause for the want of jurisdiction. Upon the authority of *Ablowich v. The Bank*, 95 Tex. 429, 67 S. W. 79, 881, the trial court was correct in retaining jurisdiction and rendering judgment for the amount due on the notes after the evidence failed to show a lien. There was no plea by the defendant that the averments either as to the lien or the amount due on the notes were fraudulently made for the purpose of conferring jurisdiction.

By the third assignment of error the defendant complains of the rejection of his testimony to show the payment of the sums of \$20 and \$10. He was not a competent witness against the minor plaintiff as to transactions with the deceased, Susie Carter, who was the mother of the plaintiff, Earl Carter, and whose heir the minor was, and was not called by the plaintiff to testify to any transaction with the deceased, and there was therefore no error in excluding his testimony to show the payments.

There was no error in the judgment, and it will be affirmed. Affirmed.

EVERSBERG v. SUPREME TENT KNIGHTS OF MACCABEES OF THE WORLD.*

(Court of Civil Appeals of Texas. Nov. 20, 1903.)

MUTUAL BENEFIT INSURANCE—AMENDMENT OF BY-LAWS—DEFENSE OF SUICIDE—AMPLIFICATION—NOTICE—EFFECT OF STIPULATION.

1. Where, in an action on a mutual benefit insurance certificate, in which a subsequent amendment of the by-laws is interposed as a ground of defense, it is stipulated that the only question to be submitted to the court is whether or not the supreme governing body had the right to enact and apply the amendment to the existing contract, the issue as to whether proper notice of the amendment was given is eliminated.

2. Where the by-laws of a mutual benefit insurance association provide that publication in the official organ of any notice required to be given the members shall be sufficient notice, and make it the duty of a certain official "to compile and arrange for publication all amendments to the by-laws," it is not necessary that an amendment, after adoption, should be published in the official organ.

3. Where a member of a mutual benefit insurance association agrees in his application and certificate that the laws then in force or that may thereafter be adopted shall form the basis of his contract, and that his benefit shall not be payable unless he shall have complied with the laws then in force or that may thereafter be adopted, he is bound by a subsequent amendment of the by-laws amplifying the defense of suicide.

Garrett, C. J., dissenting in part.

Appeal from District Court, Washington County; Ed. R. Sinks, Judge.

Action by C. R. Eversberg, as guardian of the minor child of E. H. Eversberg, deceased, against the Supreme Tent Knights of the Maccabees of the World. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

W. C. Henderson, for appellant. W. S. Robson, John T. Duncan, and Duncan, Walters & Lane, for appellee.

PLEASANTS, J. The appellant, as guardian of the minor children of E. H. Eversberg, deceased, brought this suit to recover upon a benefit certificate for \$3,000 issued by appellee to the said E. H. Eversberg on December 18, 1893. The answer of the defendant in the court below admitted all of the material allegations of the petition, but pleaded as a defense that said E. H. Eversberg committed suicide, and that under the law of appellee association, passed prior to the death of said Eversberg, appellee was only liable on said certificate to the extent of double the amount of the assessments which had been paid thereon. This amount was tendered into court by the defendant, and upon a trial of the cause by the court below judgment was rendered for plaintiff for the amount tendered by defendant and in favor of defendant for all costs of suit.

*Rehearing denied, and writ of error denied by Supreme Court.

† 3. See Insurance, vol. 28, Cent. Dig. § 1855.

From this judgment plaintiff below prosecutes this appeal.

The cause was tried in the court below upon an agreed statement of facts, supplemented by additional evidence introduced by both parties. All of the evidence in the case is undisputed. Under the evidence and agreed facts in the case appellant, as guardian, is entitled to recover the full amount named in the certificate sued on, unless the suicide law pleaded by appellee is applicable to said certificate, in which event the amount recovered in the court below is the measure of appellee's liability. The material facts bearing upon this issue are as follows: The appellee is a fraternal beneficiary association incorporated under the laws of the state of Michigan, and having a permit to do business in the state of Texas. The legislative and governing body of the association is designated in the charter and by-laws as the "Supreme Tent." The subordinate organizations as designated in said by-laws are, "Great Camps," "District Camps," and "Subordinate Tents." All of these subordinate organizations are chartered by the supreme tent. On the 28th day of November, 1893, E. H. Eversberg, who had theretofore applied for and been admitted to membership in Subordinate Tent No. 4 of appellee association, secured a death benefit certificate for \$3,000, issued by appellee. This certificate provides that at the death of said Eversberg the sum of \$3,000 should be paid by appellee to the beneficiaries named therein, provided said Eversberg "shall have in every particular complied with the laws now in force or that may hereafter be adopted." At the time Eversberg made his application and became a member of the order the by-laws contained this provision: "No benefit shall be paid on account of death the result of suicide within one year after admission, whether the member taking his own life be sane or insane at the time." The application for membership in defendant order, signed by Emil H. Eversberg, contained, among other things, the following: "I hereby declare * * * and I hereby agree that * * * the laws of the Supreme Tent of the Maccabees of the World now in force, or that may hereafter be adopted, shall form the basis of this contract for beneficial membership. * * * I also agree that should I commit suicide within one year from the date of my admission into the order whether sane or insane at the time, that this contract shall be null and void and of no binding force upon the Supreme Tent. * * * This application and the laws of the Supreme Tent now in force or that may hereafter be adopted, are made a part of the contract between myself and the Supreme Tent, and I, for myself and my beneficiary or beneficiaries, agree to conform to and be governed thereby." At a regular meeting of the officers, delegates, and representatives composing the Supreme Tent of the Knights of the Maccabees of the World held in the month of July, 1901, the

suicide law of the order was amended so as to read as follows: "No benefit shall be paid on account of the death of a member taking his own life, whether sane or insane at the time: provided that in case of suicide twice the amount of all assessments or monthly rates paid to the Supreme Tent by such member shall be paid back to the beneficiary named in the certificate, or to the person found to be entitled to receive the same, which amount shall not exceed the face of the certificate, and such amount shall be the full amount that can be claimed in any such case." Under the by-laws of the order the supreme tent was given authority to amend or change said by-laws, and the amendment to the by-law on the subject of suicide above set out was regularly passed and adopted by the supreme tent in the manner provided by said by-laws. Under the charter of the association the supreme tent is composed of the supreme officers of the order and of delegates or representatives elected by the several subordinate organizations. At the meeting of the supreme tent at which the suicide law was amended the subordinate tent to which E. H. Eversberg belonged was represented by a duly elected and accredited delegate. E. H. Eversberg committed suicide while suffering from an attack of insanity on the 21st day of May, 1902. It was not shown that Eversberg ever had actual notice of the action of the supreme tent in amending the suicide law. The by-laws of the association made it the duty of the board of trustees, which board was composed of the supreme commander, supreme record keeper, and supreme finance keeper, and two members of the association elected by the supreme tent, to designate some newspaper as the official organ of the supreme tent, and to contract with such publication to mail a copy of every issue of same to each member of the association. In pursuance of this authority the trustees designated the Bee Hive, a paper published at Port Huron, Michigan, as such official organ, and entered into a contract with said paper to mail a copy of each of its publications to each member of the order. Under this contract the Bee Hive was regularly mailed addressed to E. H. Eversberg at Brenham, Tex. The by-laws further provided that the printing in the official organ of any notices required to be given the members, when such notices are signed and attested by the proper officers, shall be deemed a legal and sufficient service of such notice. Among other duties imposed by the by-laws upon the supreme record keeper, he was required to compile and arrange for publication, subject to the approval of the board of trustees, all amendments to the by-laws adopted by the supreme tent. The amendment to the by-laws limiting the amount to be paid on benefit certificates held by members who had committed suicide was not published in the Bee Hive after its adoption by the supreme tent, but the first issue of

said paper after the adoption of said amendment contained an editorial mention of its adoption, and an issue of the paper shortly before the meeting of the supreme tent at which the amendment was adopted contained a copy of the amendment, and stated that it would be offered for adoption at the approaching meeting of the supreme tent. It is not shown that a copy of either of these issues of the Bee Hive was received by Eversberg.

The appellee association was not organized for profit, and its purposes are purely charitable and benevolent. The fund from which death benefits are paid is maintained by voluntary assessments paid monthly by the members of the order. The payment of these assessments cannot be legally enforced, the only penalty for failure to pay same being suspension from membership in the order. No one can obtain a benefit in the order without first becoming a member of a subordinate tent, and such privilege can be only conferred by a majority vote of the members of the subordinate tent in which membership is sought. Appellant, under appropriate assignments, contends that the judgment of the court below should be reversed for the following reasons: First. Because the evidence fails to show that E. H. Eversberg had notice of the adoption of the amendment to the suicide law, and therefore said amendment could not limit appellee's liability upon the benefit death certificate theretofore issued to said Eversberg. Second. Because the evidence shows that said amendment has never been published as required by the by-laws of the order, and until so published it is of no force or effect, and is not binding upon the members of the order. Third. Because to construe said amendment as applying to benefit certificates issued prior to its adoption is to give it a retroactive effect, to the impairment of vested rights, and is contrary to the Constitution and laws of this state.

The majority of the court, Chief Justice GARRETT dissenting, are of opinion that by the terms of the agreement under which the case was tried in the court below the issue as to whether proper notice was given of the adoption of the suicide amendment to the by-laws was eliminated from the case, and appellant cannot now be heard to raise that issue. Section 17 of the agreement referred to is as follows: "It is agreed that the only question to be submitted to the court in this cause is whether or not, under the contract entered into between the defendant and Emil H. Eversberg, the said supreme tent had the right to enact and apply the suicide law of 1901, as hereinbefore set out, to said existing contract. If yea, then the plaintiff is entitled to a judgment for the sum of \$323.10, with 6 per cent. interest from August 15, 1902, and all costs of these proceedings incurred prior to the date of this agreement; if nay, then plaintiff is entitled to a judgment for \$3,000, with 6 per

cent. interest from August 15, 1902, and all costs of these proceedings." It seems clear that under this agreement the only question to be determined by the court was whether the appellee had the right or power to enact the law and apply it to existing contracts, and all questions as to whether the by-laws of the order were properly observed in the manner in which the law was enacted and put in force are expressly waived. But, be this as it may, the court is unanimous in the opinion that the facts in evidence do not sustain appellant's contention that under the by-laws of appellee association amendments to said by-laws were required after adoption to be published in the official organ, and until so published were of no force or effect. All that is shown by the evidence on this subject is that the association had an official organ, and that under the by-laws publication in such organ of any notice required to be given the members was sufficient notice. There is an entire absence of evidence as to what notices were required to be given the members. The only evidence which contains any intimation that amendments to the by-laws should be published is the by-law which makes it the duty of the supreme record keeper to compile and arrange for publication all amendments to the by-laws adopted by the supreme tent. If this by-law can be construed as requiring a publication of such amendments we are not required to presume that the publication here referred to is to be made for the purpose of notice, or as a prerequisite to the binding effect of amendments adopted by the supreme tent. The language used, "shall compile and arrange for publication," would not ordinarily be employed in regard to the publication of an amendment in a newspaper, but indicates that the publication referred to is a publication together in pamphlet form of all the amendments adopted by the supreme tent. There being no by-law which required the publication of the amendment in order to give it effect, it became, when regularly adopted, the law of the order, and all of the members were charged with notice of its adoption.

We think the contention that the suicide amendment cannot be applied to the certificate sued on because to so apply it would impair vested rights is without merit. When the holder of the certificate became a member of the order, he expressly agreed that he would be bound by the laws of the order then in force or that might be thereafter adopted. He thus recognized the right of the order to change its by-laws, and consented in advance to be bound by any changes that might be made. That such an agreement is valid and binding seems to be settled by the great weight of authority. *Supreme Lodge v. Trebbe*, 179 Ill. 348, 53 N. E. 730, 70 Am. St. Rep. 120; *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Supreme Lodge v. Knight*, 117 Ind.

289, 20 N. E. 479, 3 L. R. A. 409; *Hughes v. Wisconsin Odd Fellows* (Wis.) 73 N. W. 1015; *Dornes v. Supreme Lodge*, 75 Miss. 466, 23 South. 191; *Daughtry v. K. of P.*, 48 La. Ann. 1203, 20 South. 712, 55 Am. St. Rep. 310. In the *Hughes* case, supra, the court, in discussing this question, say: "The by-law in question rested on the power delegated by the charter to the directors to pass by-laws and regulations, and upon the stipulation of the member to conform in all respects to the by-laws, rules, and regulations of the company then in force, or which might be thereafter adopted by the same or its board of directors. The subsequent by-law relied on by the company to defeat a recovery may be fairly said to have been consented to by the insured. He stipulated, in substance, to be bound by the action of the corporation at large, or of its board of directors, in respect to its by-laws, rules, and regulations. This was the effect of his contract, and, so far from being violative of the provisions of the contract, it is in accordance therewith and with the consent of the assured contained in his application. He and his beneficiary stood in like condition as to the rights and interests represented by his membership in the company as a member of the civil state, having, as a condition of the benefits and advantages of membership, submitted to be bound as such member by the action of the proper legislative authority of the state or company. * * * We think that the insured might and did contract with the defendant company to be bound and affected, in reference to by-laws and regulations of future enactment, as fully and effectually as if such laws and regulations were existing at the time he became a member, and might consent that they should enter into and form parts of the contract, modifying or varying the rights of the parties." We think the soundness of this reasoning cannot be questioned, and we shall not attempt to add anything thereto.

The judgment of the court below will be affirmed, and it is so ordered. Affirmed.

WESTERN UNION TELEGRAPH CO. v. ARNOLD et al.*

(Court of Civil Appeals of Texas. Oct. 21, 1903.)

JURISDICTION—DEMAND REDUCED BY DEMURRER.

1. Where the demand in a complaint for failure to deliver a telegram is reduced, by demurrer to the part of the demand for mental anguish, to a sum less than that necessary to give the court jurisdiction, the action should be dismissed.

Key, J., dissenting.

Appeal from District Court, Milam County; J. C. Scott, Judge.

Action by Mary C. Arnold and others against the Western Union Telegraph Com-

pany. Judgment for plaintiffs. Defendant appeals. Reversed.

Norman G. Kittrell and Geo. H. Fearons, for appellant. Monta J. Moore and Hedley, McBride & Watson, for appellees.

FISHER, C. J. During its last term this court certified to the Supreme Court the question whether the plaintiffs' petition stated a cause of action entitling the plaintiffs to recover damages for mental suffering arising from the negligence of the appellant, for failure to deliver the telegram upon which the cause of action is based. This embraced all of the plaintiffs' claim, except item of 25 cents, the cost of the message. The Supreme Court, in answering the question, held that the petition did not state a cause of action, and, in effect, held that it was subject to a general demurrer. 73 S. W. 1043. The only question left in the case is whether or not the district court and this court have jurisdiction to render a judgment in favor of appellee for the 25 cents, the cost of the message. In effect, it is held in the following cases that, where the plaintiff's demand is reduced by demurrer to a sum less than the amount of which the court would have jurisdiction, the court is without authority to proceed further, and the case should be dismissed: *Lowe v. Dowbarn*, 26 Tex. 509; *Haddock v. Taylor*, 74 Tex. 216, 11 S. W. 1093; *Rowell v. Tel. Co.*, 75 Tex. 28, 12 S. W. 534; *Wood County v. Cate*, 75 Tex. 219, 12 S. W. 536; *Peterson v. Thomas* (Tex. Civ. App.) 24 S. W. 1124; *Thomas v. Tel. Co.* (Tex. Civ. App.) 61 S. W. 501; *McFadin v. San Antonio*, 22 Tex. Civ. App. 140, 54 S. W. 48 (a writ of error was refused in this case); *Keller v. Huffman* (Tex. Civ. App.) 26 S. W. 863; *Doherty v. City of Galveston* (Tex. Civ. App.) 48 S. W. 804; *Robinson v. Garrett* (Tex. Civ. App.) 54 S. W. 270; *Hill v. Strauss* (Tex. Civ. App.) 56 S. W. 540; *Roller v. Zundelowitz* (Tex. Civ. App.) 73 S. W. 1071; *Schulz v. Tessman*, 92 Tex. 488, 49 S. W. 1031; *M., K. & T. Ry. Co. v. Kolbe*, 95 Tex. 77, 65 S. W. 34; *Connor v. Sewell*, 90 Tex. 275, 38 S. W. 35. These cases rest upon the doctrine that joining an item or claim for which the law affords no relief or remedy for the recovery thereof with one for which a cause of action exists, when the latter is not of value or amount within the jurisdiction of the court, that jurisdiction does not exist, and that, when this is apparent from the face of the petition, the court will, as a matter of law, in sustaining demurrers, in effect determine that the case alleged is in part fictitious. Mere averment or assertion of a claim or demand will not create a cause of action which the court can adjudicate, when neither law nor equity recognizes that the facts upon which the claim or demand is based furnish the basis for any relief. This principle is well illustrated in the case of *Connor v. Sewell*, 90 Tex. 275, 38 S. W. 35. A different rule,

*Rehearing denied.

however, obtains when want of jurisdiction arises as an issue of fact. When a demand is pleaded for which an action would lie, and over which the court has jurisdiction according to the averments of the petition, the presumption will be indulged in the bona fides of the party bringing the suit, and that it is not fictitious, or that the demand was not laid at a sum for the purpose of fraudulently conferring jurisdiction, and also that when two or more demands are sued upon, and they are of a nature that can properly be joined in one suit, and for each of which a cause of action would lie, the failure to establish one or more would not defeat the jurisdiction of the court, although the one so established and proven would be for a sum less in amount than the court would originally have jurisdiction of.

Judgment is reversed and cause remanded, with instructions to the trial court to dismiss the case at cost of appellees. Cost of appeal is adjudged against appellees.

KEY, J. (dissenting). Not being able to concur with his associates as to the disposition made of this case, the writer will state the grounds upon which his dissent rests. The main question in the case has been certified to and decided by the Supreme Court, and I have no fault to find with that decision, which settles the law of the case against the plaintiffs as to all the damages sued for, except the contract price paid by them for transmitting the message. That the petition states a cause of action for the latter sum is not denied by the majority opinion. The plaintiffs' petition charges the defendant with breach of the contract to transmit and deliver a telegraphic message announcing the death and contemplated burial of a relative of the plaintiffs. The message was sent by the plaintiffs to a friend, who was a minister of the gospel, and whom the plaintiffs desired to be present and officiate at the funeral, which, according to the averments of the petition, he failed to do, on account of the defendant's breach of its contract. On account of that breach the plaintiffs alleged that they sustained mental pain and suffering to their damage over \$1,900, for which sum, together with 25 cents paid the defendant for transmitting the message, the petition prays judgment against the defendant. The Supreme Court held that the averments of the petition failed to bring it within the class of cases in which damages are recoverable for mental suffering; and, because of that holding, a majority of this court holds that the plaintiffs' entire case must be dismissed, upon the theory that sustaining an exception to so much of the petition as seeks recovery for mental suffering reduces the amount in controversy to less than \$500, and below district court jurisdiction.

The writer dissents, and maintains (1) that when the plaintiffs' petition was filed, and the defendant served with citation, the dis-

trict court acquired jurisdiction of the entire case; and (2) that, when the case is remanded, that court will still have jurisdiction to try the case and render judgment.

The term "jurisdiction," when applied to courts, and not restricted by the written law conferring it, means the power to hear and decide issues, both of law and fact, and the power to enforce the conclusion reached by the court. A text-writer defines "jurisdiction" as "the power conferred on a court by Constitution or statute to take cognizance of the subject-matter of a litigation and the parties brought before it, and to legally hear, try, and determine the issues, and render judgment according to the general rules of law upon the issues joined by them, either of law or of fact, or both." *Brown on Jurisdiction*, § 2. See, also, 17 *Am. & Eng. Ency. Law* (7th Ed.) 1041, 1042, and cases there cited; also *Townes on Texas Pleading*, pp. 18, 19. And it seems quite clear to my mind that, when jurisdiction is made to depend alone upon the amount in controversy, the controversy may be one of law or of fact, or both. And it seems quite as clear that the provision of the Constitution applicable to this class of cases makes the amount in controversy the sole test of jurisdiction, for it declares that "the district court shall have original jurisdiction * * * of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars, exclusive of interest." If the framers of this provision had intended to limit jurisdiction under it to cases in which the pleadings state a cause of action, why did they fail to use the term "causes of action" in that provision, when they used it in another paragraph in the same section, describing a different class of cases? The language "all suits, complaints or pleas whatever" is exceedingly broad, and includes those which fail to state a good cause of action, as well as those which do; and yet the only limitation the makers of the Constitution saw proper to place upon it was the amount in controversy.

In my judgment, the plain language and obvious meaning of the Constitution is that when a plaintiff, in good faith, files a suit, complaint, or plea by which he seeks to recover from a defendant money or other property, alleged in his pleading to be of the value of more than \$500, exclusive of interest, the district court has jurisdiction to make any ruling or decision that it sees proper to make. It may render judgment for the plaintiff for less than \$500, because of the want of evidence to show greater liability, or because it may hold that the defendant is not, in law, liable for a portion of the amount sought to be recovered, conceding the facts to be as alleged in the plaintiff's petition.

The decisions cited in support of the ma-

majority opinion seem to proceed upon the theory that when a plaintiff's petition asserts two grounds of recovery for an amount exceeding \$500, one stating a cause of action, and the other failing so to do, the district court will have jurisdiction until a demurrer is sustained to that portion of the petition which fails to state a cause of action, and the amount sought to be recovered on the other branch of the case is less than \$500. With all due respect to the decisions which support that conclusion, the conclusion itself is believed to be unsound and contrary to the weight of authority. It has been repeatedly held in this state—and the ruling is in harmony with the great weight of decision in other jurisdictions—that jurisdiction of the subject-matter is determined by the averments contained in the plaintiff's petition, unless the defendant charges the plaintiff with making false averments or contentions for the purpose of conferring jurisdiction, or unless such purpose is apparent on the face of the plaintiff's pleading. In the beginning of our judicial history, the Supreme Court of the republic of Texas stated the rule in this apt language: "The amount in controversy is the amount claimed in the plaintiff's petition." *Hunter v. Oelrich, Dallam, Dig. 358.* In *Tarbox & Brown v. Kennon, 3 Tex. 8,* this language was used in the opinion: "In questions of jurisdiction, it has often been ruled that the plaintiff's demand, as set forth in his declaration or petition, is to be considered the matter in controversy, and recourse must be had to the demand thus set out to determine the jurisdiction. In such a case the verdict, it is held, is not the rule to determine the amount in controversy; but, when a plaintiff declares for a sum within the jurisdiction conferred, and there is no plea to the jurisdiction, the court may adjudicate the subject-matter, and give judgment for a less sum than that which is required to give jurisdiction." These decisions have been frequently cited with approval, and it has been repeatedly held that, when a plaintiff sues for an amount within the jurisdiction of the court, judgment may be rendered for him for a sum less than is requisite to confer jurisdiction. The principle referred to was applied by our Supreme Court in the recent case of *Ablowich v. National Bank, 95 Tex. 429, 67 S. W. 79, 881.* In that case the amount sued for, exclusive of interest, was less than \$500; but, as the plaintiffs sought to enforce a lien on land, the Supreme Court held that the district court had jurisdiction to render judgment for the debt without foreclosing the lien. Now, if it be true that a plaintiff may sue in the district court for \$800, and the court has jurisdiction to render judgment for less than \$500, then why should it be held, when a suit is brought in good faith, that if exceptions be sustained to certain items sued for, and the remainder be less than \$500, the

court loses jurisdiction to render judgment for such remainder? To so hold is to overlook the fact that jurisdiction is determined by the amount claimed in good faith by the plaintiff. It is illogical to say that jurisdiction depends entirely upon the good faith of averments in the plaintiff's petition, and then say that the court may lose jurisdiction by some ruling made during the trial. No action of the court can change the contents of the plaintiff's pleading. When a plaintiff sues for a jurisdictional amount, and jurisdiction is determined solely by the amount sued for, what difference can it make whether the amount the plaintiff is entitled to recover is reduced to less than jurisdictional value by a finding of fact or conclusion of law? Neither the finding of fact nor conclusion of law would change the fact that the court had jurisdiction of the suit as originally brought, and, if it had such jurisdiction, our Supreme Court, and almost all other courts, hold that such jurisdiction remains, although the amount of the plaintiff's recovery may be reduced to less than the jurisdictional amount by the verdict of the jury.

The majority opinion seems to proceed upon the theory that jurisdiction of the subject-matter does not exist unless the plaintiff's petition states a cause of action for the jurisdictional amount, but in view of the broad language of the Constitution conferring jurisdiction in this class of cases, and for the reasons heretofore stated, the writer cannot sanction that proposition. If such contention be correct, then the district court never acquired jurisdiction of the subject-matter of this suit, and, if the defendant had confessed judgment, such judgment would have been utterly void, because jurisdiction of the subject-matter cannot be conferred by consent.

It is also said in the majority opinion that sustaining a demurrer in this class of cases, in effect, determines that the case alleged is in part fictitious, and I find myself unable to sanction that conclusion. It is conceded that, if a plaintiff act in bad faith for the purpose of conferring jurisdiction, the court has the power to thwart that purpose and refuse to entertain the suit. It is also conceded that such bad faith or fraudulent conduct may consist in averments of fact known by the pleader to be untrue, or in legal conclusions or prayers for relief in the petition, which the pleader knows, or should be presumed to know, are untenable. Our own decisions illustrate both classes of cases. It is not necessary to cite cases in which plaintiffs have been charged with alleging excessive values or amount of damages for the purpose of conferring jurisdiction. The other class of cases is illustrated by *Swigley v. Dickson, 2 Tex. 193,* in which the plaintiff sued on a note upon which a credit was indorsed, and which credit reduced the amount

to less than district court jurisdiction. The petition sought to recover the face of the note, and made no reference to the credit. The note was filed with the petition, and the court held, in effect, that it appeared from the petition and note that the plaintiff, in claiming the face of the note, was acting in bad faith, in order to evade the restriction imposed on the jurisdiction of the court in which the suit was brought. Other illustrations might be given in which the court would be warranted in deciding that the plaintiff's pleading showed on its face that he was not acting in good faith in the conclusions of law sought to be drawn from the facts stated in the pleading. For instance, in a suit upon a note, if the plaintiff, without charging the defendant with any other wrongful conduct than failure to pay the note, should ask judgment for exemplary damages. It is so well settled that such damages are not recoverable in such a case that a court might well presume that they were not claimed in good faith. But such conclusion is not warranted in every case in which the court reaches the conclusion that the plaintiff is asserting a claim that he is not entitled to. Controversies often arise, and cases are often presented, in which good lawyers, and sometimes judges, will differ as to the rules of law by which the rights of the parties should be governed; and in such a case a plaintiff and his counsel might contend in good faith that he was entitled to recover, and yet it might properly be decided that he was not. In an early case our Supreme Court said: "And in a case admitting of reasonable doubt as to whether the amount in controversy is within the jurisdiction, and whether the plaintiff might have had reasonable ground or expectation of recovering the amount claimed, it being a sufficient amount to give jurisdiction, the case will not be dismissed for the want of jurisdiction." *Graham v. Roder*, 5 Tex. 145. The case at bar falls in the class of cases referred to. Our Supreme Court has established the doctrine that in certain cases damages may be recovered as compensation for mental anguish resulting from failure to transmit and deliver a telegram, and many cases have arisen since that doctrine was first announced in which lawyers and judges have, in good faith, differed as to the right to recover such damages. And in some cases decided by the Supreme Court the line of demarcation and distinction is very dim. Such being the conditions when the facts upon which this case is predicated arose, and counsel for the plaintiffs having found a decision in another state in a somewhat similar case which supports the right to maintain such an action, it ought not to be held that, because they were mistaken in the views of the law which they urged, therefore the plaintiffs' action to recover such damages was not brought in good faith or

was fictitious. The Tennessee case just referred to, and which tends to support the plaintiffs' contention, was disapproved by our Supreme Court in this case; but such disapproval does not change the fact that it may have influenced the plaintiffs and their counsel, and led them to believe that they were entitled to recover the damages sued for. Furthermore, the trial court sustained the plaintiffs' contention, and this court was in such doubt as to warrant certifying the question to the Supreme Court. *Tidball v. Eichhoff*, 66 Tex. 58, 17 S. W. 263, was a suit on a bond for \$300 executed in pursuance of an order of court in a suit involving a contest over the proceeds of the sale of certain property sold under an attachment lien. The bond obligated its makers to pay Eichhoff all the damages that he might sustain in case they, as interveners in the case, failed to show that Eichhoff was not entitled to the proceeds of the sale. Eichhoff asked for judgment against the makers of the bond for \$150, attorney's fee paid by him to defend his rights in the contest; \$150, paid by him for his personal expenses in attending court; \$128.81, interest on the proceeds of the sale of the attached property; and \$62.15, court costs paid by him. The case went to the Supreme Court, where it was held that the only item of damages recoverable by Eichhoff was the item of interest, amounting to \$128.81. The case was reversed (*Eichhoff v. Tidball*, 61 Tex. 421), and at the second trial the defendant excepted to all the other items set up in the plaintiff's petition, which exceptions were sustained. Thereupon the defendants moved to dismiss the suit because the amount in controversy was less than \$200. The motion was overruled, and the court gave judgment for the plaintiff for \$102.50. The question of jurisdiction was presented to the Supreme Court, and, after enumerating the several items claimed by the petition, Chief Justice Willie, speaking for the court, said: "This amount being in controversy between the parties, the case was within the jurisdiction of the county court, and of the district court when the case was removed there by reason of the disability of the county judge. But it is said that it was adjudged by this court when the case was before us on a former appeal that the only item of damages which the plaintiff was entitled to recover was the interest upon the \$2,929.25 during the time that it was stayed in the hands of the court by reason of the execution of the bond. The court below followed the decision of this court upon that point, and rendered judgment for eight per cent. interest per annum upon the above sum, amounting for the time it was detained from the plaintiff to \$102.50. It is now claimed that, this amount being within the exclusive jurisdiction of a justice of the peace, the court below was not authorized to enter such a judgment. The objection

cannot prevail. The rule is that 'jurisdiction, so far as matter or amount in value is concerned, must be determined by the petition; and that question is concluded by its averments, in so far as they state facts in relation to the thing in controversy, unless it otherwise appears that a plaintiff, in framing his petition, has improperly sought to give jurisdiction where it does not properly belong.' *Dwyer v. Bassett & Bassett*, 63 Tex. 274. The averments of the petition, therefore, were sufficient to give the court below jurisdiction to render the judgment appealed from. If the items sued for, and upon which no recovery was had, were fraudulently included in the suit for the purpose of giving the court a jurisdiction to which it was not entitled, this should have been pleaded, and made an issue in the case. *Dwyer v. Bassett & Bassett*, supra. There was no such pleading in this cause, and no proof that any fraud upon the jurisdiction of the court was intended. The most that can be said in favor of the appellant's position is that the plaintiff below was mistaken as to the measure of damages to which he was entitled by reason of the execution of the bond. That he was not honestly mistaken is not made to appear, and he cannot be deprived of the amount which he is justly entitled to recover, and which the court below was authorized to adjudge to him, because, through an error of law, he claimed a sum in addition to it to which he had no right." That case is referred to with approval in *Ratigan v. Holloway*, 69 Tex. 469, 6 S. W. 785; and *Dwyer v. Brenham*, 70 Tex. 33, 7 S. W. 598. Similar rulings were made by this court at its last term in *Cammack v. Prather*, 74 S. W. 354, and *Hill & Morris v. Railway Co.*, 75 S. W. 874. The cases cited in the majority opinion, all of which, except one, are later than the case in 66 Tex. and 17 S. W., do not refer to that case; and therefore it seems to the writer that it has been overlooked, and not overruled, by the Supreme Court, although it is conceded that the rulings made in the cases referred to in 74 and 75 Tex., and 11 and 12 S. W., are in direct conflict with Judge Willie's opinion and the decision in the *Tidball Case*. Therefore, finding the decisions of the Supreme Court in conflict on the question, and believing that Judge Willie's opinion states the law correctly, the writer feels constrained to dissent from the ruling made by this court on the question of jurisdiction. It is true that the amount remaining in controversy is small, but the costs of the trial court are not inconsiderable; and, believing that the suit was brought in good faith, and that sustaining an exception to the claim for damages for mental anguish does not deprive the district court of jurisdiction of the remaining branch of the case, I cannot consent to the action of this court in directing that the suit be dismissed at the plaintiffs' cost.

RAYWOOD RICE, CANAL & MILLING CO. v. WELLS.*

(Court of Civil Appeals of Texas. Nov. 19, 1903.)

IRRIGATION—CONTRACT FOR WATER—BREACH —INSTRUCTIONS—MEASURE OF DAMAGES.

1. In an action for breach of a contract to furnish water for irrigation purposes, it is proper to refuse to instruct that, if the jury find plaintiff is entitled to recover, they should consider testimony relative to losses in crops in the neighborhood on account of rain, since it is giving undue prominence to particular features of the evidence; the court having, in its general charge, instructed that the jury should consider the condition of the weather and other circumstances.

2. In an action for breach of a contract to furnish water for irrigating purposes, the measure of damages is the market value of a crop that would have been produced when harvested, less that proportion of the crop which was agreed to be paid for the water, and expenses that would have been incurred in planting, raising, harvesting, and preparing the crop that would have been produced.

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Action by J. M. Wells against the Raywood Rice, Canal & Milling Company. From a judgment for plaintiff, defendant appeals. Affirmed.

C. F. Stevens, for appellant.

GARRETT, C. J. This suit was brought in the district court of Liberty county against the Raywood Rice, Canal & Milling Company to recover damages for the breach of a contract to furnish water for the irrigation of rice land. The cause was tried by a jury, and resulted in a verdict and judgment in favor of the plaintiff for the sum of \$800. The plaintiff entered into a contract with the defendant to furnish water from the canal of the defendant for the irrigation of about 175 acres of land, which, on the strength of the contract, the plaintiff planted in rice in the year 1902. A portion of the land planted by the plaintiff had been rented by him from another party at an agreed rental of one-fifth of the crop. The plaintiff agreed to pay the defendant one-fifth of the crop produced on the land for the furnishing of the water. The defendant breached its contract by failing to furnish the water as it had agreed to do, and the plaintiff sustained damage to the amount found by the jury as the net loss upon a crop that might have been produced if the water had been furnished according to contract. Testimony was heard affecting the probable yield of the rice crop for the year 1902 in the vicinity of plaintiff's land, and it was shown that there had been heavy losses on account of rain in harvesting time. The defendant requested the court to instruct the jury that, if they should find that the plaintiff was entitled to recover, they should consider the

*Rehearing denied, and writ of error denied by Supreme Court.

testimony relative to such losses to said crop in measuring the damage. It was properly refused for the reason given by the trial judge—that it would be improper to give such prominence to a particular feature of the evidence. The general charge also instructed the jury that they should consider the condition of the weather and other circumstances.

The charge complained of under the fourth assignment of error is not subject to the criticism made of it, because the direction is sufficiently clear that the one-fifth for the rent of the land from the third party should also be deducted; but, if the defendant had desired a more specific instruction, it should have requested one. The measure of damages submitted by the court was the market value of the crop that would have been produced and harvested if the defendant had furnished water in accordance with its contract, less the one-fifth to be paid for the water, and the expenses that were and would have been incurred in planting, raising, harvesting, and preparing the crop of rice that would have been produced and harvested. This was the correct measure of damages. *Canal & Milling Co. v. Langford Bros.*, 74 S. W. 926, 7 Tex. Ct. Rep. 418.

There being no error in the record, the judgment of the court below will be affirmed. Affirmed.

TEXAS & N. O. R. CO. v. LOONEY.

(Court of Civil Appeals of Texas. Nov. 12, 1903.)

OVERFLOWING LANDS—DAMAGES—PLEADING—EVIDENCE—VARIANCE.

1. In an action for damages to land by being overflowed, evidence that plaintiff was prevented from planting a crop thereon was insufficient to authorize judgment for plaintiff; it being conceded that the land itself was not damaged.

Appeal from Cherokee County Court; James P. Gibson, Judge.

Action by W. A. Looney against the Texas & New Orleans Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Willson, Box & Watkins and Baker, Botts, Baker & Lovett, for appellant.

GILL, J. This suit was brought by appellee against the appellant railway company to recover damages to certain land, alleged to have been the result of an overflow occasioned by the negligence of defendant in failing to construct a culvert for the passage of the waters of Graveyard branch. The defendant answered by general denial, and further sought to defeat the plaintiff's claim by pleading and proof that the damages could have been prevented by the expenditure on the part of plaintiff of \$25 in

the construction of short ditch. A trial in the justice court resulted in a judgment for plaintiff. An appeal to the county court and a trial without a jury resulted likewise, the court awarding a sum equal to the cost of the ditch which he held that plaintiff ought to have dug. On this appeal the defendant makes the following points against the judgment: (1) That as the suit was for damages to land, and the undisputed proof being that the land as such sustained no damage, judgment should be reversed, and here rendered for appellant; (2) if the evidence authorizes the conclusion that the land was damaged, the judgment should nevertheless be reversed, because no evidence was adduced by which the extent of such damage could be measured.

The following facts appear practically without dispute: Plaintiff was the owner of a farm adjoining the road of defendant. The company had constructed its road across a small stream called "Graveyard Branch," the point of intersection being about 400 yards from the head of the stream. The actual drainage area above the roadbed was about 100 acres. No culvert was constructed under the road at that point, but, instead, ditches were dug along the side of the roadbed, and the waters thus diverted. On the side of plaintiff's farm next to the roadbed was about two acres of woodland, low and marshy, and covered with pine timber from eight to ten inches in diameter. The remainder of plaintiff's land has been reduced to cultivation. In July, 1902, a heavy rain fell, and by reason of the lack of a culvert, and the construction of the ditches by the defendant, the waters of Graveyard branch overflowed the woodland in question. How long the water remained on the land is not shown. Neither the value of the land, nor the rental value thereof, is made to appear. The only proof of damage is the testimony of the plaintiff, whose testimony is duplicated by the other witnesses adduced by him. He said, among other things: "No injury was done to the land by the overflow water. The damages I seek to recover are for the value of the tomato crop which I intended to plant during the fall of 1902, but which I did not plant because of the overflow of July 10, 1902." Further he said: "Had I cleared the two acres of land, and cultivated same in a fall crop of tomatoes, I think I would have gotten enough tomatoes, from the sale of which I would have realized \$150 to \$200." The cost of preparation, cultivation, and marketing is not shown, nor is the probable yield more definitely shown. Plaintiff further said: "The land was uncleared and had never been in cultivation. The two acres still remain uncleared. I intended to clear the land during the year 1902, and cultivate it in a fall crop of tomatoes. I consider the land specially adapted for growing fall tomatoes. I had other land which I could have planted in tomatoes, but I did not plant

¶ 1. See *Damages*, vol. 15, Cent. Dig. § 447.

any, as I did not think the land was suitable for growing fall tomatoes." Further: "I do not know any one near Jacksonville who grows fall tomatoes. I have never raised any fall tomatoes." The defendant company prior to the trial constructed a culvert under its roadbed at Graveyard branch. Plaintiff could have prevented the overflow at a cost of \$25, but did not do so. As stated in the outset, the suit is for damages to land. The pleadings nowhere set out the loss of crops, or the purpose to clear the land and plant it in tomatoes. An overflow does not necessarily damage land, as such, and the undisputed evidence is that it did not have that effect in this instance. At most, it prevented the planting and maturing of a crop, damages for which are not asked for in the pleadings. We therefore sustain the assignment that the proof of damage adduced, even if otherwise sufficiently definite, is variant from the pleadings, and that the undisputed proof shows that the damages sued for were not sustained.

The judgment of the trial court is reversed, and judgment is here rendered for defendant. Reversed and rendered.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. TURNER.

(Court of Civil Appeals of Texas. Nov. 28, 1903.)

CARRIERS—DUTY TO ALIGHTING PASSENGER—DEGREE OF CARE.

1. Where a train has stopped at a passenger's destination a reasonably sufficient time for him to alight, the carrier's duty toward such passenger, in starting its train, is only to use ordinary care not to injure him, and a charge imposing on the carrier that degree of care which "a very cautious person" would have exercised was error.

Appeal from District Court, Upshur County; R. W. Simpson, Judge.

Action by John W. Turner against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed.

E. B. Perkins and Marsh & McIlwaine, for appellant. Warren & Briggs, M. B. Briggs, and A. Maberry, for appellee.

RAINEY, C. J. Appellee sued to recover damages for personal injuries occasioned by the alleged negligence of appellant. The ground of negligence alleged was that plaintiff was a passenger on appellant's train, and that the train was not stopped a reasonably sufficient time at Comer, the point of his destination, for him to alight with safety, and as he was attempting to alight the train started with a sudden jerk, throwing him to the ground, his hand going under the wheel of the train, thereby injuring him. Appellant pleaded the general issue, contrib-

utory negligence, and several special issues, which it is not necessary here to enumerate. Plaintiff recovered, and the railway company appeals.

The court charged the jury: "If you find from a preponderance of the evidence that defendant stopped its train at Comer on the night in question for a reasonably sufficient length of time for passengers to alight therefrom, and that in starting its train on said occasion the defendant exercised that degree of care that a very cautious person would exercise under similar circumstances, then the plaintiff cannot recover." The portion of the charge relating to the degree of care incumbent upon defendant in starting the train is erroneous when considered in connection with the other portion of the same paragraph relating to the length of time the train stopped. Whether the train stopped at Comer a reasonably sufficient length of time for appellee to alight in safety by the use, on his part, of reasonable diligence, was a controverted issue under the evidence. The rule is, when a train reaches a station, the duty is imposed upon the carrier to announce its arrival, and give the passengers a reasonable opportunity to alight from the cars. It is the duty of the passengers desiring to alight therefrom to use reasonable diligence under the circumstances to do so. When a train is stopped, and does afford a reasonable opportunity for passengers to alight, then the employees of the carrier have the right to presume that all passengers desiring to do so have left the cars, and the duty of the carrier to those who have reached their destination and failed to alight is the use of ordinary care not to injure them. *Hutchinson on Carriers*, § 613; *Railway v. Martin* (Tex. Civ. App.) 63 S. W. 1089; *Railway Co. v. McCullough* (Tex. Civ. App.) 33 S. W. 285; *Railway Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *Railway Co. v. McKenzie* (Tex. Civ. App.) 70 S. W. 237. The degree of care imposed upon the railway company by said charge was too onerous if the train stopped at Comer a sufficient time for appellee, by the use of reasonable diligence, to have alighted therefrom. Under such circumstances the railway company was only under the obligation to use ordinary care not to injure him.

For the error indicated, the judgment is reversed, and cause remanded.

ALICE, WADE CITY & C. C. TELEPHONE CO. v. BILLINGSLEY.*

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

TELEPHONE COMPANIES—POLE IN STREET—NEGLIGENCE—PERSONAL INJURIES—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.

1. Under Rev. St. 1895, art. 693, authorizing telephone companies to set their poles on any

*1. See *Carriers*, vol. 3, Cent. Dig. §§ 1224, 1225, 1222.

*Rehearing denied December 9, 1903, and writ of error denied by Supreme Court.

public street so as not to incommode the public, such companies are required to place their poles so as not to be in dangerous proximity to the traveled portion of the street.

2. A telephone company, with knowledge that the main travel at a street corner was around and close to one of the angles formed by the intersection of the streets, set one of its poles at a distance of 9½ feet from this angle, leaving a passage of that width between the pole and two posts which stood in the angle. Plaintiff's wife attempted to drive a gentle horse through this passage, and, as the vehicle was passing between the pole and the posts, the horse threw his head to one side to drive away a fly, causing one of the fore wheels of the buggy to strike the pole, throwing plaintiff's wife from the buggy and injuring her. *Held*, that the location of the post was the proximate cause of the injury.

3. Whether or not plaintiff's wife was guilty of contributory negligence was, under the evidence, for the jury.

Appeal from District Court, Bee County; Jas. C. Wilson, Judge.

Action by W. A. Billingsley against the Alice, Wade City & O. C. Telephone Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. C. Scott and W. W. Dodd, for appellant. John C. Beasley, Nat Parks, and Dougherty & Dougherty, for appellee.

NEILL, J. This suit was brought by the appellee to recover damages for personal injuries sustained by his wife in being thrown from a buggy by reason of appellant's negligence in obstructing one of the streets of Beeville by placing and maintaining a telephone pole therein, and thereby rendering it unsafe and dangerous to persons in its legitimate use. The appellant, after interposing a general demurrer and a number of special exceptions to appellee's petition, answered by a general denial; a plea of its authorization, as a telephone company, to place its poles along the public streets of Beeville, and that the pole against which the buggy collided was placed where it would not interfere with the free and safe use of the streets by the public; and by a plea of contributory negligence. After the general demurrer and special exceptions to appellee's petition were overruled, the parties went to trial before a jury, and a verdict was returned upon which judgment for \$1,000 was rendered in favor of appellee.

Conclusions of Fact.

In the northwestern part of the town of Beeville, Avenue D and Walton street run diagonally, and intersect, the one with the other. The first-named street is 50, and the second 30, feet wide. On the east and west lines of Avenue D, south and north of its intersection with Walton, are constructed substantial fences. On the north and south lines of Walton, east and west of its intersection with Avenue D, are erected like fences. At the intersection of the streets where the fence along the north line of Walton joins the fence along the east line of Avenue D are two large

posts. The two streets so fenced have continuously for 15 years been used as public thoroughfares. During that time, in the use of the streets by the public, the main travel was around and close to the point of intersection with the north line of Walton with the east line of Avenue D, such being the shortest route. With knowledge of the facts stated, the appellant, prior to the summer of 1900, set one of its telephone poles, firmly implanted in the ground, in Walton street and Avenue D, at a distance of 9½ feet from the intersection of said streets, leaving a passageway that distance in width between the pole and the two posts on the corner of the streets, which post was maintained by appellant at said place at the time of the accident hereinafter mentioned in these conclusions occurred. The pole, considering the position it occupied, constituted an undue obstruction in the legitimate use of said streets by the public, and rendered it dangerous to persons traveling in vehicles in turning down Avenue D, south, to Walton street, east. On the 23d day of August, 1900, appellee's wife, Mattie Billingsley, undertook to drive a buggy, drawn by a safe and gentle horse, down Avenue D, to the south, and turn down Walton street, to the east; and while in the exercise of ordinary care, following that part of the street mostly traveled, just as the buggy was between the place where the two fence posts stood on the corner and the telephone pole set at a distance of 9½ feet therefrom, the horse, to nip a fly that was pestering him, suddenly threw his head to one side, and caused the right fore wheel of the buggy to collide with said telephone pole with such force and violence as to throw Mrs. Billingsley over the dashboard of the buggy onto the ground with such force as to painfully and seriously injure her.

From these facts we conclude (1) that appellant was guilty of negligence in erecting and maintaining the telephone pole where it did; (2) that such negligence was the proximate cause of the injuries sustained by appellee's wife; (3) that she was guilty of no negligence proximately contributing to her injury; and (4) that, by reason of appellant's negligence, appellee was damaged in the sum found by the verdict.

Conclusions of Law.

The foregoing facts, upon which the conclusions are found, were specifically alleged in appellee's petition. If, therefore, they constitute a cause of action, it follows that the petition was not subject to the exceptions urged against it; and, if we are correct in finding such facts were proven, and in the deduction of the conclusions from them, it also follows that the judgment should not be disturbed upon appellant's contention that it is not supported by the law and evidence. Therefore we will enunciate the law deemed applicable to the facts pleaded and proven, and, when this is done, we think it will be

demonstrated that appellee stated and proved a good cause of action.

Poles erected in a highway without authority of law are nuisances, and one sustaining damages special and apart from what the public in general sustain by reason thereof, may maintain an action against him who maintains such a nuisance. *Keasbey on Elec. Wires*, § 60; *Webb's Pollock on Torts*, 487. But in this state telegraph corporations (which includes telephone companies) are authorized by statute to set their poles upon and across any of the public streets in this state in such a manner as not to incommode the public in the use of such streets. *Rev. St. 1895*, art. 698. Where the privilege of using streets for telegraph and electric lines is, as in this state, subject to the condition that the poles shall be so placed as not to incommode the public, courts are inclined to construe the right granted as subject to the implied condition that the poles shall not be so located as to be dangerous. *Keasbey on Elec. Wires*, § 62. So, where a telegraph or telephone company has erected poles in dangerous proximity to the traveled portion of the highway, and a traveler in a vehicle, while in the exercise of due care and vigilance, is injured by contact therewith, the company will be liable for the injury; and it has even been held that a municipality which directs or permits the maintenance of a pole in such a dangerous locality will be liable jointly with the company. *Joyce on Elec. Law*, § 605; *Thompson, Com. on Neg.* § 1233; *Cleveland v. Bangor (Me.)* 32 Atl. 892, 48 Am. St. Rep. 838. A telegraph or telephone company, in the exercise of the right accorded it by the statute referred to, is bound to use reasonable care in the construction and maintenance of its poles, so that travelers along such streets, in the exercise of ordinary care, shall not be discommoded or injured by coming in collision with them (*Thompson, Com. on Neg.* § 1236), and whether it has used such care is a question of fact for the jury.

It makes no difference whether the failure of a telephone company, in the exercise of a right given by statute to set its poles on a public street in such a manner as not to incommode the public, be deemed negligence per se, or negligence in its ordinary form, for, however considered, it is a question for the jury to determine from all the evidence whether there was such a failure on the part of the company. If there were, the company would be liable for such injuries to travelers along the street as are proximately caused from such failure. In the absence of statutory authority, the erection and maintenance of its poles in a public thoroughfare by a telephone company would be a nuisance, for the right of the company to place them there would not exist. So it would seem that, where one undertakes to defend such act under the statute, it is for him to show that he brought himself within

its terms. And unless he proves that they were placed in such a manner as not to discommode the public in the use of the streets, there is a failure of such proof on his part. *Wolfe v. Erie Teleg. & Telep. Co. (C. C.)* 33 Fed. 320; *Shear. & Redf. on Neg.* § 13.

The appellant having erected the telephone pole in dangerous proximity to the main-traveled portion of the street, it follows from the principles of law stated that it is liable for the injuries inflicted, if its location there was the proximate cause of the collision, and there was no negligence on the part of Mrs. Billingsley contributing thereto. "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred." *Shear. & Redf. Neg.* § 26; *Gonzales v. Galveston*, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17. "Where there is negligence, and injury flowing from it, and there is also an intermediate cause, disconnected from the negligence, and the operation of this cause produces the injury, the person guilty of the negligence cannot be held responsible for the injury. The inquiry must always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury. * * * Intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but, as a rule, these agencies, in order to accomplish such result, must entirely supersede the original culpable act, and be in themselves responsible for the injury, and it must be of such a character that they could not have been foreseen or anticipated by the wrongdoer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one will not exculpate the other, because it would still be the efficient cause of the injury. The intermediate cause must supersede the original wrongful act or omission, and be sufficient of itself to stand as the cause of the plaintiff's injury, to relieve the original wrongdoer from liability. 'One of the most valuable of the criteria furnished us by the authorities is to ascertain whether any new force has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient as the cause of the misfortune, the other must be considered too remote.' * * * The new force or power here would have been harmless, but for the displaced wire, and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it contributed no less directly to the injury on that account." *Ahern v. Telegraph Co. (Or.)* 33 Pac. 403, 22 L. R. A. 640; *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 524, 66 S. W. 221. It must therefore be held that dangerous proximity of the pole to the main-traveled

part of the street was, and not the momentary swerving of the horse, the proximate cause of the collision which resulted in the injury to Mrs. Billingsley. City of San Antonio v. Porter, 24 Tex. Civ. App. 444, 59 S. W. 923; Eads v. City of Marshall (Tex. Civ. App.) 29 S. W. 171; 1 Shear. & Redf. p. 593; 1 Thompson on Negligence (last Ed.) § 93; Cleveland v. Bangor (Me.) 32 Atl. 892, 48 Am. St. Rep. 836.

The question of contributory negligence was one for the jury. Although Mrs. Billingsley was aware of the situation of the pole, such knowledge did not constitute her undertaking to drive along the road between it and the two fence posts at the corner negligence per se. Beach on Contributory Negligence, § 247; 15 Am. & Eng. Ency. of Law (2d Ed.) 468; City of Denison v. Sanford (Tex. Civ. App.) 21 S. W. 785; Kelly v. Railway Company (Minn.) 9 N. W. 588; Maus v. City of Springfield (Mo. Sup.) 14 S. W. 630, 20 Am. St. Rep. 634; City of Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; Cleveland v. Bangor, supra. Nor did the fact that she might have driven on the other side of the street charge her with such negligence. City of San Antonio v. Porter, supra; Ball v. City of El Paso (Tex. Civ. App.) 23 S. W. 835; McKelgue v. City of Janesville (Wis.) 31 N. W. 299; Walker v. Decatur Company (Iowa) 25 N. W. 257; Shear. & Redf. on Neg. § 376, and cases cited under note 9.

All questions raised by assignments of error not disposed of by what we have said have been carefully considered, and we think none present such an error as would require a reversal of the judgment. It is therefore affirmed.

PRICE v. OATMAN et al.

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

GUARANTY — EXECUTION — EVIDENCE — LETTERS — SECONDARY EVIDENCE — HARMLESS ERROR — CREDIBILITY OF WITNESS.

1. In an action on a contract of guaranty which had been signed by no other guarantor than defendant, his testimony that before he signed it the principal stated that the guarantees required at least two guarantors, and that another would be obtained, and that he signed it on that understanding, is admissible, as explanatory of his testimony that the guarantees returned it to the principal to obtain another guarantor, stating that they would not otherwise accept it, and that the principal brought the instrument and letter to him, and that he redelivered it to the principal only because he relied on such statement in the letter of the guarantees, and the statement of the principal that he would not return it to them without such additional signature.

2. Testimony that a letter returning and refusing to accept a guaranty without an additional guarantor purported to be from the guarantees, was on their stationery, and that their name was signed thereto with a stamp, like the signatures to all letters about the matter afterwards received from them, is sufficient

to authorize a finding that the letter was written and signed by them.

3. Testimony of the person to whom a letter was sent, and to whom it was returned after defendant read it, that he did not know where it was, that he supposed he destroyed it, and that he did not turn it over to defendant, is sufficient to authorize defendant's giving secondary evidence of its contents.

4. Erroneous admission of evidence affording only a partial defense in a case tried by the court is not ground for reversal, the judgment for defendant as to the whole account showing that it was not predicated on such evidence.

5. The court may credit a guarantor's statement that the guarantee was not to accept the guaranty till it was signed by another, though, after he was informed no one else had signed it, he tried to get a settlement by the principal, and though many letters afterwards passed between them, he did not expressly deny liability till sued.

Error from Llano County Court; F. J. Johnson, Judge.

Action by Ed. V. Price against H. C. H. Oatman and others. Judgment for defendant Weeks. Plaintiff brings error. Affirmed.

McLean & Spears, for plaintiff in error. Chas. L. Lauderdale, for defendants in error.

STREETMAN, J. Ed. V. Price, doing business under the firm name of Ed. V. Price & Co., brought this suit against H. C. H. Oatman, as principal, and J. A. Weeks, as guarantor, to recover the amount of an account due said Price & Co. by Oatman. Judgment was rendered against Oatman, but in favor of Weeks, and Price & Co. have prosecuted this writ of error.

Four assignments of error are based upon plaintiff in error's bill of exception to the following testimony of the defendant Weeks: "The defendant Oatman presented to me the instrument sued on, and requested me to sign it; and he at the same time, and before I signed it, told me that the beneficiary named therein, Ed. V. Price & Co., required at least two solvent persons to sign it, and that, if I would sign it, he would get another good name on it. Because of this representation and promise, I signed it, with the understanding and upon the condition that it should not be delivered to or accepted by Ed. V. Price & Co. until such other person should sign it with me. During the month in which the instrument bears date, or the month following, the defendant Oatman again came to me, and presented to me the said instrument here sued upon, together with a letter addressed to him, and purporting to have been written and signed by said Ed. V. Price & Co., and delivered both the said instrument and letter into my hands. I have not the letter in my possession, and cannot procure it. I have made an effort to procure it, but have been unable to do so. I requested said Oatman to deliver it to me, or to produce it to be used at this trial, but he said he had destroyed it and he did not deliver it to me. This letter was signed just like all the other letters that I

afterwards received from Ed. V. Price & Co., and I believe the signature was that of Ed. V. Price & Co. When said Oatman so presented to me the said instrument and letter, he said that he had sent the instrument in to them without having procured the other name or signature to it, as he had promised to do, and that they had returned it to him, together with this letter, so that he might procure such other signature; that he had forgotten to procure it before forwarding the instrument before, and had, by oversight, sent it in without such other signature. I had not seen the signature of Ed. V. Price & Co. prior to the time when said letter was shown to me. I can't say that I examined it very closely. I had it in my hands and read it. The signature was not made with a pen. It was printed with a stamp. It was just like the signatures to all the letters that I afterwards received from them about the business, and copies of which have been introduced by the plaintiff. It was on the stationery of Ed. V. Price & Co., and I believe it was their signature. Said letter stated that Ed. V. Price & Co. had refused to accept the proposed guaranty with one name—my name alone—upon it, and that they would not accept the guaranty at all without at least two solvent persons as makers or principal signers thereon, and that for that reason they had returned it to said Oatman. Said Oatman then explained to me that he had before sent it in to Ed. V. Price & Co., by mistake, without having procured such other signature to it, as he had intended to do, and said that he would now procure another—naming Geo. Gray as the person whom he would procure to sign it with me—and that he would not return it without first procuring such additional signature. Thereupon, believing and relying upon the statement contained in said letter that said Ed. V. Price & Co. would not accept the instrument without such additional signature to it, and that Oatman would not return it to them without such additional signature, I redelivered it to Oatman, together with said letter, upon the condition and with the understanding that before it should be delivered to or accepted by Ed. V. Price & Co. at least one other person must sign it with me as principal; and but for such belief, and reliance thereon, I would have destroyed said instrument, instead of redelivering it to said Oatman for the purpose stated. Afterwards, while said Oatman was doing business for Ed. V. Price & Co., I believed that he had procured such additional signature to the instrument, and I so believed during the time of my correspondence with them until informed to the contrary by their letter which has been introduced in evidence. During the month of December, 1900, I wrote Ed. V. Price & Co. that I would not any longer be responsible to them upon said instrument. In February or March, 1901—I cannot remember the dates, and have neither

the letters, nor copies of them—I wrote them not to send any more goods to Oatman, except C. O. D."

The first assignment complains of the evidence concerning the first conversation with Oatman. Standing alone, this evidence might have been inadmissible, but, as explanatory of the subsequent transactions between plaintiff, Oatman, and Weeks, it was properly admitted.

The second and fourth assignments complain of the admission of secondary evidence of the contents of the letter from Price & Co., because the execution of the original was not sufficiently proved, nor its loss shown, and because the opinions of the witness as to the signature were inadmissible. The evidence was sufficient to justify the court in finding that the letter was written and signed by Price & Co. Oatman, to whom the letter was directed, and to whom it was said to have been returned by Weeks after reading it, testified that he did not know where the letters received by him from Price & Co. were. He said: "I suppose I destroyed the correspondence I received from them. I do not know where they are. I did not turn over such correspondence to John A. Weeks." This was sufficient to excuse Weeks from producing the original of the letter.

Objection was made to the evidence concerning the letters written by Weeks to plaintiff, because the originals were not produced, and the originals were not shown to have been received by Price & Co. The trial was before the court without a jury, and it is apparent that the judgment was not predicated upon these letters, because they would have afforded only a partial defense for Weeks, whereas the judgment was in his favor as to the whole account. If there was any error in admitting them, therefore, it would not authorize us to reverse the case. The admission of improper evidence in a trial before the court without a jury is not reversible error, when it is apparent that the judgment is based upon other evidence in the case.

The fifth and sixth assignments of error complain that the verdict in favor of Weeks is contrary to the evidence. The theory of Weeks was that he relied upon the representation and statement of plaintiffs that they had not accepted the instrument as originally signed, and that they would not accept it until it was signed by at least two guarantors, and that therefore there was no lawful delivery to and acceptance by Price & Co. of the guaranty. Letters were introduced showing that, after Weeks had been informed that no other person had signed the guaranty, he continued to try to get a settlement by Oatman; and, although many letters passed between Weeks and plaintiff, Weeks does not seem to have expressly denied his liability until he was sued. These facts tend very strongly to discredit his evi-

dence, but we are unable to say that the court could not have given credit to his testimony notwithstanding the facts stated.

We have given careful consideration to the statement of facts, and have reached the conclusion that there is sufficient evidence to sustain the judgment. Finding no error, the judgment is affirmed.

JERNIGAN v. HOUSTON ICE & BREWING CO.

(Court of Civil Appeals of Texas. Nov. 13, 1903.)

MASTER AND SERVANT—PERSONAL INJURIES — DEFECTIVE APPLIANCES — EVIDENCE — PLEADINGS—VARIANCE—INDEPENDENT CONTRACTOR.

1. In an action for personal injuries, in which plaintiff alleged that the falling of the iron which injured him was caused by the insufficient strength of the hook used to hoist it, evidence that the hook broke because it was too large to pass through a hole in the iron, so that the weight was borne on the point of the hook, causing it to break in the middle, was properly excluded.

2. In an action by a servant for personal injuries from the falling of an iron, owing to the breaking of a hook used to hoist it, it appeared that a hook of the size used would support a much heavier weight if not defective, and the only inspection of the hook shown was made three or four weeks before the accident occurred, and it had been used continuously during the intervening time to lift heavy weights. *Held*, sufficient to require submission to the jury of the issue as to whether or not the hook was defective.

3. In an action by a servant for personal injuries it appeared that the work was done under the supervision of a certain person, but that the president of defendant corporation was present, giving directions at various times while the work was in progress, and several witnesses testified that the person in charge of the work was defendant's foreman. This person testified that he had an oral contract to perform the work, and that, though defendant paid the laborers, it was at his request, because he could not keep the accounts straight. He was not required to give any bond, and, though the work was completed some months before the trial, he had had no settlement with defendant. *Held* to require submission to the jury of the issue as to whether the person in charge of the work was an independent contractor.

Appeal from Harris County Court; Blake Dupree, Judge.

Action by E. Jernigan against the Houston Ice & Brewing Company. From a judgment for defendant, plaintiff appeals. Reversed.

Byers & Byers, for appellant. Baker, Botts, Baker & Lovett, for appellee.

PLEASANTS, J. This is a suit by appellant to recover damages from appellee for personal injuries alleged to have been caused by appellee's negligence. The petition alleges, in substance, that appellant, while in the employment of appellee, and in the proper discharge of the duties of his employment,

was injured by the falling of a heavy piece of iron which appellant and other employees of appellee were engaged in moving under the direction and supervision of appellee's president and the foreman in charge of the work, and that said injury was due to the negligence of appellee in failing to furnish appellant with reasonably safe appliances with which to perform his work. The allegations of the petition in respect to the defect in the appliances are as follows: "That a heavy piece of iron was being hoisted by means of a chain and block and tackle, and the chain or hook by means of which the iron was lifted gave way and broke; that plaintiff was ignorant of the fact that the chain or hook attached thereto was insufficient to support the weight; that the chain or hook was not of sufficient strength to support the strain upon it when the attempt was made to hoist the heavy piece of iron." The appellee's answer contains a general demurrer and general denial and special pleas setting up the defenses of contributory negligence, assumed risk, unavoidable accident, and hidden defect; and further pleaded that at the time appellant was injured he was not in appellee's employment, but in that of an independent contractor, who had a contract with appellee to remove an old ice plant from appellee's premises. The cause was tried by a jury in the court below, and under peremptory instructions from the court a verdict was returned in favor of the defendant, and judgment was rendered accordingly.

The evidence as to the manner in which appellant's injury was caused was undisputed, and is in substance as follows: Appellant and others were engaged in moving an iron tank from a building owned by appellee. The tank was removed by sections, and as each section was loosened from its fastening it was caught by a hook suspended by a chain from a pulley, by means of which it was hoisted from its position. The hook was attached to the section of the tank that was being raised by placing it in one of the rivet holes in said section. While engaged in raising one of these sections, which weighed about 1,500 pounds, the hook by which it was being raised broke, and the heavy iron section fell upon appellant, and injured him as alleged in his petition. This hook and the other appliances mentioned belonged to appellee, and had been used about the premises for some time for hoisting machinery and other heavy articles. The hook was an inch in diameter, and according to expert testimony should have sustained a weight of 8,000 pounds. It had been examined for defects three or four weeks before the accident, and then appeared to be in good condition. After its examination it had been frequently used to hoist heavy articles, and a few days before it broke it had sustained a weight of 4,000 pounds. The work in the prosecution of which appellant

was injured was being done under the direct supervision of Peter Murphy, but the president of appellee company was present, and gave directions at various times while the work was in progress. Several witnesses testified that Murphy was appellee's foreman, and was in charge of the work as such. The work of removing the tank had been in progress for some time previous to the day on which appellant was injured, and all of the persons employed in the work had been paid by appellee. Murphy testified that he had an oral contract with appellee to remove an old ice plant, of which this tank was a part, from appellee's building; that he took the contract to remove the plant for \$1,000, and under said contract he was to furnish all the labor necessary for the work, and that appellant and the other laborers engaged in such work were employed by him. He admitted that the appellee had paid the wages of the laborers, but said that this was done at his request, and was done because he could not keep the accounts straight. He further testified that he was not required to give any bond for the performance of the work; that he completed his contract some four months before the trial in the court below, but had not had a settlement with appellee; that appellee still owed him money on said contract, and was holding same pending the result of this suit; and that he is now selling lunches on the streets of Houston for a living.

Appellant's assignments of error from the first to the fifth, inclusive, complain of the ruling of the trial court in sustaining defendant's objection to testimony offered by plaintiff to the effect that the hook used in hoisting the section of tank which fell upon plaintiff was too large to fit into the rivet hole in said section into which it was placed; that only the point of said hook would go into the hole, and that by reason of this fact the weight of the section pulled the two ends of the hook apart, and caused it to break in the center. This testimony was objected to on the ground that it varied materially from the allegations of the petition, the only allegation in the petition as to the defects in the hook being that it was of insufficient strength to sustain the weight put upon it, and this testimony was an attempt to show that the hook did not break because it was of insufficient strength, but because it was not properly inserted in the rivet hole of the iron that was being hoisted.

We think the objections to the evidence were properly sustained. The petition specifically alleged that the defect in the appliances furnished plaintiff consisted in their insufficiency in strength, and the only negligence charged was in the failure of defendant to furnish appliances of sufficient strength to sustain the weight of the iron that was being lifted. Defendant was only called upon to meet the case made by the petition, and plaintiff could only recover upon

proof of the negligence charged in the petition. *Ry. Co. v. Johnson* (Tex. Civ. App.) 68 S. W. 907. Appellant is certainly not in a position to complain of the refusal of the court to permit him to introduce this evidence, because, if it be true, it would not authorize a recovery under plaintiff's petition, and its only effect would be to rebut the inference that arises from the other evidence in the case that the hook was of insufficient strength as alleged in the petition.

The sixth assignment assails the charge of the court instructing the jury to find for the defendant. We think this assignment should be sustained. The evidence in the case was sufficient to raise the issue of negligence on the part of appellee in failing to furnish a hook of sufficient strength to sustain the weight put upon it, and also the issue of whether appellant at the time he was injured was in the employment of appellee or of an independent contractor. If the evidence only showed that the iron that was being hoisted fell upon appellant and injured him, it would be insufficient to raise the issue of negligence on the part of appellee, because negligence cannot be inferred from the mere happening of an accident. *Ry. Co. v. Robinson*, 73 Tex. 285, 11 S. W. 327. But the evidence goes further, and shows that the iron fell because the hook by which it was being hoisted broke, and that a hook of the size of this one which was not defective would be capable of sustaining four times the weight of the iron that was being raised by this hook. The only inspection of the hook shown by the evidence was made three or four weeks before this accident occurred, notwithstanding it had been frequently used to lift heavy weights during the time between such inspection and the happening of the accident by which appellant was injured. From these facts we think the jury might have reasonably inferred that the hook broke because of some defect or injury which rendered it of insufficient strength to sustain the weight put upon it, and that appellee might, by a more frequent inspection, have discovered the defect in the hook, and was guilty of negligence in failing to discover same.

As before stated, the evidence is clearly conflicting on the issue of whether or not Murphy was an independent contractor, and that issue could not properly be withdrawn from the jury.

The judgment of the court below is reversed, and this cause remanded for a new trial. Reversed and remanded.

HARBERS et al. v. LEVY et al.

(Court of Civil Appeals of Texas. Nov. 12, 1903.)

VENDOR'S LIEN—NOTES—FRAUD—BONA FIDE PURCHASER—HOMESTEAD.

1. The owner of a homestead, occupied by himself and wife as such for many years, deeded

ed it to a third person for the purpose of raising money, with the homestead as security, his wife joining in the acknowledgment, but not herself signing the deed. The land was conveyed back to the husband, the grantor retaining a vendor's lien, to whom the grantee executed notes for part of the pretended purchase, no consideration passing in either of the transactions. *Held*, that the notes were fraudulent.

2. One having knowledge of the occupancy of land as a homestead as such for over 18 years, and knowing all the parties, approached the holder of a vendor's lien thereon and notes secured thereby, all fraudulently executed about that time, and asked where he could buy good vendor's lien notes. Being offered the notes in question, he refused to buy, though he loaned the holder an amount equal to the notes so held as collateral to a note of the holder in an equal sum, and receiving an assignment of the lien notes, before maturity. He had no search made of the title at the time of making the loan, but testified that he knew some sort of transaction was made whereby the notes could be given by the owner of the homestead; that he had no knowledge of any fraud in the transaction, and that he believed the principal note upon which he made the loan was good without the collateral. *Held*, that he was not a bona fide holder of the lien and notes, entitling him to foreclose for balance due.

3. Where it is shown that vendor's lien notes were fraudulently executed, without consideration, for the purpose of raising money, with a homestead as security, the burden is on plaintiffs, in an action to foreclose the lien for payment of balance on the notes, to show the amount due, even if they are innocent holders of such notes.

Appeal from District Court, Brazos County; J. C. Scott, Judge.

Action by Samuel Levy and another against Hattie C. Harbers and others. From judgment for plaintiffs, defendants appeal. Reversed.

Tallaferro & Armstrong, V. B. Hudson, and S. R. Henderson, for appellants. A. C. Breitz, Ford, Ford & Nagle, and Doremus & Butler, for appellees.

GARRETT, C. J. This action was brought by Samuel and Julius Levy, partners composing the firm of Levy Bros., against Hattie C. Harbers and Albert, Fred, Clem, Elma, and Hattie Ray Harbers, to foreclose a vendor's lien upon two parcels of land situated in the county of Brazos, for the payment of a balance due upon two promissory notes alleged to have been executed by A. H. Harbers and the said Hattie C. Harbers, his wife, to A. D. McConnico, in part payment of the purchase money for the land described in the petition, which had been conveyed to the said A. H. Harbers by the said A. D. McConnico; and it was alleged that the notes had been transferred to the plaintiffs for a valuable consideration, before maturity. It was further alleged that the said A. H. Harbers had died intestate and insolvent, and that there had been no administration, and no necessity for any, and that he had left as his sole heirs the said Hattie C. Harbers, his surviving wife, and their children, the said Albert, Fred, Clem, Elma, and Hattie Ray Harbers. The three last named children

were alleged to be minors. Sam R. Henderson was appointed by the court as guardian ad litem for the minor defendants. The defendant Hattie C. Harbers pleaded non est factum to the execution by her of the notes and deed, and also that they were executed by the said A. H. Harbers for the purpose of furnishing security to borrow money, and were void, and were of no binding force, because the land was the homestead of herself and the said A. H. Harbers. There was a trial to the court without a jury, which resulted in a judgment in favor of the plaintiffs establishing a vendor's lien against the land for the balance due on the notes sued on amounting to \$781.90, and ordering that the same be sold for the payment of the sum adjudged to be due; the surplus, if any, to be paid to the defendant Hattie C. Harbers.

A. H. Harbers and A. D. McConnico were partners in business as insurance agents. Harbers was pressed for money, and was considerably indebted to his firm. He owed bills around town, and needed money to pay them. The land upon which the plaintiffs seek to establish the vendor's lien was the homestead of Harbers and his wife, and had been for many years. In order to raise money, with the homestead as security, Harbers executed a deed on January 28, 1896, to A. D. McConnico, for the two tracts of land described in the petition, which were the homestead, reciting a cash consideration of \$2,500, no part of which was paid. The deed purported to have been signed also by the defendant Hattie C. Harbers, and to have been duly acknowledged and proven for record by both the said A. H. Harbers and his wife. A. D. McConnico executed a deed to the said A. H. Harbers, dated January 29, 1896, by which he conveyed to the said A. H. Harbers the said homestead premises for a recited consideration of \$2,500, of which \$1,000 was recited as paid in cash, and the balance as evidenced by three promissory notes for \$500 each of the same date as the deed, payable to the order of the said A. D. McConnico on January 29, 1897, 1898, and 1899, after date, and signed by A. H. Harbers and H. C. Harbers. The notes recited that they were executed as a part of the consideration of the land described and the retention of the vendor's lien. Both deeds were filed for record at the same time on January 31, 1896, and were duly recorded. The purpose of the conveyances of the land and the execution of the notes was to raise money on the notes. Nothing was paid as a consideration for the execution of the deeds. McConnico was cashier of the Merchants' & Planters' Bank of Bryan, and the Levy Bros. were money lenders. According to the testimony of Samuel Levy, about January 14, 1896, he asked McConnico if McConnico knew of any good vendor's lien notes that he could buy. McConnico showed him the three notes signed by A. H. Harbers and H. C. Harbers, pay-

able to himself, and offered to sell them at their face value. Levy declined to buy them, but offered to lend McConnico \$1,500 on his own note, with the three vendor's lien notes attached as collateral. McConnico accepted the offer, and the loan was made. Levy had resided in Bryan 18 years, and knew Harbers all the time, and that he had occupied all that time the premises in controversy as a homestead, and that he and his family were in possession of and occupying the same at the time he took the note from McConnico. Levy testified that he knew from the notes that some sort of transaction was made by which Harbers and wife could give the notes, but that he had no knowledge or suspicion of any fraudulent arrangement between Harbers and McConnico, and knew nothing of the deeds, except such information as was disclosed by the face of the notes; that he did not have the title to the property examined, and made no inquiry as to the notes or transaction on which they were based, and, regarding Harbers and McConnico as honorable men, he believed the notes to be all right. Harbers died in January, 1897, before the maturity of the first note. The defendant, his widow, paid the first note, and made payments of the others, reducing them to the amount ascertained by the judgment. She made no objection to the notes, but testified that she made the payments to protect her husband's name. She testified that she did not sign the deed from Harbers and herself to McConnico, or the notes sued on; and it was shown by the exhibition of the deed and notes and comparison of signatures admitted to be genuine that she did not do so. The defendant Elma Morris testified that she signed her mother's name to the deed at the direction of her father. The notary who certified to the acknowledgment testified that the defendant Hattie C. Harbers signed and acknowledged the deed, but on cross-examination it was shown that he was old and nearsighted, and he thought that perhaps the defendant had taken the deed into another room, and returned with it signed; also that he had never met the defendant more than two or three times. The amount of the recovery in the judgment is for the balance due on the note. There is no proof in the record of what, if anything, McConnico owed the plaintiffs on his note.

We are of the opinion that the evidence conclusively charges the plaintiffs with notice of the fraud in the transaction in which the notes sued on were executed. Samuel Levy knew all of the parties connected with the transaction. He knew that for 18 years Harbers, with his family, had occupied the premises in controversy as a homestead, and that they were residing thereon and in possession thereof when he acquired the notes. The recitals in the notes and their effect, taken in connection with his previous knowledge, advised him that there must have been

a conveyance of the premises from Harbers to McConnico. The deeds were a part of the title which gave the vendor's lien which Levy acquired as the assignee of the notes, and he was bound by such information as they would have given him, although he did not have actual knowledge thereof. His conduct showed that his suspicions were aroused, because, although he was in search of good vendor's lien notes, he declined to take these except as collateral security to the note of a maker, whom he believed good without them. Notwithstanding the knowledge he had that some sort of a transaction had been effected by which Harbers and his wife could make the notes so as to be secured by land which he knew was being occupied by them as a homestead, and had been occupied by them as such for 18 years, yet there is not one syllable of inquiry made by him either of McConnico or of Harbers or his wife. A simple question, suggested by the slightest prudence, would have elicited the facts, or led to such further inquiry as would have laid bare to an honest search for information the fraud involved in the execution of the notes and their purpose. If the defendant Hattie C. Harbers did not acknowledge the deed, it could not be of any binding force against her, although the plaintiffs had acquired the notes without knowledge of the fraud in their execution, and were innocent holders thereof. But the testimony of the notary is sufficient to support the conclusion of the court that she had acknowledged the deed.

It having been shown that the notes were fraudulently executed without consideration, and for the purpose of raising money, with the homestead as security, the burden was on the plaintiffs, although they might be innocent holders thereof, to show what amount was due them on the note for which they were collateral, since there could be no recovery for a greater amount. We are of opinion, however, that upon the undisputed facts of the case judgment should have been rendered for the defendants; hence the judgment of the court below will be reversed, and such judgment will be here rendered as should have been rendered.

Reversed and rendered.

GULF, C. & S. F. RY. CO. v. COOPER.*
(Court of Civil Appeals of Texas. Oct. 23, 1903.)

MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—INSTRUCTIONS.

1. Evidence on the issue as to whether plaintiff, a brakeman, injured in coupling cars, had a good reason for his presence between the cars, held to sustain a finding for plaintiff.

2. A locomotive was backing up, approaching a train, when it stopped on the signal of a brakeman, who then went in front of the for-

*Rehearing denied October 22, 1903.

ward car to adjust the drawhead thereon, and the locomotive, without warning, started backwards, whereby he was injured. *Held*, that the brakeman was not guilty of contributory negligence in not seeing the engine so as to avoid the injury.

3. The engineer was negligent in backing the train without further signal and without warning.

4. Where a brakeman adjusting a defective drawhead is injured by the locomotive backing toward the car without warning, a contention that the brakeman assumed the risk by continuing in the service of the railroad after learning of the defect in the coupler was without merit.

5. A brakeman signaled a locomotive which was backing toward the train to stop which it did, whereupon he went in front of the forward car to adjust the drawhead, and the engine started backward, whereby he sustained injuries. *Held*, that the fact that the brakeman knew of a rule of the railroad directing an employé never to place himself in a dangerous position until he knows that the engineer has seen and obeys his signal did not preclude the brakeman from recovering for the injuries.

6. It was not error to refuse to instruct on a rule of the railroad on the subject of exposing the hands and arms to defective coupling apparatus, as the injury was not caused thereby.

7. It was not error to refuse to charge on a rule of the railroad forbidding employés to go between cars while in motion, as the train was at a standstill.

8. It was not error to refuse to charge on a rule of the railroad requiring operatives to inspect the train at every stop, and report every defective apparatus, as not based on the evidence.

9. It is proper, in an action by a servant for injuries, to refuse to charge that the burden of proof is on plaintiff to relieve himself from contributory negligence, where contributory negligence, as a matter of law, is not shown.

10. In an action by a servant for injuries, proof of his life expectancy is admissible, though the injury, while permanent, did not result in entire disability.

11. The rendering of judgment for plaintiff's attorney for half the amount recovered—such sum having been assigned to him as a contingent fee—was no predicate for reversal at the complaint of defendant.

Appeal from District Court, Montgomery County; L. B. Hightower, Judge.

Action by Tee Cooper against the Gulf, Colorado & Santa Fé Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry, F. J. & R. C. Duff, and D. W. Glasscock, for appellant. J. Llewellyn, for appellee.

GILL, J. This is an appeal by the railway company from a judgment rendered against it in favor of the appellee, Tee Cooper, for damages alleged to have been suffered by him through the negligence of appellant's employés in charge of one of its engines while he was in the discharge of his duty as brakeman on one of appellant's freight trains. The negligence alleged was the act of the engineer in running or backing the engine and tender against the front car of a

freight train without warning or signal, and in violation of a signal from appellee, while the latter was engaged in adjusting the drawhead preparatory to making the coupling to the tender. The defendant answered by general denial and pleas of assumed risk and contributory negligence.

The following brief statement of the facts will serve the purposes of this opinion: In September, 1902, plaintiff was in the employ of defendant as head brakeman on a freight train, and was engaged in the performance of his duties as such on the night of the accident. When the train he was on reached a point near the East San Jacinto river, the engine and tender were detached from the train of cars, and run a short distance west for the purpose of getting water. Immediately thereafter the engine and tender were backed to within a short distance of the train, when, in response to a stop signal from plaintiff, the engine was stopped within 12 or 15 feet of the front car. Plaintiff then went upon the track to pull the drawhead to a position which would enable it to couple automatically by impact with the tender coupler. Just as he took hold of the drawhead, and while he was looking toward it, and not toward the tender, the engineer backed the engine and tender against the car, injuring plaintiff as alleged. The engine was thus backed without signal from plaintiff, without his knowledge, and without warning either by bell, whistle, or otherwise. The coupling apparatus was of the automatic kind, which, when in good order, coupled by impact of the approaching car, without the necessity of going between the cars for any purpose. The night was dark, and the signals were given by lanterns. Plaintiff had a lantern, which, before he went upon the track, was seen by the engineer on the outside of the track. When plaintiff was at the drawhead the plaintiff's lantern was held just outside the rail. The engineer and fireman both testify that they did not know the plaintiff had gone between the cars, and supposed he was on the outside of the track. That the engine was stopped in a short distance of the car in response to his signal is shown without dispute, and there is evidence to support the conclusion that it was backed upon plaintiff without his knowledge, and without signals from or warning to him.

The main points of controversy are the condition of the drawheads, and the necessity for plaintiff to go between the cars. The evidence is conflicting, the defendant making a strong showing from several witnesses that the apparatus was in perfect condition. This was corroborated by the fact that the coupling was actually made notwithstanding the accident. On the other hand, it was undisputed that when plaintiff undertook to make the same coupling at Beaumont, on the same trip, it required two efforts to do so; and plaintiff testified that

the drawhead would get out of line, and it was necessary to place it in line and hold it until the coupling was made; and he further stated that on the occasion of the accident he had pulled the car drawhead when the tender struck him. It is fair to consider, further, in this connection, the fact that plaintiff was actually between the cars for some purpose, or the accident would not have happened. It will not do to say he was there without motive, for to place himself in a position of great danger without any reason would be against nature. It is not difficult to credit his statement that he at least believed the drawhead needed adjustment, in view of his experience with it at Beaumont. That he gave a silly or impossible explanation as to the cause of the deflection of the drawhead does not necessarily prove that his story is false. It simply shows that, without any knowledge as to the part of the mechanism of the drawheads underneath the cars, he was advancing a theory as to the cause of the deflection.

Upon the issue of the reason for his presence between the cars, the trial court imposed, perhaps, a greater burden upon the plaintiff than the law required, for the charge required him to establish a necessity for his presence there, rather than that a reasonably prudent man would have believed his presence between the cars was necessary under the circumstances, and would have so acted. On this issue the jury have found in favor of plaintiff, and we do not feel authorized to disturb the finding.

On the issue of whether plaintiff saw or ought to have seen the tender when it began to approach the second time, the trouble with plaintiff's proof is the presence of some confusion and apparent contradiction in his own statement. There is no opposing testimony, the plaintiff being the only witness to his own acts immediately preceding and attending the accident. The conflicts and confusion are more apparent than real, when the entire statement of plaintiff is considered together. That he did not actually see or hear the engine's approach after it stopped in response to the stop signal goes without saying, for, being sane, even if he remained between the cars, he could and would have assumed such position as to escape injury. That the space between the cars was ample for his safety after the drawheads touched is evidenced by the nature of his injury, which was to his foot and the lower part of his leg, the body being uninjured. The engineer says he approached the car gently. The plaintiff says the approach was rapid and sudden. The nature of the injuries corroborated the plaintiff's statement in this respect, for the cars must have been moved considerably by the impact, to go far enough to catch the plaintiff's foot. That he was not negligent in failing to see its approach is not an unreasonable conclu-

sion, because the approaching engine had stopped in response to his stop signal; and, it being the manifest duty of the engineer not to approach again without a signal, a reasonably prudent man might, as plaintiff did, have fastened his attention for a moment on the car drawhead, resting in the belief that the engineer would not move until signaled again.

It may be safely said the following facts are amply established: First, that the engine stopped in response to plaintiff's stop signal, and he went to the car drawhead in the belief that it needed adjustment in order to be successfully coupled; second, that while between the cars the engineer, without further signal, backed the engine against the car without plaintiff's knowledge, and mashed his foot, rendering amputation necessary.

That the engineer was negligent in backing the train without further signal and without warning, it seems to us, is apparent. We find, therefore, that the verdict is supported by the evidence, and thus dispose of the assignments addressed to its sufficiency upon the issues above discussed.

We will now dispose of such assignments as present questions of law:

Under the first, second and sixth assignments, appellant contends that because plaintiff, after learning of the defect in the coupler, continued in the service of defendant, he assumed the risk thereof. This proposition would be sound if he complained that he was injured by the defective coupler, but the principle invoked can have no application here. Will appellant contend that the brakeman who goes under a car to adjust a broken brakebeam assumes the risk of the engineer starting the train and crushing him without warning?

Under the seventh assignment, appellant contends that plaintiff cannot recover because it was shown that he was familiar with rule No. 313, which directs employes never to place themselves in a dangerous position until they know the engineer has seen and obeyed the signal, and in no instance to act upon the assumption that it will be obeyed. A complete answer to this contention is the testimony of plaintiff, found by the jury to be true, to the effect that his stop signal was obeyed, and the engine still when he went between the cars.

By the tenth assignment, appellant complains of the refusal of the trial court to charge upon certain rules of the company, and to instruct the jury that if plaintiff, when injured, was acting in violation of such rules, he could not recover.

Rule No. 312, embodied in the charge requested and refused, was upon the subject of exposing the hands and arms to defective or illfitting coupling apparatus. As the injury in question was not caused by defective apparatus, the charge was erroneous, and should not have been given.

The case was tried in part upon the provisions of rule No. 313, and the rule itself was given to the jury in a special charge.

Rule 314 referred to the danger of going in between cars while in motion, and there is no contention that plaintiff violated such rule.

Rule 417 requires train operatives to inspect the train at every stop, and report to the conductor any defective apparatus. As there is no connection between the accident and a violation of this rule, if shown, it is manifest the charge was rightly refused.

The appellant asked the court to charge that the burden of proof was on the plaintiff to relieve himself of the suspicion of contributory negligence, and complains of the court's refusal to give it. It is clear that contributory negligence was not shown, as matter of law, and unless this was done, it is well settled that such a charge would be error. *Ry. Co. v. Shieder*, 88 Tex. 156, 30 S. W. 902, 28 L. R. A. 538.

The point is made under the eighth assignment that as the injury to plaintiff, though permanent, did not result in entire disability, it was error to allow proof of his life expectancy by the introduction of mortality tables. We are aware that the point has been sustained by our Supreme Court and other Courts of Civil Appeals in this state. *Railway v. Douglas*, 69 Tex. 699, 7 S. W. 77; *City of Honey Grove v. Lamater* (Tex. Civ. App.) 50 S. W. 1053; *Railway v. Nelson* (Tex. Civ. App.) 49 S. W. 713. But in *Railway v. Cooper*, 20 S. W. 990, this court, after a review of the authorities, announced a different rule, and the Supreme Court refused a writ of error in the case. We believe the weight of reason is with the rule as then announced, and we are of opinion the refusal of writ of error should be treated as an approval of the doctrine by our court of last resort. The objection that the mortality table admitted in evidence was not sufficiently identified as in general use is without merit.

The plaintiff agreed that the court might render judgment in favor of his attorney, Llewellyn, for half the amount recovered; that sum having been theretofore assigned to him, in writing, as a contingent fee. The judgment was accordingly so rendered. By appropriate assignments of error, this feature of it is assailed. We are of opinion that, if error, it in no wise affects appellant, and its complaint in this respect ought not to be allowed.

The other assignments need not be mentioned in detail. They are believed to be without merit.

The general charge of the trial court, together with the special charges given, fairly and correctly submitted the cause to the jury, and the issues were determined in favor of plaintiff. The controlling inquiry was one of credibility of witnesses—a matter in which appellate courts, for excellent reasons, rarely

ly if ever interfere. The plaintiff's testimony supplies every element necessary to establish liability, and we do not regard it as a case calling for interference on our part upon that ground.

The judgment is affirmed. Affirmed.

WILLIAMSON v. WORK et al.

(Court of Civil Appeals of Texas. Oct. 30, 1903.)

EVIDENCE — LOST DEED — ADMISSIBILITY OF COPY — SUFFICIENCY OF AFFIDAVIT — AFFIDAVIT OF FORGERY — BURDEN OF PROOF — INVALID DEED — ADMISSIBILITY — APPEAL — STATEMENT OF FACTS — AMENDMENT.

1. An affidavit by one of several defendants that "the defendants, nor either of them, are or is able to produce the original of the following described deed," etc., is a sufficient compliance with Rev. St. 1895, art. 2312, providing that when a party shall file an affidavit stating that any recorded instrument has been lost, or that he cannot procure the original, a certified copy of the record shall be admissible.

2. An affidavit that a deed relied on by the opposite party is a forgery puts such party on proof of its genuineness.

3. Though Batt's Rev. Ann. St. art. 4668, makes it the duty of the county court of a new county to have transcribed the records of the parent county for public inspection, under which a certified copy of such transcribed record would be admissible in evidence, there is no authority for recording in the new county a certified copy of the record of a deed in the parent county, and a certified copy of such record in the new county is not admissible.

4. The fact that a grantor's husband did not join in her deed, so that it was inoperative to pass title, will not destroy its admissibility as corroborative evidence, by its recitals, of the extent of a prior deed.

On Rehearing.

5. Where the fact that a certain deed was introduced is omitted from the statement of facts, which is correctly copied into the record, the omitted fact cannot be presented to the court on appeal, on motion for rehearing, by attaching the deed to the motion, with certificates from opposing counsel and the trial judge showing its introduction, and an agreement by opposing counsel that, if the court entertains the motion, the deed may be considered as having been admitted on the trial.

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Action by Helen Williamson against P. A. Work and others. From a judgment for plaintiff, granting insufficient relief, she appeals. Reversed.

Greer & Greer, for appellant. Coke & Coke, Nail & Dies, and J. N. Votaw, for appellees.

GARRETT, C. J. This was an action of trespass to try title, brought in the district court of Hardin county by Helen Williamson against P. A. Work and others for the recovery of an undivided one-fourth interest in five tracts of land. The case was tried to the court without a jury, and resulted in a judgment for the plaintiff for two of the

¶ 2. See Deeds, vol. 16, Cent. Dig. § 573.

tracts, and in favor of the defendants as to the other three. The plaintiff alone has appealed.

The land in controversy was patented by the republic of Texas to Jonathan H. Lawrence and William B. Creecy, and the plaintiff showed by evidence her right to recover through heirship from William B. Creecy, unless Creecy, in his lifetime, had conveyed the land. As tending to show this fact, the court received in evidence a certified copy from the record of deeds of Hardin county, certified March 27, 1908, of a copy recorded therein, certified March 25, 1908, from the record of deeds of Jefferson county, of a deed recorded therein, as shown by said copy, March 17, 1849, executed by Jonathan Lawrence, by J. F. Johnson, his attorney in fact, and William B. Creecy, to B. L. Simpson, dated December 27, 1848. Hardin county was created in 1872, subsequent to the original record of the deed in Jefferson county, and the land lies in a portion of Hardin county taken from Jefferson county. The plaintiff filed an affidavit of forgery, attacking the genuineness of the deed, and objected to the admission in evidence of the copy from the record of deeds of Hardin county. The deed purported to be a notarial act executed in the city of New Orleans, and recited that William B. Creecy was "of St. Louis county, State of Missouri." There were some interlineations noted at the foot of the deed after the certificate of record made by the county clerk of Jefferson county, which are not deemed material. From the position of the note, it would appear to have been made by the clerk, and not the notary. It was shown by the evidence that Creecy lived in Vicksburg, Miss., and mysteriously disappeared from there in 1841, and that he was traced to New Orleans, where he was lost sight of, and never heard of afterwards. The dates of the patents show that four of them were issued in 1845, and the other May 10, 1841. An affidavit of the loss of the original deed was filed by the defendants. It was made by only one of the defendants, W. A. Petty, and was to the effect that "the defendants, nor either of them, are or is able to produce the original of the following described deed," etc. This affidavit was made March 29, 1897. The defendants put in evidence, for the purpose of showing acts of ownership and the assertion of claim of title under the deed from Lawrence and Creecy, an attempted deed from Clara Graves, of the city of New York, shown by the certificate of acknowledgment to be the wife of W. H. Graves, to James Moran and Charles A. Goff, also of the city of New York, for the said five surveys patented to Lawrence and Creecy, containing the recitals: "Having been conveyed by the said patentees [Lawrence and Creecy] to the said Barnard L. Simpson, deceased, the former husband of the said party of the first part, by deed executed December 27, 1848, and recorded in the land records of Jefferson

County, Texas, Book G, pages 142, 143 and 144, on March 17, 1849, to which deed reference is hereby made for a full and complete description of the metes and bounds of said lands, as well as to the original patents which accompany this deed of conveyance. The party of the first part, Mrs. Clara Graves, inherited the said property under the act of the State of Texas providing for the descent and distribution of the estates of decedents; the said lands being community property and there being no issue she was entitled as survivor to all the real estate in Texas acquired during the term of her marriage with her said husband, the said Barnard L. Simpson." This deed was dated and acknowledged November 23, 1875, and was recorded in the record of deeds for Hardin county December 15, 1875. It was received in evidence over the objections of the plaintiff. The defendants deraigned title from Goff and Moran down to themselves. They were in possession of the original patents for the land issued to Lawrence and Creecy.

The affidavit of Petty was that the defendants could not procure the original deed from Lawrence and Creecy to Simpson. In form, it was in compliance with the statute (Rev. St. 1895, art. 2312), and was a sufficient predicate for the introduction of a certified copy from the proper record. *Butler v. Brown*, 77 Tex. 345, 14 S. W. 136. A specific statement of the acts of diligence in searching for a lost deed is only necessary when it is sought to prove the contents thereof by parol under the rules of the common law. *Foot v. Silliman*, 77 Tex. 268, 18 S. W. 1032. The affidavit of forgery put the defendants upon proof of the execution of the deed from Lawrence and Creecy to Simpson. The inability of the defendants to produce the original having been shown by the affidavit of one of them, a certified copy from the proper record was admissible as evidence. And if such copy should show that the deed had been recorded for more than 30 years, it would be evidence of such an ancient document, with the necessary corroborative proof derived from the certificate of acknowledgment. *Holmes v. Coryell*, 58 Tex. 688; *Brown v. Simpson's Heirs*, 67 Tex. 231, 2 S. W. 644. But the copy offered in evidence was not from any record authorized by law, and was not competent evidence. *Belcher v. Fox*, 60 Tex. 529. It was from the records of Hardin county, into which the copy from Jefferson county had been recorded. This fact was shown by the certificate of the county clerk of Hardin county to the copy admitted in evidence. Hardin county was created in 1872. It was not necessary for the deed to be recorded again in that county. Rev. St. 1895, art. 4668. This statute was first enacted in 1875, but that had been the rule of decision prior thereto. Note to article 4668, *Batt's Rev. Ann. St.* The statute makes it the duty of the county court of the new county to have the records transcribed for public

inspection, and, if this had been done, a copy from the transcribed records would have been a good copy, but there was no authority of law for recording the certified copy from Jefferson county into the deed records of Hardin county. The transcribed record would have been directly from the Jefferson county record, while in this instance a copy intervenes between the two records. The right to put in evidence a certified copy is purely statutory, and, to be availed of, the statute must be complied with. The copy offered in evidence should have been rejected. The deed from Clara Graves to Moran and Goff was void because the grantor's husband did not join in it, and was inoperative to pass the title, but the original deed was admissible for the purpose of corroborating the evidence of the validity of the deed from Lawrence and Creecy to Simpson. *Fordtran v. Perry* (Tex. Civ. App.) 60 S. W. 1000.

For the error shown, the judgment of the court below will be reversed, and the cause remanded. Reversed and remanded.

On Rehearing.

(Dec. 10, 1903.)

The appellees, in their motion for a rehearing, show that, as a matter of fact, a copy of the deed from Creecy to Simpson, certified from the records of Jefferson county, was put in evidence, and attach to their motion an agreement of counsel for appellant and a certificate of the trial judge to that effect. They also attach the certified copy from the records of Jefferson county, and show that copies from the records of both Jefferson and Hardin counties were before the court, and that in making up the statement of facts the copy from the records of Jefferson county was omitted; and counsel for appellant agrees that said copy attached to the motion "may be looked to by this court and considered as having been offered and admitted in evidence on the trial thereof, provided this court shall see fit to entertain a rehearing of said cause." A statement of facts filed after the time allowed by law, although agreed to by counsel for both parties and approved by the trial judge, will not be considered by this court. *Wilcox v. League*, 71 S. W. 414, 6 Tex. Ct. Rep. 214. This court has no jurisdiction to correct the record of the trial court or to change it. *Bogges v. Harris*, 90 Tex. 476, 39 S. W. 565. But it is not now proposed to show that the statement of facts has not been correctly copied into the record. It is admitted that it is correct as made up, and it is sought to add to it an additional fact to change this court's judgment upon a record properly made up. There is no law or rule of the court by which this can be done. To allow it even in an apparently simple instance would establish a precedent that would lead, in principle, to grave changes in the record after it has been made and filed and submitted in this court. Parties must see

that their records are correctly made up, and not seek to change them after the jurisdiction of this court has attached, except in the manner provided by law for their correction. While it would probably expedite the final disposition of the controlling questions in this case for this court to consider the copy of the deed attached to the motion for rehearing, it is better that the case should be remanded for another trial, than to establish the precedent of allowing a statement of facts to be amended as is sought to be done.

The motion will be overruled. Overruled.

ALLEN v. HAZZARD.*

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

COSTS — STENOGRAPHER'S SERVICES — PREPARING STATEMENT OF FACTS — MUNICIPAL CORPORATIONS — ORDINANCES — HORSES RUNNING AT LARGE — EVIDENCE.

1. Under Sayles' Rev. Civ. St. art. 1421, providing that each party to any suit shall be responsible to the officers of the court for the costs incurred by himself, a party to a cause, on whose motion the stenographer is ordered to transcribe the testimony and file the same in order that such party may prepare a statement of facts, is liable for the cost of transcribing the notes.

2. The denial of such a motion could not be complained of by the moving party, it appearing that the court would have granted the motion if the moving party would have consented to assume payment for the work.

3. On appeal a bill of exceptions contained what purported to be all the evidence introduced on the trial "for the purpose of showing defendant's negligence," which question, together with the extent of plaintiff's injuries and the measure of damages, was all there was to the case. A motion for a new trial did not complain of the damages as excessive, and only one ruling in regard to the admissibility of evidence was questioned, which objection was not supported by the bill of exceptions. *Held*, that the denial of a motion to order the stenographer to transcribe the notes taken on trial that appellant might make up a statement of facts was not prejudicial.

4. A horse running through the streets of a city, returning to its stable, unattended, is "running at large," within the meaning of an ordinance making it unlawful for horses to run at large, notwithstanding that the horse has been accustomed and trained to return to the stable after being turned loose.

Error from District Court, El Paso County; J. M. Goggin, Judge.

Action by Minnie B. Hazzard against R. A. Allen. Judgment for plaintiff, and defendant brings error. Affirmed.

Patterson & Buckler, for plaintiff in error.

JAMES, C. J. Plaintiff (defendant in error) alleged that defendant was accustomed to turn his horse loose in the city of El Paso for the purpose of permitting him to go alone to a certain livery stable, and on August 17, 1900, turned him loose, knowing that he was accustomed to run and trot rapidly along the street towards the stable; that when plaintiff came into that street on a bicycle

*Rehearing denied December 9, 1903, and writ of error denied by Supreme Court.

she saw the horse coming rapidly down the street towards her, and in the direction she was going, and she, through fear and excitement in attempting to avoid being run over by turning out of the way, lost control of her wheel, which fell, throwing her to the ground and injuring her. Her petition also alleged two city ordinances—one against driving or riding at a faster gait than six miles an hour; the other declaring it unlawful for horses, mules, etc., to run at large in the city—both ordinances providing penalties for their infraction. Judgment was for \$1,500.

There is no statement of facts, and the first assignment of error is to the refusal of the court to order the stenographer (appointed to take the evidence in the trial) to file the evidence for the use of plaintiff in error in preparing a statement of facts. The bill of exceptions makes it appear that counsel did not charge his memory with the testimony on account of there being a stenographer to take it down, and did not remember it sufficiently to properly prepare a statement from memory; that he moved the court that she be ordered to transcribe the testimony from her notes, and file same. It appears further from the bill that she had not filed same because the court had directed her not to do so, having stated that it would tax as costs only her per diem of \$10. She was willing to file it provided an order was made fixing her compensation therefor, to be taxed as costs. It also appeared that the defendant had no property in El Paso county, nor in Texas, and had disposed of all his property in Texas, and was at the time residing in England. Under article 1421, Sayles' Rev. Civ. St., defendant would have been liable to the stenographer for this expense. The court may have been influenced in its decision of this motion by the fact that no costs be made out of defendant by its process, if at all. The court was ready to grant the motion of the applicant if he would assure payment for this particular work, which was refused. Under the circumstances we believe appellant cannot complain.

Moreover, plaintiff in error does not appear to have been prejudiced by the refusal. There is only one other bill of exceptions in the record, and in this bill, and at plaintiff in error's instance, we find given what purports to be all the evidence introduced upon the trial, "for the purpose of showing the negligence of defendant, or that the horse was running at large." This was practically all there was in the case, except the extent of plaintiff's injuries and the measure of damages.

We notice that the motion for new trial does not complain of the damages as excessive, and question only one ruling in regard to the evidence admitted as to injuries sustained, and this objection is not supported by a bill of exceptions, and could not have been considered with a statement of facts.

The third and fourth assignments contend that the court erred in admitting the two ordinances. They are based on the bill in which the testimony concerning negligence, etc., was set forth. The ordinance declaring it unlawful for horses to run at large in the city of El Paso was objected to because it had no application to this case, as there was no evidence that the horse was running at large in the sense of the ordinance. It appeared from the evidence that the horse had a saddle and bridle on, and was galloping rapidly along the street; that plaintiff was frightened, and thought the horse had thrown its rider, and was vicious; that she thought the horse would run over her; and attempted to get out of its way, and in doing so met with her injury. Defendant admitted to her he had turned the horse loose. There was no direct testimony that defendant had turned it loose to go to the livery stable, but such is its effect as claimed by plaintiff in error, and plaintiff so alleged in her petition. Upon this assignment we are of opinion that the horse was running at large within the meaning of the ordinance. The fact that it may have been accustomed or trained to return to the stable when turned loose would not except it from the ordinance. It was allowed to go through the streets unattended and unrestrained, and therefore it was at large. The assignment will accordingly be overruled; and this view of the law also necessitates the overruling of the second assignment, which questions the charge of the court as assuming that defendant was guilty of a violation of the ordinance, and of negligence per se, in turning the horse loose to run along the street.

The other ordinance objected to was one prohibiting the riding or driving at a speed greater than six miles an hour. It is not necessary to discuss this at all, the former ordinance embracing the act.

Affirmed.

GALVESTON & W. RY. CO. v. CITY OF GALVESTON.*

(Court of Civil Appeals of Texas. Nov. 3, 1903.)

MUNICIPAL CORPORATIONS—TAXES—IMPROPER RENDITION—ACT OF AGENT—DOUBLE ASSESSMENT.

1. Where the property of a railroad company in a city is rendered for taxation by the company's agent, the trackage being rendered separate from other real estate owned by the company in the city, and the valuation of each being made distinct items, which was followed by subsequent assessments, there is not a double assessment.

2. Where the property of a railroad in a city is rendered for taxation by its agent in a form contrary to the statute, and the form and substance of such rendition were followed in subsequent years, the company cannot take advantage of the want of statutory form in the rendition.

*Rehearing denied October 29, 1903.

Error from District Court, Galveston County; Robt. M. Franklin, Judge.

Action by the city of Galveston against the Galveston & Western Railway Company. From a judgment for plaintiff, defendant brings error. Modified and affirmed.

Gresham & Gresham, for plaintiff in error.
J. Z. H. Scott, City Atty., for defendant in error.

GILL, J. This suit was brought May 20, 1896, by the city of Galveston against plaintiff in error, a railroad corporation, for the purpose of recovering delinquent taxes alleged to be due the city by the company on property owned by the company, and situated in said city, together with 8 per cent. interest thereon. On June 9, 1902, the pleadings of plaintiff were amended so that recovery was sought for the city taxes alleged to be due for the years 1893 to 1899, inclusive. A trial on June 23, 1902, resulted in a judgment in favor of the city, but only 6 per cent. interest was allowed. The property alleged to be liable for taxes for each year is fully described, and the total tax per \$100 for municipal purposes and the total tax for school purposes is alleged, but the various municipal purposes for which the municipal tax was levied, and the various funds for the benefit of which they are levied, are not alleged. The allegations as to the levies of the municipal and school taxes for the first year sued for are as follows: "Plaintiff's city council, by ordinance duly passed, levied and ordered to be collected ad valorem taxes amounting to \$1.50 for municipal purposes and 20 cents for the support of public schools upon each \$100 valuation of all real, personal, and mixed property within the corporate and territorial limits of the city of Galveston," and the allegation is repeated as to the taxes alleged to be due for each year sued for. The petition then alleges that on the 1st day of January and the 1st day of October of said year certain property, a list of which is set forth, was situated in said city, and subject to taxation under said ordinances, and sufficiently alleges its rendition, valuation, assessment, etc. These are the entire allegations with reference to the passage of the ordinances by which the taxes were levied and assessed, nor is the city's authority to levy, assess, and collect taxes for the support of public schools, nor the ordinances by which such taxes were levied, otherwise alleged. It is not averred that the city, by a vote of its citizens, assumed control of its public schools, nor that the tax levied for school purposes was authorized by a vote of the citizens. There is no allegation of acceptance of the assessment rolls by the city council for any of the years sued for. The pleadings are lengthy, and we have set out only such parts as are necessary to the presentation of the questions certified.

(1) In the petition of plaintiff, on which the case was tried, it was alleged that by the ordinance levying the taxes sued for: "The taxes for municipal purposes for each year were made and became payable September 1st of such year, and bore interest at the rate of 8 per cent. per annum from and after October 1st of such year, and such taxes for the support of free schools were made and became payable January 1st of the year next succeeding such year, and bore interest at the rate of 8 per cent. per annum from March 1st thereof."

(2) It is alleged by plaintiff that the valuation of defendant's property for taxation for the years 1897, 1898, and 1899, upon which the taxes for those years as sued for were based, was made, and the property appraised for taxation, by plaintiff's board of equalization. But, as stated in the main certificate, the formal acceptance and approval of the rolls by the city council is nowhere alleged, either as to the years above named or any of the other years sued for.

To the amended petition the defendant company interposed a general demurrer and a special demurrer questioning the right of the city to recover interest on the taxes sued for. Exception was also presented as to the sufficiency of the allegations respecting the school taxes. These were overruled, and a trial to the court without a jury resulted in a judgment for the amount claimed, interest at 6 per cent. and costs, with foreclosure of the tax liens. From this judgment the company has appealed.

As far as the facts are concerned it will suffice to say that the evidence sustains the findings of the trial court and supports the judgment. As grounds for reversal appellant urges: First. That the court erred in overruling the general demurrer and holding that the ordinances levying the municipal taxes were sufficiently pleaded. Second. That the court erred in holding, as against the general demurrer, that the city ordinances levying the school taxes for the years 1898 and 1899 were properly pleaded, and that the allegations as to the assessment for said school taxes are sufficient in law. Third. That the special exception questioning the city's right to recover interest should have been sustained. Fourth. That the facts show a double assessment, and the court erred in not correcting the error. The city, under a cross-assignment, asks that the judgment be reformed so as to allow the recovery of the 8 per cent. interest as sued for.

The first, third, and fourth questions presented were certified by us to the Supreme Court, and each was answered contrary to the contention of appellant. 74 S. W. 537. The question presented by the cross-assignment was also certified, and the answer sustains the contention of appellee. Of the questions raised by demurrer there remains but the one affecting the sufficiency of the allegations as to the levy and assessment of

the school taxes, and, in view of the answers of the Supreme Court to the first question, they appear to be sufficient as against the objections formerly presented in the brief. Under the contention that the facts show a double assessment appellant insists that the court should have corrected the apparent error, notwithstanding it was the rendition of defendant's agent. The facts upon this point are that of the 5.3 miles of defendant's road which lie within the city limits the greater part is located in the streets of the city, the remainder lying across certain lots and blocks purchased and owned by defendant for right of way. The property was originally rendered by the company's agent, the railway or trackage being rendered distinct and separate from the lots and blocks, and trackage and realty being valued as distinct items. All subsequent renditions or assessments were copies of the original. We are of opinion it is not in fact a double assessment. The fact that the rendition was not in statutory form cannot be taken advantage of by the company when the form and substance adopted by it were thereafter followed.

We have found no error for which the judgment should be reversed. It should be reformed, however, in the matter of interest, so that the city be permitted to recover 8 per cent., as held by the Supreme Court in sustaining the cross-assignment. As so reformed, it will be affirmed.

Affirmed.

JACKSON v. JERNIGAN.*

(Court of Civil Appeals of Texas. Nov. 21, 1903.)

LANDLORD AND TENANT—DISTRESS WARRANT—COSTS FOR CARE AND CUSTODY—INCLUSION IN JUDGMENT FOR COSTS—APPEAL—REFORMATION OF JUDGMENT.

1. Batts' Civ. Ann. St. arts. 4871, 4872, provide that an officer having custody of property under a writ of sequestration shall be entitled to compensation and charges, to be taxed in the bill of costs against the party cast in the suit, and that, if he be compelled to expend any money, he may retain possession until it is refunded, etc. Held that, by analogy, costs incurred in the care and custody of property taken under a distress warrant in a suit by a landlord for rent were to be deemed included in a judgment decreeing that defendant "do have and recover of plaintiff all costs of court."

2. Where a cause has been tried by the court without a jury, and conclusions of fact filed by the judge, the judgment can be reformed on appeal, and such judgment rendered as the record shows should have been rendered.

Appeal from Fannin County Court; T. C. Bradley, Judge.

Action by E. K. Jernigan against J. T. Jackson. Judgment for plaintiff, and defendant appeals. Reformed and affirmed.

The following statement of the case is taken from the brief of appellant, and, as it

fairly states the matters at issue in the cause, is adopted: "Appellant was tenant of appellee for year of 1902, having rented 65 acres of land in precinct No. 6 of said county, to be planted in corn and cotton. Appellee sued appellant for \$50 rents, and \$274.69 advances furnished appellant to make a crop during year 1902, and for foreclosure of landlord's lien on all of appellant's crops of corn and cotton, and had issued a distress warrant, which was levied on 5 bales of appellant's cotton then picked and ginned, and all the ungathered cotton then in the field, and all of appellant's crop of corn, consisting of 80 bushels. Appellee alleged that part of the rents were then due, and that all of the advances were then due, and made affidavit to said fact as the only ground for issuing a distress warrant. This proceeding was instituted November 1, 1902, and process issued by the justice of the peace of Precinct No. 6, and made returnable to the county court of said county. Appellant answered by admitting all of said indebtedness, except \$86.50, and pleading a tender of payment of same, except the \$86.50, which appellant refused to pay. Appellant further answered that appellee was not entitled to recover the \$86.50, because the same was recovered of appellee in a certain suit instituted in said Precinct No. 6 June 9, 1902, as costs, and pleaded the judgment in said cause of July 15, 1902, in bar of appellee's right to recover said \$86.50. A jury was waived, and cause submitted to the court, which resulted in a judgment for appellee for the sum of \$275 and all costs of court, and a foreclosure of landlord's lien on all of said crops, from which judgment appellant has appealed, and seeks a reversal of same. The contention in this suit was whether or not appellant should pay the \$86.50, the amount for work and labor and expenses incurred by the constable from June 8, 1902, to July 15, 1902, while the crop was in hands of the constable by virtue of the distress warrant issued in the former suit, which distress warrant was abated in former suit, and whether or not appellant should pay costs of this suit."

E. C. Armstrong, for appellant. Gross & Gross, for appellee.

BOOKHOUT, J. (after stating the facts). By the terms of the judgment rendered in the first suit on July 15, 1902, it was "ordered and decreed that defendant [Jackson] do have and recover of plaintiff [Jernigan] all costs of court." The costs accruing for the care and custody of the property while in the hands of the constable or his bailee were part of the costs of that case, and were taxable as such. This is the rule prescribed by statute in matters of sequestration, and we are of opinion the same rule would apply in distress proceedings. Batts' Civ. Ann. St. arts. 4871, 4872. The judgment of July 15th adjudges these costs against appellee Jernigan, and is conclusive. The plaintiff, Jer

*Rehearing denied December 5, 1903.

† 1. See Landlord and Tenant, vol. 32, Cent. Dig. § 1132.

nigan, was not entitled to recover this amount in this suit, and the trial court erred in so holding. The cause having been tried by the court without a jury, and conclusions of fact filed by the judge, the judgment will be reformed, and such judgment here rendered as the record shows should have been rendered by the court below. The appellant, in his brief, admits that he owes the plaintiff \$324.69, less \$86.50. The trial court found that appellant was entitled to recover \$25 as damages to corn and cotton crops while in the hands of the constable during the pendency of this suit, which sum, with \$86.50, should be deducted from appellee's (plaintiff's) debt, leaving due appellee \$213.19. The judgment will be reformed, and here rendered for said amount, with 6 per cent. interest from January 26, 1903, the date of judgment in the trial court. The costs of the trial court are taxed against appellant, Jackson. The costs of this court are taxed against appellee, Jernigan.

As reformed, the same is affirmed. Reformed and affirmed.

INTERNATIONAL & G. N. R. CO. v. WEAR et al.

(Court of Civil Appeals of Texas. Nov. 17, 1903.)

RAILROADS—DEATH BY WRONGFUL ACT—EVIDENCE—SUFFICIENCY.

1. In an action against a railroad company for the negligent killing of a 10 year old boy the engineer testified that deceased and his older brother were standing close to the track, and that when the engine got near them the brother started to cross the track ahead of the train, and deceased attempted to follow, and that, though he applied the emergency brake, he was unable to stop the train in time to prevent it from striking deceased. Another witness corroborated the engineer, and there was evidence that the older brother had testified at the coroner's inquest that he and deceased waited until the train got right at them before they tried to cross the track, and then ran a race to see which could get across first. Held, that the evidence was insufficient to sustain a verdict for plaintiff.

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by Bob Wear and another against the International & Great Northern Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

N. A. Stedman and Gould & Morris, for appellant. F. J. McCord & N. A. Gentry, for appellees.

PLEASANTS, J. This is a suit by appellees against appellant to recover damages for the loss of their son, whose death is alleged to have been caused by the negligence of appellant's employés. The petition alleges, in substance, that plaintiffs' son Wesley Wear, while attempting to cross defendant's track at a public road crossing near the city of Tyler, in Smith county, was run over and

killed by a passenger train on defendant's railroad; that at the time said Wesley was killed he was only 10 years of age, and had a weak and immature mind, and did not have the mental capacity or discretion to understand and appreciate the danger attending the moving of engines; that he had no knowledge of the velocity of a train in motion, and did not know the danger of attempting to cross a railroad track in front of an approaching train; that the employés of defendant who were operating said train saw the said Wesley and other children running along the public road toward said crossing, and could tell by the manner in which they were running that they would attempt to cross the track in front of the approaching train; and that the death of said Wesley was caused by the negligence of the employés of defendant operating said train "in negligently running said train and approaching said crossing at a high rate of speed, to wit, 40 miles an hour, and in not having said train under control in approaching said crossing; that the engineer in charge of said train saw the danger and peril of plaintiffs' son, yet, seeing his peril and danger, he negligently failed to stop said train, or to use the appliances at hand to check the speed of said train to avoid killing said child or lessening his injuries; that had said engineer, when he saw the peril of plaintiffs' son, used the appliances at hand to check the speed of the train, any and all the injury and death of plaintiffs' son could have been avoided, but, seeing his danger and peril, said agents and servants in charge of said train moved over and across said public crossing onto and over your plaintiffs' son, and killed him." The defendant answered by general denial and plea of contributory negligence. The trial in the court below by a jury resulted in a verdict and judgment in favor of plaintiffs for the sum of \$250.

The record discloses the following facts: On August 17, 1901, plaintiffs' son Wesley Wear, who was then 10 years old, in company with his brother, Harrison Wear, who was a few years older, attempted to cross defendant's road at a public road crossing near plaintiffs' home in Smith county just as a north-bound passenger train on said railroad was approaching the crossing, and was struck and killed by the engine of said train. L. T. Branham, the engineer who was operating said engine, testified that when he first saw the boys they were standing near the track, and when he got near them the larger boy put out his foot as if he was going to try to run across ahead of the train. When he saw the boy make this motion, he called to him to stop, and made a motion to him with his hand to go back. When he saw that the boy would not stop, he applied the emergency brake, and did everything he could to stop the train, but was unable to do so in time to prevent it striking the boy Wesley, who attempted to follow his brother

er across the track. The train was running at its usual rate of speed, which was 30 miles an hour. Before reaching the crossing, the whistle of the engine had been blown, and proper warning of the approach of the train given. The train could be seen approaching the crossing from the south for a distance of 500 yards. W. Hartwell, a witness for the defendant, testified that he lived 335 steps from the place of the accident, and saw the boys run up to the track and stop, and when the train got within a few yards of the crossing they tried to run across the track in front of the engine, and the smaller boy was struck by the engine and killed. This evidence is not contradicted by any testimony in the case except that of Harrison Wear, who testified that he and his brother were running along the public road, going to church, and that he did not hear the train whistle, and did not see it coming before he and his brother were on the track. J. C. Cox testified for the defendant that he was justice of the peace, and held an inquest over the body of Wesley Wear; that Harrison Wear testified at said inquest that he and his brother, Wesley, waited until the train got right at them before they tried to cross the track, and they then ran a race to see which could get across first.

Appellant, by proper assignment, raises the question of the sufficiency of the evidence to sustain the verdict. We think the assignment should be sustained. It may be granted that there is evidence in the case sufficient to sustain the finding of the jury that plaintiffs' son was not of sufficient mental capacity to be guilty of contributory negligence in attempting to run across the track in front of a rapidly approaching engine, and yet the verdict cannot be sustained unless the evidence further shows that the defendant's employes were guilty of negligence which was the proximate cause of the boy's death. If the employes of defendant who were operating the train at the time the boy was killed had, as alleged in the petition, seen him running towards the crossing in such manner or under such circumstances as would have reasonably indicated that he intended to attempt to cross the defendant's track in front of the train, and said employes, after seeing the danger, could, by the use of proper care, have prevented the accident, their failure to use such care would be negligence. But no such case is made by the evidence above stated. When the engineer first saw the boys, they were standing by the track, and he could not reasonably presume that, just before the train reached the crossing, they would attempt to cross the track. There being nothing in the surroundings or in the actions of the boys to put him upon notice of their intention to cross the track in front of the train until it was too late to stop the train in time to prevent the accident, he cannot be held guilty of negligence in not sooner applying the brakes and

attempting to stop the train. The statute does not require railroad trains to slacken their speed in crossing a public road, and, unless the operatives of the train in any particular case are chargeable with knowledge of facts which would make it their duty, in the exercise of reasonable care, not to run the train over a public crossing at its usual rate of speed, it is not negligence for such operatives to fail to reduce the speed of their train when approaching a public road crossing. The testimony of Harrison Wear is contradicted by the overwhelming weight of the evidence and by his own sworn statement at the inquest held over the body of his brother, and we cannot believe the jury based their verdict upon it, but must have been influenced by the belief that the speed at which the train was run over the public road was negligence in itself. We think the judgment of the court below should be reversed, and the cause remanded for a new trial, and it is so ordered.

Reversed and remanded.

WESTERN UNION TELEGRAPH CO. v. CHAMBERS.*

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

TELEGRAM—ERROR IN TRANSMISSION—MEASURE OF DAMAGES—INSTRUCTION—EVIDENCE.

1. To charge that, "You can only allow plaintiff for the mental anguish caused by being prevented," etc., at the close of a charge on measure of damages allowing "fair compensation for the mental anguish, if any," is not erroneous as assuming that mental anguish had been proven.
2. Evidence held sufficient for the jury to find that the funeral of plaintiff's son would have been delayed until plaintiff's arrival if the telegraph company had transmitted correctly a notice of the son's death delivered to it.
3. Evidence held to present for the jury the question whether plaintiff knew of the mistake complained of in the transmission of a telegram received by him.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by D. B. Chambers against the Western Union Telegraph Company. From a judgment in favor of the plaintiff, defendant appeals. Affirmed.

Webb & Goeth, for appellant. Thos. O. Murphy, for appellee.

JAMES, C. J. D. B. Chambers brought this suit in the district court of Bexar county to recover damages from appellant, alleged to have been sustained by appellee by reason of the negligence of the telegraph company in the transmission of the following telegram addressed to him by his son, A. F. Chambers, sent from Des Moines, Iowa, on the 29th day of March, 1902, to wit: "Arthur died this noon, wire us if you can come."

*Rehearing denied December 9, 1903, and writ of error denied by Supreme Court.

Arthur was plaintiff's son. The message, as delivered to the appellee in San Antonio, read, "Father died this noon, wire us if you can come." Prior to his death he had not been sick. A. F. Chambers was a married man, and had a father-in-law named Gunder, whom he generally referred to as "father" or "Father Gunder." Plaintiff alleged and testified that from the wording of the message as delivered to him he thought that his son's (A. F. Chamber's) father-in-law had died, and he did not answer the telegram by wire, until he received the following message, sent by the telegraph company on March 31st, at the request of A. F. Chambers at Des Moines, to wit: "San Antonio, Tex. Please request answer ours 29th Chambers, No. 716 Cameron Street. Same important. Des Moines, Ia., Mar. 30, 1902." Upon receiving request for an answer about noon March 31st, plaintiff says that he became suspicious that there might be a mistake in the message some way, and he was a little puzzled about it; that he wrote the following telegram, "Cannot come," on the back of the last message he received, as an answer to it, and sent it to the telegraph office by Mrs. Monette, his stepdaughter, and when he sent it to the office he told her to inquire if she could ascertain if there had been a mistake in any way in the transmission. "I was still under the impression, and did not know at this time yet, but what it was Gunder's death. When I sent that answer I did not know it was my son." Plaintiff testified that if the telegram had read "Arthur" he would have replied at once, "I will come," and would have left at once, and that he would have arrived at Des Moines before the burial. That Mr. Gunder was only a passing friend, and he wondered why they were so anxious to hear from him, and that is what he told his stepdaughter in regard to what there is about having inquiry made as to whether there might be a mistake or not. Stephen Dolan, a witness for the defendant, and its receiving clerk, testified that a lady came in about 1 o'clock on March 31st, bringing a telegram, and remarked that there was an error in the wording of one of the messages; that the word "father" she thought ought to have been "Arthur"; that she was almost sure it ought to have been "Arthur," instead of "father"; whereupon the San Antonio office sent the following message to Des Moines: "Des Moines, Iowa. Please repeat quick the first word your 10 paid March 29th, Chambers signed same. Reads father our copy, rush answer. Dolan, S. A. 31." This was answered by the Des Moines office, and the answer as received back at this office on said day, March 31st, and referred to plaintiff on April 2d, as follows: "San Antonio, Texas, Sys date first word our 29th Chambers agd same if Arthur repeat Arthur. Des Moines, Ia. Mch. 31st. Respy referred to D. B. Chambers, 716 Cameron St. This refers to message you received Saturday. The first word should read Ar-

thur instead of father. Western Union Tel. off. Dolan San Antonio, March 31, '02." Arthur Chambers' remains were buried at Des Moines, April 1st, about 6 p. m., and appellee was not present at the funeral. Appellant answered by general demurrer and general denial. The case was tried on the 16th day of March, 1903, before a jury, and resulted in a verdict in favor of plaintiff for the sum of \$750.

The first assignment questions this clause of the charge as assuming that plaintiff suffered mental anguish and was prevented from attending his son's funeral: "In this connection you are instructed that you cannot allow plaintiff anything for the natural grief caused by the death of his said son, but can only allow him for the mental anguish caused by being prevented from attending his funeral." The clause was the close of a paragraph on the measure of damages, in which paragraph the jury had just been told. If they found for plaintiff, "to allow him such a sum as they believed from the evidence would be fair compensation for the mental anguish, if any, suffered by him by reason of being unable to attend the funeral of his son." The jury could not observe this charge without having already acted upon the preceding instructions and found for plaintiff upon them. In those charges they were fully and properly instructed, and must, in order to have reached a verdict for plaintiff, have found both of these facts from the evidence.

The second is that the evidence is against the verdict, as it was an uncontradicted fact that Arthur Chambers had a wife, who had the control and disposition of his body, and no one else could have delayed the burial, and there is no evidence that his wife would have postponed it until plaintiff could have arrived; and the only evidence that the funeral would have been postponed was that of A. F. Chambers, who is not shown to have had any authority over the body or the funeral. This assignment is clearly not sustainable. A. F. Chambers testified that, "If we had received an answer on March 29th or 30th, stating that plaintiff desired to attend the funeral, we would have delayed it to give him time to get there." This witness also stated: "I received an answer about noon on March 31st saying, 'Cannot come,' and, thinking for some reason he could not come, we went ahead with the funeral. If he had answered that he desired to attend the funeral, and would start at once, the funeral would have been delayed until he reached here." It further appears that the body was in fact held until the 31st, and buried then because of said reply. The testimony was amply sufficient to warrant the finding that the funeral would have been delayed. If it were essential in law to show that the wife would have consented to a postponement, such fact would be clearly indicated, and the testimony referred to.

The third assignment is that the evidence

shows beyond dispute that plaintiff knew of the mistake in the message. Mrs. Monette was not a witness. Plaintiff's testimony does not warrant finding as a matter of law that he knew about the mistake from the start, nor that he knew it when he sent the telegram, "Cannot come," on the 31st. He testifies he did not know that the original telegram referred to Arthur, and that he did not know it when he sent the telegram on the 31st, "Cannot come." It is entirely consistent with all the testimony that the telegraphic request for an answer he received from the telegraph company on the 31st was the first suggestion he had that there was some mistake in the original one. He testified that when he wrote the answer, "Cannot come," and sent Mrs. Monette to defendant's office with it, he told her to ascertain, if she could, if there had been any mistake, and that he was then still under the impression that it was Gunder who had died, and did not know that it was his son. He did not learn the fact until the message came to him on April 2d, 24 hours after his son was buried. There was no testimony that Mrs. Monette knew any more than plaintiff did. What she said to Dolan indicated that she had apprehensions that it was Arthur. The fact that the parties in Des Moines were desiring a reply by wire to the original telegram under the circumstances might have alarmed some dispositions more than others, and might have caused Mrs. Monette to imagine the worst. Still all the testimony goes to show that she suspected, or, to put it stronger, believed, the telegram referred to Arthur. The evidence does not even show that plaintiff had such impression, but the contrary. Whether or not Mrs. Monette's knowledge that the telegram meant Arthur could have been imputed to plaintiff, we need not consider, because she had no knowledge of that fact.

Affirmed.

DE GARCIA v. SAN ANTONIO & A. P. RY. CO.*

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

DEATH—DAMAGES—RIGHT OF WIDOW—JUDGMENT—FRAUD—RES JUDICATA—EQUITY JURISDICTION—JOINDER OF CAUSES OF ACTION—JOINDER OF PARTIES—PLEADING—DEFINITENESS—APPEAL—STATEMENT OF FACTS—RECITAL IN JUDGMENT.

1. A widow's cause of action to set aside a fraudulent judgment in an action for the negligent killing of her husband is properly joined with her cause of action for the negligent killing.

2. Where, in an action against a railway company for negligent killing, the minor heirs of the deceased fraudulently join his widow as plaintiff to cut off her rights, it is not necessary to join the minors as defendants in a subsequent action to set aside the judgment against her for costs, where the judgment for the minors for damages is not complained of.

3. Where a complaint alleges that, in an action against a railway company for negligent killing, the minor heirs of the deceased, acting in collusion with the company, fraudulently joined his widow as plaintiff, without her consent, to cut off her rights, and judgment was rendered against her because, as falsely alleged by them, she had lived apart from deceased and received no support from him for over two years prior to his death, and would have received no support from him had he lived, it is not defective as being too vague in its allegations of fraud.

4. Though, under Rev. St. 1895, art. 3022, authorizing actions for death to be brought by any of the parties entitled thereto for the benefit of all, minor heirs of the deceased may join the widow as plaintiff in such an action, if this is not done in good faith, but in collusion with the defendant to cut off her rights, the plea of *res judicata* will not avail in a subsequent action to set aside the judgment so obtained.

5. Where a wife has not, by her own acts, forfeited the right to support by her husband, she may recover damages for his death, though he has not for a long time fulfilled that duty.

6. A recital that a wife, for more than two years prior to the death of her husband, had not received any pecuniary aid from him, and would not have received any had he lived, in a judgment debarring her from recovering damages for his death, cannot be said to contain all the evidence, so as to dispense with the necessity for a statement of facts on appeal, since the facts recited are insufficient to support the judgment.

7. Where, at the time of discovery of fraud in procuring a judgment, it would have been impossible, by reason of the state of the record, and the impossibility of then securing a statement of facts, for the defrauded party to have secured a review by appeal, the judgment may be set aside by a court of equity, there being no adequate remedy at law.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Suit by Josephine De Garcia against the San Antonio & Aransas Pass Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

C. L. McGill and A. E. Heilbron, for appellant. Houston Bros. and R. J. Boyle, for appellee.

FLY, J. This is a suit instituted by appellant to recover damages for the death of her husband, and to set aside a judgment. Special exceptions were sustained to the petition, and, appellant refusing to amend, the cause was dismissed.

Appellant, after setting up her cause of action against appellee on account of the death of her husband, Alcarlo Garcia, alleged that he left surviving him, by a former marriage, two minor children, named, respectively, Concepcion and Leonides Garcia; that on January 11, 1902, they had, in the same district court in which appellant had sued, through their next friend, Augustine Trinidad, instituted a suit for their damages, and had in bad faith joined appellant in the suit, without her knowledge or consent. Fraud and collusion were charged against the minors and the appellee to defeat the claim of appellant. It was alleged that in furtherance of the fraud the minors made the following allegations in their petition: "Plain-

*Rehearing denied December 9, 1903.

tiffs show that, several years prior to his death, Alcaría García was married to Josephine De García, in the town of Luling, Caldwell county, Texas, and that the place of residence of the said Josephine De García is unknown to these plaintiffs, but they are informed and believe that she resides in the county of Travis, state of Texas; that the said Josephine De García and Alcarío García lived together at intervals, off and on, up to and about the 28th day of August, 1899, when the said Josephine De García left the bed and board of the said Alcarío García, and went to live with others, and had not lived with him since said date; that the said Alcarío García has not contributed to her maintenance or support, and at the time of his death the said Josephine De García was not receiving and would not have received any pecuniary aid from him, the said Alcarío García, had he lived, and had not received any pecuniary aid from him for more than two years prior to his death; that the said Josephine De García is joined herein as plaintiff in order that it may be judicially determined whether or not she is entitled to a part of the damages, and for the purpose of having her rights finally adjudicated. Plaintiffs further show unto the court that they bring this suit for their own use and benefit, as well as for the use and benefit of Josephine De García and all others entitled to any right or interest in the cause of action asserted in this suit." The allegations as to abandonment of her husband by appellant, and that he had not contributed to her support, are alleged to be false, and the petition proceeds as follows: "This plaintiff specifically denies that she was joined as plaintiff in said suit in said cause No. 13,362 in good faith, in order to judicially determine whether or not she was entitled to a part of the damages, and for the purpose of having her rights finally adjudicated; and so denies that the plaintiffs in said cause No. 13,362 brought said suit in good faith for the use and benefit of Josephine De García, this plaintiff, and all others entitled to any right or interest in the cause of action asserted in said suit, as well as for their own use and benefit. But this plaintiff now believes, and, so believing, here charges the fact to be, that said suit in said cause No. 13,362 was brought by said parties plaintiff in bad faith, with the fraudulent purpose and intent, in collusion with defendant and others, as aforesaid, by means of grossly false and willful misrepresentations of fact, of practicing deception and fraud upon the court, thereby misleading it to render a judgment that should operate a bar and forever conclude this plaintiff in the courts of the country from any and all pursuit of any claim for damages, however just and equitable, for the wrongful death of her said husband, the said Alcarío García, so caused and brought about by the negligent acts of defendant as aforesaid. Plaintiff, further complaining, avers that, having no

notice or knowledge of any kind whatsoever of the institution of said suit in said cause No. 13,362, she did not appear in said cause, nor did she authorize any other person to appear for her or in her behalf; that said suit was instituted and the proceedings had therein wholly without her consent and knowledge; and that such proceedings so had therein, and said judgment so rendered therein, were, as to this plaintiff, entirely and absolutely without her consent, knowledge, or authority, *ex parte*, and, for the fraud therein, void." It was alleged that in furtherance of the fraudulent design a judgment was obtained in the district court on February 7, 1902, before the court without a jury, in favor of the minors, for \$2,000, but the judgment as to appellant was as follows: "But it appearing to the court from the evidence that the plaintiff Josephine De García had not for more than two years prior to the death of Alcarío García received any pecuniary aid from him, and was not receiving any pecuniary aid from the said Alcarío García at the time of his death, and would not have received any pecuniary aid from him had he lived, the court is of the opinion that the said Josephine De García should take nothing by reason of this suit. Wherefore it is ordered, adjudged, and decreed by the court that the plaintiff Josephine De García take nothing by reason of this suit, and that defendant San Antonio & Aransas Pass Railway Company, as to her, go hence without day, and recover of and from the said Josephine De García all costs as to her incurred in this behalf, for which let execution issue." Appellant prayed that so much of the judgment as referred to her be vacated and declared void, and that she have judgment for her damages and costs.

The following special exceptions were sustained by the court: "For special exception to said petition, this defendant says and pleads that there is a misjoinder of causes of action herein, in that it is claimed to be a suit to review and set aside a judgment of this court hereinbefore rendered, and an attempt to join such action with an action for damages for the death of her deceased husband. And for further special exception, defendant says this action will not lie in manner and form as alleged, for the further reason that the plaintiff herein has failed to make the necessary parties defendant, as appears upon the face of this petition. For further special exception, defendant says that the allegations in said petition of collusion and fraud are too vague, general, indefinite, and uncertain to put this defendant upon answer thereto. And for further special exception, this defendant says that it appears upon the face of said petition that, as to this defendant, all the matters and things alleged herein by which plaintiff seeks or could seek to hold this defendant liable on account of the death of her husband have been fully litigated and determined, so far as this defend-

ant is concerned, in this honorable court; and this defendant says, as to all such questions and allegations, the matter and things set forth are *res judicata* as to this defendant; and of these special exceptions and pleas this defendant asks the judgment of the court."

There was no misjoinder of actions. In case the judgment had been set aside, appellant would have been compelled to plead her cause of action against appellee, and no good cause can exist for not filing it at the same time. It will not complicate matters at all, and no inconvenience can possibly arise from the joinder of the two actions, and there is no possible clash between them.

It is apparent from the allegations in the petition that appellant is not complaining about the judgment for damages in favor of the minors, but the only complaint is in connection with the judgment rendered against her in favor of appellee. No necessity arises for joining the minors in the suit. It will not affect their material interests in any way, and their rights will not be disturbed by any decree in the case, directly or indirectly.

The allegations are full and explicit in stating a case that might form the basis for equitable relief. They impeach the justice and equity of the judgment, and demonstrate that a different result will probably follow a new trial.

Under the terms of article 3022, Rev. St. 1895, the minors were authorized to join with them, as plaintiffs, all who might be interested in the damages sought from the railway company for the negligent killing of their father, but it was incumbent upon them to act in good faith with those joined with them in the suit; and if they and the defendant acted in collusion, and with the intent to deprive the wife of the deceased of her rights, a plea of *res adjudicata* would not avail. The wife, so long as she has not acted in a way to forfeit it, is entitled to a support at the hands of her husband; and a party wrongfully killing him cannot deprive her of damages by a plea that the husband had not been fulfilling the duties that he owed his wife. *Railway v. Spicker*, 61 Tex. 427, 48 Am. Rep. 297. Neither the letter nor spirit of the statute above cited gives any authority to a person interested in the damages arising from the death of a relative to bring others also interested into the suit, and by neglect or fraud deprive them of their rights. The authority granted by the statute is an extraordinary one, and the utmost good faith must be maintained in regard to the rights of those made parties to a lawsuit without their knowledge or consent. The extraordinary authority can be justified on no other grounds. It follows that, if there was fraud in regard to the judgment obtained against appellant, equity will set it aside, and the plea of *res adjudicata* cannot avail.

We are of the opinion that there is no mer-

it in the exceptions, and they should have been overruled; but a question of much graver import arises from the record, and concerning whose proper solution much greater difficulties arise than in any matter presented in the exceptions. It is a well-established rule of equity that its power to redress a grievance or right a wrong will not be applied where an adequate remedy at law exists or did exist when its jurisdiction was invoked. *Railway v. Wright* (Tex. Civ. App.) 29 S. W. 1134. The proceeding to set aside the judgment being one that must find its place in a court of equity, the rule enunciated must be applied to it; and, if it appears that appellant had an adequate legal remedy at hand, the judgment of the district court was right, even though placed upon untenable grounds.

It appears from the petition that it was filed about four months after the judgment that is attacked therein had been rendered. At that time appellant could have pursued the legal remedy of bringing the judgment for review before the Court of Civil Appeals by a writ of error, and, if by that means she could have obtained redress, she could not successfully invoke the equitable powers of the district court. In order to obtain relief at the hands of an appellate court, it is usually required that a statement of facts should be made a part of the record, and, in the absence of a statement of facts, the action of the trial court will not be reviewed, unless the errors are fundamental or apparent of record. It will be readily seen that an appellate court could not have reviewed the acts of the lower court on the points desired, in the absence of a statement of facts, or something in the record, either as recitals in the judgment, or facts in bills of exception, that would be equivalent to a statement of facts. It has been held in this state that a formal statement of facts is not essential where all the evidence legally and conclusively appears in the record by bill of exceptions or by recitals in the judgment. *Sallinas v. Wright*, 11 Tex. 578; *State v. Connor*, 86 Tex. 133, 23 S. W. 1103. But it must conclusively appear that all, and not a part, of the facts are in the record in some form or the other. In the judgment rendered in the case instituted by the minors, it is true that it is recited that it appeared from the evidence that "Josephine De Garcia had not for more than two years prior to the death of Alcario Garcia received any pecuniary aid from him, and was not receiving any pecuniary aid from said Alcario Garcia at the time of his death, and would not have received any pecuniary aid from him had he lived," but it cannot be said that the whole of the evidence is recited. To so hold would be to impeach the judgment, for the evidence recited is wholly insufficient to deprive the wife of receiving damages accruing by the death of her husband. As hereinbefore stated, the wife is entitled to a support from her husband, unless

she has forfeited it by her wrong conduct. The petition in the case alleged that the wife had abandoned her husband, and it must be presumed that only a part of the facts were recited in the judgment, and that the main fact, although proved, was not set forth. It will be seen, therefore, that an appellate court would not have been in a position to have intelligently reviewed the judgment on a writ of error without a statement of facts, and, as it was utterly impossible for appellant to have obtained a statement of facts when the fraud was discovered, she had no adequate legal remedy, and could go into a court of equity for redress.

We conclude that the judgment should be reversed, and the cause remanded.

PRESIDIO COUNTY v. JEFF DAVIS COUNTY.*

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

COUNTIES—COUNTY SEATS—CHANGE—VALIDITY—LOCATION OF BOUNDARIES—POWERS OF COURT—CREATION OF NEW COUNTIES—SPECIAL ACTS—CURATIVE ACTS—VALIDITY—EFFECT—LIMITATIONS.

1. Sayles' Rev. Civ. St. 1897, art. 808a, giving the district court power to determine the location of the boundary line of counties, confers power to determine all matters incident to the existence of such line, including the determination of which of two or more lines is the correct line and fixing such line.

2. When neither of two towns was within five miles of the geographical center of a county, an election for the purpose of changing the county seat from one to the other, less than a two-thirds vote being cast for the change, the change was invalid, although the county judge declared the change adopted, and the public business was transacted in the changed location, and it was uniformly treated as the county seat by the officers and the public up to and after the time when a new county was created out of its territory.

3. The term "county seat," in Const. art. 9, § 1, cl. 2, prohibiting the creation of a new county so that its boundaries will approach nearer than 12 miles to the county seat of the county from which such new county may be taken, refers to the legal county seat, and not a mere de facto one, resorted to as such by common consent and usage.

4. Act 1889 (Gen. Laws 1888-89, p. 44), defining the boundaries of Jeff Davis county, created from Presidio county by Act 1887 (Laws 1887, p. 26, c. 38), and changing the boundary line thereof, is within the purview of Const. art. 9, § 1, cl. 3, which prohibits the Legislature from detaching territory from one county and adding it to another existing county, without submitting the proposition to the electors of both counties; and, as Act 1889 was not so submitted, it never took effect.

5. The doctrines of stale demand and limitations have no application to proceedings to determine the boundary line of counties.

6. The act of 1891 (Gen. Laws 1891, p. 30, c. 29) validating by general law certain county seats cannot relate back so as to invalidate Act 1887, which constitutionally established the boundaries between Jeff Davis and Presidio counties.

7. Const. art. 3, § 56, forbidding the Legislature to pass any local or special law locating or

changing county seats, precluded the Legislature from validating the proceedings by which a town was selected as the county seat of a county by an act relating to that county alone.

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by Jeff Davis county against Presidio county. From a judgment for plaintiff, defendant appeals. Affirmed.

J. A. Gillett and Falvey & Davis, for appellant. Walter Gillis, for appellee.

JAMES, C. J. The county of Jeff Davis brought this suit in Ward county and the venue was by agreement changed to El Paso county. The proceeding was to have the boundary between the two counties adjudicated and defined, as having been authorized by the act of 1897 (Sayles' Rev. Civ. St. art. 808a). Prayer was also for a decree enjoining Presidio county from assessing and collecting taxes within the disputed district. The decree was for Jeff Davis county. Certain facts—and we think all the material facts—are undisputed. Ft. Davis was originally the county seat of Presidio county, which county then embraced what is now Presidio, Jeff Davis, and Brewster counties. On July 14, 1885, an election was held in Presidio county for the purpose of determining whether or not the county seat should be removed from Ft. Davis to the town of Marfa. The result was 302 votes in favor of the county seat remaining at Ft. Davis and 391 in favor of Marfa. On July 25th the county judge entered an order in the minutes of the county court reciting the number of votes for and against, and declaring the result to be in favor of Marfa, although it had not received a two-thirds vote. Neither Ft. Davis nor Marfa was situated within five miles of the geographical center of the county. Soon after the election all the county offices were removed to Marfa, except that of the county treasurer, who remained at Ft. Davis. We shall not dwell on this fact further than to mention that in litigation growing out of his act the Supreme Court, on practically the same facts presented in this record, held with him that the removal of the county seat was invalid. *Caruthers v. State*, 67 Tex. 132, 2 S. W. 91, decided in following year (1886). The Legislature of 1887 created Jeff Davis county out of part of Presidio's territory, the act defining the boundary line between them. This line was within 12 miles of Marfa, but more than that distance from Ft. Davis. The Legislature of 1889, passed an act (Gen. Laws 1888-89, p. 44) defining the boundaries of Jeff Davis, which changed the said boundary line to another place, and the territory between the two lines is the occasion of this controversy. Section 2 of the latter act recites that, as the former boundary line was placed "within less than twelve miles of Marfa, the county seat of Presidio county, * * * this creates a doubt as to its constitutionality;

*Rehearing denied December 9, 1903.

therefore an imperative public necessity exists," etc. The Legislature of 1891 by a general law validated county seats which had been created and circumstanced as Marfa was. From 1885 to the time of the creation of Jeff Davis county out of its territory, Marfa was the de facto county seat of Presidio county for all public business pertaining to organized counties, and so continued until its status was set at rest by this validating act. In reference to the act of 1889 changing the boundary between Presidio and Jeff Davis counties, the line as there defined was within 12 miles of Ft. Davis, and no proposition for a change in the boundary was submitted to a vote of the electors of the counties. The testimony discloses that both lines as enacted are ascertained without difficulty or dispute on the ground. Both counties have asserted jurisdiction over the disputed strip since 1889, the evidence tending to show that Presidio has been the more emphatic and persistent in this respect, and more generally recognized as having jurisdiction over this territory.

Under the first assignment of error it is insisted that the act of 1897 (article 808a, Sayles' Rev. Civ. St.) merely gives one county authority to sue another county to have the boundary line located on the ground as defined by the Legislature; that the authority given the courts does not extend to determining which of two or more lines defined by the Legislature is the legal line, and to fix such line. This position is sought to be maintained by reason of the decision in *Guadalupe County v. Wilson County*, 58 Tex. 230, at which time there was no enactment conferring upon the district court jurisdiction to establish a boundary between counties, it being held to be a political question; and, further, by the peculiar wording of the act of 1897. It is our opinion that the act giving the district court power to determine where the boundary line is located necessarily embraces power to determine all matters incident to the existence of such line. If a law defining such a boundary were for some reason unconstitutional, it would hardly be contended that the court should nevertheless proceed to ascertain and locate it as described in the act. It seems clear to our minds that, if two or more lines have been enacted, the Legislature intended that such one of them as should control in law should be the one for the court to judicially establish. We therefore overrule this assignment.

Our second conclusion is that the court did not err in holding that Ft. Davis remained the legal county seat of Presidio county, notwithstanding the declaration of the result of the election in 1885 in favor of Marfa, and notwithstanding the fact that the public busi-

ness appertaining to Presidio county was transacted at Marfa from that time, and that Marfa was uniformly treated as the county seat by the officers and the public up to and after the time Jeff Davis county was created out of its territory in 1887. This being so, the next conclusion follows, viz., that the boundary line between the two counties as defined in said last-named act, being more than 12 miles distant from Ft. Davis, was not violative of the prohibition of article 9, § 1, cl. 2, of the Constitution. Our view is that by "county seat" said clause has reference to the legal county seat, and not a mere de facto one, resorted to as such by common consent and usage.

The next conclusion is that the act of 1889, which comes within the purview of clause 3 of section 1 of article 9, was never effective, because the proposition to detach from Jeff Davis county a part of its territory and to attach same to Presidio, which would have been the direct effect of this act, was never submitted to a vote of the electors of both counties, as required. The consequence is that the latter act did not effect a change from the boundary as established in the act of 1887 (Laws 1887, p. 26, c. 38), which was and remains the legal boundary between the two counties, unless, as contended by appellant, this is rendered otherwise by the validating act of 1891 (Gen. Laws 1891, p. 30, c. 29) or by stale demand and the statutes of limitations. The two last-named defenses clearly have no application in this case, and, whatever else may have been the effect of the validating act, we think it cannot be given the force of changing conditions by reference back to the extent of rendering unconstitutional an act that was constitutional at the time it was passed. Under article 3, § 56, of the Constitution, the Legislature is denied power to pass any local or special law locating or changing county seats, and this prohibition, we think, precluded the Legislature from validating the proceedings by which Marfa was selected as the county seat of Presidio county by any enactment which related to that county alone. Therefore the legislative recognition of Marfa, which might be implied by the Legislature's act in passing the law of 1887 creating Jeff Davis county, whereby it cut off that portion of Presidio county which contained Ft. Davis, and the express recognition of Marfa as the county seat of Presidio, found in the act of 1889, should not have any influence whatever in determining the question of its legality as the county seat of Presidio county at the date of the passage of said acts.

These views are substantially those of the trial judge, stated in his conclusions.

Affirmed.

**CRAWFORD v. SOUTHERN ROCK ISLAND
PLOW CO.***

(Court of Civil Appeals of Texas. Nov. 14,
1903.)

**SEQUESTRATION—REPLEVIN BY DEFENDANT—
BOND—SALE PENDING SUIT.**

1. In sequestration proceedings defendant replevied the property, giving a bond, and pending suit and execution on the judgment recovered by plaintiff sold the property. The execution was returned nulla bona, and plaintiff filed a motion for execution against the purchaser setting out the grounds of complaint. An answer was filed, and the ordinary proceedings had. *Held* that, though the proceeding by motion was unusual, the irregularity could not be complained of by the purchaser.

2. Rev. St. 1895, art. 4874, provides that, if personalty seized on sequestration be replevied by defendant, the condition of the bond shall be that he will not waste, sell, or dispose of the same, and will have it forthcoming to abide the decision of the court or pay the value thereof. Article 4877 provides for a satisfaction of the judgment by the return of the property. *Held*, that defendant was not, by the giving of such bond, authorized to sell the property pending suit, so as to give a good title to the purchaser.

3. Where, in sequestration, defendant gave a replevin bond, and judgment was rendered for plaintiff with a writ of possession, and the property could not be found, and judgment was awarded on the bond, and defendant, pending suit, had sold the property, and the execution was returned nulla bona, it was not an election on the part of plaintiff to pursue the defendant, so as to waive any remedy against the purchaser.

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Action by the Southern Rock Island Plow Company against J. D. Crawford. Judgment in favor of plaintiff. Defendant appeals. Affirmed.

Crawford & Crawford, for appellant. Finley & Knight, for appellee.

RAINEY, O. J. In September, 1896, appellee herein sold to Pitluk, Meyer & Co., merchants, on credit, certain wagons and fixtures. On October 9, 1896, Pitluk, Meyer & Co. conveyed, in trust for benefit of their creditors, their stock of merchandise, including the wagons and fixtures, to J. H. Le Grand. On October 10, 1896, appellee herein sued Pitluk, Meyer & Co. and said Le Grand to recover said wagons and fixtures, alleging that same had been obtained from them by false and fraudulent representations, etc., and that the title had not passed out of appellee. A writ of sequestration was issued and levied upon said wagons and fixtures, and same replevied by said Le Grand, who, while said suit was pending, sold the wagons and fixtures to J. D. Crawford, appellant herein. In said suit judgment was rendered in favor of appellee herein against Pitluk, Meyer & Co. and J. H. Le Grand for said property, with a writ of possession, and, if the property could not be found, a judgment

was awarded upon the replevy bond for \$1,180.30 and costs. No writ of possession was ever issued. The said property not being returned to satisfy the judgment, execution was issued to Dallas county, which being returned nulla bona, an alias execution was issued to Smith county, where the defendants resided, which was also returned nulla bona. On February 4, 1898, the Southern Rock Island Plow Company, appellee herein, filed in the district court of Dallas county, in cause No. 15,362, styled "Southern Rock Island Plow Co. v. Pitluk, Meyer & Co. et al.," being the suit above mentioned, a "motion for execution against J. D. Crawford." Said motion complains of J. D. Crawford. It alleges the sale of said wagons and fixtures by him, the proceedings had in said cause No. 15,362, the conversion of the goods *lis pendens*, and prayed for citation against said Crawford that the judgment in said cause No. 15,362, to the extent of the value of the goods so converted, be established against said Crawford, and for general relief, etc. Judgment was rendered accordingly, from which this appeal is prosecuted.

The first contention urged by appellant is "that the form of procedure adopted and used by the plaintiff in this action is not conformable to any procedure known to the laws of this state, and for this reason no cause of action was set forth against the defendant J. D. Crawford." The filing of the "motion for execution against J. D. Crawford" was a proceeding not usual in our practice. A better way would have been to have brought a direct action against Crawford in the ordinary way. But the proceeding herein was, in effect, the same. The motion set out fully plaintiff's complaint against Crawford, and alleged the facts upon which he was sought to be held liable. He was duly cited, answer was filed, and the proceedings had thereafter conformed in every particular to a trial of an ordinary cause. Crawford had his day in a court of competent jurisdiction, and the irregularity complained of is not such as operated to his injury. *Southern R. I. P. Co. v. Pitluk* (Tex. Civ. App.) 63 S. W. 354.

The next contention is, in effect, that, Le Grand having replevied the property, the replevy bond was a substitute for the property, and he had the right to sell the property, and convey a good title to the purchaser thereof. The effect given to replevy bonds varies in the different jurisdictions, but such variance arises from the wording of the different statutes authorizing their execution. Where provision is made for the return of the property replevied to satisfy the judgment, the rule is, as we understand the decisions, that the bond is not a substitute for the property, and the only right conferred by the bond is the right to hold possession thereof during the pendency of the litigation. Article 4874, Rev. St. 1895, provides: "If the property to be replevied, as provided in the preceding article, be personal property, the

*Rehearing denied December 5, 1903, and writ of error denied by Supreme Court.

condition of the bond shall be that the defendant will not remove the same out of the county, or that he will not waste, ill-treat, injure, destroy, sell or dispose of the same, according to the plaintiff's affidavit, and that he will have such property, with the value of the fruits, hire or revenue thereof, forthcoming to abide the decision of the court, or that he will pay the value thereof and of the fruits, hire or revenue of the same in case he shall be condemned so to do." From which we think it clearly appears that the Legislature only intended to confer the right on the defendant to retain possession of the property during the pendency of the suit, in the event plaintiff recovered judgment. The clause "that he will pay the value thereof," etc., was intended merely as an alternative to secure plaintiff against loss in the event there was a failure to return the property, and was not intended to confer upon the defendant the right to put the property out of reach of the plaintiff. This view as to the legislative intention is strengthened by the language used in article 4877, Rev. St. 1895, where provision is made for a satisfaction of the judgment by a return of the property, "which he has bound himself to have forthcoming to abide the decision of the court." We find nothing in the statute that would warrant a construction, short of a satisfaction of the judgment, that the giving of a replevy bond would operate to divest the rightful owner of the title, and vest it in a wrongdoer, who wrongfully obtained possession thereof from the rightful owner. The appellee in the first proceeding obtained judgment establishing its title to the property with a writ for its possession, and an alternative judgment on the bond, and, the defendant having purchased the property during the pendency of the first proceeding, he is charged with notice of plaintiff's right thereto, and liable to him for the conversion thereof, the parties to the replevy bond having failed to comply therewith either by return of the goods or otherwise satisfying the judgment. *Southern R. I. P. Co. v. Pitluk* (Tex. Civ. App.) 63 S. W. 354; *York v. Carlisle*, 19 Tex. Civ. App. 269, 46 S. W. 257; *Boydston v. Morris*, 71 Tex. 697, 10 S. W. 331.

The remaining contention is that, appellee having taken judgment in the alternative "for the value of the goods, and sought to collect same, and never having issued a writ of possession, thereby elected to pursue Pitluk, Meyer & Co., J. H. Le Grand, and Rowland and Haden on the judgment for the value of the goods, and waived all claim to the goods in the hands of the purchaser, J. D. Crawford." We are of the opinion that the doctrine of election is not applicable to the facts of this case. The judgment recovered by him was such as provided by the statute in such cases. The replevy bond was breached by the failure of Le Grand to return the property, which authorized an execution for the value thereof against the makers of the

bond. In exercising this right plaintiff did not waive the right to pursue the property in the hand of a purchaser, or the right to recover its value of such purchaser.

Finding no error in the judgment, it is affirmed.

CAHILL et ux. v. DICKSON et al.*

(Court of Civil Appeals of Texas. Nov. 14, 1903.)

CONTRACTS — BREACH — EFFECT — CONSIDERATION — SUFFICIENCY — HOMESTEAD RIGHTS — PRIOR LIENS — ESTOPPEL — SUBMISSION TO JURY — EVIDENCE.

1. Where defendants, as attorneys, successfully prosecuted plaintiff's suit to recover land, under an agreement whereby they were invested with title to one-half thereof immediately upon its recovery, and entitled to joint possession with him, and their proportion of the rents, and plaintiff thereafter took possession of more than one-half of the land, attempted to secure exclusive possession of all of it, denied defendants' right or title to any part thereof, and instructed tenants not to pay defendants any rent whatever, such violation absolved defendants from any further obligation which may have rested on them to pay further costs and expenses incurred in the litigation.

2. Evidence held to show a sufficient consideration to support an agreement whereby plaintiff's attorneys were to conduct on his behalf a suit to recover title to certain land, and to advance costs, etc., therein, in consideration of plaintiff's conveying to them a portion of the land recovered, in accordance with a prior agreement.

3. The refusal to submit a certain issue was not error, where the subject of the inquiry, so far as material and proper for submission, was embraced in other issues submitted.

4. Where plaintiff borrowed money to pay a valid, subsisting lien for costs, under a judgment therefor, and also a tax lien, to which his land was subject, and, a few hours before executing his note for such money, and a trust deed securing the same—both containing a stipulation of subrogation to such liens—plaintiff was married, the fact being concealed or not made known to the payees of the note, he and his wife could not assert a homestead claim on the land, as against the holder of the note, and the purchaser of the land at a sale under the deed of trust.

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Action by Patrick Cahill and wife against Joseph M. Dickson and others to set aside certain conveyances, agreements, and a judgment affecting land. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. E. Firmin, for appellants. McCormick & Spence and Jeff Word, for appellees.

TALBOT, J. In January, 1894, Patrick Cahill, appellant, brought suit in the district court of the Forty-Fourth Judicial District

*Rehearing denied December 5, 1903, and writ of error denied by Supreme Court.

of Texas against C. H. Benson et al., to recover about 300 acres of land, a part of the James M. Hamilton survey, situated in said county. The defendants Joseph M. Dickson and W. J. Moroney, a firm of lawyers doing business under the name of Dickson & Moroney, were employed by Cahill to bring and prosecute said suit, and they entered into the following agreement with reference thereto, to wit:

"The State of Texas, County of Dallas. Whereas, Patrick Cahill has brought suit in the District Court of Dallas County, Texas, against C. H. Benson et al., to recover the title and possession of 300 acres of land in the south corner of the James M. Hamilton Survey, in Dallas County, bought by the said Cahill at sheriff's sale under an execution against Adeline Geiger et al., on the 7th day of April, 1874, as per deed recorded in Book V, page 137, of the Records of Deeds of Dallas County, Texas, to which records reference is hereby made for a more particular description of said land; and

"Whereas, the said Cahill has employed Dickson & Moroney to prosecute said suit,

"Now, therefore, it is hereby agreed by and between the said Cahill and the said Dickson & Moroney that they, the said Dickson & Moroney, shall prosecute said suit to final judgment, and render to the said Cahill all legal services that may, or become, necessary both in the district and appellate courts, in order to recover said land. In consideration for which, the said Cahill hereby grants and conveys to the said Dickson & Moroney one-half of what may be recovered in said suit; and if nothing is recovered in said suit, then the said Dickson & Moroney shall receive no compensation for their services; no personal liability being assumed by the said Cahill beyond the said one-half interest in said property as hereinabove specified.

"Witness our hands in duplicate, this 25th day of January, 1894. [Signed] Dickson & Moroney, by W. J. Moroney. Pat Cahill."

This suit was tried, and May 10, 1895, verdict and judgment rendered in favor of Cahill for the land, without rents or damages, and in favor of the defendants therein, C. H. Benson and others, for \$4,035 for improvements made in good faith. An appeal was taken from this judgment, and on May 23, 1896, the same was affirmed as to title to the land in Cahill, and reversed and remanded for a new trial on the issues of rents and improvements, and a boundary dispute between defendants Wood and Baker, involving 54 acres of the 300 acres. 37 S. W. 1088. On the return of the mandate, Cahill, through defendants Dickson & Moroney, his attorneys, sued out a writ of sequestration, which was levied January 2, 1897, on all said land, except the tract of 30.15 acres in the possession of defendant George Brown, and another tract of 100 acres in the possession of defendant Robert N. Merritt, who had

rented same from Cahill for the year 1897. On February 15, 1897, said Cahill, through Dickson & Moroney, gave a replevy bond for said property so sequestered, and obtained possession of the same. The bond for said sequestration writ and the replevy bond were made by Dickson & Moroney, without aid of Cahill in obtaining sureties. April 30, 1897, a second trial of said suit on the issues of rents and improvements was had, and resulted in a judgment in favor of C. H. Benson for \$2,174, and for Robert Merritt for \$1,114, for improvements made in good faith, and allowing plaintiff Cahill nothing for rents or use and occupation of said land. From this second judgment Dickson & Moroney prosecuted an appeal for Cahill, but the judgment was affirmed. 46 S. W. 889. Wood and Baker, defendants, prosecuted a writ of error from the judgment in favor of Cahill for the 300 acres of land, and it was reversed and remanded as to the 54 acres. Thus it appears that the ultimate result of this litigation was that Cahill established title to and recovered 246 acres of the land, subject to Benson's claim for \$2,174 for improvements, and Merritt's claim of some character for \$1,114. During the pendency of this suit, and in 1896, Cahill employed F. M. Etheridge, an attorney at law, to aid in the prosecution thereof, agreeing to pay him therefor a fee of \$500, and secured payment of same by a first mortgage lien on his (Cahill's) interest in said tract of land sought to be recovered. Etheridge's employment by Cahill was separate and independent of Dickson & Moroney's contract. In the fall of 1897 Cahill went upon the land, and took possession adversely to Dickson & Moroney of more than half of the tract of land. He attempted to take exclusive possession of all of it, claimed all the rents for himself, and notified the tenants to pay Dickson & Moroney no rents. He denied that Dickson & Moroney had any interest in the land or rents accruing therefrom. Shortly after this conduct on the part of Cahill, a certified costs bill, amounting to \$326.57, was issued by the clerk of the district court in the suit of Cahill v. Benson et al. This suit was still pending at this time on the claims of defendants Benson and Merritt for improvements, and on the controversy with Wood and Baker as to the title to the 54 acres claimed by them. Dickson & Moroney refused to pay this bill of costs of \$326.57, because they denied liability for the same, and because Cahill had breached his contract with them by taking possession of the land; denying that they had any interest in it or the rents, and notifying the tenants not to pay any rents to them. This bill of costs was by the sheriff of Dallas county, Ben E. Cabell, through his deputy, J. S. Lewis, levied upon all the interest of Patrick Cahill in and to the said 300 acres of land described in plaintiff's petition. The land under this levy was advertised for sale on the 4th day of Janu-

ary, 1898. Patrick Cahill did not have the money to pay off this costs bill and relieve the land of the seizure and lien fixed thereon, and, to prevent a sale of said land under said costs bill or execution, Cahill borrowed \$500. He executed his note dated December 31, 1897, payable to the order of Dickson & Moroney two years after its date, with interest thereon at the rate of 10 per cent. per annum, and 10 per cent. additional for attorney's fee if collected by suit, or if not paid at maturity, and placed in the hands of an attorney for collection. This note also recited "that it is subrogated to the lien of the execution levied on the property on which this note is a lien and to the lien of taxes, said execution and taxes being paid out of this note. Interest paid semiannually and if not paid when due to bear interest at same rate as principal." Cahill executed and delivered to Joseph M. Dickson, as trustee, a deed of trust on all of his undivided interest in and to said 300 acres of land, and Dickson & Moroney indorsed the note to Mrs. Sallie Dickson, who advanced the \$500 which was paid to Cahill. Cahill with this money paid off the costs bill, or execution for costs, which had been levied by the sheriff on the land, amounting, with costs of levy, etc., to \$330. He also paid \$47.56 taxes due on the land, and appropriated the balance of \$122.44 to his own private use. At the time of the execution of said note and deed of trust, the said Patrick Cahill and Dickson & Moroney entered into another written contract, as follows:

"The State of Texas, County of Dallas. This agreement, by and between Patrick Cahill and Dickson & Moroney, witnesseth: That,

"Whereas, heretofore, to wit, January 19, 1894, the said Patrick Cahill, by Dickson & Moroney, attorneys, brought a suit of trespass to try title in the District Court of Dallas County, Texas, Forty-Fourth Judicial District Court, against C. H. Benson et al., for 300 acres of land, in the south corner of the James M. Hamilton Survey, in Dallas County, Texas, and also to recover for the rents or value of the use and occupation of the said land; and

"Whereas, thereafter, on the 25th day of January, 1894, the said Cahill and the said Dickson & Moroney entered into the following agreement, to wit: 'The State of Texas, County of Dallas. Whereas, Patrick Cahill has brought suit in the District Court of Dallas County, Texas, against C. H. Benson et al., to recover the title and possession of 300 acres of land in the south corner of the James M. Hamilton Survey, in Dallas County, bought by the said Cahill at sheriff's sale under an execution against Adeline Gelger et al. on the 7th day of April, 1874, as per deed recorded in Book V, page 137, of the Records of Deeds of Dallas County, Texas, to which records reference is hereby made for a more particular description of said land; and

"Whereas, the said Cahill has employed Dickson & Moroney to prosecute said suit,

"Now, therefore, it is hereby agreed by and between the said Cahill and the said Dickson & Moroney that they, the said Dickson & Moroney, shall prosecute said suit to final judgment, and render to the said Cahill all legal services that may, or become, necessary both in the district and appellate courts, in order to recover said land. In consideration for which, the said Cahill hereby grants and conveys to the said Dickson & Moroney one-half of what may be recovered in said suit; and if nothing is recovered in said suit, then the said Dickson & Moroney shall receive no compensation for their services; no personal liability being assumed by the said Cahill beyond the said one-half interest in said property as hereinabove specified.

"Witness our hands in duplicate, this 25th day of January, 1894. [Signed] Dickson & Moroney, by W. J. Moroney. Pat Cahill.'

—Which agreement was duly acknowledged by the said Cahill and Wm. J. Moroney before C. C. Bumpas, a notary public within and for Dallas County, Texas, on said 25th day of January, 1894, and which is of record in Book 181, page 164, of the Deed Records of Dallas County, Texas; and

"Whereas, the said written agreement is in accordance with the verbal agreement prior to the institution of said suit; and

"Whereas, on, to wit, on May 10, 1895, on verdict of a jury, judgment was rendered in favor of the said Patrick Cahill for the land, without rents or damages, and in favor of the defendants, C. H. Benson, Isaac Benson, Robert N. Merritt, Geo. Brown and T. K. Flowers for \$4,035 for improvements made in good faith; and

"Whereas, on, to wit, May 23, 1896, on appeal from said judgment, the same was affirmed as to the title, and reversed and remanded for a new trial on the issues of rents and improvements in good faith; and,

"Whereas, after the return of the mandate from the said judgment, said Cahill, through said Dickson & Moroney, his attorneys, sued out a writ of sequestration which was levied January 2, 1897, on all said land except the tract of 30.15 acres in the possession of the defendant George Brown, and also except another tract of 100 acres in the possession of the defendant Robert N. Merritt, who had rented same from plaintiff Cahill for the season of 1897; and

"Whereas, on, to wit, February 15, 1897, said Cahill, through the said Dickson & Moroney, gave a replevy bond for said property so sequestered, and obtained possession of the same; and

"Whereas, both said bonds were made by and through the said Dickson & Moroney, without the aid of the said Cahill in obtaining sureties; and

"Whereas, on, to wit, April 30, 1897, on a second trial, judgment was rendered for C. H. Benson for \$2,174, and for Robert Merritt

for \$1,114 for improvements, and allowing plaintiff nothing for the rents or use and occupation of said land; and

"Whereas, the said Cahill, through the said Dickson & Moroney, his attorneys, has prosecuted an appeal from said second judgment, which appeal is now pending, and the appeal bond for the said Cahill was made by and through the said Dickson & Moroney without his aid in obtaining sureties therefor; and

"Whereas, the said Cahill, through Dickson & Moroney, his attorneys, has brought a second suit against C. H. Benson et al., on the appeal bond given on the first appeal, for the purpose of recovering the rents or value of the use and occupation of the premises, pending said appeal, which suit is now pending, undisposed of; and

"Whereas, Robert N. Merritt brought still another suit against the said Cahill in the District Court of Dallas County, Texas, to enjoin the said Cahill from interfering with the possession of the said Merritt, of the said property, which suit resulted in a judgment in favor of the said Merritt, and taxing the costs of said suit against the said Cahill, which said costs are still unpaid, and execution has been issued for said costs, amounting to \$13.05; and

"Whereas, in the management and prosecution of the said suits, brought by Cahill through his said attorneys, Dickson & Moroney, the said attorneys have, up to the present time, incurred expenses and paid costs to the amount of about \$546.30, and it will probably be necessary for plaintiff or the said Dickson & Moroney on his behalf, to pay additional costs in order to properly conduct said business and manage said suits; and

"Whereas, the said Dickson & Moroney have collected \$365 from rents on said premises; and

"Whereas, in said original suit there is now due the sum of \$326.51 taxed as costs against the said Cahill, and a certified cost bill of same has been issued and levied upon the said land, and the said land is advertised thereunder on the first Tuesday in January, 1898, and additional costs are thereby incurred; and

"Whereas, the said Cahill is unable to pay the said costs, and is desirous of arranging with his said attorneys, the said Dickson & Moroney, to get them to make the necessary advancements for the same, and to indemnify them for what they have already advanced or may hereafter advance by way of costs and expenses; and

"Whereas, a portion of the rents for the season of 1897 have not yet been collected, but suit is pending therefor in the name of Dickson & Moroney v. George Brown et al., in the County Court of Dallas County, Texas,

"Therefore, it is hereby agreed between the said Patrick Cahill and the said Dickson & Moroney, as follows, to wit:

"First. The said Dickson & Moroney here-

by agree to loan to the said Cahill \$500, to be secured by note and trust deed executed herewith, which shall be a first lien on Cahill's interest in said land; superior to any other lien under this agreement; said \$500 to be used, so far as necessary, in paying taxes, and costs in said original suit of Cahill v. Benson et al., the amount so paid, with ten per cent. interest thereon, to be allowed in favor of said Cahill on final accounting. Said Cahill also agrees to pay the costs in said suit of Merritt v. Cahill, but the amount so paid shall not be considered on final accounting, as Dickson & Moroney are not liable for the same.

"Second. The said Dickson & Moroney also agree to advance and pay, from time to time, whatever it may become necessary or proper to advance and pay for costs and reasonable and proper expenses in the further prosecution of said suits above mentioned, or any other suits which might arise out of the same, in order to fully protect the rights of the said Cahill and the said Dickson & Moroney, so far as the said Dickson & Moroney may be able to do so by the use of reasonable diligence.

"Third. It is further agreed that the said Dickson & Moroney shall be allowed ten per cent. per annum interest on all moneys heretofore advanced by them, or that may hereafter be advanced by them, from time to time, from the date of said respective payments or advancements, until the same shall be paid to them.

"Fourth. The said Cahill recognizes the right of said Dickson & Moroney to recover for their own indemnity whatever may be due by the said George Brown for unpaid rents; and the said Cahill further agrees that the said Dickson & Moroney shall henceforth have the exclusive renting of said property and premises until all of the said litigation has been finally terminated, and until there is a final settlement between them said Dickson & Moroney and the said Cahill and until it has been judicially determined that the said Dickson & Moroney are not to be held liable on any of the said bonds so given as aforesaid or on the bond given by them in the said suit of Dickson & Moroney v. George Brown et al.; and the said Dickson & Moroney shall be entitled to the possession of the said premises, and shall have the right to hold same, and rent same, and collect the rents until all liability of the said Dickson & Moroney on any of the said bonds has been finally satisfied.

"Fifth. The said Cahill further agrees not to interfere in any manner whatever with the rights of the said Dickson & Moroney under this contract; and he further agrees to render to the said Dickson & Moroney such assistance as they may require of him, and as he may be able to render in the further conduct of any of said litigation.

"Sixth. The said Dickson & Moroney agree to keep an account of all their expenses and

disbursements, and to render such account to the said Cahill from time to time at his request.

"Seventh. On final settlement, all of said costs and expenses so advanced by the said Dickson & Moroney, with interest thereon, shall be charged against the common fund, and it shall be credited with all rents which the said Dickson & Moroney may have received or may hereafter receive; and shall also be credited with all costs which the said Dickson & Moroney, for and on behalf of themselves and the said Cahill, may be able to collect back from the said defendants or their sureties, and the rents which they may be able to collect by suit, or otherwise, and after such settlement, all balance (if the credits and collections shall exceed the disbursements) shall be retained, one half by the said Dickson & Moroney, the other half being paid to the said Cahill.

"As collections are made from time to time, by the said Dickson & Moroney, from any source, the amounts so collected shall be credited against the other charges, and such amounts so paid shall thereupon cease to draw interest.

"If, at any time, the said Dickson & Moroney shall have in their hands any surplus funds over and above what may be necessary to pay all costs and expenses that they may have incurred, and which, in their judgment, it will not be necessary for them to retain for their own indemnity, they agree from time to time, to divide the same, paying one-half thereof to the said Cahill; and

"Whereas, there is a dispute now pending as to what tenants are entitled to portions of said premises during the season of 1898, the said Dickson & Moroney are hereby authorized, if they see proper and are able to do so, to settle and compromise said disputes in such manner as in their judgment they may deem best. The expenses, if any, to be divided equally between Cahill and Dickson & Moroney.

"In order to protect the said Dickson & Moroney from any liability on said bonds, and as security for the faithful performance of this agreement by the said Cahill, he, the said Cahill, does hereby grant, bargain, convey and mortgage to the said Dickson & Moroney his interest in said 300 acres of land above mentioned, a more particular description of which can be found in the judgment rendered in favor of the said Cahill for the said land in said suit by said Patrick Cahill v. C. H. Benson et al., in the District Court of Dallas County, Texas, to which reference is hereby made.

"Witness our hands in duplicate this 31st day of December, 1897. [Signed] Pat Cahill. Joseph M. Dickson. William J. Moroney.

"The above instrument was read to Patrick Cahill and explained to him before signing, and at his request, we hereby sign our names as witnesses on his behalf.

"Witnesses to signature of Pat Cahill: J. Laing. J. D. Rodgers. W. M. Crow.

"The State of Texas, County of Dallas. Before me, the undersigned authority, on this day personally appeared Joseph M. Dickson, known to me to be the person whose name is subscribed to the foregoing instrument in writing, and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

"Given under my hand and official seal this January 3, 1898. [Signed] W. M. Crow, Notary Public, Dallas Co., Texas.

"The State of Texas, County of Dallas. Before me, the undersigned authority, on this day personally appeared Patrick Cahill, known to me to be the person whose name is subscribed to the foregoing instrument in writing, and acknowledged to me that he executed the same for the purposes and considerations therein expressed. And I do further certify that the said instrument was by me carefully read over to the said Patrick Cahill and fully explained to him by me, and that the said Cahill signed and acknowledged the said instrument after having had the same fully explained to him by me as above stated.

"Given under my hand and official seal this January 3, 1898. [Signed] W. M. Crow, Notary Public, Dallas Co., Texas."

The deed of trust executed by Cahill to secure the loan of \$500 contained the usual provisions authorizing the sale of the land in case of default in payment of note given therefor, etc., and also contained a stipulation of subrogation to the lien created by the levy of the certified costs bill on the land, and of the taxes due thereon. The agreement to loan the \$500 and to make the note and deed of trust was really made on the 31st day of December, 1897, but they were not executed and delivered until January 3, 1898. Appellants were married January 3, 1898, a few hours prior to the execution of the deed of trust. At the time the \$500 was paid to Patrick Cahill, and the note and deed of trust executed and delivered to Joseph M. Dickson, neither Dickson nor Moroney nor appellee Reeves knew of his marriage.

Patrick Cahill failed to pay the semiannual interest on the \$500 note, and the trustee in the deed of trust advertised the said Cahill's one-half interest in said 300-acre tract of land for sale. Thereupon, and on the 1st day of November, 1898, Cahill brought this action to enjoin and restrain the sale under said deed of trust; claiming, among other things, that the land was his homestead at the time of the execution of said deed of trust. The court granted a temporary restraining order, but subsequently dissolved it. After this the trustee, Dickson, advertised said Cahill's one-half interest in said land for sale on the 6th day of December, 1898, and the same was on that day sold, and appellee Reeves became the purchaser thereof. The sale was made in the manner provided

by the deed of trust and by law. On the 3d day of December, 1898, Etheridge transferred to appellee Reeves his said claim against Cahill. On February 8, 1899, Reeves instituted an action of trespass to try title in the district court of the Forty-Fourth Judicial District of Texas against Patrick Cahill and his wife, Mary Cahill, to recover from them the undivided one-half interest in said 300-acre tract of land that had been purchased by him at the trustee's sale. On the 12th day of July, 1899, Reeves recovered judgment against said Patrick and Mary Cahill for said one-half of said land. On September 29, 1899, C. H. Benson transferred to appellee Reeves the judgment rendered on his claim for improvements in said suit of Cahill v. Benson et al., and subrogated Reeves to all of his right under said judgment. Reeves and Cahill on the 18th day of October, 1899, entered into a written contract whereby they adjusted all differences between them with reference to the land. In this contract the trustee's sale of the said Cahill's one-half interest in the land to Reeves is recited and recognized by Cahill, and Reeves therein transferred to Cahill, in addition to other matters, the Etheridge claim and all rights acquired by Reeves under contracts between Benson and Reeves. At this time Reeves also conveyed to Patrick Cahill an undivided interest of one-half of a part of the tract of land purchased by him at said trustee's sale, in consideration of which Cahill executed and delivered to Reeves his 10 promissory notes for the aggregate sum of \$1,500. The payment of these notes was secured by a vendor's lien on the land, and by a deed of trust thereon, and no part of said notes have ever been paid. In appellee Reeves' answer in this suit he set up the transactions between himself and Cahill, and prayed for a cancellation of his deed conveying to Cahill a half interest in a part of said land, or, in the alternative, for judgment on his notes and foreclosure of his vendor's lien. Appellee Reeves also asked for judgment against appellants and his co-appellees, quieting his title to his one-half of said 300-acre tract.

The temporary injunction granted in this suit on application of appellant Cahill having been dissolved, appellant filed on June 9, 1902, his third amended original petition, alleging, among other things, substantially, that, by the terms of the agreement between him and Dickson & Moroney, they were to take charge of, manage, control, and conduct his suit against Benson et al. to its completion, they to advance and pay all costs and expenses incident thereto, in consideration of which all that was recovered in said suit was to be divided equally between him, Patrick Cahill, and the said Dickson & Moroney; that it was understood that appellant was poor, and unable to furnish any money towards prosecution of said suit, and was not to assume any liability or obligation for costs; that this agreement was orally

made, and afterwards, on January 25, 1894, Dickson & Moroney pretended to have reduced to writing said agreement, but that it was materially variant from the verbal agreement, in that the written agreement did not state that Dickson & Moroney were to pay all costs, and otherwise bear the expenses of the litigation; that Dickson & Moroney refused to pay costs of the suit, and on the 11th day of November, 1897, there had accrued in said suit of Cahill v. Benson et al. costs amounting to \$326.51, which constituted a part of the amount Dickson & Moroney had agreed to pay, and the nonpayment was unknown to him; that Dickson & Moroney, with intent to deprive him (Cahill) of his property, well knowing that he was wholly without means to pay any such sum, instructed the clerk of the court to issue execution for said \$326.51, and the sheriff to levy same upon his (Cahill's) interest in said 300-acre tract of land; that Dickson & Moroney had collected and had in their possession at this time rents from said land more than enough to pay off said costs bill levied on his (Cahill's) interest in said land; that up to this time they had not claimed any interest in the rents; that Dickson & Moroney led appellant to believe that his interest in the land was liable for all the costs of said suit of Cahill v. Benson et al., and that the issuance and levy of the certified costs bill, the securing of said note of \$500, and deed of trust to secure its payment, was a device and fraud on the part of Dickson & Moroney to incumber his (Cahill's) interest in said land, and ultimately deprive him of it; that he (Cahill) was impoverished, and without friends, credit, or money, all of which was well known to Dickson & Moroney, and they took advantage of his condition, and adopted the method resorted to by them, knowing and intending that it would and should result in a loss of his property. He further charged that no service was ever had on his wife, Mary Cahill, in the suit of Reeves v. Cahill et al., in which Reeves recovered his interest in said 300 acres of land; that said land was the homestead of himself and wife, and was when said deed of trust was executed, and exempted from forced sale. Cahill further, in effect, charged that Dickson & Moroney and Frank Reeves, in all the suits and transactions relative to his said interest in said land, had conspired and were acting together, with the intent to defraud him, and secure the said land for their own use and benefit. Appellant Cahill sought the following relief: "(1) That the contract, note, and trust deed dated December 3, 1897, executed January 3, 1898, be declared fraudulent and void. (2) That all sales, deeds, and conveyances, transfers, judgments, had or made, or purporting to be had or made, thereunder, be declared null and void, as being fraudulently had and obtained, and as an attempted lien upon their homestead. (3) That plaintiffs' title to said

land be freed from all said deeds, etc., and the apparent clouds created thereby be removed. (4) That defendants be required to render an accounting of all sums by them had and received, and of any and all property had and received or acquired under or by virtue of the various contracts, etc., alleged, from January 19, 1894, to trial. (5) That, if plaintiffs' title should be found to be incumbered by reason of the matters alleged, then that the interest of Dickson & Moroney be declared to be held by them in trust for plaintiffs, divested out of them, and vested in Patrick Cahill, unincumbered, and that all moneys, etc., received by Dickson & Moroney be charged to them, and plaintiffs recover same. (6) That, if plaintiffs' title and homestead rights have been lost or incumbered, or defendants have disposed of their interest in the lands, then that plaintiffs recover the value thereof. (7) Should Reeves be declared to have acquired any right, title, etc., in said lands, then that to that extent it be declared to be lost to plaintiffs by the fraudulent devices of Dickson & Moroney, and they be held liable for the amount and value thereof to plaintiff Patrick Cahill, or to plaintiffs, as their respective interests may appear upon trial hereof. (8) General relief."

Dickson & Moroney answered by general and special exceptions, general denial, plea of not guilty, cross-action in trespass to try title, and special answer asserting the loss of Cahill's title to the land by the contracts made by him with Frank Reeves, and the judgment thereon. They also set up the new contract made with Cahill January 3, 1898, and alleged that appellants were due them for expenses incurred and disbursements made thereunder \$1,000.

The case was submitted to a jury on four special issues, to wit: "(1) Did said Dickson & Moroney, in the verbal agreement made between them and Patrick Cahill prior to the execution of the written agreement of January 25, 1894, agree that they would advance and pay all costs, disbursements, and expenses incident or appertaining to said lawsuit, and that they would accept one half of what might be recovered in said suit in full payment for their legal services, and for whatever money they might advance and pay, and that said Cahill should have the other half of what might be recovered in said suit, without deducting anything therefrom for or on account of any part of such costs, disbursements, or expenses? (2) When said Cahill executed the aforesaid written agreement, dated December 31, 1897, and executed January 3, 1898, was he correctly informed of the terms of said instrument by W. M. Crow, the notary public before whom the said instrument was acknowledged? (3) When said Cahill executed the aforesaid deed of trust to J. M. Dickson, dated December 31, 1897, executed January 3, 1898, was he correctly informed of the terms of said deed of trust by W. M. Crow, the notary public

before whom same was acknowledged? (4) Was said Patrick Cahill induced to execute the said written agreement and note and deed of trust which he executed on January 3, 1898, by reason of any misrepresentations to him by said Dickson & Moroney, or either of them, and, if so, what misrepresentation, if any, did they make?" To each of which questions the jury answered "Yes," and to the fourth question they further answered, "We believe, under the evidence, that Patrick Cahill was led to believe by Dickson & Moroney that his part of the land was liable for all of said costs." Dickson & Moroney filed a motion to have judgment entered upon this verdict in their favor, and thereupon judgment was rendered that Patrick and Mary Cahill take nothing, and defendants Dickson & Moroney recover, as against the Cahills, an undivided one-half interest in the land, and a personal judgment against Patrick Cahill on their cross-action for the sum of \$475. Judgment was also rendered in favor of Frank Reeves against Patrick and Mary Cahill and Dickson & Moroney for an undivided one-half of 150 acres of said land.

In addition to the foregoing findings of fact, we find that Dickson & Moroney did pay all costs and expenses of the litigation to recover the land up to the fall of 1897, when Cahill took adverse possession of the same, and denied that Dickson & Moroney had any interest in it; that an auditor was appointed by the court to adjust the accounts of Dickson & Moroney and Patrick Cahill; and that the auditor filed his report, in which all matters of account in dispute between them were found in favor of Dickson & Moroney. No objections were filed to this report, and it appears that Cahill collected and appropriated \$1,147.50 during the progress of the litigation, and at the time of the trial Dickson & Moroney had paid out \$950 in excess of what they had collected, for one-half of which Patrick Cahill was liable. The contract, note, and deed of trust executed January 3, 1898, were fully explained to Cahill before he signed them. There was no misappropriation of rents or other funds collected by Dickson & Moroney from said land. Cahill has never paid or tendered to Dickson & Moroney, or to the owner of said note, the money received by him on the same, or any part thereof.

The appellant contends that the court erred in rendering judgment for the appellees on the verdict of the jury, and the questions involved in the contention are presented by his first and second assignments of error. The grounds of complaint are, in effect, that the judgment does not conform to, but is in contradiction of, the verdict; that the same is against the law, because it was shown by the verdict of the jury that Dickson & Moroney had agreed verbally on January 19, 1894, to file suit of Cahill v. Benson et al., and to pay all costs and expenses of said

suit; that it was further found by the verdict that Cahill's signature to the contract of January 3, 1898, was procured by the misrepresentations of Dickson & Moroney that Patrick Cahill was liable for said costs; and that the seizure of his interest in the land under the certified costs bill was made as a means to secure the contract of January 3, 1898. It will be noted that the case was submitted on special issues. The appellant testified, and the jury found in answer to the first question submitted by the court, that by the terms of the verbal agreement entered into between appellant and appellees Dickson & Moroney prior to the execution of the said written agreement of January 25, 1894, the said Dickson & Moroney agreed to advance and pay all costs and expenses incident to the suit of Cahill v. Benson et al., and that they would accept one-half of what might be recovered in payment of their legal services and the money so advanced and paid. This verbal agreement was merged in the written agreement of January 25, 1894, which did not provide, in terms, that Dickson & Moroney were to pay costs, expenses, etc., of said suit; and, if it be admitted that said written contract does not obligate Dickson & Moroney to pay such costs and expenses, nevertheless the rights of the parties thereafter are to be determined by the terms of said written agreement, unless it should appear that appellant Patrick Cahill could not read said written instrument, did not know its contents, and was informed or led to believe by Dickson & Moroney that said written agreement was the same as the verbal agreement. The evidence as it appears in the record was very meager and unsatisfactory; tending to show that appellant did not know the contents of said written agreement of January 25, 1894, when he signed it, or that any deception whatever was practiced in securing his signature thereto. Furthermore, if it be conceded that Dickson & Moroney, by the terms of their contract with appellant, were to pay the costs and expenses of the suit of Cahill against Benson et al., and that they refused to do so, still the evidence is sufficient to warrant the finding that, before such refusal on their part, appellant Cahill went upon the land and took possession of more than one-half of it, attempted to secure exclusive possession of all of it, denied appellee's right or title to any of said land, and instructed tenants on the premises not to pay them any rent whatever. This was in violation of Dickson & Moroney's rights, and a breach of the contract made with them. Appellees Dickson & Moroney had prosecuted the suit of Cahill v. Benson et al. to a final determination, recovering the land therein sued for. They were, by the terms of their agreement with Cahill, invested with the title to one-half of said land immediately upon the recovery thereof, and entitled to joint possession of the same with him, and their proportion of the rents.

We believe this unwarranted violation of the contract with Dickson & Moroney absolved them from any obligation that may have vested upon them to pay further costs and expenses incurred in the litigation for the recovery of the land. Neither of the issues discussed above were submitted to the jury, and no written request made by the appellant to have them, or either of them, submitted. Article 1331 of the Revised Statutes of 1895, regulating the submission of cases upon special issues, was amended by an act of the Legislature passed in 1897. By this amendment it is provided that the "failure to submit any issue shall not be deemed a ground for reversal of the judgment upon appeal or writ of error unless its submission has been requested in writing by the party complaining of the judgment. Upon appeal an issue not submitted and not requested by a party to the cause shall be deemed as found by the court in such manner as to support the judgment: provided there be evidence to sustain such finding." Acts 1897, p. 15, c. 7; *Southern Oil Co. v. Wallace* (Tex. Civ. App.) 54 S. W. 638. Applying the above rule of law to the proceedings in and the facts of this case, we have findings by the trial court that Dickson & Moroney did not misrepresent the contents of the written agreement dated January 25, 1894, to the appellant Cahill, and that he knew the terms thereof when he signed it; that, by the terms of the agreement, Dickson & Moroney did not obligate themselves to pay the costs and expenses of the suit of Cahill v. Benson et al., or, if they did, that Cahill had broken and repudiated the contract; and that Dickson & Moroney were not bound to proceed further under it.

The contention of appellant that Dickson & Moroney caused the execution or certified costs bill to be levied upon his interest in the land, and secured the execution of the contract, note, and deed of trust of January 3, 1898, in view of his impecunious condition, as a means to deprive him of his interest in the land, is not sustained by the evidence. The evidence established indisputably that at this time Cahill had gone upon the land, denied Dickson & Moroney's right to any portion of it, and was appropriating or seeking to appropriate all rents. Execution had been issued for costs due, and, by reason of the status of affairs produced by the conduct of Cahill, they refused to pay any more costs until the differences and disputes which had arisen between them were settled. The efforts to settle these matters resulted in the execution of the new contract, note, and deed of trust. These instruments were all fully explained to Cahill before he signed them, and he must have fully understood their contents, because, according to his own testimony, he refused to sign on account of some of the provisions there. Being unable to raise the money from any other source, he finally accepted the proffered loan of Dickson

& Moroney, and prevented the sale of his property at that time. This new contract of January 3, 1898, recited the history of the litigation to recover the land, the acts done in the prosecution thereof by Dickson & Moroney, the liabilities incurred thereby on their part, and claims made upon Cahill. By the terms of this contract, the rights of the respective parties were defined, and new duties assumed. We think ample consideration is shown to support this contract for any new rights Dickson & Moroney may have acquired thereby, and, under the evidence, warranted the personal judgment against Cahill for \$475, and he has no cause of complaint thereat. This is, in effect, the finding of the court below on these questions, and the judgment is sustained by the evidence.

It is true, the jury, in response to the questions submitted to them, answered that they believed Dickson & Moroney, in procuring the contract, note, and deed of trust of January 3, 1898, led Cahill to believe that his part of the land was liable for all of the costs incurred in the suit of Cahill v. Benson et al.; but we are of the opinion that this became immaterial, under the facts disclosed by the record, and the findings embraced in the judgment of the court. If Dickson & Moroney were not bound, by the terms of this contract with Cahill, to pay the costs of that suit, or by the conduct of Cahill were justified in declining to pay such costs, then, as a matter of fact, Cahill was liable for the same, and his interest in the land subject to seizure therefor. The statement of this fact to Cahill furnishes no ground for the avoidance of said contract, note, and deed of trust.

There was no error in refusing to submit the issue presented in appellants' seventh assignment of error. The subject of this inquiry, in so far as material and proper for submission, was embraced in the second and third issues submitted by the court. The evidence shows, and the jury found, that Patrick Cahill was correctly informed of the terms and contents of the contract, note, and deed of trust by W. M. Crow, the officer who took his acknowledgments thereto, before he executed them. This was sufficient.

There seems to be no substantial objection to the judgment rendered by the court in favor of appellee Frank Reeves. The assignment of errors filed by appellants do not point out or specifically complain of any error in respect thereto. We have carefully examined the record, however, and considered the assignments filed as applicable to each of the appellants in so far as the same may suggest error in the judgment below.

It appears from appellants' eighth assignment of error that they requested the court to submit to the jury the following issue: "Was or was not the land in controversy the homestead of Patrick Cahill on January 3, 1898?" We believe there is no merit in the contention that the land involved in this suit was the homestead of appellants at the time

of the execution of said contract, note, and deed of trust, and the court properly declined to submit that issue. The appellants, Cahill and his wife, were married just a few hours before these papers were signed and executed by Patrick Cahill, and the fact concealed or not made known to Dickson & Moroney, or to either of them, before the money was received by Cahill. A certified bill of costs had been issued on a valid and subsisting judgment against Cahill for such costs, and duly levied upon his interest in the land in controversy, several weeks prior to his marriage, and there was thereby created and fixed a valid lien upon the same. There was also existing before and at the time of his marriage a tax lien upon the land for taxes due thereon, and the note and deed of trust under which the land was sold and bought by Reeves were executed by Cahill with full knowledge of their legal effect, and for the purpose of obtaining money with which to pay off and satisfy said liens, and thereby avoid a sale of his property. The money thus obtained was loaned by Dickson & Moroney for the express purpose of discharging said liens, and the greater part thereof was so appropriated by Cahill. The note and deed of trust contained a stipulation of subrogation to the liens existing on said land, and, in view of the very nature and purpose of the transaction and these express stipulations, we think it cannot be reasonably urged that this purpose was not effectually accomplished. These liens upon the land having been shown, and the right of subrogation thereto having been established in the holder of said note and deed of trust executed January 3, 1898, it seems clear that the homestead claim asserted by appellants cannot be successfully maintained in this suit, because it is the well-settled doctrine in this state that homestead rights cannot be acquired in land as against parties holding prior equities and incumbrances thereon. *White v. Shepperd*, 16 Tex. 172; *Clements v. Lacy*, 51 Tex. 150; *De Bruhl v. Maas*, 54 Tex. 475.

It may also be said that appellants are effectually estopped and precluded by Cahill's own acts, and by the judgment of a court of competent jurisdiction, from asserting any homestead right as against the appellee Reeves. It is made to appear that after Reeves purchased the land at the trustee's sale under the deed of trust of January 3, 1898, he instituted an action of trespass to try title against appellants in the district court of Dallas county, Tex., in which their homestead rights were involved, and recovered judgment for appellants' interest in said land. Besides, appellee Reeves had become the owner of the claim of Etheridge, amounting to \$500, secured by a first mortgage lien on Cahill's one-half interest in said land, given long prior to his marriage. C. H. Benson had also transferred to him his judgment for improvements made upon the land, recovered in the suit of Cahill v. Benson et

al. By an adjustment and settlement between Cahill and Reeves in October, 1899, of all their matters pertaining to the land, Reeves transferred his interest in the land back to Cahill, and took Cahill's notes for the purchase money; reserving a vendor's lien on the land to secure the payment of said notes. Cahill made default in the payment of said notes, and in this suit Reeves asked for a rescission of the trade and recovery of the land. This relief was awarded him by the court, and no satisfactory reason is assigned for disturbing this judgment.

Finding no reversible error in the record, the judgment of the court below is affirmed.

WILLARD v. SANFORD.

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

SALE OF LAND—ALLOWANCE FOR DEFICIENCY—MUTUAL MISTAKE.

1. In case of mutual mistake as to boundaries of a survey conveyed by deed describing it by metes and bounds and as containing a certain number of acres, both parties being ignorant that part of it conflicted with an earlier survey, a deduction for the deficiency will be allowed from the purchase price.

Appeal from District Court, Shelby County; Tom O. Davis, Judge.

Action by Mrs. Tedy Sanford against S. L. Willard. Judgment for plaintiff, and defendant appeals. Reversed.

D. M. Short & Sons, for appellant. Bryarly & McKnight, for appellee.

PLEASANTS, J. Appellee brought this suit against appellant to recover the amount due upon the purchase-money note for a tract of 140½ acres of land sold by her to appellant and to foreclose her vendor's lien upon said land. The answer of the defendant admitted the execution of the note, but averred, in substance, that there had been a failure of title to 23½ acres of the land for the purchase money of which the note was given, and prayed that the value of said 23½ acres be deducted from the amount due on the note. The cause was tried in the court below without a jury, and judgment rendered for plaintiff in accordance with the prayer of her petition. The trial court filed conclusions of law and fact, and from the facts found by the court and the undisputed evidence in the case we deduce the following: Appellee on October 14, 1899, conveyed to appellant the G. R. Hughes pre-emption survey in Shelby county, and in part payment of the purchase money for said land appellant executed the note sued on. The land is described in the deed as 160, less 19¼ acres, which had been previously sold by appellee; said 160 acres being described by metes and bounds. At the time this deed was executed, the survey had not been patented. As originally surveyed, 23½ acres of the Hughes survey conflicted with the Graham,

which is an older survey. This 23½-acre conflict was embraced within the field notes set out in the deed from appellee to appellant, and appellant purchased same in good faith believing that it was a part of the Hughes survey. The trial court also found that the appellee did not discover the conflict in the two surveys until after her conveyance to appellant. After appellant purchased the land, he applied for a patent, which was refused because of an apparent conflict with the Graham survey. This was the first notice appellant had of such conflict. A resurvey of the Hughes pre-emption made under order of the Commissioner of the Land Office demonstrated that 23½ acres of land embraced in the deed from appellee to appellant was a part of the Graham survey. This 23½-acre strip was in the constructive possession of the owners of the Graham survey at the time appellant purchased, and is now held by them. The 23½ acres was the most valuable portion of the land conveyed to appellant, and he testifies that he would not have purchased any of the land if he had known he was not getting title to the 23½-acre strip. The 19¼ acres referred to in the deed as not conveyed thereby formed no part of 23½ acres involved in this suit, and on account of the conflict with the Graham survey the quantity of land to which appellant has title is 23½ acres less the quantity conveyed to him by the appellee.

The finding of the trial court that appellee did not know of the conflict until after she had conveyed the land, taken in connection with the undisputed fact that the 23½ acres was embraced within the boundaries set out in the deed and the further finding of the court that appellant did not know of the conflict, and thought he was buying the 23½ acres, presents a case of mutual mistake as to the quantity of land sold against which equity will give the purchaser relief, the deficiency in quantity being gross. *Mitchell v. Zimmerman*, 4 Tex. 75, 51 Am. Dec. 717; *O'Connell v. Dike*, 29 Tex. 299, 94 Am. Dec. 282; *Moore v. Hazelwood*, 67 Tex. 626, 4 S. W. 215; *Wheeler v. Boyd*, 69 Tex. 293, 6 S. W. 614; *Walling v. Kinnard*, 10 Tex. 508, 60 Am. Dec. 216. The trial court held that, because there was no fraud or affirmative misrepresentation on the part of appellee, and because appellant, by the use of ordinary diligence, would have discovered the conflict before he purchased the land, he was not entitled to recover. Neither of the reasons given by the court authorize a judgment for the plaintiff under the facts found showing a mutual mistake as to the boundaries of the land and the resultant deficiency in the quantity of land sold. It would be inequitable and unjust to compel appellant to pay for land which he did not get, and which, under the findings of the trial court, both he and the appellee thought at the time the sale was made was a part of the Hughes survey, and would become the property of

appellant under the deed executed by appellee. Upon these facts appellant would be entitled to compensation for the loss of the land to which appellee had no title. The evidence is not sufficiently definite as to the value of the 23% acres of land for us to fix the amount which appellant should be allowed to recover for its loss, and for this reason we cannot render judgment for the appellant. Because the trial court erred in rendering judgment for the appellee upon the facts as found by the court, its judgment is reversed, and this cause remanded for a new trial.

Reversed and remanded.

CARPENTER et al. v. ANDERSON.*

(Court of Civil Appeals of Texas. Nov. 17, 1903.)

JUSTICE OF THE PEACE—JUDGMENT—DIRECT ATTACK—ACTION—SERVICE—VALIDITY—EXECUTION SALE—INNOCENT HOLDER.

1. An action in the district court to set aside a justice's judgment, all parties in interest being made defendants, is a direct, and not a collateral, attack, and proof outside the record as to the service of process on which the judgment is based is admissible.

2. Rev. St. 1895, art. 1602, providing that the rules governing the service of citations issued out of district courts shall govern also the justices' courts, and article 1647, providing that no judgment shall be rendered by a justice against any person unless such party has been cited, either personally or by publication, do not authorize the commencement of actions in justices' courts against nonresidents by notice, as provided for district courts in article 1230; such notice not being a citation.

3. The attempted use by a justice of the peace of a notice, instead of a citation, to commence an action, is wholly without force or effect.

4. Rights acquired by a bona fide purchaser for value under an execution on a judgment of a justice of the peace fair on its face will not be disturbed, though the judgment be invalid.

5. Where one purchases land at an execution sale, which he knows to be worth \$2,500, for \$53, neither he nor his vendee with knowledge of these facts is an innocent holder for value, so as to support the conveyance, where the judgment is invalid.

6. Where an execution sale is set aside on account of invalidity of the judgment, which was fair on its face, the vendee is entitled to be reimbursed by the judgment debtor for the sum paid by him, which amount he admits he owes the judgment creditor, and for the satisfaction of which debt the proceeds of the execution sale were used.

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Suit by S. L. Anderson against A. G. Carpenter and others. From a judgment in favor of plaintiff, defendant A. G. Carpenter and another appeal. Reformed and affirmed.

L. B. Moody, for appellants. Fisher, Sears & Sherwood, for appellee.

GILL, J. This is a suit by the appellee, S. L. Anderson, against the appellants, A.

G. & J. C. Carpenter, and Bradley, Alderson & Co., plaintiffs in a justice court judgment rendered against appellee and S. P. Hudson, purchaser of the land in controversy at execution sale thereunder. The petition contained two counts, the first being in the ordinary form of trespass to try title. By the second he sought, as against all the defendants, to set aside the justice judgment, and the sales and deeds made pursuant thereto. The reasons averred for the vacation of the judgment were that plaintiff was a nonresident of the state of Texas, and had never been served with any sort of process. As ground for setting aside the sheriff's sale, he averred that he had received no notice thereof as required by law, and for this reason, and because the execution was general, instead of against the property attached, the sale was void. Further, that the property sold was worth at the time of the sale \$5,000, of which the purchaser was aware; that it was nevertheless sold to him for the unconscionable price of \$53.33; that the purchaser's vendee had full notice of this, of the want of service, and of the other irregularities averred. Bradley, Alderson & Co. did not answer. S. P. Hudson disclaimed. A. G. & J. C. Carpenter answered by general denial and plea of not guilty.

The court upon the trial directed the jury to return a verdict for appellee, which was done, and judgment rendered accordingly. The Carpenters alone have appealed. Their contentions are: First. That the judgment of the justice, on which their title rests, was only voidable, and not void; and, as the record was fair on its face, a stranger thereto could treat it as of absolute verity, and acquire rights thereunder which could not be disturbed, even though the judgment should be set aside as between the parties on direct attack. Second. That the attack is collateral, and the judgment therefore unassailable in this proceeding. Third. That, if the judgment and sale were rightly set aside, the court nevertheless erred in refusing to require of plaintiff a return of the purchase money paid by them to S. P. Hudson, or at least the sum paid by Hudson at execution sale.

The appellee propounds the propositions: (1) That the justice of the peace is not authorized by the statute to procure substituted service on nonresidents by issuance and service of notice, as in the district or county courts. (2) If he had such authority, the service was nevertheless void; having been made on the return day of the writ, at which time it was functus officio. (3) There being in fact no lawful service, the judgment was absolutely void for want of jurisdiction of the person of Anderson, and, being so, no one could acquire any rights thereunder. (4) If only voidable, and not void, this is a direct attack, all parties at interest being made defendants, and the court properly heard proof of want of service. (5) That,

*Writ of error denied by Supreme Court.

¶ 6. See Execution, vol. 21, Cent. Dig. §§ 820, 821.

whether void or only voidable, the defendants had notice of the facts, as well as the want of sufficient consideration at the sheriff's sale, wherefore they cannot require of appellee the return of any sum as a condition to the vacation of the judgment and recovery of his land.

The following facts are undisputed: The plaintiff was indebted in the sum of \$35.48 to the firm of Bradley, Alderson & Co. This firm brought suit on the claim by original attachment in the justice court of Harris county, Tex. The constable levied the attachment on the land in controversy. The suit was instituted on June 29, 1900. Anderson is now a resident of Minnesota, and has never resided in Texas. The justice record shows that, on the day of the filing of the suit, a notice to serve defendant was issued to him, as a resident of Washington county, Iowa. Alias notice was issued August 21, 1900, and the fact noted on the docket. On April 2, 1901, a pluries notice to serve was issued to Minnesota, and the fact noted on the docket. It was also noted that same was executed in Minnesota April 8, 1901. Then follows the justice judgment, dated June 25, 1901, which recites that "defendant, though duly and legally served with citation, came not, but wholly made default." Judgment for the debt was thereupon rendered, and the attachment lien foreclosed. It thus appears that the last judicial utterance concerning service was a solemn declaration that it had been lawfully had. The notice of April 2, 1901, was returnable April 8, 1901. It had indorsed thereon an affidavit of one Neuenschwander to the effect that on April 8, 1901, he had delivered to Anderson, in person, in the state of Minnesota, a true copy of the notice, and copy of plaintiffs' petition. It was shown by parol that no other process issued, and that the judgment was actually rendered on the return of Neuenschwander, as stated above. Upon this phase of the case, the only point of dispute is the truth of the return. Anderson swears there was in fact no service, and Neuenschwander that the return stated the truth. Execution was duly issued and levied upon the land, and same was duly advertised for sale. The constable mailed a notice of the proposed sale to the defendant in the judgment, addressed to his last known address in Minnesota. Anderson swears it never reached him. The land was duly sold on August 6, 1901, and S. P. Hudson, one of the defendants in this suit, became the purchaser for the sum of \$53.33. At that time the 226 acres of land was worth between \$10 and \$15 per acre. It fronted on an improved public road, and lay within five miles of the city of Houston. Thereafter Hudson, through an agent, proposed to sell the land to the Carpenters. The latter, being fully aware of the value of the land, consulted an attorney as to the state of the title, and especially as to the validity of the justice judg-

ment and the sale thereunder. The attorney advised him that the title thus conveyed was good. Thereafter the Mr. Carpenter who had charge of the proposed purchase inspected personally the justice record, and acquainted himself with its contents. This investigation and negotiation resulted in a sale of the land to the Carpenters on the 8th of November, 1901, for a cash consideration of \$1,806; Hudson conveying by warranty deed. The Carpenters also had actual knowledge of the sum the land brought at execution sale.

We shall not take up in detail, nor in the order of their presentation, the assignments of error urged by appellants. They fall under the classifications indicated by our statement of appellants' contentions on this appeal.

In Texas, justices of the peace exercise a general jurisdiction within their limitations, and their judgments are to be measured and estimated by the same rules as apply to judgments of the district and county courts. *Davis v. Robinson*, 70 Tex. 395, 7 S. W. 749; *Heck v. Martin*, 75 Tex. 472, 13 S. W. 51, 16 Am. St. Rep. 915.

First, therefore, of their contentions that the nature of this attack is collateral, and that evidence aliunde the record is inadmissible to disclose a secret vice in the justice judgment. That the attack is direct, and not collateral, is so well settled, we forbear to enlarge upon the proposition, but cite a few leading Texas cases on the point, and pass to the more difficult problems presented on this appeal. *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329; *Crawford v. McDonald*, 88 Tex. 630, 33 S. W. 325.

It follows, therefore, whether the justice judgment be held absolutely void or merely voidable, the court rightly heard proof aliunde on the issue of service. This conclusion disposes of all the assignments addressed to the action of the trial court in this respect.

But whether there was actual service of the notice issued by the justice was a subject of conflict in the evidence. So, in order to justify the trial court in directing a verdict in favor of appellee, we must conclude that the justice was without power under our statute to procure service by the means used. Article 1602 of our Revised Statutes of 1895 is as follows: "All the rules governing the issuance and service and the return of citations, issued out of the district and county courts, and providing for acceptance of service, and entering appearance, shall, except where otherwise provided by law, govern also the justices' courts in so far as they can be applied to the proceedings of said courts." Article 1647 provides: "No judgment, other than a judgment by confession, shall be rendered by a justice of the peace against any party who has not entered an appearance, or waived service, unless such party has been cited either personally or by publication." The article last quoted not only prescribes,

but limits, the cases in which a justice may render judgment. Article 1602 renders applicable the rules governing district and county courts as to citations, but no further. It will be noted that in each of the articles mentioned the word "cited" or "citation" is used. Now, a citation is a writ of the court addressed to an officer of the court, and commands him to do certain things. Service by publication is a citation, and therefore may be resorted to by a justice of the peace. Inasmuch as the powers of the justice of the peace in this respect are derived from the statute, and as by no provision of the statute is that court explicitly authorized to acquire jurisdiction over a defendant by issuance and service of notice as provided by statute for district and county courts, we must hold the power wanting, unless "notice" and "citation" are synonymous terms. Service on nonresidents by notice is provided for district and county courts by article 1230. It may be had upon application of the plaintiff, his agent or attorney, against any nonresident defendant, or one absent from the state. Such paper is prepared by the clerk of the court out of which it is to issue, must be addressed to the defendant, and it must contain for defendant the usual information embodied in a citation, and must be attested by the clerk, and the seal of the court affixed. Under articles 1231 and 1232, it may be served by any person competent to make oath of the fact. Such a notice addressed to an officer of another state, instead of the defendant, has been held to be invalid. *Porter v. Hill County* (Tex. Civ. App.) 33 S. W. 383. The case of *Perez v. Perez*, 59 Tex. 324, sustains the distinction we make, though the case is not directly in point. We conclude that the justice had no power to procure service by the method adopted. The attempted use of "notice," instead of "citation," was not a mere irregularity. It amounted to no more than if the justice had sent defendant a message advising him of the pendency of the suit. That some sort of lawful service is necessary to sustain even the judgment in rem is not questioned. It follows, therefore, that the judgment, as between the parties, was rightly set aside. This conclusion renders it unnecessary for us to determine the effect of service on return day of a writ, and whether, the writ being functus officio, such service would be a nullity, or merely an irregularity.

In adjusting the rights of Anderson as against Hudson and the two Carpenters, it is necessary to determine whether the judgment is void for want of any service, or voidable because lawful service was distinctly adjudged to have been had. If void, no one could acquire any rights thereunder, and the appellee's right to judgment would be absolute and unhampered by conditions. Notwithstanding the confusion and irreconcilable inconsistencies to be found in the adjudged cases, growing out of the indiscriminate use of the terms "void" and "voidable," we find

that where the clear question has been presented, as applied to domestic judgments, there is a practical unanimity of decision on the proposition that, where the record is regular on its face, strangers may deal with it as of absolute verity, and this even where the recital of personal service is not true in fact. It seems, the question is one of evidence, rather than of jurisdiction. *Crawford v. McDonald*, *supra*, and cases cited: *Alston v. Emmerson*, 83 Tex. 231, 18 S. W. 566, 29 Am. St. Rep. 639. If a court renders a judgment in excess of its powers, it is a nullity, of course. In such a case the jurisdiction, or lack of it, does not depend on any fact to be judicially ascertained by the court in connection with the trial of the case. In the matter of jurisdiction of the person, the fact of service must necessarily be judicially ascertained by the court; and, having adjudged it to have been done, the record is regular, and may not be collaterally impeached. It is still true that a court had no power to render a judgment in the absence of jurisdiction over the person of the defendant, but, once adjudged, the existence of the fact cannot be questioned, except in a direct attack. From the application of this rule follow consequences in individual cases calamitous and hard to be borne, but it is deemed better that occasional individuals should suffer the consequences of false judgments, than that the public confidence in the verity of public records should be shaken or destroyed. If the rule were otherwise, purchasers would not buy at judicial sales, or else would buy only at prices which would justify the risk. Rights acquired under such judgments by innocent strangers for value will not be disturbed, the wronged party being relegated to his remedy against the plaintiff who procured the false recital to be made. We understand this to be the settled rule in Texas. *Lawler's Heirs v. White*, 27 Tex. 251; *Fitch v. Boyer*, 51 Tex. 338; *Davis v. Robinson*, 70 Tex. 395, 7 S. W. 749; *Heck v. Martin*, 75 Tex. 472, 13 S. W. 51, 16 Am. St. Rep. 915. Appellee, however, cites the case of *Scanlan v. Campbell* (Tex. Civ. App.) 55 S. W. 502, in support of the proposition that such a judgment is absolutely void. In that case the plaintiff, the city of Houston, was purchaser at its own execution sale, and subsequently sold by quitclaim deed to Scanlan. In a suit between Scanlan and Campbell, the owner, the latter directly attacked the judgment, making the city a party. The ground of the attack was that the judgment was rendered without service, and this charge was found to be true. Justice James, in delivering the opinion, indulged in a discussion of the nature of the judgment, and expressed the opinion that all purchasers under a judgment rendered without personal service bought with notice of the vice, whatever the recitals therein; that they must inquire, at their peril, if service had been obtained. On motion for rehearing, this opinion was reit-

erated at length, and many authorities cited. We have examined the authorities, and are constrained to the conclusion that they do not support the opinion announced. The case has given us much concern, not alone because writ of error was refused by the Supreme Court, but because of the learning of the justice who wrote the opinion. We cannot bring ourselves to believe that our Supreme Court would have thus overruled the long line of Texas cases announcing a contrary doctrine without distinctly expressing the purpose so to do. We have concluded that writ of error was refused because a right conclusion was reached upon the entire case, and that whether the judgment was void, or merely voidable, was not a question necessary to be decided. The plaintiff bought from the city, accepting a quitclaim deed; and Justice James determined the appeal when he wrote, "Besides, plaintiff's deed was a quitclaim, and could confer no better right than the city had." If, therefore, the judgment assailed here is to be set aside and the sales annulled as between appellee and the vendees, some other reason must be found than the asserted nullity of the judgment. No irregularity was shown either in the sale, or in the proceedings preceding it and subsequent to judgment.

Appellee contends that the judgment was rightly vacated because of the unconscionably small sum at which the land sold at execution sale. Nothing is better settled than that mere inadequacy of price will not authorize the setting aside of a sheriff's sale otherwise regular. Something more must be shown, of which the purchaser had, or ought to have had, notice. But a distinction exists between a mere inadequacy of price and a price so grossly out of proportion to the value of the property sold as to shock the conscience, and justify the court in holding that there was no consideration. While the regular record of the judgment imports absolute verity to a stranger, yet he who invokes the doctrine against a hidden vice therein must be a bona fide purchaser for value. If Hudson was not such a purchaser in this case, his vendee knew it, for he not only knew the price brought at execution sale, but knew the value of the property at that time. He knew that property worth between \$2,500 and \$3,000 had been sacrificed for the nominal sum of \$53.33, and that he purchased from Hudson at much less than its real value. The court will proceed upon the theory that the gross disproportion between price and value ought alone to have put the parties upon inquiry, and that to take advantage of it was constructive fraud. To be a bona fide purchaser for value, one must pay a fair price. We regard the disproportion so gross as to render the sum paid no consideration, and Hudson not a purchaser for value. *Nichols-Steuart v. Crosby*, 87 Tex. 443, 29 S. W. 380; *McKamey v. Thorp*, 61 Tex. 652; *Bank v. Bank* (Tex. Civ. App.) 30

S. W. 386. This being true, the court was correct in directing a verdict for Anderson. But the latter admits he owed the debt for which Bradley, Alderson & Co. sued, and it is undisputed that the \$53.33 went to its discharge. The court should have required the sum thus paid by Hudson to be refunded to his vendees, the appellants. While the sum named is regarded as no consideration, when viewed in the light of the value of the property for which it was paid, yet, considered alone, it ought not to be held de minimis.

The judgment of the trial court is therefore reformed in the respect mentioned, and, as so reformed, is affirmed; judgment being here rendered for appellants against plaintiff for the amount paid by Hudson, and that they have a lien upon the land therefor. Reformed and affirmed.

On Motion for Rehearing.

(Nov. 12, 1903.)

We have considered appellants' motion for rehearing in this cause, and are of opinion it should be overruled. We have nothing to add to what has been said on the points decided. Appellants have, however, assailed the accuracy of a fact finding, which, for the sake of accuracy, we take the trouble to correct. We stated in the main opinion that the land in controversy lay within five miles of the city of Houston, and fronted on an improved public road. The land is in fact eight miles from the city of Houston. The error was immaterial, and its correction does not affect the result.

Overruled.

HAMBURG-BREMEN FIRE INS. CO. v. BAILEY et al.

(Court of Civil Appeals of Texas. Nov. 24, 1903.)

GARNISHMENT—COSTS OF GARNISHEE—DISMISSAL OF SUIT.

1. A cause, by agreement of counsel, was set for trial March 11th, and the garnishee, served under a writ returnable March 2d, was notified of that fact. On March 7th the garnishee's answer was in the hands of its counsel. On March 9th, plaintiff, knowing that the garnishee's attorney had its answer, without notice to such attorney, dismissed the garnishment, and later in the same day the garnishee filed its answer, and in due time a motion to retax costs, and allow its attorney's fees for preparing the answer. *Held*, that the garnishee was not guilty of inexcusable negligence in failing to anticipate the dismissal of the garnishment suit, to which plaintiffs were entitled by the statute, and to file its answer before such dismissal, and the motion to retax costs should have been granted.

Appeal from Lavaca County Court; C. J. Gray, Judge.

Action by Nannie C. Bailey and others against C. H. Holchak and the Hamburg-Bremen Fire Insurance Company, garnishee. From a judgment sustaining demurrers to a motion to retax costs, the garnishee appeals. Reversed.

Price, Green & Green, for appellant. Patton & Schwartz, for appellees.

PLEASANTS, J. This is an appeal from a judgment of the court below sustaining demurrers to a motion to retax costs filed by appellant in a garnishment proceeding in said court, in which appellant was sued as garnishee. The record shows that in a suit in said court, in which appellees were plaintiffs, and O. H. Holchak was defendant, appellees sued out a writ of garnishment against the appellant on the 9th day of January, 1903, and same was served on appellant on said date. The original suit was filed on the same day the writ of garnishment was sued out, and was brought to the March term of the court, which began on March 2, 1903. The writ of garnishment required appellant to answer at said March term. By agreement of attorneys representing the plaintiffs and the defendant in the original suit, that cause was set for trial on March 11th. Counsel for appellant was informed of this agreement. Appellant's answer in the garnishment proceeding was prepared prior to March 7th, and on that day was properly verified by its agent at Dallas, Tex., and forwarded to appellant's counsel, at Hallettsville. This answer denied any liability of appellant to the defendant Holchak, and prayed for an allowance of \$15 attorney's fees as reasonable costs of its preparation. On the 9th day of March, appellees' attorney, knowing that appellant's answer was in the hands of its attorney, and also knowing its contents, without any notice to appellant's attorney, caused said garnishment proceeding to be dismissed. Thereafter, on the same day, appellant filed its said answer, and in proper time filed a motion to require the clerk to retax the costs in the garnishment proceeding, and allow appellant its attorney's fees for preparing its answer; the clerk having refused to tax any costs in favor of appellant. To this motion, which set out the facts above stated, appellees filed the following demurrers: "Nannie C. Bailey et al. v. Hamburg-Bremen Fire Ins. Co. (No. 642.) In County Court Lavaca County, Texas. And now come the plaintiffs, and show to the court that garnishee's motion to retax the costs in this case shows that the court has no authority to enter the order prayed for, and has no jurisdiction in this matter, in this: that this case had been disposed of and dismissed before the act done by garnishee, viz., filing an answer, for which he claims a fee. (2) The clerk had no authority to file the answer for the filing of which garnishee claims an allowance of a fee, and the court has no jurisdiction to adjust any equities arising out of private agreements or understandings between parties. Wherefore plaintiffs pray that said motion be dismissed."

We are of opinion that the motion to reopen the case for the purpose of adjudicating

the question of costs should have been granted. Had the answer been filed before the order of dismissal was taken by appellees, it is not questioned that appellant would, under the statute, have been entitled to reasonable attorney's fees for preparing its answer. Rev. St. 1895, art. 219; Johnson v. Blanks, 68 Tex. 496, 4 S. W. 557. The only question in the case is whether appellant's attorneys were guilty of such negligence in failing to file its answer before appellees dismissed their suit as would authorize the trial court to refuse to give appellant a hearing upon the question of costs. No judgment could have been taken against appellant in the garnishment suit until after judgment had been obtained by appellees against the defendant in the original suit. Appellant's attorneys having knowledge of the agreement under which the original suit was set for trial on March 11th, and knowing that appellees' attorneys were informed that appellant's answer had been prepared, and knew its contents, should not be charged with inexcusable negligence in failing to anticipate that appellees would dismiss their garnishment suit before the day set for the trial of the original suit. It is well settled that a defendant may file his answer at any time before his cause is called for trial; and this court has held that, when a garnishee has reasonable ground to believe that the original suit in which the writ of garnishment issued would not be tried until the succeeding term of the court to that at which the writ required him to answer, the failure to answer at the term named in the writ was not such inexcusable negligence as would authorize the refusal of a writ of certiorari and a trial de novo, when the petition for that relief showed that the garnishee was not indebted to the defendant in the original suit. We think the same rule should be applied in the instant case. Heath v. Jordt, 72 S. W. 1022, 6 Tex. Ct. Rep. 826. It is true that, under the statute, appellees had the right to discontinue their garnishment suit at any time before an answer was filed, upon the payment of all costs that had accrued; but having caused appellant to incur the expense of preparing an answer in order to protect its rights, and knowing that said answer had been prepared, and that it denied any liability of appellant to their debtor, they ought not to be permitted to escape the penalty of wrongfully causing appellant to incur said expense merely because the answer had not been filed at the time they dismissed their suit, unless the failure to file same was due to inexcusable negligence on the part of appellant or its attorneys, and, as we have before said, we do not think appellant can be charged with such negligence under the facts of this case. A different question would be presented if appellant's answer had not been prepared before the suit was dismissed. Appellant being charged with notice of appellees' right, under

the statute, to discontinue their suit at any time before an answer was filed, would be required to take notice of such dismissal, and expenses thereafter incurred by it could not be charged against appellees.

We think the court below erred in sustaining the demurrers to the motion, and if, upon a hearing of said motion, the facts therein alleged are shown to be true, judgment should be rendered in favor of appellant for the reasonable cost and expense of preparing its answer.

The judgment of the court below is reversed, and this cause remanded for a new trial in accordance with the views above expressed. Reversed and remanded.

WRIGHT INVESTMENT CO. v. FRISCOE REALTY CO. et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

NOTES—BONA FIDE PURCHASER—NOTICE.

1. Where an indorsed note was given to one in order that he might raise thereon a certain sum, less than its face, and he transferred it before maturity for \$800, the fact that it was for \$1,250, and that the indorsee had reason to believe one of the indorsers solvent, did not charge him with knowledge of the purpose for which it was delivered to his transferee.

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Suit by the Wright Investment Company against the Friscoe Realty Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

C. O. Kidd, for appellants. Wm. G. Schofield, for respondent.

BRACE, P. J. This is an action upon a promissory note. The petition, omitting caption and corporation averments, is as follows: "That on or about the 27th day of October, 1898, said defendant the Friscoe Realty Company, by description the Friscoe Realty Co., and defendant John C. Hall, executed their certain negotiable promissory note, dated on said day, herewith filed, marked 'Exhibit A,' and made a part of this petition, whereby they promised to pay ninety days after the date thereof to the order of Joseph E. Baker and Sidney E. Davis the sum of twelve hundred and fifty dollars (\$1,250), for value received, negotiable and payable without defalcation or discount, with interest at the rate of eight per cent. per annum from maturity, payable at No. 304 North Eighth street, St. Louis, Mo.; that thereafter, and before the maturity of said note, said Joseph E. Baker and Sidney E. Davis indorsed the same by writing their names across the back thereof, and delivered the same to defendant W. C. Dines, for value; that thereafter, and before maturity of said note, said defendant W. O.

Dines indorsed said note, and delivered the same to plaintiff, Wright Investment Company, for value; that thereafter, and when said note became due and payable according to the tenor and effect thereof, plaintiff caused demand of payment to be made at 304 North Eighth street, St. Louis, Missouri, where said note was by its terms made payable, but that payment thereof was then and there refused, and thereupon plaintiff caused said note to be duly protested, and due notice of said demand and protest to be given to and served upon said Joseph E. Baker and Sidney E. Davis and W. C. Dines, the indorsers of said note. Plaintiff says that it is now the legal holder and owner of said note, and that no part thereof has ever been paid, although often demanded. Wherefore plaintiff prays judgment for said sum of twelve hundred and fifty dollars, the face of said note, for interest, damages, and his costs in this behalf expended. Wright Investment Co., John W. Tristler, Pres., Plaintiff." The defendant Friscoe Realty Company, John C. Hall, Joseph E. Baker, and Sidney E. Davis, answered, admitting the execution of the note sued on; that the indorsements thereon are genuine; that payment thereof was refused at maturity; that the same still remains due and unpaid, and that said note was duly protested as alleged in plaintiff's petition; and for defense to plaintiff's action, in substance, pleaded that said note is without consideration, was made for the accommodation of the defendants Friscoe Realty Company and John C. Hall, and was thereafter by them delivered to said Dines without consideration, and for the sole purpose of enabling him to borrow a small sum of money thereon, of all of which facts the plaintiff had notice; and that no consideration passed from said Dines to plaintiff for said note. Defendant Dines filed no answer.

The case was submitted to the jury upon the following instructions:

For the plaintiff:

"(1) The court instructs the jury that if they believe from the evidence that plaintiff purchased the note in controversy for value, before maturity, they must find their verdict for plaintiff, even though they may believe from the evidence that Dines had no right or authority to sell the note, unless they shall further believe from the evidence that, at the time it purchased said note, plaintiff had notice or knowledge that Dines had no right or authority to sell the note.

"(2) The court instructs the jury that, even though they believe from the evidence that the note in controversy was given to Dines by Hall for the sole purpose of using it as collateral in securing a loan for a smaller amount, yet if they also believe from the evidence that plaintiff purchased said note from Dines before its maturity for a valuable consideration, they must find their verdict for the plaintiff, unless they shall fur-

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. § 904.

ther believe from the evidence that, at the time plaintiff purchased said note, it had notice or knowledge of the circumstances and conditions under which Dines secured and held said note.

"(3) The court instructs the jury that, if they find their verdict for the plaintiff, they will assess its damages at the sum of twelve hundred and fifty dollars, with interest thereon at the rate of eight per cent. per annum from the 30th day of January, 1899, until the date of the verdict, together with four per cent. of twelve hundred and fifty dollars, the principal sum of said note, as damages, in lieu of protest charge, and that they will compute the said interest and damages, add them to the principal of said note, and assess plaintiff's damages at the sum of said principal, interest, and damages."

For the defendant:

"(1) The court instructs the jury that if they find from the evidence that the note sued upon was transferred before maturity, and for value, by W. C. Dines to plaintiff, and that, at the time of said transfer of said note by the said W. C. Dines to plaintiff, the said W. C. Dines was not the owner of said note, or had no authority to transfer the title thereto to said plaintiff, or that the said note was obtained by the said W. C. Dines from the said John C. Hall for the purpose and with the understanding that the same was to be used by the said W. C. Dines as collateral to secure a loan of \$250, or that after the said Dines secured possession of said note, and before any transfer thereof to plaintiff, it was understood and agreed between said Dines and the said Hall that the same was to be returned to the said Hall, and you further find that the said plaintiff had actual notice of said fact or facts, if shown, then you will find a verdict for defendants, Friscoe Realty Company, John C. Hall, Sidney E. Davis, and Joseph E. Baker."

And the court, on its own motion, instructed the jury "that, if three-fourths of their number concur in a result, the jury may return that result as the verdict of the jury." Thereupon the jury returned a verdict for the plaintiff for the amount of the note, with interest and damages, as instructed, in which nine of their number concurred. From the judgment thereon the defendant appealed, and, as the constitutionality of the law authorizing such verdict was properly questioned in the court below, the appeal comes to this court.

The constitutionality of this jury law having heretofore been sustained in numerous cases, nothing more need be said on that subject.

We find no material error in the rulings of the court upon the admissibility of evidence.

In addition to the instruction given for the defendants, they asked for eight other instructions, which the court refused, and the refusal of these instructions is the principal

error assigned for reversal. These instructions are not only numerous, but voluminous, repetitive, and argumentative, and, in the view we take of this case, need not be set out; nor is any extended statement of the facts shown in evidence required for the purposes of this decision.

J. W. Tristler, president of, is practically, the Wright Investment Company, doing business in its name as a "bill broker," and John O. Hall, president of, is practically the Friscoe Realty Company, doing business in its name as a "real estate broker," and, for the sake of brevity, their personal names are used. The indisputable facts established by the evidence are that the note in suit was executed by Hall, indorsed by Baker and Davis, and by them delivered to Hall, to be by him discounted for his own benefit, with the expectation that the proceeds would be by him used in a real estate venture that he then had in contemplation. Hall did not have the note discounted, but, being indebted to Dines in the sum of \$250, delivered the note to him for the purpose of enabling Dines to raise that amount of money on it; and Dines, before maturity, sold the note to Tristler for \$800, received the money, indorsed the note, and delivered it to Tristler. Upon these undisputed facts, the plaintiff was unquestionably entitled to recover, unless Tristler, at the time he purchased the note, had knowledge of the purpose for which the note was delivered to Dines. This was the only issue of fact in the case on the evidence, and was very clearly presented to the jury in the instructions given. The only effect the instructions asked for and refused could have had would have been to obscure the issue. The other evidence tended to prove that Dines had previously discounted notes for Hall; that Baker and Davis had frequently indorsed notes for Hall, which he had procured to be discounted; that a good deal of this paper was afloat; that Tristler previously had transactions with both Hall and Dines in the line of his business which proved to be all right; that at or about the time he purchased the note in question he made inquiries as to the solvency of Davis, and got a good report as to him; that when Dines was offering the note to him Dines told him that he had to raise some money for some children in the probate court; that he had to have some money, no matter what it would cost, and that John Hall was on his bond; that none of the parties to the note ever disclosed to plaintiff, or to any one else, any of the facts or circumstances connected with the execution, indorsements, or transfers thereof, or gave out any information upon the subject, except such as appeared upon the note itself, and the record will be searched in vain for any evidence tending to prove that Tristler had any knowledge whatever of anything in regard to the note except such facts as appeared upon the note itself. The mere fact that the note was for

\$1,250, that Tristler may have had reason to believe that Davis, one of the indorsers, was solvent, and that Dines was willing to take and did take \$800 for the note, could not, in the very nature of things, charge Tristler with such knowledge. But that he might thereby be so charged was the end sought to be accomplished by the defendants' refused instructions. The court committed no error in refusing these instructions, and could not well have been convicted of error if it had given a peremptory instruction for a verdict for the plaintiffs on the pleadings and evidence. The law on this subject is too well settled in this state to require more than the citation of a few of the many cases. *Hamilton v. Marks*, 63 Mo. 167; *Lee v. Turner*, 89 Mo. 489, 14 S. W. 505; *Mayes v. Robinson*, 93 Mo. 114, 5 S. W. 611; *Jennings v. Todd*, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373; *Borgess Inv. Co. v. Vette*, 142 Mo. 580, 44 S. W. 754, 64 Am. St. Rep. 567; *Leavitt v. Taylor*, 163 Mo. 158, 68 S. W. 385.

The judgment of the circuit court is affirmed. All concur.

SOMERVILLE v. STOCKTON.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

APPEAL—REVIEW—CONFLICTING EVIDENCE— MOTION FOR NEW TRIAL—TRIAL COURT'S DISCRETION.

1. An order on motion for new trial reciting that "the verdict and judgment rendered herein be set aside and vacated on the ground that the evidence was insufficient to support the verdict, means that the verdict was set aside because the testimony of plaintiff, when considered with that offered by defendant, was insufficient to support the verdict, and not that the verdict was set aside, because there was no testimony on the part of plaintiff so as to confine the inquiry on appeal to that one question, and to require the court to reverse the judgment if that question was found against the court below.

Appeal from St. Louis Circuit Court; Warwick M. Hough, Judge.

Action by William Somerville against Robert H. Stockton. Judgment in favor of plaintiff, and from an order granting a new trial plaintiff appeals. Affirmed.

F. J. McMaster, for appellant. Upton M. Young, for respondent.

ROBINSON, J. This is an action for damages growing out of an alleged deceit practiced by defendant upon plaintiff, whereby the latter was induced to advance to a failing investment realty company of which defendant was the president and general manager the sum of \$5,000. The answer filed by defendant was a general denial. At the trial before a jury a verdict was rendered in favor of the plaintiff for \$7,111.67, the amount claimed in his petition, with interest. Defendant filed his motion to set aside the

verdict and to grant to him a new trial, which was sustained, and the reason assigned by the court for so doing was "that the evidence is insufficient to support the verdict." Plaintiff prosecutes this appeal from that order, and asks this court to remand the cause, with directions to the trial court to enter up judgment for the plaintiff upon the verdict as rendered.

In view of the nature of the issue presented by an appeal of this character, it appears wholly unnecessary to go into a general discussion of the numerous questions which have been suggested in the briefs filed herein, or to consider the testimony offered in favor of either party, further than to say there was not that total want of testimony in behalf of the plaintiff that would have authorized the court to have instructed the jury that they should find for defendant, as the defendant now asserts should have been done; nor was the testimony offered in behalf of the plaintiff so one-sided and all-convincing as to justify us in saying of the action of the trial court in determining otherwise that it had abused the judicial discretion with which it is invested of granting to either party one new trial, when, in its judgment, the verdict as made is against the great weight of the testimony, or where manifest injustice will be done if the verdict is permitted to stand as rendered.

The court refused to give a peremptory instruction to the jury, as requested by defendant, that their verdict should be for the defendant, but permitted the jury under proper instructions to pass upon the facts of the case, and afterwards, in the exercise of its lawful power, believing, as it evidently did, that the great weight of the testimony was against plaintiff's contention, set the verdict aside, and awarded to defendant a new trial. The recitation in the court's order that "the verdict and judgment rendered herein be set aside and vacated on the ground that the evidence is insufficient to support the verdict" evidently was not intended to mean, as appellant would have it appear, that the trial court had declared that the verdict was set aside because there was no testimony on behalf of plaintiff to support a verdict in his favor, and that our inquiry for that reason, on this appeal, should be confined to that one question, and, if found against the trial court, from a review of all the facts in the case, its ruling should be reversed, and the trial court now ordered to enter up a judgment on the verdict as found by the jury. It is quite evident from all the proceedings at the trial that the court meant only by its order to declare that the testimony offered in behalf of plaintiff was insufficient to support the verdict when considered in the light of what seemed to it the great preponderance of the testimony offered in support of defendant's theory of the transaction involved in the controversy, and not that plaintiff's testimony

offered was wholly insufficient to support any verdict whatever if left standing by itself uncontradicted by other facts or circumstances. In other words, it was no declaration in the nature of a demurrer to plaintiff's testimony offered that would put this court to the sole and single inquiry of determining from a review of all the facts, if any testimony could be found to support plaintiff's contention and upon that determination reverse or affirm its action in the premises.

On appeal of this character, as on appeals from a final judgment, this court must refuse to weigh conflicting testimony, such as was presented by the facts of this case, or to reverse the ruling of the trial court on a matter properly within its discretion, but will interfere only for errors of law committed, or where, conceding everything that is claimed by the party as true in whose favor a new trial is granted, he or she is still not entitled to a verdict (a condition clearly not presenting itself under the facts of this case). As no claim is here made by appellant that upon all the testimony in the case a verdict could not have been returned for the defendant, or that the plaintiff was entitled to a peremptory instruction at the close of the case that the jury should return its verdict for him, this court must refuse on this appeal to interfere with what appears the proper exercise of a lawful discretion, vested in the trial court, of granting to either party to a controversy one new trial when, in its judgment, the verdict as rendered is against the great weight of the testimony offered; and its order is therefore affirmed. All concur.

DICE v. HAMILTON.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

ADVERSE POSSESSION—LIMITATIONS AGAINST STATE—EVIDENCE—TESTIMONY ON FORMER TRIAL—ADMISSIBILITY—APPEAL—OBJECTIONS TO EVIDENCE—WAIVER.

1. The statute (Gen. St. 1866, c. 191, § 7) taking effect August 1, 1866, and providing that nothing contained in any statute of limitation shall extend to any lands belonging to the state, was prospective only in its operation, and hence, where persons were in possession of state school lands prior to the taking effect of such action, and fenced such lands in 1865, limitations commenced to run against the state from such date.

2. In ejectment defendant offered what purported to be a transcript of the testimony of plaintiff in a former suit between the same parties, and the court decided that it was not properly before the court, because not made a part of the record in the former case by bill of exceptions; whereupon counsel for plaintiff stated that if defendant's attorney would swear that it was the testimony of plaintiff on the former trial it would, of course, be admissible, and the attorney was sworn and so testified. Held, that plaintiff could not complain on appeal that it was error to admit the testimony.

3. Plaintiff could not complain on appeal that, while the transcript of the evidence in a former

suit might have been used to refresh the memory of the witness who made it, it was inadmissible as evidence in itself, he not having made such objection on the trial.

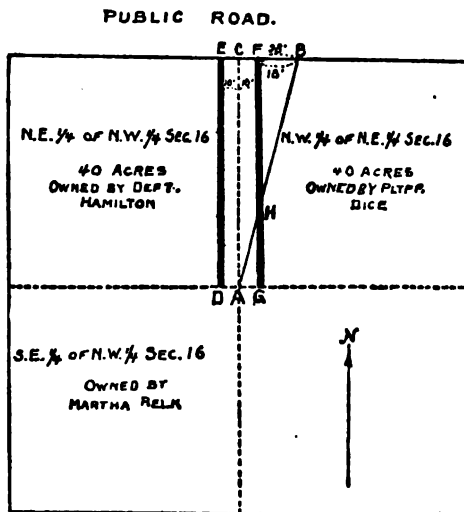
Appeal from Circuit Court, De Kalb County; A. D. Burnes, Judge.

Action by John W. Dice against Henry Hamilton. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. F. Harwood, for appellant. Hewitt & Blair, for appellee.

MARSHALL, J. This is an action in ejectment for a triangular strip of land lying in the northwest quarter of the northeast quarter of section 16, of township 58, range 30, in De Kalb county, Mo., and described in the petition as follows: "Commencing at a point twenty-eight feet east of the northwest corner of said forty-acre tract, and running thence in a southwesterly direction to the southwest corner of said forty-acre tract." The petition is in the usual form, the ouster being laid as of December 2, 1897. The answer is a general denial, but the real defense is title by limitations. The trial court rendered judgment for the defendant, and plaintiff appealed.

The controversy will be more readily comprehended by an examination of the following plat:



EXPLANATION.

Division line between N. W. of N. E. and N. E. of N. W. indicated by dotted line from letters A to C.

Land described in petition indicated by triangle A, B, C.

Private road 20' wide, lying 10' on each side of subdivisional line between land of plaintiff and defendant, indicated by heavy black lines D, E, F, G.

Land really in dispute is the triangle formed by B, H, and F.

All the land lies in section 16, township 58, range 30, De Kalb county. The plaintiff owns the northwest quarter of the northeast quarter of section 16, and the defendant owns the northeast quarter of the northwest quarter of section 16. Mrs. Martha Belk owns the 40 acres that lie south of the de-

fendant's 40, being the south quarter of the northwest quarter of section 16.

Although the petition claims the triangle indicated on the plat by the letters A, B, C, and describes it as having a front of 28 feet on the north, along the line of the public road, the fact is that in 1892 Mrs. Belk, in order to obtain access to her land from the public road, caused the county court to condemn a private road 20 feet wide, from the northeast corner of her land to the public road running along the north line of section 16, whereby 10 feet were taken off of the land of each the plaintiff and defendant, the subdivisional line between the lands of the plaintiff and defendant being the center of the private road. *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. 656. The private road is indicated on the plat by the letters D, E, F, G. In consequence of all which the land really in dispute in this case is the triangle indicated by the letters B, H, and F, and is 18 feet on the north, and running southwesterly to zero at the point H.

The plaintiff claims title to the land as being a part of the northwest quarter of the northeast quarter of section 16, and shows that he acquired title to said 40 acres by assignment from Samuel C. Rodgers, dated April 2, 1860, and that Rodgers was himself the assignee of Michael A. McCartney, who it is claimed originally purchased the land under the laws of this state. The land was originally school land, and was sold to McCartney for the sum of \$2 an acre, but the date of such sale is not disclosed by the record. McCartney sold to Rodgers, but the date of sale and the price does not appear. Rodgers sold to the plaintiff, in 1860, for \$372.50. But the patent of the state was never issued until November 15, 1897, and then it was granted to the plaintiff, "assignee of Samuel Rodgers, assignee of Michael A. McCartney."

The defendant has no title to the land in controversy, except such as rests upon the statute of limitations. The defendant derives his title to his 40 by a warranty deed from W. W. Curtis dated March 4, 1882, and has been in possession thereof ever since. Curtis acquired title from John E. Thomas by warranty deed dated January 15, 1881. Thomas acquired title from David Whittaker by warranty deed dated November 8, 1878. Whittaker acquired title from W. C. Moore by warranty deed dated July 17, 1865. Moore acquired title by warranty deed from William Munson dated March 2, 1864. Munson acquired title from Thomas Reed by warranty deed dated October 6, 1865, and Thomas Reed acquired title by a patent from the state dated April 24, 1874. These dates become important by reason of the contentions of the parties hereto.

The evidence shows that Moore went into possession of what he supposed to be his 40 in 1864, and that the plaintiff went into possession of what he supposed to be his 40 in

1860. Neither party seems to have had a very clear idea of where the division line between their lands ran. There were no government stones set showing such divisional lines. There is no dispute that the plaintiff has never been in possession of the triangular strip in controversy, but that the defendant has been in possession thereof ever since he purchased from Curtis in 1882, claiming it as a part of his 40, and that Whittaker, his mesne grantor, was in possession of it, claiming it also as a part of said 40, from August 7, 1865, until he sold it to Thomas, in 1878. In short, the evidence shows that the defendant and those under whom he claims title have been in possession of the strip in controversy, claiming it to be a part of the northeast quarter of the northwest quarter of section 16 since, at least, as early as March 2, 1864, when Moore purchased from Munson. Various surveys were made to establish the division line between the land of the plaintiff and the defendant, but each survey located the line at a different place. Some showed that the strip was a part of the land of the plaintiff, and some showed that it was a part of the land of the defendant. Neither party would accept the survey made at the instance of the other. Some time in 1888 this plaintiff brought a suit in ejectment against this defendant for the possession of said strip, and upon a trial of that case the judgment went in favor of the defendant.

When Whittaker purchased from Moore, in 1865, he had a survey made of the land, which showed this strip to be a part of the northeast quarter of the northwest quarter of section 16, and he had it fenced, and cultivated it, and claimed it, and it has been cultivated and claimed in the same manner by his grantees ever since. He and they claimed up to the fence on the one side, and the plaintiff likewise claimed to the fence on the other side. The evidence excludes the idea that the parties claimed only to the fence supposing it to be the true line, but without intending to set up any claim to it unless it was within the true line. There seems to have been no doubt in the mind of either party that the land belonged to the defendant until shortly before 1888, when the plaintiff had a survey made which showed it to be a part of his 40, and he then brought the prior ejectment suit above noted.

Upon the trial of this case the defendant offered a transcript of what purported to be the testimony of the plaintiff at the trial of the prior case. It was not made a part of the record in that case by a bill of exceptions. Thereupon the record herein shows that the following proceedings were had: "By Court: It is not before me in a proper way. You would have to show the facts. By Plaintiff: If Mr. Hewitt would go on the stand and swear to what he says, that would be the best. By Court: He says that he remembers it, and one is as good as the other. By

Plaintiff: If Mr. Hewitt swears that is the testimony, that, of course, makes it admissible. **By Defendant:** Mr. Dice says his father testified. Before this was tried the first time we made a motion for costs, and thought that this man was the plaintiff. He never said he was not, and to-day is the first time we ever knew he was not the plaintiff in this case. Defendant offers a demurrer to the evidence. Demurrer overruled by the court. R. A. Hewitt, Jr., being sworn, testifies as follows: I was attorney for Mr. Hamilton in the trial of the cause in which this plaintiff was plaintiff and this defendant was defendant, concerning this same tract of land, October, 1888, and the transcript of the evidence of plaintiff, John W. Dice, which I now offer in evidence, is a true and correct transcript of the evidence of said John W. Dice as given by him in the trial of said cause. **By Court:** It will be admitted in evidence; read it—for which see page 3 of the written portion of this bill of exceptions, to and including page 11; to which evidence the plaintiff at the time objected as being irrelevant and not competent under the issues made by the petition and answer. The court overruled the objection, and the plaintiff excepted at the time. The evidence shows that the plaintiff is over 80 years old, and that he was unable to attend the trial of this case. The record then shows that the plaintiff also objected to the reading of the said testimony, because, while it purported to be a draft of a bill of exceptions, it had never been signed, sealed, or made a part of the record, and because the plaintiff could be called and examined, and that the defendant, “for the purpose of making such written matter competent,” called Robert A. Hewitt, who testified as above set forth, and that thereupon the court overruled the objection and admitted the testimony, and the plaintiff excepted. The plaintiff then asked and the court refused to give the following instructions: “(1) The court declares the law to be that under the evidence the statutes of limitation of this state cannot prevail to destroy plaintiff’s title to, and right of possession of, the land sued for, and judgment must be for the plaintiff. (2) The court exclude all that part of the evidence read from the pretended bill of exceptions, for the reason that the same was never allowed and made a record of court.” The case was tried before the court, a jury being waived, and judgment was rendered for the defendant, and the plaintiff appealed.

1. The first contention of the plaintiff is that the title to the land in controversy was vested in the state of Missouri in trust for school purposes until November 15, 1897. When the patent was issued to the plaintiff, as assignee of Rodgers, who was the assignee of McCartney, and that ever since August 1, 1866, when the General Statutes of 1865 went into effect, it has been provided by law that “nothing contained in any stat-

ute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this state” (Gen. St. 1866, c. 191, § 7), and therefore the defendant could not acquire title by adverse possession, and hence the court erred in refusing the plaintiff’s first instruction.

It will be observed that the plaintiff shows that he has been in possession of his 40 ever since 1860, and that the defendant and his grantors have been in possession of the other 40 ever since March 2, 1864, and that the strip in controversy has been fenced and cultivated by the defendant and those under whom he claims ever since Whittaker fenced it, in 1865, and that he and they have asserted title thereto since that date, and that their right and title was not questioned by any one until the plaintiff had a survey of the land made about a year before he brought the prior ejectment suit, in 1888. Prior to the adoption of the statutes of 1865, containing the provision above quoted, the statute of limitations ran against the government as well as against the citizen. *Conn. Mut. Life Ins. Co. v. St. Louis, 98 Mo., loc. cit. 424, 11 S. W. 960*, and cases cited.

The statute invoked by the plaintiff took effect on August 1, 1866, and was prospective only in its operation. Prior thereto the statute of limitations ran against the state. The defendant and those under whom he claims went into actual, adverse possession, certainly as early as July, 1865, and have been in continuous, open, notorious, adverse possession ever since, claiming the land as their own. Such possession having begun prior to the adoption of the statutory provisions relied upon, the right of action accrued to the state in 1865, and the statute of limitations began to run in the defendant’s favor from that date, and the enactment of the provision relied upon by the plaintiff did not interrupt or stop the running of the statute. This action was begun in 1898. The defendant had therefore been in such possession for some 33 years when this suit was commenced, and hence had acquired title by limitation against the claim of the plaintiff under the state. There was no error, therefore, in the refusal of the plaintiff’s first instruction.

2. The second error assigned is the action of the trial court in permitting the defendant to read the transcript of the testimony of the plaintiff given upon the trial of the former ejectment suit, in 1888. When the transcript of that evidence was offered the court of its own motion decided that it was not properly before the court. The plaintiff said that if the defendant’s attorney would swear “that it is the testimony that, of course, makes it admissible.” The defendant’s attorney upon that suggestion was sworn, and testified that he was the defendant’s attorney upon the trial of the former case, and that “the transcript of the evidence of plaintiff, John W. Dice, which I now offer in evidence, is a

true and correct transcript of the evidence of said John W. Dice as given by him in the trial of said cause." The court then admitted the evidence. It is true, as the plaintiff contends, that the transcript does not appear to have become a bill of exceptions or a part of the record of the former case, and therefore it does not prove itself. But, when the court of its own motion was about to exclude it, the plaintiff said that, if the defendant's attorney would swear that it was the testimony of the plaintiff on the former trial, "that, of course, makes it admissible." The defendant's attorney acted upon this suggestion, and swore as required, and the court then admitted the evidence. It is thus clear that if the court committed error in this regard it was error invited by the plaintiff, and therefore the plaintiff cannot be heard to complain. *Harper v. Morse*, 114 Mo., loc. cit. 323, 21 S. W. 517; *Johnson-Brinkman Co. v. Bank*, 116 Mo., loc. cit. 569, 22 S. W. 813, 38 Am. St. Rep. 615.

It is argued, however, that while the transcript might be used to refresh the memory of the witness who made it, it was inadmissible as evidence itself. Of this it is only necessary to say that no such objection was urged in the trial court, and that court cannot be convicted of error with respect to any matter not called to its attention. Cases must be tried in appellate courts upon the same theory upon which they were tried in the courts below. *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263; *Walker v. Owen*, 79 Mo. 563; *Hart v. Leete*, 104 Mo. 315, 15 S. W. 976; *Minton v. Steele*, 125 Mo. 181, 28 S. W. 746. There was therefore no error in refusing the plaintiff's second instruction.

Aside from all this, however, the evidence so complained of added nothing essential to the defendant's case, for the reason that substantially every fact so testified to was also shown by the testimony of other witnesses, and was practically the same as the testimony adduced by the plaintiff upon this trial. The trial was had before the court, and it does not appear how the rights of the plaintiff could have been prejudiced by the admission of such evidence.

The judgment of the circuit court is affirmed. All concur.

WARD v. HARTLEY.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

PUBLIC POLICY—ILLEGAL CONTRACTS—PARTNERSHIP—CAMPAIGN EXPENSES OF PARTNER.

1. Where the chief building contracts of a firm of building contractors related to public works in the city in which the firm was located, an agreement between the partners to pay from the partnership funds the expenses incurred by one of the partners in a campaign for the office of president of the city council was open to the imputation of being founded on an understanding contrary to public policy and is not enforceable.

2. The members of a firm agreed to pay the expenses of one of them in a campaign for a city office, the agreement being of such a nature as to be open to the imputation that it was contrary to public policy, and unenforceable. The money, however, was actually furnished, and there was no evidence that it was used for any improper purpose. *Held*, that the partner whose expenses were paid could not be compelled to return to the firm the money so advanced him.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Thomas J. Ward against William Hartley. From a judgment for plaintiff for a part of his demand, he appeals. Reversed.

Carl Otto, for appellant. T. J. Rowe, for respondent.

VALLIANT, J. Plaintiff and defendant entered into copartnership in 1890 in the city of St. Louis to transact the business of building and bricklaying. The firm continued in business from the date above named until September, 1896, during which period they transacted a large business, the gross receipts from which amounted to more than \$300,000. There had been no statement or adjustment of their accounts between themselves in September, 1896, when, to enforce such settlement, this suit was begun. By agreement the cause was referred to a referee, who, after due hearing, stated the account, and made his report. After that report was filed, it became necessary to refer the case again to the same referee to supplement his report by taking account of payments of debts of the firm which the plaintiff had since paid. The referee made his second report, which was final. The conclusion of the referee was that, if neither party had drawn anything out of the firm treasury, there would be in the treasury for division between the two \$9,114.11, whereof each would be entitled to \$4,557.05, but that defendant had drawn out for his own use \$9,765.10, while the plaintiff had drawn out nothing, and therefore, but for one outstanding debt amounting to \$671.01, the defendant would be indebted to the plaintiff in the sum of \$5,208.04. But the report recited that the plaintiff, for the sake of a final disposal of the case without further delay, consented that the referee might state the account as if that firm debt had been paid by the defendant, and in pursuance thereof the referee so stated the account, and found that there was a balance due from the defendant to the plaintiff of \$4,872.54, for which sum the referee recommended that judgment be rendered in favor of the plaintiff, and that each party pay half the costs.

It is unnecessary to state more in detail the account, for the reason that there is really but one item in dispute; that is, \$7,200, charged in the firm's expense account under the head of "election expenses." The report of the referee on this item is as fol-

lows: "This item is one of the main points of disagreement between the partners. And it seems to have stood in the way of their arriving at any settlement of their accounts among themselves. In the spring of 1893 plaintiff was a candidate for the office of president of the city council, and he claims that the expenses he incurred in that election amounted to about \$9,000, and he charged \$7,200 of this amount to the firm. He testifies that it was agreed between him and defendant that his election expenses should be borne by the firm. Several other witnesses testified to the fact that defendant told them that the firm was paying the election expenses of plaintiff. It appears that plaintiff had been a member of the house of delegates, and he testified that the firm secured its business largely by reason of the fact that he was in politics. He further testified that his election would further the chances of payment of several claims which the firm held. Defendant was present at the hearing before me, but was not sworn as a witness. I accordingly find that defendant believed that the election of plaintiff would be an advantage to the firm in business point of view, and that defendant did agree that the firm would pay the election expenses of plaintiff, and that they might be paid with the funds of the firm. Having agreed that the firm funds should be paid out for this purpose, defendant cannot now object to that expenditure. Ordinarily, defendant would be entitled to an itemized statement of the expenditures. From the nature of the expenditures it might not be reasonable that all the items of small expenditure should be given in detail, but defendant would be entitled to a statement itemized to a reasonable degree at least. But it was testified by plaintiff and Mr. O'Reilly that this item of \$7,200 was entered in the books of the firm in June, 1893, a few months after the election, and that defendant sometimes looked over the books. Defendant did not take the stand at all, but remained silent. I conclude, therefore, that this item was entered in the books at the time stated, and was seen by defendant. But he does not appear to have made any objection to it until some time in 1896. And then, as I gather from the testimony, his objection was to the entire item as an unauthorized expenditure. Defendant, having agreed that the expenditure should be paid by the firm when he saw the amount entered in the books, if he questioned the correctness of the amount, he should then have called for an itemized statement or other proof of the correctness of the sum entered in the book, and not let the charge stand unchallenged for about three years." Accompanying the referee's report is a schedule showing the works upon which the firm had been engaged, from which its receipts had been derived. Much the larger part of these were public works in the city. The defendant filed exceptions

to the report of the referee, the chief of which was aimed at this item of election expenses which the referee had allowed. The main ground of the defendant's exception to the item was that the agreement that the firm should pay it was void, because it was without consideration and against public policy. The court sustained the exception, and struck out that item, the effect of which was to reduce the amount which plaintiff was entitled to recover to \$1,272.54, for which sum judgment for the plaintiff was entered, each party to pay half the costs. The plaintiff appeals from that judgment, and assigns for error the action of the court in striking out that disputed item.

When an agreement has no legal consideration to support it, it cannot be made the basis of a cause of action nor of an affirmative defense. If such an agreement is relied upon for the cause of action, the plaintiff cannot prevail; if such is relied on by the defendant in a plea of confession and avoidance, the defense will fail. The question, therefore, of who is to suffer because the agreement is invalid, depends upon which party is forced to rely upon it. And so it is with a contract void because contrary to public policy, whichever party comes into court relying on it will be turned out; and not only will he be turned out when he comes seeking to enforce a contract contrary to public policy, but when he comes, either as plaintiff or defendant, seeking relief touching past transactions growing out of such a contract, the court will not listen to him. The court has no more regard for the man who comes seeking to recover what he voluntarily laid out in furtherance of an unlawful project than it has for one who seeks to enforce an unlawful contract. Courts prefer to have nothing to do with transactions growing out of such contracts, and to leave parties just where their own voluntary acts in such cases have placed them. *Tyler v. Larimore*, 19 Mo. App. 458; *Attaway v. Bank*, Id. 578; *Green v. Corrigan*, 87 Mo. 359. It appears from the record before us that the plaintiff and defendant were partners engaged in the trade of bricklaying and building. They undertook large contracts, the largest of which were for public works. They were competitors in the market with other concerns for like work. The plaintiff had been a member of the house of delegates, and was, at the time of incurring the expenses in question, a candidate for the office of president of the council. Both partners were of the opinion that the firm had derived benefit in the past because of the prominence of the plaintiff in politics, and would derive benefit in the future if he should be elected to the office for which he was a candidate, and for that reason it was agreed between them that the plaintiff should pay the expenses he would incur in his race for the office out of funds in the partnership treasury; that the plaintiff did

so, and defendant knew it; that the partnership continued thereafter for more than two years, and in the course of the partnership the defendant drew out of the treasury for his own use nearly \$10,000, which was a considerable overdraft of his share, and left nothing for the plaintiff. The position of the defendant now is that plaintiff must put back into the treasury the \$7,200 of election expenses, paid out as above indicated, before the balance is struck in the copartnership account, because, he says, there was no consideration to support his agreement to pay those expenses out of partnership funds, and besides the contract was against public policy.

The consideration to support the agreement was, to say the most for it, of doubtful validity. It may be that the mere eclat which the parties supposed would reflect on the firm by the elevation of one of its members to the high office in the city government was all that was contemplated, and it may be that they estimated that distinction as being worth the money they agreed to pay for it, just as many firms indulge in other forms of advertisement. But beyond that we can perceive no consideration for the agreement. The firm as bricklayers and builders could derive no legal advantage from the fact that one of its members was president of the council; and if the plaintiff had been elected, and had faithfully performed his duty in the office, as the law presumes he would, the firm would have derived no illegal advantage from his position. Therefore the motive for the agreement does not sufficiently appear to justify us in holding that it was supported by a legal consideration. The only theory on which direct advantage to the firm could be expected is that the plaintiff, if he had been elected, would have used his official influence to favor his firm over others in like business. But such a course would be liable to result in detriment to the public service, and would be contrary to public policy. When the validity of a contract is challenged on the ground that it is contrary to public policy, it is to be investigated as we investigate a transaction that is charged to have been contrived in fraud. We have no inflexible rule to apply to it, but must be governed by the circumstances of the case. In 15 A. & E. Ency. L. (2d Ed.) p. 971, the law writer says: "It is a general rule that contracts which place the individual interests of public officers in conflict with their duty to the public, or otherwise place them under an inducement to act in violation of such duty, are illegal." And in the same connection it is said: "In determining the validity of the contract, its actual effect upon the officer is immaterial, and therefore the fact that the contract did not actually have any corrupting influence upon the officer will not relieve it of illegality." Page 972. In *Koehler v. Feuerbacher*, 2 Mo. App. 11, the court, per

Bakewell, J., said: "Contracts in total restraint of trade, or of marriage, against the prohibitions of statutes, to infringe a copyright, to defraud the government or third parties, to oppress third parties, or prevent the due course of justice, or induce a violation of public duty that tends to encourage unlawful or immoral acts, or that are founded on trading with an enemy, are all against public policy, and void. And probably this is a complete enumeration of the several classes to which contracts against public policy may be reduced." In *Story on Contracts*, § 675, the author, speaking of public policy, says: "It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule, however, may be safely laid down; that wherever any contract conflicts with the morals of the times, and contravenes any established interest of society, it is void as being against public policy." In view of the fact that the chief building contracts on which this firm was engaged related to public works, the agreement between the partners to pay the election expenses of the plaintiff out of funds in the treasury of the firm is liable to the imputation (whether justly so in fact or not) that it was founded on such an understanding between them as was against public policy, and it is therefore one of those contracts which the courts decline to have anything to do with—either to enforce if it remains unexecuted, or to relieve against if what was intended to do has already been done. If the plaintiff in this case were now seeking to require his quondam partner to contribute to the payment of these election expenses on the ground that he had agreed to do it and that the plaintiff had incurred the expenses on the faith of the agreement, the court would turn the plaintiff away without relief. But the plaintiff is not here in that attitude. These expenses were not only agreed to be paid, but they were in fact paid out of funds in the firm's treasury, with the knowledge and consent of the defendant; and it is he who is asking to be relieved against the situation in which he voluntarily placed himself in doing what he now says was wrong against the public. In such case the court looks as coldly on the defendant as in the other view it looked on the plaintiff.

There is no suggestion in this record that this money was spent for an improper purpose. The law condemns the use of money to influence voters or election officers, but it recognizes that there are legitimate expenses to be met in a political campaign; therefore the mere fact that the plaintiff expended money for the purpose disclosed by the evidence does not carry the implication that it was spent for an unlawful purpose. The plaintiff had no more right to use the firm's money to pay his election expenses than he would have had to use it to pay any other individual debt of his own. But partners

may agree among themselves to donate any portion of the firm's money to any legitimate object; and if one of the partners, authorized by the others, does so, it is, as between themselves, as legitimate a use of the money as if it had been paid out in the discharge of a firm obligation. When a political campaign is on, if the members of a commercial firm get together and agree to contribute out of the firm treasury a certain sum to be used in the legitimate expenses of a particular candidate or party, and authorize one of their firm to pay the amount out of the firm assets then in his hands, as long as that agreement is unexecuted either party may repent of his agreement, and forbid its execution, because it has no consideration to support it; but if the partner who was directed to make the payment actually does so before any other member of the firm withdraws his consent, it becomes as to all the members a voluntary payment, and the partner who has made the disbursement cannot be called to account for it. That is just such case as we now have before us for decision. The plaintiff has not this money in his hands. He has, with the knowledge and consent of the defendant, long since paid it out to strangers to this record. The defendant's attitude is that of asking the court to decree that the plaintiff bring that money back. It is the defendant who is asking affirmative relief to lift him out of the consequence of his own self-alleged illegal contract, to throw the whole burden of their joint act on the plaintiff, who, at the worst, was only in pari delicto with the defendant himself. The court will leave them, in respect to that transaction, just where it found them.

The judgment is reversed, and the cause remanded to the circuit court, with directions to overrule the exceptions to the referee's report, and enter judgment for the plaintiff as therein recommended, adding to the \$4,872.54 interest at the rate of 6 per cent. per annum from the date of the report, June 26, 1900, to date of the judgment. All concur.

WATERS et al. v. HERBOTH.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

WILLS—WIFE'S TESTAMENTARY RIGHTS—STATUTES—CONSTRUCTION.

1. Laws 1895, p. 169, enacts that, if a wife die without "child or other descendants in being capable of inheriting," her widower shall be entitled to one-half her estate. Section 2939, Rev. St. 1899, provides that, if a husband die "without any child or other descendants in being capable of inheriting," his widow shall be entitled to one-half of his estate. Section 4003, Rev. St. 1899, gives a married woman the right to dispose of her estate by will, subject to the rights of her husband, if any, to his curtesy therein. The chapter on "Administration" (sections 105, 107, Rev. St. 1899) gives certain articles and \$400 to the widow in case the husband

die intestate; and section 111 gives the husband certain enumerated articles in case the wife die intestate; and section 2 of such chapter provides that if there is no more in the estate than the articles enumerated, and the amount of money mentioned, there shall be no administration. *Held*, that the interest given the husband by Laws 1895, p. 169, is one that the wife cannot defeat by will; such law and section 2939, Rev. St. 1899, being intended to form one law, establishing the relative rights of husband and wife in the property of each other under the same conditions, and sections 105, 107, 111, Rev. St. 1899, not being designed to affect final distribution.

Appeal from Circuit Court, St. Charles County; E. M. Hughes, Judge.

Judicial proceedings on settlement of the estate of Virginia E. Herboth, deceased. From a judgment of distribution, August Herboth appeals. Reversed.

Hickman P. Rodgers, for appellant. N. D. Thurmond, for respondents.

VALLIANT, J. Appellant was the husband of Virginia E. Herboth, who died in 1897, without ever having had a child; leaving a will purporting to dispose of all her property. When the probate court came to make a final distribution, the husband claimed one-half the estate, in spite of the will, by virtue of the act of the General Assembly entitled "An act to amend chapter 55 of the Revised Statutes of Missouri, 1889, entitled 'Dower,' by adding a new section thereto, to be known as section 4518a," approved March 2, 1895. Laws 1895, p. 169. The matter was carried by appeal to the circuit court, where the judgment was adverse to the husband's claim; that court holding that the act of 1895 was unconstitutional. The husband appeals.

Before the matter came on for final distribution in the probate court, the husband, as executor, had instituted in the circuit court a suit against the distributees and legatees, the object of which was to obtain an interpretation of the will. That suit resulted in a decree to the effect that the will did not recognize the right of the husband to one-half the estate under that statute, but did recognize the possibility of such a right, and provided that a legacy therein of \$1,500 to him, and a release therein directed of a deed of trust debt for \$2,000 which he owed the testatrix, should be conditioned on his not being entitled to one-half the estate under the statute, and that, if it should turn out that he was so entitled and claimed it, then the legacy of \$1,500 and the release of the \$2,000 debt should become void. It was also declared by the decree that the will expressly gave the husband, in addition to the \$1,500 legacy and the release of the \$2,000 debt, all that part of the estate that he would have taken if there had been no will under the act of the General Assembly of date April 8, 1895 (Laws 1895, p. 35), which is now section 111, Rev. St. 1899, in the chapter on "Administration." There was no appeal from the decree, and it is to be taken as the

final adjudication of that subject. It was after the decree in that case that this cause came on for adjudication of the rights of the parties on the final distribution of the estate, when, as above said, the circuit court held that the act of March 2, 1895, was invalid, and that the husband was entitled to only what the will gave him; hence this appeal.

In *O'Brien v. Ash*, 169 Mo. 283, 69 S. W. 8, the constitutionality of the act of March 2, 1895, which is now section 2938, Rev. St. 1899, was in question, and the court decided that the act was constitutional and valid. That decision by this court was not rendered before that judgment of the circuit court in this case. The case of *O'Brien v. Ash* was twice argued before us, and the question of the validity of the statute was fully considered. We have followed the argument of the learned counsel for respondents in the case now before us, but we see no reason to change our views on that question as expressed in *O'Brien v. Ash*.

It is urged, however, on the part of respondents, that, conceding the act in question to be constitutional, still it must be read in connection with section 4603, Rev. St. 1899, which gives the right to a woman to devise and bequeath her estate "by her last will and testament, subject to the rights of her husband, if any, to his curtesy therein." The contention is that the act of 1895 gives the surviving husband of the childless wife one-half her estate, provided only she die intestate, and the argument is that to hold otherwise would be to repeal or modify the statute which gives the wife the right to make a will. That the aim of the statute was to limit the right of the wife to dispose of her estate by will is quite evident, but in that particular her right was not more restricted by that statute than was her husband's right to dispose of his property by will under like conditions restricted under sections 2938, 2939, Rev. St. 1899. The two sections stand together in the revision, and were so intended by the lawmakers. They were intended to form, when taken together, one law establishing the relative rights of the husband and the wife in the property of each other under the same conditions; the only difference being that the husband's estate is required to make restitution of certain property he received from his wife, in addition to one-half of the property held by him in his own right at the time of his death. The twin sections are as follows:

"When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts."

"When the husband shall die without any child or other descendants in being, capable of inheriting, his widow shall be entitled: First, to all the real and personal estate which came to the husband in right of the marriage, and to all the personal property of the husband which came to his possession with the written assent of the wife, remaining undisposed of absolutely, not subject to the payment of the husband's debts; second, to one-half of the real and personal estate belonging to the husband at the time of his death absolutely, subject to the payment of the husband's debts."

The use of the same words to express the legislative intent in reference to the half of the wife's property which the husband is to have when she dies childless that are used to express the like intent in reference to her half of his estate when he dies childless shows that it was the intent to put the one as much beyond the wife's right to make a will as it was to put the other beyond the husband's right to make a will. We hold that the interest given the husband in the one section and that given the wife in the other are equally beyond the right of either to defeat the will.

It is argued for respondents that this construction makes the statute conflict with section 111, Rev. St. 1899, which gives the husband certain enumerated articles in case the wife die intestate. Sections 105-107 in the chapter on "Administration" give certain articles and \$400 to the widow. Those sections were not designed to affect the final distribution, but the idea was to allow the widow to have those articles in the beginning. They were to be separated from the estate that was to be administered—to form no part of it, neither for the creditors nor the distributees. They were to be given to the widow in the first place, and it was only what was left after those articles were given to the widow that was to be treated as the estate to be administered. This is further shown by section 2 in the same chapter, which is to the effect that, if there is no more in the estate than those articles and that amount of money, there shall be no administration. Section 111 was only intended to give the husband like articles and the same amount of money out of his wife's estate that she was to have under sections 105-107 out of his estate, provided she should die intestate. Those sections have nothing to do with sections 2938 and 2939, above quoted, and are not to be considered in construing them.

The court erred in holding that the husband in this case was not entitled to one-half the estate. The judgment is therefore reversed, and the cause remanded to be retried according to the law as herein expressed. All concur.

SIEGELMAN v. JONES.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

USURY—AGENCY—EVIDENCE.

1. Where, in replevin by a chattel mortgagee to recover the property, the defense is usury, evidence that an attorney acting as agent of defendant to secure the loan charged \$10 for the services is insufficient to show usury on the part of the plaintiff, who did not know of such charge, nor that any part of the money for which she gave the check was for the compensation of the attorney.

2. In an action on a loan, where defendant pleaded usury because of a commission paid by him to the attorney for his services, evidence that plaintiff had made several loans after the one in controversy through the same attorney was properly excluded, where evidence of other loans made before the present loan was admitted, and the evidence excluded was only cumulative.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by Hattie Siegelman against Fred M. Jones. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Grayston & Taylor and W. J. Owen, for appellant. Thomas & Hackney, for respondent.

ELLISON, J. This is an action in replevin. The judgment below was for plaintiff. It appears that plaintiff loaned defendant \$90. and took his note for that sum, with 8 per cent. interest, secured by a chattel mortgage. Plaintiff's claim is based on the mortgage, and the sole defense is usury in the loan. Defendant charges, and the undisputed facts show, that defendant only wanted to borrow \$80, but that, obtaining the money through an attorney, who charged him \$10 for procuring the loan, he executed his note for \$90. The evidence shows that plaintiff did not know that the attorney had charged the defendant for procuring the loan, nor did she know that any part of the \$90 for which she gave her check was for the attorney's compensation, nor did she know the attorney was receiving compensation. It was held in *Brown v. Archer*, 62 Mo. App. 287, that a lender could not put forward his agent to do a money-lending business for him, with the expectation and knowledge that such agent would obtain from the borrower the compensation due him for such services to the lender, and escape the consequences of the agent's unlawful exactions. Whether the attorney was plaintiff's agent was a question passed upon by the trial court, sitting as a jury. That court made a finding against the defendant's theory, and the principal question presented is whether there was any evidence upon which to base such finding. An examination of the record shows to us a case, the decision of which, were we the tribunal to pass upon facts in the first instance, would not be free from embarrassment. But it is just such a case as

the law has wisely left to be determined by the tribunal which has a view of the parties and witnesses, and an opportunity for observations and conclusions which are necessarily denied us. We believe the record does present evidence and circumstances which justify the court in its conclusions.

Complaint is made that the court refused to hear evidence of loans of plaintiff's money made by the attorney referred to after the present loan. The court heard all evidence as to other loans made before the present loan. The offers made of subsequent loans which were like those shown to have been made prior to the loan in controversy were only cumulative, and could not possibly have influenced the court, considering the number which had already been shown. To show loans subsequent which were of different character, and in which the business relations between plaintiff and the attorney were said to be different, would only evidence a change in their relations after the loan in question, and would, of course, not be competent. We do not believe, under the circumstances and the character of the evidence already heard, that error was committed in the rulings to which we have referred.

Other objections to evidence are not well taken. The purpose of the evidence complained of as being conversations out of defendant's presence, as declared and specifically limited by the court, was proper. And the same may be said of evidence of defendant's promise to pay the note.

After a careful examination of the case, our conclusion is that the judgment should be affirmed. All concur.

KOERPER v. ROYAL INV. CO.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

BUILDING CONTRACT—MODIFICATION—RESCISSION—ABANDONMENT—QUESTION FOR JURY—MECHANIC'S LIEN—COUNTERCLAIM.

1. Where no time is fixed in a building contract for the completion of the building, it must be completed in a reasonable time.

2. Whether a building contract was abandoned by the contractor is a question for the jury, under conflicting evidence.

3. Where the only consideration for plaintiff's signing a contract for a forfeiture in a modification of a previous contract was the defendant's unfulfilled promise to pay money due plaintiff under the first agreement, defendant has no counterclaim based on the forfeiture provision of the second contract, in an action to enforce a mechanic's lien for work done under the contracts.

4. Where a building contract was entered into, and afterwards rescinded by the mutual consent of the parties, a new agreement to proceed with the work under modified terms is supported by a valid consideration.

5. Where a building contract was entered into, and the contractor refused to do the work called for, a new agreement to proceed with the work under modified terms is supported by a valid consideration.

¶ 1. See *Contracts*, vol. 11, Cent. Dig. § 948.

6. A party to a building contract cannot rescind the contract where his own nonperformance of the contract prevents performance by the other.

Appeal from St. Louis Circuit Court; D. G. Taylor, Judge.

Action by Lawrence J. Koerper against the Royal Investment Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Adiel Sherwood and Jos. S. McIntyre, for appellant. C. W. Rutledge, for respondent.

Opinion.

GOODE, J. This is an action to enforce a mechanic's lien for work done on the dwelling house No. 4623 Berlin avenue, in St. Louis. What we are concerned with is a counterclaim set up by the defendant, wherein it claims a forfeiture of \$5 a day for 29 days, or \$145. Plaintiff, Koerper, who did business under the style of the American Stair Company, agreed to put in the stairways of said dwelling and some others then being constructed by the defendant. The contract was made by the following proposal, which was accepted by the defendant:

"St. Louis, Mo., Feb. 18th, 1902.

"Royal Investment Co.: We propose and agree to furnish and build the following stairs called for under the heading of stairs in and according to the plans and specifications prepared by —, Architect, for the building to be erected for one house owner, located at 4623 Berlin avenue, unless otherwise specified below:

1 main flight of stairs,	quartered white oak	
1 rear " "	yellow pine	
1 attic " "	yellow pine	(Accepted.)
		(\$208.00.)

for the sum of two hundred and eight dollars, \$208.00.

"Terms: One-half cash when stairs are roughed up; balance due when same are completed.

"Respectfully,

"American Stair Co.,

"By L. J. Koerper."

Koerper was slow about finishing the stairs—unreasonably slow, the defendant asserts—and was several times notified by the latter to expedite the work on the stairs of this and the other houses. Those notices failed to hasten the work rapidly enough to satisfy the defendant. So on June 20, 1902, a letter was addressed to the plaintiff, notifying him of the cancellation of his contracts. Said letter was as follows:

"June 20, 1902.

"American Stair Company, City—Gentlemen: You are hereby notified that we this date cancel your contracts for 4623-33 Berlin avenue and 5053 Westminster Place owing to the fact that you have failed to do anything you have agreed to do.

"We do this after sending a representative to your office to find out whether you are in a position to complete the work, and whether

er you have the material on hand, which we find you have not; besides there is nobody there to attend to business.

"We will have the work finished and charge the same to your contract account. We will have it finished at once.

"Yours truly,

"Royal Investment Company,

"C. R. H. Davis, Pres."

This letter was received on the day it was written, and plaintiff thereupon called the president of the defendant company by telephone, and protested against the attempted cancellation, as he had almost finished the work. Davis told Koerper to come to the former's office, and they would talk the matter over. Koerper went, and the result of the interview was the submission of the following proposal by the plaintiff, and its acceptance by the defendant.

"St. Louis, June 23, 1902.

"Royal Investment Company, City—Gentlemen: We agree to finish complete 4623 Berlin avenue by the 1st day of July or forfeit \$5.00 a day for every day after July 1st, that expires until the stairs are completed.

"We also agree to finish 4623 Berlin avenue by July 5th or forfeit \$5.00 per day.

"We also agree to finish 5053 West Minister Place complete by July 6th or forfeit \$5.00 per day.

"If in the event over five days should elapse between the date we agree to complete the stairs, we hereby authorize the Royal Investment Company to have the stairs completed at our expense.

"It is agreed and understood that the payment is to be spot cash upon the completion of each house, providing the other work is progressing according to this agreement.

"Yours truly,

"American Stair Company,

"Per J. L. Koerper."

After the execution of that agreement the work still proceeded slowly, notwithstanding hurry notices from the defendant, and was not finished until the latter part of July—plaintiff says the 26th, and defendant the 29th.

The counterclaim is based on the provision of the last contract for a forfeiture of \$5 a day unless the stairs were completed by July 1st. Koerper asserts that the sole cause of the delay prior to June 23d, when the contract for a forfeiture was signed, as well as subsequent to that date, was the failure of the defendant to pay him one-half the contract price when the stairs were done in the rough, as by the original contract the defendant was bound to do; that, on account of not being paid, he was unable to get material or hands to finish the work. He further contends that the sole consideration for his signing the contract providing for a forfeiture was the agreement of the defendant to pay what was due him on account.

The circuit court held the provision for a forfeiture of \$5 a day should be treated as

penalty, instead of liquidated damages, and that in no event was the defendant entitled to recover more than nominal damages on his counterclaim, as it made no proof of actual damages. The defendant insists that this ruling was erroneous, and that is the main proposition discussed by its counsel. But for the question of penalty or agreed damages to become material, it is indispensable that the contract providing for forfeiture should be supported by a consideration; otherwise, whatever its meaning is, it is a nude pact.

One theory of consideration presented by the defendant is that in making the second contract it waived any claim for loss theretofore entailed by plaintiff's failure to complete the stairs in a reasonable time. Suffice to say as to this proposition that there is nothing in the contract of June 23d referring to a claim by defendant for damages for previous delay, or undertaking to waive such a claim.

Another proposition relied on in this connection is that if the plaintiff had broken his agreement prior to June 23d, by failing to finish the stairs in a reasonable time, and remained in default after repeated demands for performance, those facts gave the defendant a right to cancel the original contract, as it undertook to do on June 23d, and that the original contract being then at an end, the parties made a new one, giving the plaintiff until July 1st to finish the stairs, and binding defendant to pay him the price originally stipulated. The first agreement contains no clause providing for its annulment or rescission by one party for the other's breach. The defendant's right to rescind it for nonperformance by plaintiff depends, therefore, on the rules of contract law which define the limits of the right to rescind for a breach. No time having been fixed in the first contract for the completion of the work, plaintiff was bound to complete it in a reasonable time. *Bryant v. Saling*, 4 Mo. 522; *Salisbury v. Renick*, 44 Mo. 554. The several notices given to the plaintiff informed him that defendant was insisting on its legal right to have the work done in a reasonable time; and protracted delay on his part, without good cause or excuse, might have constituted such a breach of the contract as would justify the defendant in treating it as abandoned, and taking steps to have the work finished by some one else. 2 *Parsons, Contracts* (8th Ed.) p. 794; *Dubois v. Canal Co.*, 4 Wend. 285; *Lake Shore Ry. Co. v. Richards* (Ill.) 38 N. E. 773, 30 L. R. A. 33; *Miller v. Phillips*, 31 Pa. 218; *Cook v. Hamilton Co. Comm'rs*, 6 Fed. Cas. 392 (No. 3,157). By no means every breach of a contract by a party entitles the other to regard it as abandoned, and it is not always easy to tell what breach is sufficient to do so. One rule is that, when the failure or refusal to perform substantially deprives the innocent party of the benefit that would

arise from performance—in other words, goes to the entire consideration that induced him to make the contract—he may treat it as abandoned by the nonperforming party. *Freeman v. Taylor*, 8 Bing. 124; *Geary v. Bangs*, 37 Ill. App. 301; *Tarrabochia v. Hickie*, 1 Hurlst. & N. 182; *Springfield Seed Co. v. Walt*, 94 Mo. App. 76, 67 S. W. 938. The consideration for the defendant's agreement with the plaintiff was the building, not the partial building, of the stairs, and delay in finishing a job of that sort could be extended until it operated to practically destroy the benefit or consideration which prompted the owner to contract. One may readily see that a contractor engaged to construct some detail of a building in process of erection might be guilty of such obstinate delay, after notice to expedite the work, as would render it necessary for the owner of the building to have some one else complete that particular work, or do without his house indefinitely. But this case presents disputed facts as to the abandonment of the first contract by the plaintiff. So a conclusion cannot be pronounced as a matter of law one way or the other. Plaintiff's contention is that the delay was forced by the refusal of the defendant to pay him, while the defendant's is that it was causeless and inexcusable. The question of abandonment was therefore for the jury. *Chouteau v. Jupiter Ironworks*, 94 Mo. 388, 7 S. W. 467. It is only when the facts are shown without conflict that the question is one of law. *Henry v. Bassett*, 75 Mo. 89; *Casey v. Gunn*, 29 Mo. App. 14. It was submitted to the jury, and what we are to determine is the soundness of the court's rulings on the instructions requested by the two parties relating to that issue.

For the plaintiff, the court instructed the jury that, if they found the only consideration for plaintiff's signing the contract for a forfeiture was defendant's promise to pay him anything already due under the first agreement, they should find a verdict for the plaintiff on the counterclaim. That instruction was proper, as presenting the phase of the facts testified to by the plaintiff, namely, that the only consideration for the contract of June 23d, providing for a forfeiture, was defendant's promise to pay what was then due. As there was testimony to support this theory, it was right to instruct on it. Such a promise would be an inadequate consideration for plaintiff's supplemental agreement for a daily forfeiture. *Lingenfelder v. Brewing Co.*, 103 Mo. 578, 15 S. W. 844. The first agreement contained no forfeiture clause, and an agreement to modify a previous one must be supported by a new consideration. *Henning v. Ins. Co.*, 47 Mo. 425, 4 Am. Rep. 332; *Merrill v. Trust Co.*, 46 Mo. App. 236.

Another instruction given for the plaintiff may or may not have been accurate, in treating the forfeiture as penalty, instead of liq-

liquidated damages, but we are not concerned with that point now. The point of immediate moment is whether it was accurate in its treatment of the issue of cancellation or abandonment. On that issue it told the jury that if plaintiff voluntarily abandoned the original contract, or consented to its cancellation, or failed and refused to proceed with the work under it, and defendant, after such failure, notified him that it canceled said contract because of his failure, and plaintiff, subsequent to his abandonment, consent to the cancellation, or receipt of such notice, signed the contract of June 23d, it was a valid agreement. That charge, therefore, finds an adequate consideration for the second contract in either of these three contingencies, to wit: First, an abandonment of the original contract by the plaintiff; second, his consent to its cancellation; third, his refusal to proceed with the work, and notice of rescission by defendant given because of such refusal. It is obvious that the first and third contingencies are in effect one, for an outright refusal, without good cause, to complete the work, would be an abandonment, and the instruction couples failure and refusal to proceed by the conjunctive particle. The second contingency was a rescission by consent, which would have been valid, of course. The effect of the instruction was that if the jury found the plaintiff agreed to a rescission of the first agreement, or refused to do the work called for, the second agreement was valid; and that is the law.

Defendant asked an instruction declaring that the contract of February 15th required plaintiff to complete the work in a reasonable time, and if the jury believed it was not completed in a reasonable time, and plaintiff was repeatedly notified to go on with it, but failed to do so, then defendant had the right to cancel the contract, etc. The deficiency in the statement of facts declared in that charge to afford just ground for rescission by the defendant is that it took no account of the plaintiff's evidence that his failure to go on with the work was due to the defendant's refusal or failure to pay the first installment of the price. Defendant had no right to rescind for plaintiff's nonperformance, if its own nonperformance prevented him from performing. *Eberly v. Curtis*, 5 Mo. App. 596; *Smith v. Coal Co.*, 36 Mo. App. 567; *Preble v. Bottom*, 27 Vt. 249.

The other difference between the plaintiff's and the defendant's instructions is that the former treat the forfeiture clause as providing a penalty, and the defendant's as stipulating the damages to be recovered if the stairs were not finished in time. The court adopted the plaintiff's view of that question, and its ruling would make it necessary to decide whether the provision was for penalty or stipulated damages, but for

the fact that the verdict went against the defendant on its counterclaim; thus demonstrating that the jury found the plaintiff neither abandoned the original contract, consented to its cancellation, nor failed and refused to proceed with the work under it. This was equivalent to finding that there was no consideration for the contract of June 23d, except a promise by the defendant to pay plaintiff what was already due, for the only contingency in which the jury was directed to disallow the counterclaim entirely was a finding that such a promise, and nothing less, was the consideration. If they found the original contract had been abandoned by plaintiff, or he had refused to proceed with the work, or consented to its cancellation, they were instructed to allow nominal damages, namely, \$1, on the counterclaim. As the jury disallowed the counterclaim, it is unnecessary to pass on the question of penalty or liquidated damages.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

HEMAN CONSTRUCTION CO. v. McMANUS.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

MUNICIPAL CORPORATIONS—SIDEWALKS—ASSESSMENT—CONSTRUCTION BY OWNER—CONSTRUCTION BY INTERSECTION—LIABILITY—COST OF OTHER INTERSECTIONS—ORDINANCES.

1. A city ordinance directed the cost of certain sidewalks to be charged as a lien on adjoining property, and that there should be assessed against each lot the cost of the improvement in the proportion that the linear feet of each lot should bear to the total number of all the property chargeable, but that where the owners had constructed a sidewalk at their own expense the feet so constructed should be excluded from the total number of feet in making the calculation, and that as to them no charge should be made except for the pro rata cost of intersections. Under another ordinance, a lot owner within the improvement district was granted permission to pave the sidewalk in front of his property, and under an ordinance the annual contractor constructed various intersections within the improvement district. *Held*, that the fact that the lot owner had constructed intersections at the corners of his property did not relieve him from liability for his pro rata share of the construction of all intersections embraced in the improvement district.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by the Heman Construction Company against Camilla S. McManus. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Hickman P. Rodgers, for appellant. Sim T. Price, for respondent.

REYBURN, J. This, an action upon a special tax bill, originated before a justice of the peace of the city of St. Louis, and on

appeal a nonjury trial was had upon the following agreed statement:

"It is agreed that this case may be submitted upon the following statement of facts, to wit:

"Section 568. Sidewalks, Constructed at Expense of Owner, When. Whenever the municipal assembly shall direct, by ordinance, the improvement of a public street or avenue, the board of public improvement may, upon the application of the owner of any property fronting or bordering such improvement, grant permission to such owner to construct the sidewalk in front of said property, but without such permission no sidewalk shall be constructed by any person other than the contractor having the annual contract for constructing new sidewalks.' Revised Ordinance, City of St. Louis, 1892.

"Section 1372. Contracts for Grading and Repairing, to be Made Annually. The board of public improvements shall, in every year, enter into contract for one year, beginning on the first of July, for the grading, constructing, reconstructing and repairing of sidewalks, and for the repairing of street and alley and gutter paving, and such other similar work as may be ordered by ordinance, or which may become necessary to be done during the year.' Revised Ordinance, 1892.

"That said board of public improvements entered into contracts with G. Eyermann, Jr., which contract was numbered 4,282, and duly executed for the work mentioned in the preceding section, and for the particular year during which the work mentioned in the special tax bill hereinafter set forth was constructed.

"Ordinance 18,864, approved March 25, 1897, which ordinance is hereto attached and made a part of this statement.

"Permit No. 13,660, dated April 1, 1897, issued by board of public improvements to Thomas Ward McManus, a copy of which permit is hereto attached and made a part of this statement:

"Permit No. 13,660. (Copy.) St. Louis, Apl. 1, 1897. Permission is hereby granted Thos. Ward McManus to pave sidewalk with granitoid in front of his property on E. S. of Sarah Str. from Pine Str. to Laclede Ave. abt. 500 ft. x 6 ft. To be completed on or before May 1st, 1897. Said work must be done in accordance with the specifications of the street department, and the street commissioner must be notified when the work is to be commenced. (Per application of Apl. 1st, 1897.) Said work must be done under the supervision and control of the street commissioner and to his satisfaction. By Order of the Board of Public Improvements. Robt. McMath, President.'

"That Thomas Ward McManus, under the authority of permit No. 13,660, constructed the entire sidewalk on Laclede avenue and Pine street, fronting the property of said Camilla S. McManus, and that said sidewalk as constructed included the intersections

which were part of said sidewalk in front of said McManus' property, and that said work as done was accepted by the city of St. Louis.

"That afterwards, and in pursuance of the authority conferred by the charter and ordinances of said city and said contract No. 4,282, the contractor named in said contract constructed all of the intersections on Sarah street between Laclede avenue and Olive street, with the exception of the following, viz.:

"The intersections which constituted a part of the sidewalk constructed by Thomas Ward McManus in front of the property of defendant, Camilla S. McManus; the intersections made by certain other property owners under same circumstances as McManus; and the intersections which had been previously made as a part of the sidewalk of streets crossing said Sarah street between Laclede avenue and Olive street.

"That afterwards the special tax bill involved in this suit, being Exhibit A to plaintiff's petition, and which tax bill is made a part of this statement, was issued to the contractor named in said contract No. 4,282, for the cost of said intersections made by him, and by said contractor was assigned to Heman Construction Company. That demand for the payment of said special tax bill was made upon Thomas Ward McManus on July 7, 1897, and that no part of said special tax bill has been paid, and that Camilla S. McManus was the owner of property fronting on east side of Sarah street between Laclede avenue and Pine street, but said demand may be considered as good as if made upon her.

"That the copy of final measurement, diagram, and certificate signed by A. N. Milner, which is hereto attached, correctly describes the work done by said contractor under said Ordinance No. 18,864, and that the following explanations of the same are true, viz.:

"(1) The parts shown in pale blue represent sidewalks laid by contractor and assessed against the property abutting same.

"(2) The parts shown in red represent intersections made for the purpose of connecting detached parts of sidewalk in the district on Sarah street between Laclede avenue and Olive street, the total cost of which intersections was prorated and assessed against all the property fronting on Sarah street in said district according to the front foot; the validity of such assessment against the McManus property being the question involved in this case.

"(3) That at the time the sidewalks and intersections shown in diagram were laid all other sidewalks and intersections on Sarah street and the streets running east and west where the same cross Sarah street had been laid, but are not shown in diagram.

"(4) The parts marked 'Previously done,' and appearing at a point representing Lindell Boulevard where it intersects Sarah

street on the east, were not laid under the contract in this case, but are shown for the purpose of illustrating the purpose of intersections."

Ordinance No. 18,864, approved March 25, 1897, was made up of three sections. The first authorized the board of public improvements to cause the sidewalks on Sarah street, between Laclede avenue and Olive street, to be constructed of granitoid, excepting such parts as were already paved. Section 2 provided for the material of which the sidewalks should be made, and the last section directed that the cost should be charged as a lien upon the adjoining property fronting or bordering on the improvements provided for, and paid by the owners, and the method of ascertaining the proportionate amount chargeable against each abutting lot was then ordained in the following words: "When said work is completed, the president of the board of public improvements shall compute the cost thereof, and levy and assess the same as a special tax bill against each lot of ground abutting thereon and chargeable therewith in the names of the owners thereof, respectively, in the proportion that the linear feet of each lot fronting or bordering on said improvement bears to the total number of linear feet of all the property chargeable with the special tax aforesaid, and shall make out and certify to the comptroller, on behalf of the contractor, bills of such cost and assessment accordingly as required by law: provided, however, that in cases where owners of abutting property have constructed such sidewalk at their own expense and the same is not reconstructed by the city hereunder, the linear feet of such property shall be excluded from the total linear feet in making such calculation and assessment for such abutting sidewalk, and as to them no assessment or charge shall be made, except for the pro rata cost of intersections authorized by this ordinance."

The improvement district was in a residence neighborhood, and the sidewalks extending in every direction were but six feet wide, with spaces of three feet at each side, one such space adjacent to the building line and one abutting on the street next to the curb; hence at the various street corners where sidewalks had been constructed only in front of each corner lot an unimproved space or intersection remained directly opposite each front, and beyond the boundary line of the adjoining lot.

From the conceded facts it thus appears that ordinance numbered 18,864 provided for construction of granitoid sidewalks on Sarah street between Laclede avenue and Olive street; that prior to the passage of this ordinance the board of public improvements, under authority of section 568 of the Revised Ordinances of the City of St. Louis, granted permission to Thomas W. McManus, representing the respondent, to pave the sidewalk with granitoid in front of property of re-

spondent, on east side of Sarah street from Pine street to Laclede avenue, and on behalf of respondent such sidewalk was constructed, intersections inclusive, and the work accepted by the city. The annual contractor, under municipal directions and authority of the charter and ordinances of the city, and especially contract No. 4,248, between him and the city, constructed 10 intersections on Sarah street between respondent's property and Olive street, being all remaining intersections between Laclede avenue and Olive street, except those intersections constituting part of the sidewalk constructed by respondent, intersections made by other property owners under the same conditions, and intersections previously made as part of the sidewalk of streets crossing Sarah street between Olive street and Laclede avenue. Under section 1372 of Revised Ordinances, the board of public improvements was authorized to enter into the annual contract with Eyer-mann. Ordinance No. 18,864, approved March 25, 1897, had authorized and directed the sidewalks on Sarah street between Laclede avenue and Olive street; and under section 568 of the Revised Ordinances, and by permit No. 13,660, of date April, 1897, respondent, in effect, had been permitted to construct the sidewalk on Sarah street from Laclede avenue to Pine street, being 446 feet, and constituting so much of the work contemplated by ordinance 18,864 as was directly abutting her property. The purpose of section 568 was to permit the property owner under supervision, and subject to approval of and to the satisfaction of the street commissioner, and in accordance with the specifications of the street department, to perform that portion of the work chargeable against his property, in lieu of having it performed by the contractor under contract executed by virtue of section 1372.

The permit under which respondent constructed the sidewalk adjacent to her property was silent respecting intersections, and the concluding clause or sentence of the ordinance, under which the contractor performed the work, exempted from any assessment or charge owners of abutting property who had constructed such sidewalks at their own expense, and when same was not reconstructed under the terms of the ordinance, except for the pro rata cost of intersections authorized thereby. If respondent had refrained from constructing the intersections at the corners of her property, and been content to have the contractor perform such work, the other property owners in the improvement district would have contributed proportionately to the cost of her intersections, in like manner as she is now asked to contribute toward the cost of making other intersections. The tax bill, under the agreed statement, made a prima facie case for plaintiff, and the ordinance is in no respect assailed. The proposition advanced on behalf of respondent that her construction of the

intersections adjoining was, in effect, a full payment of and absolved her of any and all obligations that could have been imposed upon her property for the construction of all intersections embraced in the improvement district designated by the ordinance is not maintainable, and is negated by the language of the ordinance itself in express terms. The defendant has failed to establish any fact rebutting the presumptive force of the bill upon which the action is founded, and under the latest authorities her property is burdened with its payment. *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163. The judgment, therefore, will be reversed, and the cause remanded, with instructions to enter judgment for plaintiff for the amount of the tax bill, with interest at the rate of 15 per cent. per annum from July 7, 1897.

BLAND, P. J., and GOODE, J., concur.

PRIESMEYER v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

STREET RAILWAYS — INJURY TO PEDESTRIAN — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF — EVIDENCE — SUFFICIENCY — INSTRUCTIONS.

1. Where, in an action against a street railway company for injuries to a pedestrian from being struck by defendant's car, there was no proof that plaintiff did not look or listen before attempting to cross the track, it will be presumed that she was in the exercise of due care.

2. It is not negligence as a matter of law for a person to fail to look and listen before attempting to cross a street railway track while a car is over 200 feet distant, with the view of the motorman unobstructed.

3. Where plaintiff, in attempting to cross defendant street railway company's track, fell while the car was over 200 feet distant, and the motorman's view unobstructed, the question of whether he could have seen plaintiff in time to have stopped the car before injuring her was for the jury.

4. In an action for negligence, failure to specifically define reasonable care is not error, where no such definition was requested.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Action by Louisa Priesmeyer against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle, Priest & Lehman, for appellant. Thomas B. Harvey, for respondent.

REYBURN, J. In action for damages for personal injuries, plaintiff's cause of action was substantially set forth as follows: That on the 13th day of April, 1902, as she was crossing the street and car tracks of defendant, the transit company, at intersection of Eleventh and Hebert streets, defendant, by negligently running one of its cars at a high and dangerous rate of speed, and by

negligently failing to ring a bell, sound a gong, or give other warning to plaintiff of the approach of its said car, and by negligently failing to keep a vigilant watch for persons upon or crossing the streets and the car tracks of defendant, and by negligently failing to stop its said car after defendant and its servants saw, or by exercise of ordinary care could have seen, the dangerous position of plaintiff on the street near or on its tracks, did negligently cause said car to run over plaintiff; and the hurts inflicted were detailed, damages specified, and judgment therefor prayed.

The answer embodied a general denial and plea of contributory negligence, in that plaintiff went and was in front of a moving car at a time and place when she knew, or by exercise of reasonable care should have known, of the approach of the car, and avoided collision therewith.

Plaintiff, an aged woman, about 71 years old on day of the occurrence, in her testimony evidenced great mental weakness. She stated that she had always been healthy and strong prior to the injury, and was walking down Eleventh street to Hebert street on the afternoon of the day involved, which was Sunday, to visit her sister; that she heard no bell or car, nor did she see the latter, and was struck by the car on Hebert street while crossing going south, and rendered unconscious.

Henry Nagle and Edward S. Fiedler, teamsters, were standing at the southwest corner of Eleventh and Hebert streets, and witnessed the casualty. The first named testified that they had been at the corner about five minutes, and saw Mrs. Priesmeyer as she stepped off the curb at northeast corner of Eleventh and Hebert streets, passing from north to south side of Hebert street on east side of Eleventh street, and she fell as she hit the rail, and the car was then coming round the curve 250 or 300 feet away, going north on Tenth street, making the bend for Hebert street, and running at from 25 to 30 miles per hour; that the time was near half past 6, the day bright and still light, no lights being lit even in the saloon from which they had just emerged; that the motorman made no effort to check or stop the car until he struck the lady; that witness saw the car at the bend or curve, from which there was a clear unobstructed view for three blocks from the curve, the corner of Tenth and Hebert streets being vacant except for a signboard extending at an angle across; that he took occasion to go to the point mentioned, where he saw the car, to see whether he could observe clearly the corner where the lady was, and found he could; that the curve was long and not abrupt, and Tenth and Hebert streets came together there. On cross-examination he stated he was 60 feet from the lady, and she was prostrate scarcely a second when she tried to rise, and the car hit her as she was on her

hands and knees attempting to get up; that he remarked to his companion upon the speed of the car. On redirect examination he stated all of the curve was visible from where the lady was, and at request of plaintiff's counsel he had measured the distance, and found it was 200 feet to the curve; that the car was on the curve 200 feet away when she fell. Fiedler testified the car ran north on Tenth street to Hebert street, the latter extending in a northwestern direction as the prolongation of Tenth, and the remainder of his testimony was strongly corroborative and confirmatory of the narrative of the accident by Nagle. Two passengers in the car deposed as to its speed of 25 to 30 miles per hour, that it was light, and there was a clear view from the beginning of the curve to Eleventh street.

1. It is contended that the imperative instruction asked at close of plaintiff's case, and repeated at close of the whole case, should have been given, upon the theory that plaintiff introduced no proof that she looked or listened for a car while approaching or going upon the track. The testimony of the eyewitnesses established that the car was 200 feet or more away when the plaintiff stepped on the track, and the court was thus urged to declare as a matter of law that for a pedestrian to attempt to cross a street car track upon which a car was distant 200 feet or more, without looking or listening for the distant car, was such contributory negligence as to bar her recovery. There is an absence of any proof that she did not look or listen, and it devolved on defendant to establish the affirmative defense of contributory negligence, if any there was. *Crumpley v. Railway*, 111 Mo. 152, 19 S. W. 820. And, in absence of such proof to the contrary, the presumption is that she was exercising at the time care and diligence. *Crumpley v. Railway*, supra; *Weller v. Railway*, 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532; and *Id.*, 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592.

This case bears no resemblance to the *Moore* case, relied on by appellant. *Moore v. Railway* (Mo. Sup.) 75 S. W. 672. Plaintiff neither attempted to cross the track immediately in front of, nor in such close proximity to, a moving car as to be struck thereby before she could cross. A pedestrian is certainly justified, without imputation of negligence, in passing over a street car track in the city of St. Louis, 200 feet ahead of a car approaching at rate of 8 miles, or even more, per hour, in plain view of the operative of the car. *Schafstette v. Railroad* (Mo. Sup.) 74 S. W. 826.

The testimony of plaintiff's witnesses, which must be taken as true in considering the instruction by way of demurrer, tends to prove that no effort was made to control or lessen the speed of the car until it was upon plaintiff, and that the place where she fell was in plain view for 200 feet and more in

the direction from which the car was arriving. The distance dividing plaintiff and the car, when she stepped on defendant's track, was sufficient to justify the conclusion that the car could have been stopped by proper effort before reaching the spot where plaintiff had fallen. The imperative instructions were, therefore, properly refused; and the court also properly submitted for the determination of the jury the issue whether defendant's servant, its motorman, saw plaintiff's peril in time to have avoided the injury by the exercise of ordinary care, or, by the exercise of ordinary care in watching and looking out in front of him, he could have discovered plaintiff's peril in time to have avoided injuring her by exercise of ordinary care in stopping or checking his car.

2. Appellant next complains that the court erred in submitting to the jury the question of whether the plaintiff was guilty of contributory negligence, assigning that as the plaintiff did not look or listen for the approaching car, and no obstacle prevented her seeing it, there was no question of fact for the jury. It devolved on defendant, as already stated, to establish by proper proof its plea of contributory negligence, and there was no evidence introduced to show that plaintiff failed to look or listen for a car, and the presumption, therefore, obtains that plaintiff did what common prudence and ordinary care demanded of her. The instructions to the jury, read together, fairly and clearly submitted to the consideration of the jury all the issues embraced in the case, and, if defendant had desired more specific definition of what constituted reasonable care than contained in the charge, it was its right to ask therefor—"mere nondirection is not error." *Fearey v. O'Neill*, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440.

Upon the record before us the case was fairly tried, and, in view of the injury to plaintiff, the amount of the verdict conservative, and the judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

FILLINGHAM v. ST. LOUIS TRANSIT CO.*
(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

CARRIERS—PASSENGERS—STREET CAR—INJURY IN ALIGHTING—SUFFICIENCY OF PETITION—PRELIMINARY STATEMENT OF COUNSEL—EFFECT—ASSUMPTION OF RISK—DURATION OF CONTRACT OF CARRIAGE—INSTRUCTION AS TO DEGREE OF CARE—CONTRIBUTORY NEGLIGENCE.

1. A passenger alleged that the defendant company operated an electric line through a country district; that the car she was on was an open one; that at a regular station defendant maintained an elevated wooden platform; that plaintiff notified the conductor of her desire to alight at this station, and that it was the duty of the carmen to stop opposite the

*Rehearing denied December 1, 1903.

platform, but they carelessly ran the car beyond that, and stopped where the ground was three or four feet below the running board and the surface was rough; that when the car stopped the conductor carelessly called the name of the station, and waited for plaintiff to alight, without offering to assist her; and that in attempting to step carefully onto the ground, by reason of the great distance and the uneven surface, she fell and was injured. *Held*, that the petition stated a cause of action, though it was not expressly averred that the place where the car stopped was unsafe or dangerous.

2. The opening statement of counsel as to what he expects the evidence will disclose is not an admission binding on his client, so as to form a basis for a nonsuit.

3. The doctrine of assumption of risk has no application to the case of a passenger injured while attempting to alight from an electric car at a dangerous place selected by the carmen, though she made no demand to have the car returned to a safe place for alighting.

4. A passenger's contract for carriage on an electric car covers the period needed for safely alighting therefrom, during which she is entitled to be shown the highest degree of care.

5. In an action by a passenger for injuries, an instruction that defendant is held to "the utmost care, skill, and vigilance," accompanied by a recital of the particular facts which will sustain a recovery, is not ground for reversal, in the absence of a request for amendment, though it does not define the degree of care specified as that which would be exercised under the circumstances by very cautious men.

6. An electric car running through a country district ran past a platform provided for the exit of passengers and across a road, where it stopped to permit a passenger to alight, the conductor calling the station. There was a footboard along the side of the car, and plaintiff was permitted to alight, without assistance or remonstrance from the carmen, at a place testified by her to have been 3 or 4 feet, and by others 22 inches, below the footboard, and where the ground was uneven. *Held*, that she was not necessarily guilty of contributory negligence, though she failed to go along the footboard to the rear of the car, which was opposite a level piece of ground.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Phoebe Fillingham against the St. Louis Transit Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Boyle, Priest & Lehman, for appellant. Judson & Green, for respondent.

Opinion.

GOODE, J. The point is made in this case—which is one to recover damages for personal injuries—that the petition is fatally defective in failing to show any connection between the negligence charged against the defendant and the injuries to the plaintiff. To deal with that point, a synopsis of the petition will be given. After charging that the defendant owns and operates an electric railway in the city of St. Louis and northwardly therefrom through St. Louis county to Creve Coeur Lake, the petition states that the plaintiff was heretofore a passenger on one of the defendant's cars traveling over said country line; that the car was an open one, with a footboard on either side for the

use of passengers in entering and leaving it; that one of the regular stations on the line for receiving and discharging passengers was at Woodson Road, a wagon road intersecting the railway three or four miles west of the city limits; that at said station defendant maintained an elevated wooden platform for the safety and convenience of passengers in entering and leaving its cars, which platform was located on the north side of its track, and immediately west of Woodson Road, and was known as "Woodson Road Station"; that plaintiff notified the conductor of the car she was on of her desire to leave it at Woodson Road, and that it was the duty of the carmen to stop opposite said wooden platform for her to alight, but that they carelessly ran the car beyond the platform across Woodson Road, and brought it to a stop some distance west of both the platform and the road, at a place where the ground was three or four feet below the running board of the car from which passengers had to step in alighting, and where the surface of the ground was rough; that when the car came to a stop at that place the conductor carelessly called the name of said station, and waited for plaintiff to alight, without having the car returned to the platform, and without assisting or offering to assist her; that plaintiff thereupon attempted to step carefully from the railing of the car, and in doing so, by reason of the great distance from the railing to the ground underneath, and on account of the uneven surface of the ground, fell, and was severely injured. In addition there is an averment as to the extent of her injuries. The testimony for the plaintiff went to prove the truth of everything alleged.

The objection made to the sufficiency of the petition is that there was no averment that the place where the car stopped was dangerous for an alighting person. It is true the adjective "unsafe" or "dangerous" is not used in the petition, but the description of the spot shows it was an inconvenient place, necessitating an awkward descent from the footboard. According to the petition, the surface of the ground was three or four feet from the footboard of the car, and was, moreover, rough, and liable to cause her to fall. It is charged, besides, that there was a platform where it was customary to let passengers off, and that, instead of stopping the car at the platform, the carmen ran past it, then stopped opposite low ground, and the conductor called out her station, and permitted her to get off without assistance or remonstrance. The stated acts of the defendant's employes in charge of the car were negligent acts, and they are pleaded as the cause of the injury to the plaintiff; so the assignment against the sufficiency of the petition is overruled.

2. Error is assigned because the circuit court refused to nonsuit the plaintiff on the opening statement made by her counsel.

¶ 4. See Carriers, vol. 9, Cent. Dig. §§ 1224, 1332.

That statement was not a solemn admission in court of facts material to the case, but was a mere recital of what facts counsel expected the evidence would disclose. Such a statement to the jury is intended to help them grasp the bearing of the evidence on the issues, and ought to be truthfully given. But the law in this state does not authorize the nonsuit of a party on a statement of anticipated proof, which, perchance, contains something that might, if established by evidence, result in a nonsuit. Parties are bound by the admissions of their counsel, during trial, of facts material to the issue to be tried, as such admissions dispense with the necessity of proving the doubtful fact. *Pratt v. Conway*, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602. But a mere preliminary outline by counsel of what he expects the evidence will be is not a solemn admission to take the place of proof. *Russ v. Railroad*, 112 Mo. 45, 20 S. W. 472. Aside from this legal proposition, the statement made by the counsel in this case, if it had had the effect of a solemn admission in open court, would have afforded no ground for a nonsuit; for it substantially followed the petition, and showed a *prima facie* case.

3. Before taking up the other points involved in the appeal, we will dispose of the defense of assumption of risk, which is insisted on by the defendant; for we wish to emphasize the proposition that, when a plaintiff in an action for damages for an alleged negligent tort is shown to have assumed the risk, this puts out of the case all questions relating to the degree of care the defendant was bound to observe, or whether he was negligent, or the plaintiff guilty of contributory negligence. If the risk was assumed, and the circumstances were such that it could be legally assumed, there is no liability for mere negligence. That Mrs. Fillingham assumed the risk of injury in alighting from the car is asserted on an assumption that her own testimony shows she observed and estimated the length and difficulty of the step she had to take to reach the ground before taking it; that, therefore, she appreciated the danger, and voluntarily risked it. In point of fact her testimony hardly bears out this contention, since she swore she had not time to examine the ground well, and that the distance was more than she supposed. But, aside from the effect of her testimony, what, we ask, has the doctrine of assumption of risk to do with this case? That doctrine generally pertains to controversies between masters and servants, although litigation, attended by circumstances which make the defense available, may arise between parties not sustaining that relation. *Warren v. Ry.*, 163 Mass. 484, 40 N. E. 895. Arise where it may, the defense is one which must rest on contract; or, if not exclusively on contract, then on an act done so spontaneously by the party against whom the defense is invoked that he was a volunteer, and

any bad result of the act must be attributed to an exercise of his free volition, instead of to the conduct of his adversary. *Adolf v. Columbia Pretzel Co.* (Mo. App.) 73 S. W. 321. The word "assumption" imports a contract or some kindred act of an unconstrained will. Whenever a man does anything dangerous, he faces the risk, but it by no means follows that, legally speaking, he assumes the risk. That Mrs. Fillingham's agreement with the defendant for carriage contemplated and covered the risk of alighting at such a place as she did, will not bear argument; neither will the contention that, because she made no demand to have the car returned to the platform, she took to herself the risk incident to getting off at the point selected for her by the car operators. She was justified in relying to some extent on their judgment and skill; and, though she might do so in circumstances that would debar her from recovering damages, it would be on the score of contributory negligence—a defense to be examined below.

But in considering the relevancy of the doctrine of assumption of risk to the present case we must remember above all that the law forbids a carrier to contract against the consequences of any negligence it may be guilty of in conveying passengers. *Jones v. Railway*, 125 Mo. 666, 28 S. W. 883, 28 L. R. A. 718, 46 Am. St. Rep. 514; *Tibby v. Railway*, 82 Mo. 292. Hence, if the injury to the plaintiff occurred from the carmen's inattention to duty, defendant would be liable even if plaintiff had assumed the risk of injury in alighting by an express agreement. On the other hand, if the accident did not arise from the fault of the employes, but was either purely fortuitous or caused or contributed to by plaintiff's own carelessness, the defendant, as suggested above, is exonerated from responsibility by legal rules entirely distinct from the doctrine of assumption of risk, namely, by the rule that a defendant is not answerable for an accident unless caused by his tort, or if the plaintiff's own negligence was an active cause. We fail, therefore, to discern how the doctrine of assumption of risk can be pertinent. As plaintiff was of full mental and physical competency, if the car was stopped at her command, in order that she might get off, and she had suffered an injury in getting off, possibly it could be argued that she assumed the risk by an implied contract, or according to the maxim "*Volenti non fit injuria*"; but on such facts it might be argued with equal cogency that the carmen were innocent of negligence. *Neville v. Railway*, 158 Mo. 293, 59 S. W. 123. But she gave no such order, and we think there was evidence on the averment that the place where the car stopped was unsafe, and that the carmen were negligent in stopping it there.

4. The next point to be examined is as to whether the contract for carriage was in force while plaintiff was leaving the car or

had previously terminated. In other words, when does such a contract end? This is a material question in determining the degree of care the defendant owed the plaintiff. It may be easily answered. The contract between a carrier and a passenger continues not only during the interval of time consumed in transporting the passenger from his starting point to destination, but during the period needed for a safe exit from the vehicle. *Kelly v. Railway*, 70 Mo. 604; *Straus v. Railway*, 75 Mo. 185; *Hurt v. Railway*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; *McKimble v. Railway*, 139 Mass. 542, 2 N. E. 97; *Pa. Ry. Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; *Hutchinson, Carriers* (2d Ed.) § 612; *Nellis, Street Railways*, p. 479. The degree of care required of the carrier for a passenger's safety while he is leaving the vehicle is as high as that required while he is in transit; that is to say, the extraordinary care imposed by the law on carriers of passengers begins when the contract of carriage takes effect on the rights of the parties, and continues unimpaired until that contract ends with deposit at destination; thus protecting passengers as they get on and off conveyances. *Weber v. Railway*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541; *Grace v. Railway*, 156 Mo. 295, 56 S. W. 1121. Part of this duty to safeguard passengers while leaving a car or other vehicle consists in taking care to put them off at a reasonably safe place. *Talbot v. Railway*, 72 Mo. App. 291; *Atkinson v. Railway*, 90 Mo. App. 489; *Young v. Railway*, 93 Mo. App. 267; *Bass v. Railway* (N. H.) 46 Atl. 1059; *Stewart v. Railway* (Minn.) 80 N. W. 854; *Johnson v. Railway*, 11 Minn. 296 (Gil. 204), 83 Am. Dec. 83; *Nellis, Street Railways*, p. 484; *Hutchinson, Carriers*, § 615. This rule is to be distinguished from the one holding a carrier only for lack of ordinary diligence in respect to platforms and approaches in actions for injuries resulting before the relation of carrier and passenger began or after it ended. *Cobb v. Railway*, 149 Mo., loc. cit. 150, 50 S. W. 310; *Kelly v. Railway*, 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74. Common carriers are not, of course, insurers of the safety of those they convey, nor answerable for an accident to them, no matter how produced, but only for those accidents which can be traced to some neglect of duty. In every such case the question is one of negligence, which must appear either from testimony or the nature of the accident. Hence, if an injury happens to a passenger in getting off a vehicle at a difficult landing place, and is caused thereby, the carrier's responsibility depends on whether it was negligent in discharging the passenger at the place. Certain cases cited by the defendant appear to have been reversed on the ground that the trial court held the defendant railway companies were absolutely bound to provide a safe landing place, instead of being bound to use the highest care to do so. *Big-*

elow v. St. Ry. Co., 161 Mass. 393, 37 N. E. 367; *Conway v. Ry. Co.*, 87 Me. 283, 32 Atl. 901. In the latter case the court said the company was no insurer of the safety of a landing place, but discharged its duty when it selected the place with the greatest care.

5. Having decided that the same degree of care that must be taken of a passenger while in transit must be taken also while he is disembarking, the question arises what that degree of care is; or, rather, in what words a jury ought to be instructed concerning it. No one will dispute the proposition that it is the highest care, the utmost that very prudent men employ in performing the contract of carriage with like means of transportation. The point of controversy as to the care required is raised on a charge given to the jury in substance as follows: That the defendant was bound to exercise toward plaintiff "the utmost care, skill, and vigilance" to carry her safely, and also on her arrival at destination to stop the car at the usual stopping place, or some other place where it was suitable for plaintiff to alight; and if defendant's servants in charge of the car failed to exercise the utmost care, skill, and vigilance, and by reason thereof did not stop at the usual place, but beyond it, at a place unsafe and unsuitable for alighting, and plaintiff was consequently injured while alighting, and while she herself was exercising ordinary care, defendant was liable. It is insisted the phrase "utmost care, skill, and vigilance" overstated the care defendant was bound to observe, and called for the highest conceivable care. Further, that the instruction tended to mislead the jury, as it gave them no definite advice as to what was meant by the utmost care, but left them to conjecture what it meant. Defendant contends the court should have defined the expression "utmost care and skill" as the care and skill which very cautious men exhibit in similar circumstances. For ages the law has been that, though the carrier does not warrant the safety of passengers, he is bound to provide for it so far as skill and assiduity can do so, and is responsible if an accident occurs because of the slightest negligence on his part. *Hutchinson, Carriers* (2d Ed.) §§ 500, 501, 553; *Thompson, Carriers of Passengers*, p. 200; 2 *Kent's Commentaries* (14th Ed.) *p. 602; *Story, Bailments*, § 600; *Shearman & Redfield's Negligence* (5th Ed.) 495; *Christie v. Grigg*, 2 Camp. 79; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *Pa. Ry. Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Sawyer v. Ry.*, 37 Mo. 240, 90 Am. Dec. 382; *Huel-senkamp v. Ry.*, 87 Mo. 537, 90 Am. Dec. 399; *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799; *Sharp v. Railway*, 114 Mo. 101, 20 S. W. 93; *Schaefer v. Railway*, 128 Mo. 64, 30 S. W. 331; *Powers v. Railway*, 60 Mo. App. 481. An objection has often been raised to instructing juries by the words used in the present case, and it is not the best or the most approved form of charge. It is well

to advise a jury, if requested, or even without request, that the law means by utmost care and skill the degree of those qualities used by very cautious men in the same vocation. But this is a different proposition from saying that it is reversible error to give an instruction like the one before us, and we have neither been cited to nor found a precedent holding that it is. It might well be held erroneous to refuse a request to qualify a charge like the one in question, but be held no error to give it without qualification, if the defendant made no request that it be qualified. An instruction which expresses the law truly, but in general terms, and in a manner not likely to mislead the jury, does not constitute reversible error, since the party dissatisfied with the instruction may ask one fuller and more definite. *State v. Donnelly*, 9 Mo. App. 519; *Brown v. Railway*, 13 Mo. App. 463; *Browning v. Railway*, 124 Mo. 55, 27 S. W. 644; *Koehler v. Wilson*, 40 Iowa, 183. And, generally speaking, a court is not bound to define such expressions as we are dealing with unless asked to do so. *Johnson v. Ry.*, 96 Mo. 340, 9 S. W. 790, 9 Am. St. Rep. 351. If the instruction in hand stated the law, it could not have misled the jury by being too abstract, for it stated also the specific facts to be found to justify a verdict for the plaintiff. In *Leslie v. Railroad*, 88 Mo. 50, it was said an instruction for the plaintiff asserting the proposition that the defendant was bound to exercise the highest degree of care to carry the plaintiff from the place where he entered the train to his destination, and deposit him safely there, stated the general rule correctly, and that, as another instruction hypothecated the facts necessary to a recovery, the law was well declared. That case was much like the one in hand. In *Bowen v. Railroad*, 18 N. Y. 408, 72 Am. Dec. 529, it was said that the expression, "as far as human care and foresight will go," had become familiar in stating the rule of duty. Some of the later decisions in this state condemn the word "foresight" in instructions, as conveying the meaning that a carrier is bound to act as if it possessed foreknowledge that an accident would happen unless certain precautions were taken. *Smith v. Ry.*, 108 Mo. 243, 18 S. W. 971; *Dougherty v. Ry.*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; *Freeman v. Ry.*, 95 Mo. App. 94, 68 S. W. 1057. And it was held erroneous to charge that a plaintiff who was injured by a car door falling should recover if the door could have been kept from falling had the defendant used "the greatest possible care and diligence that were necessary." *Gilson v. Ry.*, 76 Mo. 282. What was condemned in that instruction was the word "necessary," which was conceived to require the precaution needed to prevent the accident, whether the highest care would have provided that particular precaution in advance or not. The most that can be deduced from the decisions in this state is that it is

erroneous to instruct the jury in a way which may impart the notion that a carrier of passengers is bound to know as well before as after an accident what precautions were required to prevent it; but we are aware of no decision which holds that it is erroneous to instruct that such a carrier is bound to use the utmost care, skill, and diligence in caring for passengers, without enlarging on the meaning of the charge, if the defendant asks no more specific direction. All commentators on the law of negligence agree that the law exacts of the carrier the utmost care, skill, diligence, and even foresight, and concur in stating the rule in those words, which have often been employed by eminent judges in charging juries. The word "foresight" is irrelevant to the present discussion, for the trial court did not embody it in the instruction given, nor any other expression which has been condemned. The instruction correctly enunciates the law. While carriers are not absolute insurers of the safety of passengers, they are, for all practical purposes, insurers against the results of the negligence of their employés; since they are liable for slight negligence. That the jury might have adopted the notion that the defendant's servants were under an obligation to use superhuman care, or care beyond that of the most cautious man, unless further admonished than they were in the present case, is altogether improbable, considering that they were told the specific acts they must find defendant's servants did, or omitted to do, in order to find said servants fell short of performing the whole duty they owed to the plaintiff. No evidence was introduced to show that cautious railway men would let a person off at a spot like the one on which the plaintiff alighted, nor was any comparison drawn between the conduct of such men and that of the crew in question. And in truth the defendant does not contend the spot was safe or suitable, but that plaintiff knew its danger as well as any one. In *Huelsenkamp v. Railroad*, supra, it is said that public policy and safety require a railroad company to be held to the greatest possible care and diligence. In *Lemon v. Chancellor*, 68 Mo. 340, 30 Am. Rep. 799, an action for damages for injuries sustained by the unsoundness of defendant's hack, the trial court charged that the burden was on the defendant to prove the breakdown of the hack was caused by inevitable accident and not from any defect of the hack or careless driving, and "that by the exercise of the utmost human foresight, knowledge, skill, and care such injuries could not have been prevented by defendant." That instruction was approved. In *Smith v. Railroad*, 108 Mo. 243, 18 S. W. 971, an instruction was given at plaintiff's instance declaring that the law imposed on a common carrier of passengers the utmost care in carrying them safely to the place of destination, and that the absence of such care was negligence,

and rendered the company liable, if the passenger was free from contributory negligence. Another instruction, given at defendant's instance, told the jury the railroad company was not an insurer of the safety of passengers, and that, to entitle a passenger to recover, it devolved on him to show his injury was occasioned by the negligence of the company. The use of the phrase "utmost care" was considered at some length, with the result that the Supreme Court held the jury were properly instructed. In *Sharp v. Cable Ry. Co.*, 114 Mo. 94, 20 S. W. 93, the instruction complained of told the jury the defendant was bound to use the utmost practicable care and diligence with reference to its cars, including brakes and grip irons. The instruction was approved by the Supreme Court. In *Clark v. Ry. Co.*, 127 Mo. 197, 29 S. W. 1013, it is said to be the duty of a carrier of passengers to convey them safely as far as it is capable of doing so by human care and foresight, and that it is responsible for all injuries resulting to passengers from any, even the slightest, neglect. The correlative of slightest neglect is utmost care. In *Powers v. Railway*, 60 Mo. App. 481, an instruction was approved which told the jury it was the railway company's duty to exercise the highest practicable care, caution, and diligence to safely transport the plaintiff. Attention to the authorities has satisfied us that we are not warranted to reverse this judgment on the ground of an improper direction concerning the care the defendant was bound to take of the plaintiff, though we prefer a charge referring to a definite standard of care when the facts in proof make it proper to give such a charge. If defendant thought its cause would be helped or the jury enlightened, by defining, or trying to define, the meaning of "utmost care and skill," it should have presented an appropriate instruction to the court.

6. There can be no doubt that the facts of this case tended to show negligence on the part of the carmen in stopping where they did. The place was unsuitable for alighting, and, moreover, was past the usual stopping point, whether that be, as contended by the defendant, the center of Woodson Road itself, or the platform. This being true, the only remaining point to be considered is the alleged contributory negligence of the plaintiff, and in the consideration of that defense we must apply to her conduct the test of ordinary care, while the company's is to be tested by a higher standard. The defendant insists the plaintiff showed she was guilty of contributory negligence in stepping down at a spot which she knew was dangerous, instead of going to the rear of the car, which is said to have been opposite a level piece of ground. The evidence is conflicting as to

whether that end of the car stood at a level part of Woodson Road; and this point of her negligence in not getting off the rear of the car was at best one to be taken into account by the jury in making up their minds on the issue of plaintiff's exercise of care. What is certain is that passengers were permitted to alight from any portion of the footboard, and that plaintiff was permitted to do so without remonstrance. Indeed, there was no testimony tending to prove passengers were accustomed or expected to walk along the footboard to a suitable landing place, or that they could do so comfortably, and without risk of falling. It has already been shown that plaintiff did not fully realize the length of the step she had to take, or know precisely what sort of ground she would step on. While she said the distance was 3 or 4 feet, other witnesses said it was only about 22 inches. To hold that she was negligent as a matter of law in getting off there would be to lose sight of the high care the carmen were bound to take of her. She really got off where she did at their invitation. The car was so constructed that passengers could alight from it at either side by stepping on the running board, and from it to the ground; and it was expected they would alight in that manner. Stopping, calling out the station, and watching her as she moved to leave the car—all of which acts the conductor did—certainly amounted to an invitation to her to leave it where it stood. *Talbot v. Railroad* and *Leslie v. Railroad*, supra; *McGee v. Railroad*, 92 Mo. 206, 4 S. W. 739, 1 Am. St. Rep. 706; *Railroad v. Painter*, 53 Kan. 414, 36 Pac. 731; *McDermot v. Railway*, 82 Wis. 246, 52 N. W. 85; *Pa. Ry. Co. v. White*, 88 Pa. 327; *Roberson v. Railroad*, L. R. 2 Q. B. Div. 85; *Poole v. Ry. Co.*, 100 Mich. 379, 59 N. W. 390, 25 L. R. A. 744; *Bass v. Ry. Co.*, 70 N. H. 170, 46 Atl. 1056. She is not to be charged with negligence in relying on the judgment of the carmen and acting on their invitation, unless the danger of alighting at the spot was so extreme and apparent as to deter a person of ordinary prudence. *Hinshaw v. Ry. Co.*, 118 N. C. 1047, 24 S. E. 426, and other cases above cited. That the evidence proved beyond dispute the danger was of that sort, and therefore called for a nonsuit by the court on the ground that the plaintiff certainly contributed to the accident by her own lack of care, is an untenable position, as clearly appears from the stated facts.

The rulings on the instructions were in accordance with the views above expressed, and, as we have found none of the assignments of error to be meritorious, we affirm the judgment.

BLAND, P. J., and REYBURN, J., concur.

TILLMAN v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

CARRIERS—INJURY TO PASSENGER—DEGREE OF CARE REQUIRED—INSTRUCTION.

1. In an action by a passenger for injuries it is not error to instruct that the common carrier of persons is bound to use "the highest degree of care" for the safety of its passengers.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by George Tillman against the St. Louis Transit Company. Judgment for plaintiff, and defendant appeals. Reversed.

Boyle, Priest & Lehman, for appellant. E. E. Wood, for respondent.

REYBURN, J. On Sunday, the 14th day of September, 1902, at about half past 3 o'clock p. m., plaintiff, in company with five associates, signaled a north-bound car of defendant on the south end of Jefferson Avenue Bridge. The car upon which they sought transportation was of the Jefferson avenue line, an open summer car, with footboards along the sides. Papin street extends eastwardly and westwardly under the bridge, and a flight of steps leads therefrom to the bridge, and it was the street nearest to the point of the occurrence and southern terminus of the bridge, there being no street north for some distance. The testimony of Tillman and his companions tended to establish that they ascended the steps to the east side of the bridge, and hailed the car, which, by reason of its rapid speed, passed the usual stopping place, and stopped above the alley beyond and about 200 feet northward of Papin street, when they ran forward and clambered on the footboard, and the car, after a very brief period, estimated at two seconds, upon signal bell sounded by the conductor, started and moved off with a sudden jerk. Tillman was near the middle of the car, and he had grasped with his left hand a handhold when the car started, and it threw him around, and, as the car went by an iron trolley pole 10 feet beyond the point at which it had stopped, the latter struck him on the right shoulder, and knocked him off the car, producing the injuries complained of. The car proceeded, as variously estimated by the several witnesses, 100 to 200 feet before stopping in response to the cry of alarm of one of plaintiff's comrades. The post, by actual measurement, was 37 inches from the rail, and was not upright, but leaned over toward the track, from having been struck at some previous time near its base. The foregoing is the narrative of the plaintiff and his associates; but defendant introduced a plat, which exhibited the scene of the accident, and tended to show that the distance from the point where the cars customarily stopped to the next trolley pole was 106 feet 8 inches,

which post was about 1 foot square at its base, tapering off to about 4 inches at the top. A trolley car had jumped the track and struck it about a year prior, and it stood 3 feet $3\frac{1}{2}$ inches from the rail to its nearest surface, and, being wider at the base and tapering, and plaintiff a tall man, the pole would be $2\frac{1}{2}$ to 3 inches further distant from plaintiff's shoulder than it would be on a line with the running board. The petition set forth at great length plaintiff's complaint, pleading general negligence, and charging special negligence in two counts. The first assigned, as the negligent and actionable conduct of defendant, that the car stopped at or near the intersection of Papin street and Jefferson avenue to permit plaintiff and others to become passengers thereon, and, while plaintiff was stepping upon the car, and before he had time to completely enter it, on account of the negligence of defendant and its servants, the car suddenly lurched forward, throwing plaintiff off the car upon and against a post placed near the track. The other count was predicated upon a section of the so-called "Vigilant Watch Ordinance" of the city of St. Louis, providing that conductors and motorman operating street cars should stop for passengers wishing to enter or leave, and remain stationary a sufficient length of time to allow the passengers to safely board or leave the cars. The further averments were that defendant had accepted the provisions of this ordinance, and by its violation at the time plaintiff attempted to enter, by causing the car to lurch suddenly forward, caused plaintiff to enter the car while in motion; that the defendant had negligently caused its track to be built dangerously near the post upon which plaintiff was thrown, and was negligent in allowing the post to remain so near its track as to be dangerous to passengers. The answer was a mere general denial.

1. Appellant presents as the first error exhibited by the record that there was a substantial variance; that the proof failed to respond to the allegations of the petition, but was a departure therefrom; that the charge was that the car lurched forward, throwing plaintiff off the car and upon and against a post or upright standard placed near the track of the defendant, while the evidence of plaintiff established conclusively that the post knocked him from the footboard. As the case will be reversed and remanded for a new trial for a more conspicuous and patent error committed at the trial, it is not deemed necessary to give lengthy consideration to this contention, but it is sufficient to suggest that prior to a retrial the petition may be bettered and made clearer by amendment.

2. The second instruction charged as follows: "The court instructs the jury that a common carrier of persons, such as a street car corporation, is bound to use the highest degree of care for the safety of its passen-

¶ 1. See Carriers, vol. 3, Cent. Dig. §§ 1087, 1327.

gers and for persons attempting to become passengers on their cars." We are not impressed with the argument on behalf of appellant that this devolved upon defendant to exercise "the utmost care and foresight of which the human mind could conceive," but, in our judgment, it only announced the proposition, well established, especially by the decisions of the highest tribunal of this state, that in the performance of its duties as a common carrier of passengers the defendant was obliged to use that degree of care which a very prudent man would adopt in the performance of such duties with the like means of transportation. In *Leslie v. Railway*, 88 Mo. 50, the instruction assailed embodied the language herein criticised, and was held not objectionable, but approved. See, also, *Sharp v. Railway*, 114 Mo. 94, 20 S. W. 93, and *Powers v. Railway*, 60 Mo. App. 481, sanctioning the definition of the degree of care imposed, interpreted in even more vigorous terms. See, also, *Fillingham v. Transit Company*, 77 S. W. 314 (decided at this term by this court), where this proposition is ably discussed and the authorities reviewed at length.

3. The defendant asked the trial court to embrace the following in its charge to the jury: "If, from the evidence, the jury believe that both the plaintiff and the servant of defendant operating its car were equally guilty of negligence which directly contributed to the accident and injury complained of, then your verdict should be for defendant." The probative force and weight of the testimony introduced by defendant tending to show that plaintiff's injuries were contributed to directly by his own conduct was for the decision of the jury; but there was evidence of such contributory negligence on his part, which entitled defendant to have this issue submitted to the consideration of the jury, and its refusal constituted error requiring a reversal. *Hogan v. Railway*, 150 Mo. 36, 51 S. W. 473; *Hornstein v. Railway*, 97 Mo. App. 271, 70 S. W. 1105.

4. Instruction indicated as No. 8, defining the measure of plaintiff's recovery, is manifestly the consequence of clerical errors, and in the disposition made of the case deserves no further attention.

The judgment is therefore reversed, and the cause remanded for a new trial.

BLAND, P. J., and GOODE, J., concur.

WALTER A. ZELNICKER SUPPLY CO. v.
MISSISSIPPI COTTON OIL CO.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

FOREIGN CORPORATIONS—SERVICE OF PROCESS—SUFFICIENCY OF RETURN—ABATEMENT OF ACTION—PERSONAL JUDGMENT.

1. A return of service of summons on a foreign corporation, merely reciting a delivery of a copy to its president, but failing to show that

the corporation has no office or place of business in the state, is insufficient, under Rev. St. 1899, § 570, subd. 4, providing that when defendant is a foreign corporation, and has an office or does business in the state, service shall be by delivering a copy of the writ to any officer or agent in charge thereof, "or if it have no office or place of business, then to any officer, agent or employé in any county where such service may be obtained."

2. The insufficiency of the return of service of summons on a foreign corporation may be corrected by amendment, if the facts warrant it, so as to show conformity to the statute, and therefore such insufficiency is not ground for abating the action.

3. Jurisdiction to render a personal judgment against a foreign corporation cannot be acquired unless it is doing business or has an office or agency in the state; and service under Rev. St. 1899, § 570, subd. 4, cl. 2, authorizing service on any officer or agent in any county where such service may be obtained, if the company has no office or place of business in the state, is insufficient to sustain such judgment.

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by the Walter A. Zelnicker Supply Company against the Mississippi Cotton Oil Company. From an order sustaining a motion in the nature of a plea in abatement, and directing that the suit abate, plaintiff appeals. Reversed.

R. P. & C. B. Williams, for appellant. J. F. & R. H. Merryman, for respondent.

BLAND, P. J. The suit is to recover damages for breach of contract. The return on the writ of summons is as follows: "Served this writ in the city of St. Louis, Missouri, on the within-named defendant, the Mississippi Cotton Oil Company (a corporation), this 12th day of March, 1903, by delivering a copy of the writ and petition, as furnished by the clerk, to John A. Lewis, its president. Joseph F. Dickmann, Sheriff. By A. H. Watson, Deputy. Fee \$1.00." Defendant filed the following motion to abate suit: "Now comes the defendant, and, appearing for this purpose only, moves the court to quash the service of the sheriff made on the defendant herein, and, for reason therefor, would respectfully state: (1) That the said return simply shows that said service was obtained by delivering a copy of the writ and petition to John A. Lewis, its president. (2) Defendant states that plaintiff ought not to maintain this action, for the reason that defendant was a corporation organized under the laws of the state of Mississippi, and that it was not at said time, and is not now, doing business in the state of Missouri, nor did it ever have any office, agent, or employé in said state." Plaintiff demurred to the motion in the nature of a plea in abatement. The demurrer was overruled. Plaintiff filed the following reply: "Now this day comes plaintiff, and, for reply to the new matter set up in answer of defendant herein, denies each and every allegation thereof, and asks for judgment in accordance with the prayer of his petition." The motion in the nature of a plea

in abatement was sustained by the court, and the suit ordered to abate. Plaintiff saved his exceptions in the usual way, and appealed.

In respect to the service of summons on foreign corporations, the fourth subdivision of section 570, Rev. St. 1899, is as follows: "Where defendant is a corporation or joint stock company, organized under the laws of any other state or country, and having an office or doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business, or if it have no office or place of business, then to any officer, agent or employé in any county where such service may be obtained, and when had in conformity with this subdivision, shall be deemed personal service against such corporation, and authorize the rendition of a general judgment against it." The obvious meaning of this subdivision of the statute is that, if the foreign corporation has an office or place of business in this state, service of the writ must be made by delivering to the officer or agent of the company in charge of such office or place of business a copy of the petition and writ, but, if the foreign corporation has no office or place of business in this state, that the writ may then be served by delivering a copy of the same, with a copy of the petition, to any officer, agent, or employé of the company found in the state. The return, therefore, to be good under the second clause of the subdivision, should state affirmatively that the defendant company had no office or place of business in the state. The return falls so to state, and for that reason is insufficient, under the statute. But this insufficiency of the return furnished no ground for abating the suit, as it might have been amended to conform to the requirements of the statute if the facts authorized it.

It is contended by the defendant that the return, as made, was insufficient to confer jurisdiction on the court over the person of the defendant. We are inclined to agree with this contention. The authorities seem to be that jurisdiction to render a personal judgment against a foreign corporation cannot be acquired, except where the corporation is doing business, or has a business office or agency, in the state where sued. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Fitzgerald, etc., Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608; *Goldrey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *King v. Sullivan*, 93 Ga. 621, 20 S. E. 76; *Crook v. Girard Iron Co.*, 87 Md. 188, 39 Atl. 94, 67 Am. St. Rep. 325; *Eureka Mercantile Co. v. California Insurance Co. (Cal.)* 62 Pac. 393; *Phillips v. Library Co.*, 141 Pa. 462, 21 Atl. 640, 23 Am. St. Rep. 304, *Watkins Land Mortgage Co. v. Elliott (Kan. Sup.)* 62 Pac. 1004, 84 Am. St. Rep. 385. It is stated in the petition that defendant was a Mississippi corporation, but no evidence was offered to show

whether or not it had an office or place of business in the state of Missouri.

The judgment is reversed, and the cause remanded, with directions that, unless the return of the sheriff is amended so as to comply with the requirements of the first or second clause of the fourth subdivision of section 570, Rev. St. 1899, the suit be dismissed.

REYBURN and GOODE, JJ., concur.

ARKANSAS LAND CO. v. LADD.*
(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

APPEAL—FINDING OF REFEREE—CONCLUSIVENESS—REVIEW.

1. The finding of a referee will not be disturbed on appeal when supported by substantial evidence.

2. A party objecting to the finding of a referee must except to the court's action overruling his exceptions to the report, and call attention to the alleged error in his motion for a new trial, in order to make the objection available on appeal.

Appeal from St. Louis Circuit Court: Franklin Ferriss, Judge.

Action by the Arkansas Land Company against William M. Ladd. From a judgment for plaintiff, defendant appeals. Affirmed.

Upton Young and H. B. Davis, for appellant. Julian Laughlin, for respondent.

BLAND, P. J. The suit is in replevin for books, deeds, documents, etc., pertaining to real estate situated in the state of Arkansas, owned or claimed by plaintiff. A writ of replevin was issued and delivered to the sheriff of the city of St. Louis, and by him served on the defendant, who gave a forthcoming bond, and retained possession of the articles sued for. The answer was a general denial and a plea of the statute of limitations. On motion of defendant, the cause was referred to the Honorable E. W. Pattison, who heard the evidence, and made and filed his finding, which is as follows:

"(1) I find that the two lists composing items 1 and 2 in the affidavit and petition were procured and paid for by the plaintiff, that they were its property at the time of the suing out of the writ, and that the evidence does not sustain the claim of defendant that he had a lien on them, or either of them.

"(2) I find as a fact that the 20 deeds constituting the third item in said affidavit and petition were in the possession of defendant at the time of the suing out of the writ, and that they were at that time the property of the plaintiff, and that plaintiff was at that time entitled to their possession.

"(3) I make the same finding as the last above with reference to the abstract book of the Arkansas Land Company, being item 4.

*Rehearing denied December 15, 1903.

¶ 2. See Appeal and Error, vol. 2, Cent. Dig. § 1555.

"(4) I make the same finding with reference to the landbook, being item 5.

"(5) I make the same finding with reference to the letter book, being the sixth item.

"(6) I make the same finding with reference to the McCray deed, being the seventh item.

"(7) I make the same finding with reference to the lot of printed blank deeds constituting the eighth item.

"(8) I make the same finding with reference to the Godby abstract of title, being the ninth item.

"(9) I make the same finding with reference to the Carpenter & Co. abstract, being the tenth item.

"(10) I make the same finding with reference to the plats made by the St. Louis & Memphis Railroad Company, being the eleventh item.

"(11) I make the same finding with reference to the 100 original entry certificates for swamp and overflowed lands, being the twelfth item.

"(12) I find that the session acts of the state of Arkansas for the year 1869, being the thirteenth item, were at the time of the suing out of the writ the property of the defendant, and that the plaintiff was not entitled at that time, and is not now entitled, to the possession of said book.

"(13) I find that the lot of miscellaneous deeds and papers belonging to the Arkansas Land Company, which is the fourteenth item, has not been sufficiently identified to enable me to make any finding whatever with reference to them, and shall, as hereinafter stated, place upon them only a nominal value; this nominal value being placed upon them by reason of the fact that they are included in the bond given by the defendant, and, in my opinion, he is thereby estopped to assert that they are of no value whatever.

"(14) I find that at the time of the hearing the values of the various articles mentioned in the said affidavit and petition were as follows: I find it impossible, under the evidence, to separate the first two items, the president's list and the clerk's lists, so far as assessing their value. The testimony shows that the two cost \$228.50, but there is nothing in the testimony which enables me to divide this sum between the two, except an inspection of the documents themselves. Upon that inspection, I think that a reasonably fair division is to assign the value of \$100 to the president's list, and \$128.50 to the clerk's lists, and I accordingly find those sums to be their values, respectively. I find the value of the 20 deeds comprising item 3 to be \$100. I find the value of the abstract book to be \$700. I find the value of the landbook to be \$100. I find the value of the letter book to be \$1.50. I find the value of the deed from McCray to be \$100. I find the value of the lot of printed blank deeds comprising item 8 to be \$14. I find the value of the Godby abstract to be \$15. I find the

value of the Carpenter & Co. abstract to be \$10. I find the value of the plats comprising the eleventh item to be \$1. I find the value of the original entry certificates for swamp and overflowed lands, comprising the twelfth item, to be \$100. I find the value of the lot of miscellaneous deeds and papers comprising the fourteenth item to be 1 cent. I further find that the two lists constituting items 1 and 2, the McCray deed constituting item 7, the printed blank deeds constituting item 8, the plats constituting item 11, and the session acts of the state of Arkansas constituting item 13, have been turned over to the referee during the hearing of this cause. There is no sufficient evidence in the record on which to base any finding of substantial damages for the detention by the defendant of these articles, or any of them, and I therefore assess the damages at \$1.

"Conclusions of Law.

"From the foregoing findings of facts, my conclusions of law are as follows:

"That the articles comprised in items 1 to 12, inclusive, are now, and were at the date of the suing out of the writ in this case, the property of plaintiff, and that plaintiff was entitled to the possession of them, and each of them, on that date, and that defendant on said date wrongfully detained and withheld the same, and all of them, from the plaintiff, in the city of St. Louis, and that the cause of action is not barred by the statute of limitations.

"I further find that the articles embraced in items 1, 2, 7, 8, and 11, being the president's list, the clerk's lists, the McCray deed, the printed blank deeds, and the plats, should be delivered to the plaintiff, and that the aggregate value of said items at the time of the hearing was \$343.50.

"I find that the session acts of the state of Arkansas for the year 1869, being the thirteenth item in the affidavit and petition, was at the date of the suing out of the writ the property of the defendant; that plaintiff was not at that date, and is not now, entitled to its possession; that its value is \$2.50; and that it should be returned to the defendant.

"I further assess the value of items 3, 4, 5, 6, 9, 10, 12, and 14 of the list set out in said affidavit and petition, being the 20 deeds, the abstract book, the landbook, the letter book, the Godby abstract, the Carpenter & Co. abstract, 100 original entry certificates, and a lot of miscellaneous papers and deeds, at \$1,026.51, in accordance with the specific findings on pages 51-3 and 72-3 of this report.

"I find that plaintiff is entitled to recover of defendant \$1 damages for the detention of the property hereinbefore mentioned.

"I therefore recommend that judgment be rendered in favor of the plaintiff, and against the defendant and his sureties, to the following effect: That the articles embraced in items 1, 2, 7, 8, and 11 be delivered to the plaintiff under the stipulation hereinbefore

mentioned, which will be found on pages 13, 14, 67, and 68 of the record; that as to the other articles, viz., the twenty deeds, comprising item 3, the abstract book, comprising item 4, the landbook, comprising item 5, the letter book, comprising item 6, the Godby abstract, comprising item 9, the Carpenter & Co. abstract, embracing item 10, and the 100 original entry certificates, comprising item 12, judgment be rendered against the defendant and his surety that he return said articles, and each of them, to the plaintiff, or pay their assessed value as above, at the election of the plaintiff, and that he pay to the plaintiff \$1 as damages, and the costs of this suit, and that the session acts of the state of Arkansas for the year 1889, being item 13, be delivered to the defendant.

"My rulings on the objection to evidence have been entered in the transcript.

"I return herewith the evidence and the exhibits, including the two lists, the McCray deed, and the session acts of Arkansas. The printed blank deeds and the plats have been delivered to the plaintiff.

"The parties have agreed that an allowance shall be made to the referee of \$250 for his services herein, and each of said parties has paid to the referee one-half of said sum, to wit, \$125.

"All of which is respectfully submitted.

"Everett W. Pattison,

"Referee."

Defendant filed exceptions to the finding, which the court overruled, and rendered judgment for plaintiff, as recommended by the referee. No exceptions were taken to the action of the court in overruling the exceptions filed by defendant to the finding of the referee.

The case is brought here in the form of abstracts. Under the head of "Minutes of the Court," we find the following: "December 1st, defendant's motion for new trial filed. December 22d, defendant's motion for new trial overruled." The motion for new trial is not to be found in the record before us. The only intelligent information of what the evidence was is found in a résumé of it made by the referee in his report. The abstract of the evidence, as made by the defendant, is but little more than a citation to pages of the record where the evidence of the witnesses may be found, but he has not furnished us with that record, and his index is of no service to us. The finding of the referee stands upon the same footing, in respect to the evidence, as the verdict of a jury; and, if supported by substantial evidence, it cannot be disturbed by an appellate court. *Tufts v. Latschaw*, 172 Mo. 359, 72 S. W. 679, and cases cited at page 372, 172 Mo., and page 683, 72 S. W. The statement of what the evidence was by the referee in his report (and this is all we have to go by) not only supports his finding, but supports it by the greater weight of the evidence. The record, however, is in such con-

dition that we cannot review the report of the referee, or the action of the court in entering judgment thereon, for the law is that the party objecting to the finding of a referee must except to the action of the court in overruling his exceptions to the report, and again call the court's attention to the alleged error in his motion for a new trial. *Bosley v. Cook*, 85 Mo. App. 422, and cases cited. The record before us does not show that any exceptions to the action of the court in overruling the defendant's exception to the finding of the referee were saved at any time or in any manner.

It results that there is nothing here for review, and the judgment is affirmed.

REYBURN and GOODE, JJ., concur.

BIGLER v. LEONORI.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

CONVERSION—ACTION BY MORTGAGOR—INTEREST—QUESTION FOR JURY.

1. After condition broken, but prior to demand by a mortgagee for the possession of chattels, and prior to his taking possession, the mortgagor may maintain an action for their conversion by a warehouseman with whom they have been stored.

2. Whether interest should be recovered on the value of goods converted from the date of the conversion to that of the verdict is a question for the jury.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Action by Freide S. Bigler against Rufus U. Leonori, Jr., for conversion. From a judgment in favor of plaintiff, defendant appeals. Affirmed on condition of remittitur of a part of the judgment.

Kortjohn & Kortjohn, for appellant. S. G. T. Smith and A. L. V. Mueller, for respondent.

REYBURN, J. In August, 1899, plaintiff delivered to defendant, a public warehouseman in the city of St. Louis, a quantity of household goods and chattels for storage at rate of \$6 per month. About a year prior thereto plaintiff had executed and delivered to one Little a chattel mortgage upon the same personalty to secure an indebtedness of \$50 due 60 days after date; the property being then contained in and comprising the furniture and household equipment of dwellings Nos. 615 and 617 South Broadway, St. Louis, where plaintiff was conducting rooming houses. In January, 1900, defendant advertised the sale of the goods for default in the charges, purporting to act under the provisions of section 8482, 2 Rev. St. 1899; but no sale was then made, nor until February 23d following, when, without notice to or knowledge of plaintiff, and without con-

¶ 1. See Chattel Mortgages, vol. 9, Cent. Dig. § 336.

forming to the statutory requirements, the property was disposed of by defendant. The latter sale was alleged to have been made at directions of a minor son of plaintiff, whose authority as her agent was repudiated by plaintiff.

1. After condition broken, but prior to demand for possession by the mortgagee, and in advance, also, of possession taken by the latter, the mortgagor may maintain an action for conversion of the mortgaged property by a stranger. Upon default in payment of the mortgage indebtedness, or other breach of the covenants of the mortgage—for example, the removal of the property from the Broadway houses to the premises of defendant—the mortgagee could have exercised the right reserved to him therein, and, taking possession of the property, have proceeded to enforce the power of sale thereunder; but there is no evidence that the mortgagee sought to enforce the terms of the mortgage, and it is conceded that the sale of the mortgaged property was not made under the conditional right of sale therein. Until the mortgagee saw fit to put in operation the provisions of the mortgage, the rights of the plaintiff in the property, subject to the rights of the mortgagee, continued. Even if the latter had taken possession of the property, and made sale without compliance with the terms of sale provided by the mortgage, he could have been held to account for the market value *Tobener v. Hassinbusch*, 56 Mo. App. 591; *Buddington v. Mastbrook*, 17 Mo. App. 577.

2. The court, of its own motion, gave the following instruction to the jury: "If you believe from the evidence that defendant sold the property in question without any authority or consent from plaintiff, then you should return a verdict for plaintiff for such sum as you may find from the evidence the property which was stored with defendant and sold was reasonably worth at the date of sale, with interest at six per cent. from February 23, 1900, the date of sale. You will compute the interest, and add it to the principal, and render one aggregate sum in your verdict. If, however, you believe from the evidence that plaintiff did not pay the mortgage to Mr. Little, but that same was paid out of proceeds of sale, then you should deduct the amount paid on such mortgage from the damages you find for plaintiff. You should also allow defendant such sum as the evidence shows he was entitled to for storage and charges, and deduct same from the damages of plaintiff." This action was *ex delicto*, and not *ex contractu*, being for the conversion of the household property stored with defendant. Section 2869, Rev. St. 1899, formerly section 4430, has been declared but the enactment of the common-law rule in this state, and raising no presumption not already existing. As a general rule, interest is not allowable in actions sounding in tort for unliquidated damages. Under the

above statute the allowance of interest as an element of damages in addition to the value of the goods at the time of their conversion is wholly committed to the discretion of the jury. *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855. The jury may, if they see fit, allow interest in their award of damages, but the statute leaves it entirely to the jury in its discretion to give interest or not under the proof in the case; but this instruction wrests from the jury such discretionary power, and peremptorily directs the computation of interest upon the value of the property and the rendition of the aggregate of the principal and interest as the verdict. "Whatever the rule may have been in the absence of any statutory enactment, there is now no room for doubt. Language could not be plainer. The manifest intention of the Legislature by this statute is that in this class of cases the question of interest as damages should be for the jury, and not for the court." *State ex rel. v. Hope*, 121 Mo. 34, 25 S. W. 893; *Vermillion v. LeClare*, 89 Mo. App. 55. The verdict for \$373.98, obviously in obedience to the instruction above quoted, embraces principal and interest computed at the statutory rate therein named. It seems to us that the ends of justice will be promoted and subserved by affording plaintiff an opportunity to rectify the error of the lower court by remitting the excess.

It is therefore ordered that if within 10 days from the date of the filing of this opinion the plaintiff shall enter in this court a remittitur of \$58.98, the judgment shall stand affirmed for \$315; but, if such remittitur be not entered within the period fixed, then the judgment will be reversed, and the cause remanded.

BLAND, P. J., and GOODE, J., concur.

McCLURE v. ULLMANN.*

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

CONTRACT—ILLEGALITY—AGENCY—PLEADING.

1. Where one acts as agent of both the seller and purchaser of land, without the seller's knowledge of his agency for the purchaser, the contract made through him is void, as against public policy.

2. Where the illegality of a contract sued on appears from plaintiff's evidence, the defendant may take advantage of this defense, though he had pleaded only a general denial.

3. The retention of money paid under a contract, after discovery of fraud on the part of the other parties, does not constitute a ratification thereof, where it is unknown which party furnished the money.

Appeal from Circuit Court, Greene County; J. T. Neville, Judge.

Action by Roma R. McClure against L. Ullmann for breach of contract. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

*Rehearing denied December 15, 1903.

White & McCammon, for appellant. Mann, Horine & Wright, for respondent.

BLAND, P. J. The evidence on the part of plaintiff is that defendant owned a vacant lot in the city of Springfield, Mo., which Milton McClure, the husband of plaintiff, wanted to purchase; the purchase price to be furnished partly by himself and partly by plaintiff; conveyance to be made to plaintiff if her husband should succeed in making the purchase. Milton McClure had had a little trouble with defendant about another lot, and did not believe that the defendant would sell him the lot. McClure was a real estate agent, and known to be one by the defendant. McClure got Z. T. Bradley, another real estate agent, to consent to let him use his name as the purchaser, provided he could make a deal with the defendant. After this arrangement with Bradley, McClure called on defendant in the capacity of a real estate agent, and got defendant to name a price at which he would sell the lot; telling him he had a prospective purchaser for it. Defendant named his price at \$4,000. McClure then said to him: "Now, what is there in it for me? I am an agent." And he said: "I wouldn't pay you more than twenty-five dollars." McClure went away, but in a short time returned to defendant, and paid him \$25 earnest money, and took from him the following receipt and contract:

"Springfield, Mo., April 24, 1901. Received of Z. T. Bradley \$25 to apply to payment of purchase price of four thousand dollars (\$4,000) for the following described lot, fronting on College street in said city, to wit: Beginning one hundred and forty (140) feet east of the northwest corner of lot 31 of block 11, the same being the northwest corner of D. O. Dade's brick store building fronting north on said College street, thence south (with the variations of said lot as heretofore conveyed by D. C. Dade) to a point midway between the south line of College street and the north line of South alley or Pickwick street, thence west 20 feet, thence north to the south line of College street, thence east with south line of College street 20 feet to point of beginning. Abstract of title to be furnished by the undersigned showing title to be well vested in fee simple in said L. Ullmann. Title to the lot aforesaid to be conveyed by good and sufficient warranty deed to Z. T. Bradley or to such person as he may name as grantee. Said deed to convey the right and privilege to use the west wall of the Dade brick building aforesaid without cost or compensation. Balance of purchase price to be paid on execution and delivery of deed aforesaid. Same to be consummated within a reasonable time from the date hereof. [Signed] L. Ullmann." Afterwards there was some controversy about who should pay the taxes on the lot for a certain year. McClure agreed to pay these taxes. Then came up some doubt as to the exact

dimensions of the lot. This doubt was not solved, but McClure tendered the balance of the purchase price, and demanded a deed to be made to his wife, the plaintiff; the contract of sale and purchase having been assigned to her by Bradley. Defendant refused to receive the purchase money or to make a deed. Plaintiff then sued on the contract to recover damages for breach thereof. The evidence is that the lot was, at the time of the contract for its sale, worth from \$4,500 to \$5,000. The answer was a general denial. At the close of plaintiff's evidence, the court instructed the jury to return a verdict for defendant. A motion for new trial was filed, but overruled, whereupon plaintiff appealed.

The court took the case from the jury on the ground that the evidence showed Milton McClure perpetrated a fraud on defendant in acting as agent for both seller and purchaser, and for having a secret interest in the purchase. That the evidence disclosed double agency, and the practice of deception on defendant, there is no doubt; and it is hardly to be doubted that, had McClure disclosed to the defendant his true relation to the transaction, the contract would not have been entered into by defendant. The temptation to commit fraud is too great to permit one to act as agent for both buyer and seller. This dual relation, if unknown to the seller, makes the contract absolutely void, because against public policy. *Chapman v. Currie*, 51 Mo. App. 40; *Smith v. Tyler*, 57 Mo. App. 668; *Norman v. Roseman*, 59 Mo. App. 682; *De Steiger v. Hollington*, 17 Mo. App. 382; *Connor v. Black*, 119 Mo., loc. cit. 134, 24 S. W. 184; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385; *Hafner v. Herron*, 165 Ill. 242, 46 N. E. 211; *Young v. Hughes*, 32 N. J. Eq. 372; *Humphrey v. Eddy Transportation Co.*, 107 Mich. 163, 65 N. W. 13; *Hampton v. Lackens*, 72 Ill. App. 442; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Holcomb v. Weaver*, 136 Mass. 265; *Bollman v. Loomis*, 41 Conn. 581; *Jansen v. Williams (Neb.)* 55 N. W. 279, 20 L. R. A. 207; *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258; *Finch v. Conrade's Ex'r*, 154 Pa. 326, 26 Atl. 368. The case of *De Steiger v. Hollington*, supra, is on all fours with the one at bar. In that case the defendant executed a written contract to sell land. The evidence showed that the agent who procured his signature to the contract was, without the knowledge of defendant, acting also as the agent of the purchaser. On discovery of this dual capacity, the defendant refused to receive the balance of the agreed purchase price, or to execute and deliver a deed to the premises. The suit was to recover damages for a breach of the contract. The trial court refused the following declaration of law asked by the defendant: "Under the law, H. S. Beery could not act as agent for both defendant and plaintiff at the same time without the consent of both parties, and neither the receipt or writing in evidence, nor any understanding or agree-

ment at the time of signing the same, will be binding, as between defendant and plaintiff, unless the jury find from the evidence that the defendant had at the time full knowledge that said Beery was acting for and in the interest of the plaintiff." The judgment was reversed for refusal of the court to grant this instruction; the court, through Ellison, J., saying: "So jealous is the law as to the relation between principal and agent, that, in passing on questions of this character arising between them, the mere fact of the discovery of no actual fraud or bad faith does not relieve the case in the least. The cases are nearly, if not quite, uniform, where the double employment exists and is not known. No recovery can be had against the party kept in ignorance, and the result is not made to turn on the presence or absence of designed duplicity and fraud, but is a consequence of established policy." *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541. The same principle is well expressed in the case of *Everhart v. Searle*, 71 Pa. 256. It is said in that case that "it matters not that there was no fraud meditated, and no injury done. The rule is not intended to be remedial of actual wrong, but preventive of the possibility of it."

2. The contract on which this suit is brought is fair on its face. Its illegality was shown by extrinsic facts. For this reason, it is contended by plaintiff that the defense of fraud was not available under defendant's answer (a general denial); that he should have stated the extrinsic facts in his answer to make the defense of fraud available. In *Sybert v. Jones*, 19 Mo. 86, *Moore v. Ringo*, 82 Mo. 468, and *Musser v. Adler*, 86 Mo. 445, it was ruled that a special defense—as that the services sued for were contrary to public policy—should be pleaded. But in *Sprague v. Rooney*, 104 Mo. 349, 16 S. W. 505, it was held that, under a general denial, parol evidence was admissible to show that a contract under seal was void, as opposed to public policy, and that, in contemplation of law, in consequence of the proven illegality, no contract at all had ever existed. In a later case (*St. Louis, etc., Association v. Delano*, 108 Mo., loc. cit. 220, 18 S. W. 1101) it was held that the defense of illegality of the contract sued on must be specifically pleaded, in the absence of anything in the petition disclosing such illegality. In *McDearmott v. Sedgwick*, 140 Mo. 172, 39 S. W. 776, *Sprague v. Rooney*, supra, is overruled; and the cases of *St. Louis, etc., Association v. Delano*, *Sybert v. Jones*, *Moore v. Ringo*, and *Musser v. Adler*, supra, were approved. In *McDearmott v. Sedgwick*, supra, at page 183, 140 Mo., and page 779, 39 S. W., it is said that the common statement of the courts is that "if it appears from plaintiff's own showing that the contract arises from an immoral cause, or the transgression of a positive law, the court will at once refuse its assistance. But when the

illegality does not appear from the contract itself, or from the evidence necessary to prove it, but depends upon extraneous facts, the defense is new matter, and must be pleaded in order to be available." The illegality of the contract sued on did not appear upon the face of the contract or in the petition, but, in making his proof of the contract, plaintiff, by his evidence, showed that it was illegal; hence it was upon his own showing that the illegality was made to appear, and it seems to us that the manner of showing it is of no consequence. The fact that the plaintiff affirmatively shows it is the principle thing. When he made this showing, the court very properly refused him its assistance.

3. It is contended that defendant ratified the contract after he became possessed of the fact that McClure, in procuring it, was acting in a double capacity by retaining the \$25 earnest money. The record does not show whose money this was. McClure handed it to defendant, and testified he was to furnish one half the purchase price of the land, and his wife the other half, but which of them furnished the \$25 is not in evidence, and hence to whom payment or a tender of payment should be made is left in doubt. If it is McClure's money, the defendant could not pay it to the plaintiff. It was paid to him as the money of Bradley. Until the McClures agree among themselves as to which of them the money should be paid, defendant ought not to be prejudiced by not having made a prompt tender to either one of them.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

BAGWELL v. AMERICAN SURETY CO. OF NEW YORK.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1908.)

SURETY OF BUILDING CONTRACTOR—LIABILITY—DISCHARGE—SUFFICIENCY OF PROOF.

1. A surety of a contractor for the construction of a building, guarantying the faithful performance of the contract, is not relieved from liability on proof that the owner of the building failed to promptly select material, causing delay, except as to the stipulation providing for a forfeiture if the building was not completed within a specified time.

2. A surety of a contractor for the construction of a building is not relieved from liability on proof that some of the installments due under the contract were not promptly paid, the failure to pay promptly not resulting from any agreement between the contractor and the person furnishing the money for the owner.

3. The surety in a bond of a building contractor covering any alterations to the contract not exceeding in extra cost a specified sum, and stipulating that the surety expressly waived all rights to be notified of alterations, and acknowledging itself to be bound unconditionally for the faithful performance of such alterations, was not relieved by proof of changes from the original plans without the knowl-

edge of the surety, and without orders from the architect, and computation of the cost by him, as provided in the building contract, when the cost of the changes did not exceed the sum specified.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by William B. Bagwell against the American Surety Company of New York. From a judgment for plaintiff, defendant appeals. Affirmed.

W. B. & Ford W. Thompson, for appellant. Virgil Rule, for respondent.

Opinion.

GOODE, J. The appellant, the American Surety Company, is surety for William Logan on a bond given by said Logan to William B. Bagwell for the faithful performance of a contract between Logan and Bagwell, wherein the former agreed to build a house for the latter. This action was brought on the bond to recover damages for certain breaches of the building contract by Logan, which put Bagwell to an expense of nearly \$600 above the contract price of the house. The breaches were the failure of Logan to pay for materials and labor, discharge some liens for labor and material, and complete the house in the time stipulated. In defense of the action appellant answered that Bagwell failed to perform his part of the building contract, to wit, that he unduly postponed the selection of certain articles called for in the architects' specifications, and which Bagwell had reserved the right to choose, thereby hindering the contractor's work, and preventing the expeditious completion of the house; that Bagwell did not pay Logan the installments of the contract price on the dates they were stipulated to be paid, thus hindering Logan's work by leaving him without means to prosecute it; that the delay in payment grew out of an independent contract (to be stated later) entered into by Bagwell, Logan, and J. E. Love, from whom Bagwell borrowed the money to defray the cost of the house; that alterations were made by Bagwell as the house progressed in contravention of the contract. Those alleged defaults are pleaded in discharge of the appellant as surety on Logan's bond on the ground that they happened without its knowledge, and enlarged the obligation for which appellant bound itself as Logan's surety. This case was partly tried in the circuit court, but, after some evidence had been introduced, was referred to Hon. Daniel G. Taylor, as referee, before whom the taking of evidence, after many adjournments to accommodate the parties, was finished. While the hearing was in progress before the referee, it was suspended at the request of the appellant, in order that an amended answer might be filed in the cause by leave of the circuit court; and on the 19th day of December, 1902, application was made to the court for leave to file the answer. The re-

spondent objected for the reason that the case had been pending for years, had been partly tried before the circuit court, then referred. The hearing was in progress before the referee on issues that had long been made up, and the referee was so far advanced with the cause that he expected to close it on December 23d, four days from the date of the motion for leave to amend. The court sustained the objection, and refused permission to file an amended answer, to which ruling the defendant excepted, and filed a term bill of exceptions.

The amendment appellant desired to make was to insert in the answer a statement of the agreement alleged to have been made by Logan and Bagwell at the request of Love in modification of the terms of payment to Logan provided in the original contract. The proffered amendment states that, after the execution of the building contract and the bond in suit, Bagwell and Logan made a new and additional agreement in regard to payments without the knowledge and consent of the surety company, whereby Logan agreed to give plaintiff and his agent, Love, five days' time to pay any installment after it fell due; that under the new agreement Love was not bound to make a payment unless the superintendents of the building drew an order on him, and certified that Logan had paid for the materials and labor so used, and then was only bound to pay after five days; that those terms altered the contract for which appellant became surety. One term of the building agreement between Bagwell and Logan provided that no alterations should be made in the work shown and described in the drawings and specifications, except on the written order of the architects, and that, when so made, the value of the work added or omitted should be computed by the architects, and the amount added to or deducted from the contract price. The architects who drew the plans and specifications and superintended the construction of the building were Matthews & Clarke. There was a provision of the contract that, if the house was not completed by June 20, 1896, Logan should pay Bagwell \$3 a day thereafter until it was completed, as liquidated damages. The referee found that Logan, instead of finishing the job, abandoned it after the walls were up and the roof on, but when considerable work remained undone, and that Bagwell and his architects finished it, as they had a right to do under the contract. He refused to allow the forfeiture of \$3 a day against Logan, because the delay was due, in a measure, to Bagwell's own neglect in selecting certain materials; and Bagwell, moreover, took possession of the house with Logan's permission, while it remained unfinished. In consideration of those circumstances the learned referee deemed it unjust to tax the surety on Logan's bond with the penalty for delay in finishing the work. As Bagwell submitted to that ruling, it is not before us for review.

The referee found that on account of Logan's failure to carry out the contract Bagwell had to pay about \$560 more than the contract price to get the house finished, for which sum, with interest, he advised the circuit court to render judgment, and this was done. We have no cause to notice the items included in that total.

As to the release of the surety by Bagwell's failure to promptly select material and the consequent delay of the work of construction, we think that circumstance could have had no effect on the surety company's liability, except the chance of burdening it with payment of the stipulated forfeiture; and, as the judgment below relieved the company from the forfeiture, its contention on this point is devoid of merit. Slight negligence on Bagwell's part in choosing tiling and other material was not a breach going to the entire consideration of the contract, and so annulling it, and the bond with it; but one that gave Logan a claim for whatever loss he sustained by the enforced delay, and relieved him from blame for failure to finish in time if the failure was due to respondent's neglect. Under the facts shown it affected the surety's liability only as to the stipulated forfeiture. *Smith v. Crews*, 2 Mo. App. 269; *O'Neill v. Webb*, 78 Mo. App. 1; *Springfield Seed Co. v. Walt*, 94 Mo. App. 76, 67 S. W. 935.

It is earnestly contended that the surety was released by the side agreement orally made between Logan and Bagwell, allowing five days' grace for payment of each installment of the contract price. Those installments fell due as different stages were reached in the construction of the building. One was to be paid when the first floor joists were in; another when the second floor joists were in; another when the roof was on, and so on. The verbal arrangement attempted to be pleaded by way of amendment to the answer that Love, who furnished the money, should have five days' notice before he had to pay an installment, and have, too, a certificate of the architects that material and labor bills had been paid, was an amendment of a vital character, offered several years after the issues were joined, and in the midst of the referee's hearing. But we are not called on to decide whether the circuit court abused its discretion in refusing to allow it. The question is of minor importance in view of the finding by the referee that no positive arrangement of that kind was made; that the matter was discussed in a general way by Love, Bagwell, and Logan, but did not crystallize into a contract; and, moreover, that there was no consideration for such an agreement. The referee's opinion on the subject we accept, as well as his finding of the facts: "The evidence on this subject simply tended to show an oral request for an accommodation in the times of payment different from those required by the building contract made by Love, Bagwell's agent, upon

Logan, and promised by Logan. This request and promise can hardly be termed an agreement, as the evidence produced and offered shows it to have been made without any consideration whatever, and without having been reduced to writing. It cannot be contended that this understanding rises to the dignity of a contract, because it was subsequently lived up to, for such is not the fact. On the contrary, the evidence shows that some of the payments were made in exact accordance with the original building contract, and that in the only instances where there was a failure to make payments in accordance with the contract such failure resulted from facts at wide variance with the agreement or understanding between Logan and Love."

The remaining inquiry is as to whether the alterations in the building while it was under construction released the surety on the bond. The referee found that eight changes from the original plans and specifications for the house were made by order of Bagwell during construction, without the knowledge of the surety company, and without written orders from the architects and computation of the cost by them. He found further that the entire cost of the changes did not exceed \$200. If we are to look only to the building contract in deciding this point, the surety company must be held to have been discharged. As we have said, that contract provided that no alterations should be made except on a written order from the architects, and that, when made, the value of the work added to or omitted should be computed by the architects, and added to or deducted from the contract price. This course was not pursued, and if the bond contained no more than an obligation for faithful performance of the contract by Logan, the surety was released when the principal parties to the contract altered it without the knowledge or consent of the surety; and so the referee found, citing *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Killoren v. Meehan*, 55 Mo. App. 427; *Eldridge v. Fuhr*, 59 Mo. App. 44. Those cases decide that, if a building contract is materially altered without consulting the surety on the contractor's bond, the surety is discharged; and hold further that, when the contract contains a provision for computation by the architects of the cost of the changes, this must be done before the changes can be lawfully made. These rules were applied for the surety's benefit in *Beers v. Wolf*, though the cost of the deviations from the contract dealt with in that case exceeded but little the cost of the changes ordered by Bagwell. But the bond we have to construe is anomalous, and appears to bear out the contention of the respondent and the finding of the referee and the court below that the changes made by Bagwell had no effect on the surety's obligation, as their cost fell below \$200. The parties to the contract, Bagwell and Logan, were both parties to the

bond, with power to adopt what terms they pleased in deviation from those of the contract. The condition of the bond, in so far as it applies to the question under advisement, reads as follows:

"The condition of the above obligation is such, that, whereas, the said Wm. Logan, has on the day of the date of these presents, executed and entered into a certain contract for the erection of a certain building in said contract described, which contract is hereto annexed: Now, if the said Wm. Logan shall well and truly perform and fulfill all and every the covenants, conditions, stipulations and agreements in said contract mentioned to be performed and fulfilled, and any alterations and additions to said contract, provided such alterations and additions, if any such be made, shall not exceed in extra costs the sum of two hundred dollars (\$200.00).

"We, the said sureties, hereby expressly waiving all rights to be notified of, or by any further act to give our assent to, such alterations and additions and acknowledging ourselves to be bound unconditionally for the faithful performance of such alterations and additions within limit of such costs aforesaid."

It will be noticed that the above clause provides for alterations from the original plans not to entail a cost of more than \$200. But the appellant contends the true construction of the clause is that, in any event, alterations should be made in conformity to the regulations of the contract—that is, upon written orders from the architects and a computation of the cost; that, when made in that manner, they could not entail an additional expense of more than \$200. We would adopt this interpretation but for the language of the bond whereby the surety company acknowledges itself to be bound unconditionally for the faithful performance of such alterations and additions within the specified limit. We are inclined to the view which prevailed below—that the true meaning of the bond was to permit alterations to the amount of \$200 to be made in any mode the parties thought proper, regardless of the contract mode, without affecting the surety's liability. The condition of the bond binds the company not only for the performance of all the covenants, conditions, stipulations, and agreements in the contract to be performed by Logan, but contains a superadded clause, which was wholly superfluous unless it was intended to increase or diminish the surety's liability from what it would be if fixed by the terms of the contract. There can be no dispute that the intention of the bond was to do the one thing or the other—either enlarge or curtail the terms of the contract in respect to the right to alter the plans and specifications as the work progressed. Which was it? The words by which the surety company acknowledged itself "to be bound unconditionally for the faithful performance of such alterations and additions within the lim-

its of such costs aforesaid" appear to exclude the notion that the company was only bound on condition of the contract's regulations being followed, and to dispense with those regulations as to changes not increasing the cost of the building above \$200.

Judgment affirmed.

BLAND, P. J., concurs. REYBURN, J., having been of counsel, not sitting.

GRIFFITH et al. v. WILLIAMS PATENT CRUSHER & PULVERIZER CO.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

IMPLIED ASSUMPSIT—MONEY SPENT BY PURCHASER OF MACHINE—RECOVERY—PETITION—NATURE OF ACTION.

1. Money spent by a purchaser of a machine, purchased under a contract of warranty, in installing it in his place of business and in making alterations and repairs in it at the seller's suggestion for the purpose of making it work was not recoverable, on the machine failing to work, from the seller, on an implied assumpsit, where the seller never promised to pay the same, and the purchaser testified that he would have considered the money well spent, and would have borne it if the machine had come up to the warranty.

2. A petition to recover money spent by a purchaser of a machine under a contract of warranty in installing it and in making alterations and repairs in it, which alleged that the sums specified were advanced and expended for the special benefit, at the request, and for the use of the seller, constituted an action on an implied assumpsit, and not for damages for breach of the warranty.

Appeal from St. Louis Circuit Court; J. A. Blevins, Judge.

Action by J. Edwin Griffith and another against the Williams Patent Crusher & Pulverizer Company. From an order granting a motion to set aside an involuntary nonsuit, defendant appeals. Reversed.

Walther & Meunch, for appellant. Jos. Wheless, for respondents.

Opinion.

GOODE, J. Plaintiffs and defendant corporation entered into the following agreement:

"Dec. 2, '98.

"Messrs. Griffith & Boyd, Baltimore, Md.—Gentlemen: We propose to furnish you f. o. b. cars St. Louis, Mo., one (1) No. 3 Latest Improved Williams Patent Pulverizer for the sum of \$750 (seven hundred and fifty dollars.)

"This mill is guaranteed to grind so as to pass No. 60 mesh sieve eight (8) tons per hour of either Charleston or Tennessee Brown Phosphate rock or six tons per hour of Peace River Pebble; or it will grind to pass a No. 20 mesh sieve 3-½ tons per hour of Junk Bone without preliminary breaking or crushing. We will furnish with the mill two sets

¶ 1. See Sales, vol. 43, Cent. Dig. § 1290.

of screens and it will be fitted with a Newell Perforated Pulley and an outboard bearing for the shaft. The speed of the mill will be 1500 rev. per minute. We will furnish this mill on 30 days trial, subject to above conditions and guaranty.

"Terms: at the expiration of the trial we will accept a non-interest bearing note for the amount as stated above, maturing August 1, 1899. Very truly yours, The Williams Patent Crusher & Pulverizer Co., By J. W. Tierney, Phila. Agent."

"Accepted, Griffith & Boyd."

The mill or machine which was the subject-matter of the foregoing contract was bought by the plaintiffs from a salesman of the defendant after the examination of a model. Plaintiffs, it should be stated, do business in Baltimore, Md., and the defendant is a corporation, with its principal office in St. Louis, Mo. The mill was shipped to Baltimore shortly after the purchase, and was installed on the plaintiffs' premises according to written directions given by the defendant company. It failed to work according to the guaranty, and considerable correspondence ensued between the parties respecting it. The defendant directed different things to be done to make it work, which entailed expense in addition to the expense of putting in the foundation and installing the machine. The various items of expense will appear from a portion of the petition to be copied below. All efforts to make the machine comply with the guaranty failed, and plaintiffs claim they never accepted the mill, but stood ready to return it to the vendor at any time. This action was instituted to recover the sum of \$2,304.50, which the plaintiffs say they expended in putting in the mill and endeavoring to run it.

The decision of the appeal turns on the nature of the action; hence it is necessary to examine the petition. That pleading sets out, in substance, the contract between the parties, the sale and purchase of the mill, and the guaranty of the defendant concerning what kind of work it would do; that it was furnished on 30 days' trial, at the end of which plaintiffs were to pay for it by notes for \$750. After these preliminary statements the petition proceeds as follows: "Plaintiffs state that upon receipt of said mill it was duly installed in their place of business according to specific plans and specifications and directions in writing furnished by the defendants; it being necessary, owing to the size and character of said machinery, to build and prepare substantial and costly foundations and emplacements for the installation of said machine, according to plans and specifications and directions furnished by the defendant; and entailed a large cost upon plaintiffs. Plaintiffs state that said mill failed in every particular to perform the work which it was represented to do; that the said mill for a long time refused to operate at all, and then at the requirement

of very much greater horse power than was represented; and that the mill utterly failed to accomplish the grinding of the fertilizing matter indicated in the capacity represented, or at all; by reason of which said mill failed in the uses for which it was constructed. And plaintiffs state that they at once communicated these facts to the defendant, and the said defendant requested plaintiffs to endeavor to correct the defects and imperfections of said machine, and to repair its faults of construction and design, and made many suggestions for alterations and repairs in the machine and its settings and attachments, and requested and directed plaintiffs to make a great many such changes and alterations, for which plaintiffs advanced and expended, at the special instance and request and to the use of the defendant, large sums of money in effecting them, as hereinafter fully set out. And plaintiffs state that the president and other representatives of the said defendant company by its repeated statements and assurances to plaintiffs, procured plaintiffs to make all said alterations and repairs and to incur all said expenditures, and said plaintiffs state that they have thus paid out, advanced, and expended at the special instance, direction, authorization, and request of the defendant company, and to its use and benefit, in the installation, repairs, and alterations of said mill, all of which was used and expended under the direction and at the request of defendant, the following several sums of money for the several items of expense so incurred, to wit: For brick foundation of mill, \$124.95; for millwrights and carpenters, \$399.11; for ordinary labor, \$96; for belts, pulleys, chains, buckets, etc., \$659.09; for screens, wire cloth, linen cloth, and fans, \$307.30; for lumber for elevators, shafting, and mill, \$428.84; for special pulleys, shafting, and machinist labor on mill, \$377.71; for pulley coverings, \$56.62; for sheet-iron piping for dust, \$68.10; for hardware, \$15.00; for special oils for mill, \$22.43; for freight and expressage on mill and repairs, \$49.35—making a total of \$2,304.50; and an itemized statement of which expenditures is herewith filed as Exhibit B, and by reason of which the defendant company is liable to repay all such moneys to plaintiffs, as plaintiffs have often demanded of it so to do; and plaintiffs state that all and every one of these items of expense were incurred by the direction, authority, and request and to the use and benefit of the said defendant in the installation, alteration, and repair of said mill. Wherefore plaintiffs demand judgment against the defendant for the sum of \$2,304.50, with interest from July 1, 1899, with costs of suit." The answer is a general denial.

The testimony introduced by the plaintiffs tended to support the allegations of the petition in regard to the expense incurred in installing the mill, buying machinery to run it, and afterwards different articles and ap-

pliances for use in the effort to make it do what was expected of it; that the outlay for labor and articles in attempting to operate the mill was expended in compliance with suggestions by the defendant company as to certain expedients thought necessary to make the mill work satisfactorily. At the conclusion of plaintiff's testimony the court gave an instruction to the jury in the nature of a demurrer; whereupon plaintiffs took an involuntary nonsuit with leave to move to have it set aside. A motion of that kind was filed and sustained on the ground that the court erred in granting a demurrer to the plaintiffs' evidence. The defendant appealed from the order granting a new trial.

The vital question is whether this is an action for breach of warranty, or assumpsit on an implied agreement by the defendant to reimburse the plaintiffs for money paid for the benefit of the defendant at its instance and request. If it is an action of the latter sort, the plaintiffs were not entitled to recover, because there was no evidence from which to infer or imply a promise on the part of the defendant to reimburse them for their outlay in installing the machine or making it work well. The testimony was that the defendant made suggestions concerning its operation, and that those suggestions were followed with some expense to plaintiffs. The defendant neither promised to repay the expense nor was expected to do so. Edwin Griffith, one of the plaintiffs, goes far toward setting this matter at rest by his own testimony. He swore: "We would have considered the money well spent in installing the mill if it had done the work it had been guarantied to do, and our company expected to bear that expense if the mill had come up to the guaranty." Most of the items of expense sued for were incurred in installing the machine. But whether thus incurred, or for devices to make it run according to the guaranty, there is nothing to justify the inference that the defendant requested the expenditure of money for its benefit. Part of the outlay was for a sheet-iron pipe to carry dust from the mill to a dust bin. Another part was for the purchase of shafting suitable for running the mill, and still another for changes in plaintiffs' plant to make room for the shafting and pulleys needed to operate the mill. After all the expense of installation and changes had been incurred, plaintiffs notified the defendant they would go no further, nor spend any more money on the machine, until they were paid what they had already expended. The agent to whom this notice was given, instead of giving a promise to pay plaintiffs what they were out, merely said he would take the matter up with his superiors in Philadelphia. Undoubtedly there is nothing in this case from which the law will imply a promise on the part of the defendant to reimburse plaintiffs their outlay; hence there can be no recovery on an implied

assumpsit. *Skeen v. Johnson*, 55 Mo. 24; *Mansur v. Murphy*, 49 Mo. App. 266. This much is practically conceded by the counsel for plaintiffs, who contends, however, that the action is not on an implied assumpsit, but is for damages for breach of the contract of sale; that is, we suppose, for breach of the defendant's warranty. But this contention is in the very teeth of the petition, which pleads that the sums specified were advanced and expended for the special benefit, at the request of, and for the use of the defendant. This averment is reiterated three times, and is the gravamen of the petition. It may be allowed that some of the items of expense incurred would constitute part of plaintiffs' recovery of damages in a suit on the warranty, but that this action is of that character cannot be allowed without repudiating the language and essence of the petition. The issues tendered bore no relation to a breach of warranty, nor apprised the defendant that plaintiffs complained of such a breach.

It results that the circuit court erred in granting the plaintiffs a new trial. The judgment is therefore reversed, and the cause remanded, with directions to set aside the order granting a new trial, and permit plaintiffs to take a nonsuit, or amend, if so advised, on such terms as are just.

BLAND, P. J., and REYBURN, J., concur.

SCHENK v. FORRESTER.*

(Court of Appeals at St. Louis, Mo. Nov. 3, 1903.)

LANDLORD AND TENANT—PASTURES—LEASE—FENCE CONTRACT TO MAINTAIN—ESCAPE OF CATTLE—DAMAGES—LIABILITY OF LANDLORD—NOTICE TO REPAIR.

1. Where defendant rented certain pasture land to plaintiff, and agreed to keep up the fence so as to restrain stock turned into the pasture, which he failed to do, by reason of which the stock escaped into a neighboring cornfield and damaged the corn, plaintiff was entitled to recover the amount he was compelled to pay the owner of the corn to indemnify him for the damage.

2. Where a landlord warranted the security of a fence surrounding a pasture rented to plaintiff, he was not entitled to notice to repair as a condition to his liability for damages paid by plaintiff for injuries done by his stock, which escaped from the pasture by reason of the insufficiency of the fence.

Appeal from Circuit Court, Scotland County; E. R. McKee, Judge.

Action by J. A. Schenk against George Forrester. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Jno. M. Jayne and Ed. Higbee, for appellant. Smoot & Smoot and Pettingill & Meyers, for respondent.

REYBURN, J. This is an action instituted by plaintiff, the tenant, against defendant, his

*Rehearing denied December 15, 1903.

landlord, for damages claimed to have been sustained by the breach of a parol contract for the renting of pasture lands. The final amended petition contained three counts, but at the trial the court sustained appellant's demurrer as to the first and third counts of the petition, and instructed the jury to find a verdict for the defendant upon those counts, and the trial proceeded before a jury on the second count, the substantial allegations of which are as follows: That on the 12th day of July, 1900, defendant contracted with plaintiff to lease the latter the pasturage on lands described for the remainder of the season, knowing that the plaintiff desired to use the pasturage for his cattle, and for such use the plaintiff paid \$150; that as part of the consideration defendant agreed to repair the fence around the rented premises, put them in such condition as to be secure for stock, and maintain them in such condition while plaintiff used the premises, and on the faith of such promise the plaintiff accepted the use of the premises, paid the rental, and turned 100 head of cattle therein, but that the defendant had failed to repair the fence between such lands and the land of one Garrison, adjoining; that defendant's part was rotted and decayed, and not sufficiently repaired by him to turn stock, nor did he keep it in repair, and by reason of such defects and failure to repair as agreed, the stock of plaintiff broke into Garrison's fields and damaged his growing crops in the sum of \$65, for which sum plaintiff being compelled to pay Garrison, plaintiff asked judgment. The answer of defendant consisted of a general denial of each count of the petition.

1. The testimony tended to establish that early in the month of July, 1900, plaintiff and defendant entered into negotiations for the tenancy of the pasture, and together they visited and inspected the pasture, fencing, and water gap, and the verbal agreement for the tenancy of the pasture lands for the season of 1900 ensued, the fencing and water gap were repaired by the defendant, the rental paid and possession taken by plaintiff by turning in about 100 head of cattle; that about the beginning of September a deadened tree, which had been in use as a post, had fallen across the fence between the rented lands and those of L. F. Garrison, the neighbor adjoining; and that plaintiff's cattle escaped into the cornfield of Garrison, and injured the crop, for which the plaintiff had paid Garrison \$38.50. The defendant objected to the testimony offered on behalf of the plaintiff relative to the damage to Garrison's crop by the cattle as not being the proper measure of damages, but the objection was overruled, and testimony admitted by the court. The proper measure of damages recoverable by plaintiff was such injury as naturally flowed from the breach of the contract, and was restricted to such loss as was the direct, immediate, proximate, and unavoid-

able consequence of the impaired condition of the fencing. The case of *Wisdom v. Newberry*, 30 Mo. App. 241, presented a state of facts analogous to the condition disclosed herein, and it was held therein that the injury caused by escaping cattle to the neighbor's corn was not a proper element of damages. The case of *Turner v. Gibbs*, 50 Mo. 556, as well as the earlier decision of *Fisher v. Goebel*, 40 Mo. 475, are authorities to the same effect. In *Miller v. Railway*, 90 Mo. 389, 2 S. W. 439, where fire charged to have been negligently permitted to escape from defendant's locomotive communicated to inflammable materials accumulated on its right of way, and thence to plaintiff's fencing, which was destroyed, and in consequence plaintiff's crops were injured by intruding stock ranging near his lands, the railway was held liable for such damages, the court declaring: "The chief point of objection, however, which the defendant takes, is to the doctrine that the company is responsible for the destruction of the crop by cattle, etc. It was in evidence that it was a good stock range around plaintiff's field, and that many horses, cattle, and hogs came into the field after the fence was burned, and, in spite of all efforts to keep them out, destroyed the crop before the fence could be rebuilt. The destruction of the crop of corn by the stock ranging around the field, after the barrier of the fence was removed by fire, was just as natural a result, and one to be as much expected, as that the fire would destroy the fence in the first instance. Had the fire destroyed the crop of corn, no one would doubt that under our rulings the plaintiff could recover. The case is the same in principle where the immediate result of the fire is to remove the only intervening obstacle between the stock and the crop as where the natural result of such removal is as disclosed by the evidence here." Controlled, therefore, by this later expression of the Supreme Court, the theory upon which the present case was submitted to the jury in the admission of testimony and the instruction permitting recovery for indemnity paid by plaintiff to Garrison for damages to the crop of the latter by the fugitive cattle was proper.

2. The plaintiff charged in the count of the complaint upon which the trial was had that defendant had knowledge of the purposes for which plaintiff rented the land, and that the contract of tenancy embraced the agreement by defendant to maintain the fences in such condition as to be sufficient to turn stock. The plaintiff testified to this version of the compact, but the defendant controverted such understanding. If the claim of plaintiff was predicated on the mere agreement to repair by defendant, the contention of his counsel that he was entitled to notice to repair, and a reasonable time in which to comply with the obligation, would be entitled to consideration; but the plaintiff in effect charged in his petition and testified that de-

defendant warranted the security of the fence while plaintiff's cattle were upon the pasture, and the jury, under the instructions of the court, so found by their verdict. The instructions asked by the defendant and refused were defective in not responding to the issues joined by failing to submit to the jury the terms of the contract as averred by defendant in testifying on his own behalf.

The case was fairly presented to the jury, and the judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

**STEMPEL FIRE EXTINGUISHER MFG.
CO. v. NATIONAL FIRE INS. CO.
OF HARTFORD, CONN.**

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

APPEAL—BILL OF EXCEPTIONS.

1. Judgment on an agreed statement of facts cannot be reviewed in the absence of a bill of exceptions.

Appeal from St. Louis Circuit Court; John A. Blevins, Judge.

Action by the Stempel Fire Extinguisher Manufacturing Company against the National Fire Insurance Company of Hartford, Conn. Judgment for plaintiff. Defendant appeals. Affirmed.

Yates, Mastin & Howell and H. R. Hall, for appellant. F. A. Wind & Sim T. Price, for respondent.

BLAND, P. J. The material parts of the petition are as follows: "That on, to wit, the 26th day of October, 1901, the said defendant issued to the plaintiff its policy of insurance No. 860,727, whereby it insured the plaintiff against all direct loss or damage by fire to an amount exceeding two thousand five hundred dollars (\$2,500), as follows: One thousand two hundred and fifty dollars (\$1,250) on stock, in number consisting principally of fire extinguishers and parts of same, and on materials and appliances incident to the business, including advertising matter; and one thousand two hundred and fifty dollars (\$1,250) on machines, machinery, including extra parts, and on electric motor, and all appliances for furnishing or transmitting power, tools, implements, utensils, office and factory furniture and fixtures, signs and awnings, and all equipments of premises, except stock; all while contained or attached to the building situated at 622 and 624 North Main street, block No. 14, St. Louis, Mo., for which said policy the said plaintiff paid to the said defendant thirty-two and fifty hundredths dollars (\$32.50). Said policy is herewith filed and marked 'Exhibit A.' Plaintiff further states that on, to wit, the 31st day of January, 1902, said policy being then in force, the plaintiff sustained a loss by fire as follows: On the stock, two thousand and fifty dollars (\$2,050), on the machinery, two

thousand one hundred and eighty and seventy-four hundredths dollars (\$2,180.74); that proof of said loss was made by plaintiff on the 8th day of February, 1902, and accepted by defendant; that by the terms of the policy the amount due thereunder was payable sixty (60) days after the proof of said loss. Plaintiff further states that it has often demanded of the defendant the payment of said sum of twenty-five hundred dollars (\$2,500) and the defendant has failed and refused to pay the same. Wherefore, plaintiff prays judgment for the said sum of twenty-five hundred dollars (\$2,500) together with interest from the 10th day of April, 1902, at the rate of six per cent. per annum, together with its costs."

The answer is as follows, omitting caption: "Comes now the defendant, and for answer to plaintiff's petition admits that plaintiff is a corporation, as therein alleged; admits that defendant is a corporation, as in said petition alleged, and that as such it made and delivered to the plaintiff the policy of insurance sued on, whereby it insured the plaintiff against all direct loss or damage by fire to the amount of one thousand two hundred and fifty dollars on plaintiff's stock in trade, consisting principally of fire extinguishers and parts of same, and on materials and supplies, including advertising matter; also twelve hundred and fifty dollars on machinery, including extra parts, electric motor, and all appliances for furnishing or transmitting power, tools, implements, utensils, office and factory furniture and fixtures, signs and awnings, and all equipments of the premises except stock, contained in or attached to the brick building, situate at numbers 622 and 624 North Main street, St. Louis, Mo. Defendant admits that on the 1st day of January, 1902, while said policy was in force, the plaintiff sustained a partial loss and damage by fire of two thousand and fifty dollars on the first item mentioned in the policy of insurance, and of two thousand one hundred and eighty dollars on the second item mentioned in said policy of insurance. Defendant avers that among other conditions contained in said policy of insurance sued on was the following: 'In consideration of the reduced rate of premium charged for this policy, it is hereby mutually understood and agreed that this company shall, in case of loss or damage, be liable for such proportion only of the loss or damage as the amount insured by this policy shall bear to the actual cash value of the property covered by this policy at the time of the fire.' Defendant avers that the regular rate of premium charged by it upon the risk of plaintiff so insured by the defendant as aforesaid, when the clause or condition last hereinbefore quoted and called the 'reduced rate agreement' was not attached to and made a part of its policy of insurance, was \$36.25; that the rate charged for such insurance by the defendant when said clause and condition

was attached to and made a part of its policy of insurance was \$32.50; that prior to the execution and delivery to the plaintiff of said policy of insurance the defendant informed the plaintiff of said difference in the premium rate charged therefor, and defendant gave to the plaintiff the option of taking its policy of insurance with said above-quoted reduced rate agreement incorporated in and made a part of the same and paying therefor the sum of \$32.50, or of taking a policy of insurance without any such clause attached to and made a part of the same and paying therefor the higher rate of \$36.25. Defendant avers that the plaintiff elected to pay to the defendant the lower rate above referred to, namely \$32.50, in consideration whereof plaintiff accepted from defendant the policy sued on with the stipulation and condition therein as hereinbefore recited. Defendant avers that at the time of the happening of the loss sued for the actual cash value of the property covered by the first item of insurance mentioned in said policy was six thousand two hundred and fifty-seven dollars; that the actual cash value of the property mentioned in the second item of insurance contained in said policy was three thousand five hundred and eighty-two dollars and fifty-four cents. And defendant avers that, according to the terms of the said reduced rate premium hereinbefore recited, it was and is liable to the plaintiff in the sum of four hundred and eight dollars and ninety-three cents on account of said first item of insurance and the sum of seven hundred and sixty dollars and eighty-nine cents on account of said second item of insurance, making a total of eleven hundred and sixty-nine dollars and eighty-two cents, and that defendant is liable for no other or further sum whatever; that defendant has ever been ready and willing to pay said sum in full settlement of its liability under the policy sued on, and is now willing that the plaintiff shall have judgment therefor, together with legal interest from the time when the same became due and payable, and for all costs accrued up to the time of filing the answer, but defendant denies that it is indebted to the plaintiff in any greater amount. Further answering, defendant denies each and every allegation, matter, fact, and thing in said petition contained not hereinbefore admitted, and, having fully answered, asks to go hence with costs."

The issues were submitted to the court on the following agreed statement of facts: "(1) The policy of insurance sued on is to be considered as in evidence, and is hereby made a part of this agreed statement of facts as fully as if set out herein in *hæc verba*. (2) The proofs of loss, marked 'Exhibit B,' are to be considered as in evidence, and are hereby made a part of this agreed statement of facts as fully as if set out herein in *hæc verba*. (3) Subject to the objection that same is incompetent, irrelevant, and imma-

terial, defendant offers the following facts, which are to be considered as a part of this statement, subject to such objection: (a) That the defendant's company would have charged a premium of (\$36.25) thirty-six dollars and twenty-five cents for a policy of insurance identical in all particulars with the policy in suit except that the same would not have contained the following clause or provisions: 'Reduced Rate Agreement—Full Value Insurance. In consideration of the reduced rate of premium charged for this policy, it is hereby mutually understood and agreed that this company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the actual cash value of the property covered by this policy at the time of the fire. Provided, however, that if the whole insurance shall be greater than the value of the property covered, this company shall not be liable for a greater portion of the loss or damage than the amount insured by this policy bears to the whole insurance covering the property at the time of the fire.' (b) That for a premium charged of (\$32.50) thirty-two dollars and fifty cents, the policy in suit, and made a part hereof, was issued, which premium charge was the regular rate charged for a policy of the amount and covering the property at the location therein described, and with the conditions and provisions therein specified. (4) The value of the property named in the first classification mentioned in plaintiff's petition and in the policy sued on was (\$6,257) six thousand two hundred and fifty-seven dollars at the time of the fire. (5) That the value of the property named in the second classification mentioned in plaintiff's petition and in the policy sued on was (\$3,582.54) thirty-five hundred eighty-two dollars and fifty-four cents at the time of the fire."

Judgment was given by the court for the full amount of the loss. Defendant appealed.

No bill of exceptions was filed, and hence no exceptions were saved at the trial. Therefore there is nothing further to review. *Donaldson v. Thompson*, 120 Mo. 152, 25 S. W. 358; *Lilly v. Menke*, 126 Mo., loc. cit. 231, 28 S. W. 643, 994.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

KEAN v. SCHOENING.*

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—HARMLESS ERROR.

1. Any error in an instruction in an action for injury to a customer in a store from falling down the cellar stairs (the trapdoor being open) in declaring that the occupant of a store

*Rehearing denied December 15, 1903.

must keep it in a reasonably safe condition, instead of stating that he must use ordinary care to keep it reasonably safe, is harmless; the facts which the instruction requires to be found that plaintiff may recover showing that defendants used no care to keep the premises safe, and that contributory negligence is the only defense.

2. An instruction requiring the jury to find that plaintiff fell when she was using ordinary care for her own safety does not authorize a recovery without regard to her contributory negligence.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Ellen A. Kean against Edward E. Schoening and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Rassieur & Rassieur, for appellants. J. J. O'Connor, for respondent.

GOODE, J. The instructions in this case were as follows:

For plaintiff: "(1) The court instructs the jury that one who occupies a business house, and sells therein merchandise, and into which he invites the public or the plaintiff to trade with him for their mutual benefit, is bound to keep the premises in a reasonably safe condition. And if the jury finds from the evidence in this cause that on or about the 14th day of November, 1901, the plaintiff entered the defendant's hardware store in question for the purpose of purchasing a coffee pot, and that on entering said store she was met by one of the defendants, and that said defendant conducted or directed her to the rear end of said store to look at some coffee pots which defendants were offering for sale, and that while she was looking at or examining said coffee pots she stepped backwards and fell into a large hole in the floor of said store, which said hole was caused through leaving a trapdoor covering a stairway leading to the cellar under said store open, and received the injuries to her person complained of; and that plaintiff had no knowledge of the existence of said hole or open stairway until she fell into the same; and that there was no guard or other signal at or near said hole sufficient to give her warning of the existence of said hole or open stairway; and that said hole was dangerous to persons trading in or walking through said store; and that said trapdoor was left open by one of the defendants or their servants at work in or about said store, or, if not so left open, then that either of defendants knew, or by the exercise of ordinary care could have known, that said door was open, prior to her fall, but negligently failed to either close said door or give her warning that it was open; and that at the time of falling plaintiff was using ordinary care and prudence for her own safety—then their verdict must be for the plaintiff. (2) The court instructs the jury that the words 'ordinary care,' as used in these instructions, means that degree of care which would be used by a person of ordinary prudence under like or

similar circumstances as those in connection with which the words 'ordinary care' are used in these instructions, and the absence of such care is what is meant by the word 'negligence' as used in these instructions. (3) The court instructs the jury that if they find a verdict for the plaintiff they shall assess her damage at such sum as they find from the evidence to be a reasonable compensation to her for any pain of body or anguish of mind they find from the evidence she has suffered through her said injuries, and as will repay her for the loss of any earnings they find from the evidence she has sustained through her said injuries, and as will reimburse her for any money she has paid or obligated herself to pay for medicine or medical aid; provided, however, that they find from the evidence that the medicine and medical aid so charged for were actually necessary and did enter into the treatment of her said injuries and are reasonable in amount and price. And if the jury should further find from the evidence that she will necessarily suffer pain in the future through her said injuries, then they should allow her such further sum as they find from the evidence to be a reasonable compensation to her for any pain they find she will necessarily suffer in the future through her said injuries, but the whole sum of her damages must not exceed \$4,500. (4) You are instructed that the jury are the sole judges of the credibility of the several witnesses that have appeared before you, and of the weight or importance to be given to their respective statements of testimony; and if you believe from all that you have seen and heard at the trial, that any witness has willfully sworn falsely as to any of the facts mentioned in the instructions herein, as bearing on the plaintiff's alleged claim or defendants' alleged defenses thereto, then you are at liberty to disregard entirely the testimony of said witnesses."

For defendants: "(1) And if you find that the plaintiff knew that said door had been opened by the defendants, and that she thereafter stepped or fell into the opening because she failed to look about her to see whether the door was still left open, then the plaintiff cannot recover, and you must return a verdict in favor of the defendants. (2) If the jury believes from the evidence that the plaintiff knew, or by the exercise of ordinary care on her part she would have discovered, that the cellar door in question was left open, then the plaintiff cannot recover, even though you may believe that she was injured by falling into the opening. (3) The court instructs the jury that, unless they find from the evidence that it was an act of negligence on the part of the defendants to leave open the cellar door in question at the time and under the circumstances shown by the evidence, and that the plaintiff did not know, and by the exercise of ordinary care on her part would not have dis-

covered, that said door was left open, there can be no recovery in favor of the plaintiff, and you must return a verdict in favor of the defendants."

There was a verdict and judgment for plaintiff, and defendants filed their motion for new trial, complaining, among other things, that the court erred in admitting improper and illegal evidence and in giving improper and erroneous instructions at the request of the plaintiff. The court overruled defendants' motion for new trial, and defendants thereupon appealed to this court.

Opinion.

At the time of the injuries complained of defendants conducted a hardware store at No. 305 North Twelfth street, in the city of St. Louis. The storeroom was about 60 feet long and 20 feet wide. Near the rear a stairway led to a cellar beneath the floor. This stairway was entered through a trapdoor in the floor, which was, of course, an opening that a person might fall into if the door was left open. About 9 o'clock in the morning of November 14, 1901, the plaintiff, Mrs. Kean, entered the store on business. She inquired for a coffee pot like a sample she saw in a window, and one of the defendants invited her to the rear of the room to look at some pots which were on the shelves. This defendant, William Schoening, preceded the plaintiff to the back of the room, and she followed close behind. At that time the cellar door was shut, and did not attract plaintiff's attention, she says. She and William Schoening stopped near the trapdoor, and he proceeded to name the prices of articles which were on the shelves. Her eyes were directed to those wares; and while she stood in that position Edward Schoening came from the front of the store, raised the cellar door, and descended to the cellar, leaving the door open. The result was that the plaintiff took a step or two backward, fell into the hole, and was injured. She testified no warning was given that the door was open, and that she knew nothing of it being open until she fell into it. There was countervailing evidence that when Edward Schoening raised the cellar door he cried, "Look out!" and also evidence tending to show that plaintiff fell into the opening by walking forward in a careless way. The jury must have believed the plaintiff's version of the occurrence, as the instructions given to them did not warrant a verdict in her favor unless they did.

One point made by the defendants is that the court erred in telling the jury that an occupant of a business house, who invites the public to enter it to trade with him, is bound to keep the premises in a reasonably safe condition. That instruction is said to wrongly declare that the occupant of a store must keep it in a reasonably safe condition, whereas he is only bound to use ordinary care to keep it reasonably safe. This con-

tention is of trifling moment in the present action, because it cannot be held that the premises were reasonably safe with the cellar door yawning in the middle of the aisle where customers walked, or that the defendants used ordinary care, or any care, to keep them safe, if they left the door open. The only defense possible was that plaintiff knew, or had good reason to know, the door was open, and, without using proper care for her own safety, stepped into the hole. In other words, the only defense is contributory negligence on the part of the plaintiff. The instruction criticised stated with much particularity the specific facts the jury must find in order to return a verdict for the plaintiff. When read together, the instructions put the issues fully and fairly before the minds of the jury. The first one given for the plaintiff is further criticised on the score that it authorized a recovery without regard to the plea of contributory negligence on her part. This criticism is unmerited, for the instruction required the jury to find she fell when she was using ordinary care for her own safety. The facts before us are identical with those of *Welch v. McAllister*, 15 Mo. App. 492, wherein the law of such controversies is clearly expounded. The principles declared in that authority were observed by the trial judge in instructing the jury, and this appeal must fail.

Judgment affirmed.

BLAND, P. J., and REYBURN, J., concur.

STATE v. SAYMAN.*

(Court of Appeals at St. Louis, Mo. Dec. 1, 1908.)

CRIMINAL LAW—APPEAL—DISTURBANCE OF VERDICT—ASSAULT—EVIDENCE—SUFFICIENCY.

1. When defendant has been found guilty, and there is substantial evidence in support of that finding, it cannot be disturbed on appeal as against the weight of the evidence.

2. Positive evidence of prosecutrix that defendant made a violent and unprovoked assault on her with his fist, in his own house, where she had called in a peaceful and orderly manner for the purpose of getting a letter belonging to her, in defendant's possession, is sufficient to support a conviction of such assault.

Appeal from St. Louis Court of Criminal Correction; Hiram N. Moore, Judge.

T. M. Sayman was convicted of assault, and appeals. Affirmed.

F. A. O. McManus, for appellant. C. P. Williams, for the State.

BLAND, P. J. Defendant appealed from a judgment of conviction on an information charging him with unlawfully assaulting, beating, and wounding Helen Hampton. The case was tried in the St. Louis court of criminal correction. No instructions or declarations of law were asked or given. We are

*Rehearing denied December 15, 1908.

pressed to reverse the judgment on the weight of the evidence. Helen Hampton, the prosecutrix, swore positively that defendant made a violent and unprovoked assault upon her, and struck her in the face with his fist, in his own house, where she had called in a peaceful and orderly manner for the purpose of getting a letter belonging to her, then in the possession of defendant. Defendant and four or five witnesses called by him swore positively that the defendant did not assault the prosecutrix on the occasion mentioned by her, but, on the contrary, the prosecutrix became disorderly while in defendant's house, behaved in an unseemly manner, and, when requested by defendant to leave his premises, refused to go, and struck him in the face with a music roll she held in her hand; that defendant did not resist this assault. If we had power to weigh the evidence and to pass on the guilt or innocence of defendant, we would be inclined to find defendant not guilty on the evidence as it appears in the record. But the law has not put into the hands of appellate courts the scales by which to weigh the evidence in criminal cases, but in the hands of the jury, and when it has found the defendant guilty, and there is substantial evidence in support of that finding, the appellate courts have no authority to disturb that finding on the ground that it is against the weight of the evidence. *State v. Macklin*, 86 Mo. App. 671; *State v. Franke*, 159 Mo. 535, 60 S. W. 1053; *State v. Lane*, 158 Mo. 572, 59 S. W. 965; *State v. Huff*, 164 Mo. 480, 65 S. W. 256. There is substantial evidence in support of the verdict in this case. There is nothing further in the record for review, and the judgment is affirmed.

REYBURN and GOODE, JJ., concur.

DANKER v. GOODWIN MFG. CO.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

NUISANCE — GROUNDS OF RECOVERY — INSTRUCTION — MUNICIPAL ORDINANCES — ADMISSIBILITY.

1. An instruction, in an action for damages for maintaining a nuisance, submitting several grounds of recovery, only one of which has any support in the evidence, thereby contradicting another instruction which submitted but this one ground, is prejudicial error.

2. In an action for damages for maintaining a nuisance, consisting in the operation of a candle factory, whereby offensive smells are created and allowed to permeate plaintiff's premises, municipal ordinances prohibiting the accumulation of decayed substances, prohibiting the boiling of fat or grease in an offensive or unclean or defective manner, and prohibiting the owners of candle, oil, and other factories from allowing their plants to remain unclean, or conducting their business in an annoying manner, are inadmissible on the part of plaintiff.

Appeal from St. Louis Circuit Court; J. A. McDonald, Judge.

Action by August Danker against the Goodwin Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed.

E. S. & E. W. Robert, for appellant. E. E. Wood, for respondent.

GOODE, J. The defendant company has a factory on the south side of Chouteau avenue, and between Virginia and Rankin avenues, in the city of St. Louis, where it manufactures mining candles and the by-products, red oil and glycerin. The factory embraces all the north half of the block back to an alley, except 70 feet at the east end. The south end of the block abuts on La Salle street, on the north side of which street is plaintiff's dwelling house. He owns another house on La Salle street, immediately across the alley from defendant's plant, and in the same block. The latter property plaintiff purchased in 1902, nine years after defendant's plant was started, and it has been occupied by members of his family for several years. Plaintiff's two properties face south on La Salle street, the lots extending back toward Chouteau avenue to within 50 feet of defendant's factory. This action is for damages for the maintenance of an alleged nuisance. As plaintiff's case appears on the face of the petition, the nuisance consists of the following facts incident to the operation of the defendant's factory:

First. The discharge of gas, steam, smoke, and noxious vapors, which settle down on plaintiff's home and on his other property, affecting the health of his family and tenants, rendering their homes uncomfortable, and injuring the shrubbery and trees in the yards.

Second. The dissemination of unwholesome smells, which greatly annoy the members of plaintiff's family, and make them sick.

Third. Storing large quantities of glycerin, red oil, and other highly explosive and combustible articles in the factory, to the constant menace of plaintiff, his property, family, and tenants, so that those persons live in fear and dread.

Fourth. The increase of plaintiff's insurance rates by the proximity of said combustible material.

Fifth. The use of old and defective boilers, pipes, digesters, and other machinery in the factory, which apparatus, on account of its defective condition, is dangerous.

Sixth. Carelessly allowing excessive heat to be used in connection with the plant, whereby explosions may be caused, and by which the lives of persons in the neighborhood, including plaintiff, his family and tenants, are endangered. As germane to this averment, the petition pleads a section of the municipal code of the city of St. Louis, which provides for the inspection of boilers and steam-generating apparatus by a city inspector, and forbids the operation of such machinery without a previous inspection, or its

operation at a greater pressure than the inspector allows. Another section is referred to, which prohibits the use of such apparatus without the obtention of a certificate of inspection from the inspector of boilers. The charge is made in the petition that the defendant company failed to obtain a certificate of inspection, but operated its plant without one. It is also stated that the machinery was inspected by the city boiler inspector (we suppose, on that officer's own motion), and the defendant notified that certain portions of the apparatus were not safe, and should be repaired before any pressure at all might be used; that the defendant failed to heed that order of the boiler inspector.

Seventh. It is alleged that, within three years before the institution of this action, various explosions occurred in the factory, by which bricks, pieces of iron, wood, grease, and other materials were hurled through the air and about plaintiff's house, causing terror to the inhabitants, and shocking the nerves of plaintiff's wife so that her health was badly affected.

The bulk of the evidence introduced by the plaintiff during the trial went toward proving that the operation of the factory generated noxious gases and vapors, which spread through the neighborhood, and were deleterious to the health of the plaintiff's family—in fact, undermined the health of some of the members of his family. There was much evidence, too, as to the supposed explosions. No municipal ordinance requiring a certificate from the inspector to legalize the operation of the factory seems to have been introduced, and in fact the allegation about the defective machinery, noninspection, etc., remained unproven. But several ordinances of a different character, and not referred to in the petition, were introduced over the objection of the defendant. One of these prohibits the owners or occupants of property from allowing unsound meat, pork, fish, hides, decayed vegetables or food, manure, offal, garbage, or filth of any kind, which by decay might become offensive to human beings or detrimental to health, to accumulate on the premises. Another section prohibits the business of bone-crushing, fat-burning, making of glue, or manufacturing of fertilizing material from dead animals, or any boiling of swill, fat, or grease, to be done in an offensive, unclean, or defective manner within the city limits. A third prohibits the owners of soap, candle, oil, glue, hemp, varnish, or sausage factories, or places where lead is corroded by manure, from permitting the same to remain unclean, or conducting their business to the annoyance of citizens. Several other ordinances of a kindred nature were put in evidence. Defendant objected and excepted to all of them.

Before the case was submitted to the jury, plaintiff's counsel waived his claim to a verdict on the charge that the operation of the

factory was injurious to health, and on the alleged explosions; resting his case solely on proof of the emission of bad smells by the factory, which permeated the air in the neighborhood, to the physical discomfort of the occupants of plaintiff's buildings, including his family, and the depreciation of the value of his property.

An instruction defining the issue which the jury was to determine was given at plaintiff's request. It was as follows: "The court instructs the jury that if they find from the evidence that plaintiff on or about the 2d day of August, 1902, owned and was in possession of the premises on the northwest corner of Virginia avenue and La Salle street, in the city of St. Louis, and occupying the same as a dwelling for himself and his family, as charged in the petition, and that defendant was the owner of, and engaged in the operation of, a tallow plant, oil, candle, and glycerin factory on the northwest part of the block, bounded on the south by La Salle street, on the north by Chouteau avenue, on the east by Virginia avenue, and on the west by Rankin street, and between 3300 and 3400 Chouteau avenue, and about fifty feet from plaintiff's aforesaid property, in which plant and factory it operated a tallow plant, oil, candle, and glycerin factory, and that defendant so conducted such plant and factory during the time charged in plaintiff's petition as to cause at various times during the day quantities of gas, steam, smoke, and noxious vapors therefrom to permeate the air about the said property of plaintiff in such manner as to produce material physical discomfort to the plaintiff and his family in the occupancy of his said property as a dwelling, or to depreciate the value of said property, then the said plant and factory so operated by defendant was a nuisance, and you should find in favor of plaintiff, even though said business of defendant was during all such time a lawful business."

At the instance of the defendant the court instructed the jury that damages for a diminution of the value of plaintiff's property depended on a finding that offensive odors emanated from the factory, and, further, that plaintiff had withdrawn all claim for damages on the score of injury to the health of his family resulting from bad odors. The further charge was given that there was no evidence to prove the defendant stored combustible and dangerous materials on his premises; no evidence that the boilers and steam-generating apparatus were operated without a license, or that there was danger of their exploding; that therefore those averments in the petition must be disregarded.

Opinion.

The instruction given at the instance of the plaintiff permitted the jury to return a verdict in plaintiff's favor if they found the defendant conducted its plant so as to cause

gas, steam, smoke, and noxious vapors to permeate the air about plaintiff's property, to produce thereby material discomfort to plaintiff and his family in the occupancy of their dwelling, or to depreciate the value of his property. This instruction went outside the evidence, for there was no testimony that gas, steam, or smoke from the factory caused any discomfort to plaintiff's family or other residents in the vicinity. While most of the evidence introduced by the plaintiff was designed to show foul odors emanated from the factory, which were deleterious to the health of plaintiff's family, this ground of recovery, as stated, was waived. As to the factory casting out gas, steam, and smoke which spread through the neighborhood, there was no testimony. Not a witness swore to a fact of that sort. The instruction should have confined the plaintiff's recovery to a finding by the jury that stench emanated from the plant, which materially disturbed the comfort of the plaintiff and his family, and diminished the value of his property. The instruction given in behalf of the plaintiff is inconsistent with the fifth instruction given for the defendant, which restricted a possible award of damages for depreciation in the value of plaintiff's property to a finding that offensive odors were emitted from the factory. Plaintiff's counsel practically concedes the inconsistency of the two instructions, but maintains it was harmless. We are of a different mind. The rule of law that instructions should not submit issues to a jury about which there is no proof is wholesome, as tending to prevent unfounded verdicts. *White v. Chaney*, 20 Mo. App. 389; *Paddock v. Sones*, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254. Plaintiff's pleading caused this case to be tried in a way which we disapprove. The petition stated various alleged facts which tended to show the factory was a nuisance to the people near it; a mass of testimony was introduced, ostensibly to prove the different allegations, each of which would be of itself a cause of action; but finally all of them broke down and were abandoned, except the one that bad odors proceeded from the factory, and were so annoying as to amount to a nuisance. So much testimony on irrelevant issues was apt, not only to distract the jury and confuse their minds concerning the real issue, but to raise a prejudice which told against an impartial decision of the real issue, even if they understood what it was. The instruction requested by the plaintiff and given by the court was as misleading as the abandoned allegations of the petition, and the irrelevant evidence those allegations evoked, for it warranted a verdict for the plaintiff on a finding that gas, steam, and smoke disturbed him and his family, and presupposed a basis for such finding in the testimony, whereas there was no testimony of that sort.

We think the city ordinances referred to in the statement were improperly admitted

as evidence, and were of prejudicial influence, as a violation of them was not counted on in the petition as a cause of action. After the plaintiff had failed to make good several of the complaints originally preferred against the defendant, there remained as a possible ground of recovery the question of whether the factory filled the surrounding air with offensive smells, thereby creating a nuisance which specially injured the plaintiff. The presence of such stench rendered the factory a nuisance, if it was one—not a municipal declaration on the subject, even if there had been an ordinance declaring such a factory a nuisance per se. But no ordinance introduced by the plaintiff attempts to declare a place which is kept clean and conducted properly a nuisance. On the other hand, if defendant's plant was kept foul and filthy, it must have constituted a nuisance to plaintiff's family, which the law would abate without regard to municipal provisions and regulations. Ordinances may be competent as evidence when they prove some material fact, but not the gravamen of a case, though they are not pleaded. *Robertson v. Wabash Ry.*, 84 Mo. 119. But this rule consists well with the general rule that irrelevant and immaterial evidence should be excluded from a case. The ordinances were improperly received, not because they were not pleaded, but because they had no bearing on the issue to be determined. *Frederick v. Allgaier*, 88 Mo. 598.

Aside from the possible error in the first instruction, we think the case ought to be retried, in the interest of justice, on simplified issues, in order that wholly irrelevant testimony may be kept out of it.

Judgment reversed and cause remanded.

BLAND, P. J., and REYBURN, J., concur.

FRIEDMAN v. PULITZER PUB. CO.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

LIBEL—NEWSPAPER PUBLICATIONS—ABSENCE OF MALICE—EVIDENCE—SPECIAL DAMAGES—INSTRUCTIONS—EXCESSIVE DAMAGES—NEW TRIAL.

1. Where, in an action against a newspaper for libel, plaintiff sought to recover both punitive and compensatory damages, evidence of defendant's reporter, who obtained and prepared the article for publication, that he had no personal acquaintance with plaintiff, and bore him no malice or ill will, was admissible to disprove malice.

2. Where, in an action for libel, the petition embraced no elements of special damages, but simply charged generally that plaintiff had been greatly damaged by the publication, and claimed \$10,000 damages, actual and punitive, evidence tending to show that plaintiff had been suspended from an association of persons engaged in his business was inadmissible.

3. Where, in an action against a newspaper for libel, there was no evidence of an apology asked for or denied, an instruction that, if the jury found for plaintiff, in estimating the damages they might consider the publicity given

to the libel, the absence of any apology, and the pecuniary circumstances of the defendant, was erroneous.

4. A new trial granted in an action for libel on the ground that the verdict was so excessive as to indicate passion and prejudice on the part of the jury will not be disturbed on appeal unless it is manifest that the trial court abused its discretion.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by Jacob Friedman against the Pulitzer Publishing Company. A judgment was rendered in favor of plaintiff; and from an order granting defendant a new trial plaintiff appeals. Affirmed.

Jos. W. Folk and Thos. B. Harvey, for appellant. F. N. Judson, for respondent.

REYBURN, J. The pleadings in this case so fully exhibit the history of the occurrence from which this action emanated that they are reproduced at length and intact:

Plaintiff's complaint was as follows:

"Plaintiff, for his cause of action, says that, at the time hereinafter mentioned, defendant was the publisher, printer, and proprietor of a certain newspaper of large circulation published in the city of St. Louis, state of Missouri, and known as the St. Louis Post-Dispatch; that on the 13th day of March, 1898, there was printed and published in said newspaper the following false, defamatory, and libelous article, of and concerning the plaintiff, to wit:

"Uncovering a Huge Swindle—Two Market Street Ticket Brokers under Arrest—Detectives Crack a Safe in Search of Evidence in the Scalper's Office of 'Jack' Friedman—R. H. McCloskey also Accused—Forgery and the 'Raising' of Passes and Transportation Jointly Charged against the Prisoners. Pedestrians who looked into the office of J. H. Friedman, ticket broker, 1801 Market street, yesterday, saw two men drilling into a huge iron safe in the same manner that expert cracksmen operate. Instead of daylight burglary, as appeared at a glance, it was an effort by Detectives Healy and McGrath to secure contraband matter as evidence in what prominent railroad officials say is one of the most gigantic ticket swindles in St. Louis. Besides their equipment of safe-blowers' tools, the detectives were fortified with a search warrant authorizing them to take unlimited liberties in Friedman's ticket office. Meanwhile the broker, who is known throughout the West as 'Jack' Friedman, looked on in silence. He was a prisoner, arrested on the charge of issuing forged tickets. About the same time L. H. McCloskey, another ticket broker, at 1731 Market street, was also arrested on a similar charge. Both brokers were under indictment, true bills having been returned by the February grand jury in its final report Friday. It is alleged that Friedman and McCloskey operated jointly in the disposition of fraudulent tickets. The warrants for the brokers were served by deputy

sheriffs, but the work of securing tickets and paraphernalia to be used as evidence in court was assigned to the detective department. When the officers went to Friedman's place and asked for admission to his safe, the request was refused. "I cannot open the safe," Friedman is alleged to have said. After some parleying, the detectives determined to use force, and, while one stood guard, the other went out to get the tools with which to open the safe. It required an hour's work before the innermost recesses of the safe were reached. As the third inside door sprung open under the pressure of the official jimmy, Friedman looked on in amazement. Detective Healy's hand delved into the steel box, and brought out a big bunch of tickets, punches, stamps, and other paraphernalia, including a bottle of powerful acid, labeled "Ink Eradicator." It is asserted by the authorities that the acid was used in removing names of destinations and other writing on tickets. When a demand was made upon McCloskey for tickets, punches, and other material in his possession, he said: "Wait a minute, please, until I get what you want." He got it; then he threw it into the fire. At least, that is the story told by the detectives. McCloskey and Friedman were taken to the Four Courts. Friedman was released on bond, with Epstein & Burnstein as surety. McCloskey was locked up in jail. The charge set forth in the indictment is the forgery of the name of Henry Lihou, general ticket agent at Union Station. Behind this formal charge is a long story of alleged ticket manipulation, which is attracting attention from railroad men throughout the West. Briefly summarized, it is charged that Friedman kept a stamp, which he obtained from McCloskey, and which is a fac simile of the stamp used at Union Station for the purpose of executing unused portions of round-trip tickets. Friedman, it is alleged, has been the manipulator of the tickets. It is said that he is an expert on plugging tickets, raising passes, and in forging the name on the reverse side of tickets signed by the original purchaser. Friedman's ability, aided by the bogus stamp, made it possible for him to place on sale a large volume of transportation otherwise void. It is claimed that for a long while Friedman has spent his evenings in "fixing" tickets, screened from public gaze by a high desk. It is further alleged that a young man, who is not yet under arrest, and who is an expert penman, has been in the employ of Friedman and McCloskey. His duty was to remove the destination from tickets by means of the "ink eradicator," and, in the blank space thus created, fill in the destination desired by the purchaser. When there is a call for a ticket which is not in stock, the purchaser's order was registered, with the understanding that he could be accommodated by calling later. In the interim, so it is alleged, the ticket would be "fixed" for the destination wanted. For in-

stance, it was an easy matter to take a ticket good for a fifty-mile ride, and, by means of erasure and substitution, lengthen the transit power to meet the requirements. Railroad men say the country has been flooded with bogus tickets for a year or more, and the forgeries were so clever as to escape detection in almost every instance. General passenger agents knew that a wrong prevailed, but it was a long while before they had even a semblance of a clew. General Passenger Agent Townsend, of the Missouri Pacific, was one of the first to take up the case. He consulted Martin Clardy, of the legal department. Martin & Bass, attorneys, were employed as supplemental counsel, and Detective Thomas Furlong was also retained. As a result of investigation, suspicion was directed to Friedman and McCloskey, and the matter was presented to the grand jury in such a way that true bills were found. Among other plans brought into play by the railroads was the execution of test tickets, which it is said form a strong link in the evidence. "I have nothing whatever to say," said McCloskey when a reporter for the Post-Dispatch talked with him in the jail last evening. "It is charged that you burned tickets and other evidence sought by the detectives," said the reporter. "That is not correct," replied the imprisoned broker, "but I do not care to discuss my case at all." Friedman is looked upon by the authorities as the prime mover in the alleged frauds, while McCloskey is regarded as a confederate. An amusing incident in connection with the case is a mistake made by a deputy sheriff who went to Union Station Friday night, expecting to find Friedman to take a train out of the city. While the deputy was looking around for his man, whom he did not know by sight, somebody called out, "There goes Friedman now." At the same time a dapper young man hurried through the station gates, by a slightly dressed young woman. The deputy did not reach the couple, and he was glad soon afterward that he didn't, for he was informed that the Friedman who passed through the gates was not the ticket broker at all, but a wealthy young man who had been married less than a day, and was en route with his bride to the East on a wedding tour. It is given out on reliable authority that other arrests will be made and further developments are expected.

"Plaintiff says that said publication was wilful, wanton, and malicious, and that he has been greatly damaged thereby. Plaintiff therefore sues for \$5,000 actual damages and \$5,000 punitive damages, for which he prays judgment."

The answer of defendant was in the following language:

"Now comes defendant, and admits that it is a corporation, and the publisher of the newspaper in the city of St. Louis known as the St. Louis Post-Dispatch, and admits

the publication in said paper of the article set forth in plaintiff's petition on the 13th day of March, 1899, but denies that said publication was false, defamatory, or libelous of plaintiff, in any sense. And further answering, defendant says that the facts set forth in said article of and concerning plaintiff were true. And further answering, defendant says that said article set out in the petition was a fair and truthful narrative of the proceedings in the criminal court of the city of St. Louis in connection with the indictment of plaintiff and one John McCloskey, and of the arrest of plaintiff and said McCloskey thereunder, and explanatory of the charge contained in said indictment, and that said publication was made by defendant in the performance of its duty as a public journalist, and solely for the purpose of giving the public information concerning the administration of public justice in the city of St. Louis, and that said publication was made after careful investigation, and as a matter of news, without any injurious comments, and without any malice toward plaintiff; that the said publication was legitimate public news, and defendant says that said publication was privileged in the law. And further answering, and as explanatory of the circumstances under which, and the motives with which, the publication complained of in the petition was made by defendant, defendant says that said publication was a fair and truthful narrative of the proceedings in the criminal court of the city of St. Louis in connection with the indictment of plaintiff and one John McCloskey, and the arrest of plaintiff and said John McCloskey thereunder, and also was explanatory of the circumstances of said arrest and of the charge contained in said indictment, which were of public interest to the citizens of St. Louis, and that defendant made full and careful investigation from all available sources, including the statements of said indicted parties, before making said publication, and that the publication was made without injurious comments and without malice."

A jury trial resulted in a verdict for plaintiff for \$800 compensatory damages and \$2,000 punitive or exemplary damages. A motion for new trial was sustained upon the grounds that the circuit court erred in excluding evidence offered by the defendant, and in admitting evidence offered by plaintiff, and that the verdict in respect to both compensatory and exemplary damages was so excessive as to indicate passion and prejudice on the part of the jury. For the purpose of passing on the propositions arising on this record, the proof of the respective parties is not required to be recited fully or at length, but questions based upon rulings upon evidence at the trial will be considered with such fragmentary portions of the testimony quoted so far as may be deemed essential.

1. In support of the lower court's action upon the motion for new trial, respondent urges that the court erred in excluding testimony of defendant's reporter, who obtained and prepared for publication the article complained of as libelous, to the effect that he had no personal acquaintance with plaintiff, and bore no malice or ill will toward him; but the record, as exhibited, discloses that questions seeking to elicit this character of testimony were addressed to and fully answered by this witness, whose testimony was offered in form of deposition, and that defendant derived the full benefit of his testimony to establish the absence of any individual malice by the author of the article toward plaintiff. Upon the hypothesis, however, that the ruling of the trial court in this regard has been erroneously transcribed, it may be proper to remark that, in the opinion of this court, such testimony was competent and proper. If the publication had been dictated by express malice against plaintiff, such fact could have been established by plaintiff, and imputed to defendant. *Buckley v. Knapp*, 48 Mo. 152; *Haehl v. R. R.*, 119 Mo. 325, 24 S. W. 737. And as the plaintiff sought to recover punitive as well as compensatory damages, such testimony was admissible, as any facts or circumstances disproving or tending to disprove malice are admissible for the purpose of mitigating the punishment by way of exemplary damages. *Weaver v. Hendrick*, 30 Mo. 502; *Lewis v. Humphries*, 64 Mo. App. 466. The motives or purposes with which the slanderous words were spoken lie at the very foundation of malice, and are the conditions upon which exemplary damages are based; and, accompanied with the caution to the jury that evidence of the intention and motive of defendant might be considered for the purpose of abating the punitive damages, but did not constitute a defense or bar to the action, such testimony was admissible. *Calahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583, and commentators cited.

2. The petition embraced no elements of special damages, but simply and generally charged that plaintiff had been greatly damaged by the publication, with prayer for \$10,000 damages, actual and punitive, and even contained no express averment that plaintiff was engaged in business of any description. The court, however, at the trial, permitted evidence to be introduced of the suspension of plaintiff from the Ticket Brokers' Association, and also admitted plaintiff's testimony of decrease in his business earnings. In *Hughes v. Telegraph Co.*, 79 Mo. App. 133, this court adopted the definition announced by the federal Supreme Court of "special damage": "Special, as contradistinguished from general, damage, is that which is the natural, but not the necessary, consequence of the act complained of." *Roberts v. Graham*, 6 Wall. 578, 18 L. Ed. 791. There was

no foundation for the admission of either species of testimony in the plaintiff's statement of his cause of action, and all such testimony should have been rigorously excluded. This position is abundantly supported by commentators, as well as by adjudicated cases. "The general rule is that no evidence of special damage is admissible unless it be averred in the pleadings, and this is so whether special damages be the gist of the action, or be used as matter of aggravation, when the words are in themselves actionable." *Starkie, Slander & Libel* (5th. Ed.) p. 489; *Newell, Slander & Libel* (2d Ed.) p. 779; 3 *Sutherland, Damages* (2d Ed.) § 1215; *Steibeling v. Lockhaus*, 21 Hun, 457; *Hatt v. Evening News Ass'n*, 94 Mich. 119, 54 N. W. 706. "Special damages, whether resulting from tort or breach of contract, must be particularly averred, in order that the defendant may be notified of the charge, and come prepared to meet it." *Roberts v. Graham*, 6 Wall. 578, 18 L. Ed. 791.

3. The third instruction given for plaintiff was as follows: "The court further instructs the jury that, if they find for the plaintiff, in estimating the damages they may take into consideration the character of the defamation, the circumstances under which it was published, the extent of the circulation of the paper, and of the publicity thus given to the libel, the absence of any apology, and the pecuniary circumstances of the defendant." There is not a syllable to be found in the evidence respecting an apology. The record is dumb and silent as to any such reparation being asked for or declined. In this negative condition of the testimony, the attention of the jury should not have been directed to the absence of an apology, as a circumstance to be taken into consideration in estimating plaintiff's damages, as it was clearly calculated to have a material effect in the computation of the exemplary, if not the compensatory, damages awarded. The instruction was misleading and prejudicial in this regard, and tended to emphasize and render prominent and conspicuous a phase of the case respecting which no testimony had been introduced on either side. Instructions should be confined safely within the bounds of the evidence introduced, and should not be given without substantial testimony to support them. *Hewitt v. Steele*, 118 Mo. 463, 24 S. W. 440; *Mateer v. R. R.*, 105 Mo. 320, 16 S. W. 839; *Kansas & Texas Coal Co. v. Millett*, 50 Mo. App. 382.

4. Among other grounds for its action in sustaining the motion for new trial, the circuit court assigned that the verdict was so exorbitant as to both classes of damages awarded as to indicate passion and prejudice on the part of the jury. In a long, unbroken line of decisions of the Supreme Court, as well as of this court, the rule has been frequently proclaimed that it is not only the prerogative, but it is the peculiar and spe-

cial duty, of trial courts, to grant new trials when the verdict is deemed arbitrary or manifestly wrong, or when the verdict appears to be result of passion, prejudice, or misconduct on the part of the jury, and that unless it is manifest that the trial court has abused its judicial discretion, or that injustice has been done, its ruling will not be disturbed by the appellate courts. *Kuenzel v. Stevens*, 155 Mo. 280, 56 S. W. 1076; *Chouquette v. R. R.*, 152 Mo. 257, 53 S. W. 897; *Lee v. Geo. Knapp Co.*, 137 Mo. 385, 38 S. W. 1107; *Parker v. Cassingham*, 130 Mo. 348, 32 S. W. 487; *Bank v. Wood*, 124 Mo. 72, 27 S. W. 554; *Hewitt v. Steele*, 118 Mo. 463, 24 S. W. 440; *McCullough v. Ins. Co.*, 113 Mo. 606, 21 S. W. 207; *Price v. Evans*, 49 Mo. 396; *Reid v. Ins. Co.*, 58 Mo. 421; *Woodfolk v. Tate*, 25 Mo. 597; *Mason v. Onan*, 67 Mo. App. 290; *Powell v. R. R.*, 59 Mo. App. 335; *Ensor v. Smith*, 57 Mo. App. 584; *Longdon v. Kelly*, 51 Mo. App. 572. As far back as the last decision of the Supreme Court above relied on, the eminent jurist delivering the opinion observes: "But in this connection, it is well enough to make another remark. Constant complaints are reaching us that in some of the circuits the rule adopted here is followed, and [i. e., to refuse to weigh the evidence], and that the judges consider themselves bound thereby. But this is founded in an entire misapprehension. The trial courts have opportunities which we have not. In witnessing and presiding over the trial, they are put in possession of facts which we cannot possibly attain. They see the witnesses; can form an opinion respecting their veracity; can observe whether they are biased or prejudiced; can notice their willingness or unwillingness, and a great many other circumstances which it is impossible to transfer to paper. They can also form a correct conclusion as to whether any improper influences operated on the jury in producing the verdict. All these considerations render it peculiarly proper that the question of granting new trials on account of the verdict being against the weight of testimony should be exclusively exercised by the court trying the cause, and, where the trial court is of the opinion that the verdict is not supported by the evidence, or is against the weight of evidence, it should never hesitate in exercising the power, and giving the aggrieved party a new trial." All presumptions are in favor of the action of the trial court, and the exercise of the right and duty of granting new trials, when deemed proper by the trial courts in the attainment of justice, is commendable, and should be upheld, under the rules of law and limitations above declared. We can find no evidence in this record of any abuse of its discretionary authority by the trial court, and the judgment is accordingly affirmed.

BLAND, P. J., and GOODE, J., concur.

CHAMP SPRING CO. v. B. ROTH TOOL CO.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

LANDLORD AND TENANT—FIXTURES—RIGHT TO RECOVER—WASTE—UNLAWFUL DETAINER—NEW TRIAL—PERPLEXITY OF JURY.

1. The removal by a tenant of hangers, benches, shafting, platforms, pulleys, etc., which were on the premises when originally rented by defendant's assignors, constituted waste, within the meaning of Rev. St. 1890, § 3335, providing that damages in unlawful detainer shall be assessed for waste committed on the premises.

2. The right of a tenant to remove fixtures is terminated by the acceptance of a new lease which is silent as to such right.

3. On the trial of an unlawful detainer suit it appeared on the return of the verdict that the jury did not understand the instructions given, or how to express their verdict, whereupon the court refused to accept the same, and gave a supplemental instruction that there was no sufficient evidence of waste, which instruction the jury did not follow. *Held*, that the judgment for plaintiff would be reversed, and a new trial awarded.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Action by the Champ Spring Company against the B. Roth Tool Company. From a judgment for plaintiff, defendant appeals. Reversed.

See, also, 96 Mo. App. 518, 70 S. W. 506.

Ed. L. Gottschalk, for appellant. R. M. Nichols, for respondent.

REYBURN, J. After the reversal and remanding of this case by this court (96 Mo. App. 518, 70 S. W. 506) a retrial was had, and a verdict returned for plaintiff, from which defendant has appealed. Both parties recognized that the chief, if not the sole, issue at the trial was whether the defendant was liable for waste in removing from the premises hangers, benches, shafting, etc. The court, in its original charge to the jury, instructed upon the question of damages for waste and injury as follows: "The court instructs the jury that if they find and believe from the evidence that the defendant rented the premises from the plaintiff, and they or their assignors erected upon such premises an office, flooring, hangers for the shaft, and benches to work at, and elevator, platform, and pulleys, and that the same were erected for and necessary for the business it was carrying on on the premises, then the same did not become a part of the realty, and the defendant was authorized to remove the same, if it could be done without materially injuring the building, and its removal therefrom does not constitute waste. On the other hand, you are instructed that if you find from the evidence that either the hangers, benches, office, or elevator platform and pulleys were in the premises when originally rented from the Malleable Iron Works, the defend-

ant had no right to remove any such article as was in the building originally, and plaintiff is entitled to recover the reasonable value of any such article which the evidence shows has been removed by the defendant, if any. If the evidence shows that defendant damaged the building, other than by its proper use in their business, then plaintiff is entitled to recover the reasonable value of such damage. The plaintiff cannot recover anything for the removal of the heating stoves in this action." The court restricted the jury in its finding of the amount of rents and profits to the period from September 30, 1901, the end of respondent's term, to January 15, 1902, when the keys of the property were tendered. The jury thereupon returned a verdict finding defendant guilty, and that the complainant had sustained damages by reason of the premises to the amount of \$300, and also that the value of the monthly rents and profits of said tenements was \$1,050. The court thereupon inquired of the foreman of the jury how they arrived at those figures, and, it appearing that the jury did not understand the instructions of the court, or the proper method of expressing a verdict, the court therefore refused to accept said verdict, but gave the jury a supplemental instruction, over the objection of defendant, as follows: "The court instructs the jury that there is no sufficient evidence before them to authorize them in finding the defendant guilty of waste, and they will, therefore, in computing damages, disregard waste." After again retiring, the jury rendered the following verdict: "We, the jury, find the defendant guilty in manner and form as charged in the complaint, and do further find that the complainant has sustained damages by reason of the premises to the amount of eight hundred seven and $\frac{50}{100}$ dollars, and also that the value of the monthly rents and profits of the said tenements is one hundred and forty-five dollars." Defendant filed a motion for new trial in due course, but not complaining of the instructions given. In passing upon this motion, the circuit court filed the following memorandum: "The verdict is excessive under the instructions, still I think it may stand under the authority of *Williams v. Lane*, 62 Mo. App. 66, and *Loughran v. Ross*, 45 N. Y. 795 [6 Am. Rep. 173]. The court erred in refusing to instruct that plaintiff owned the fixtures which had been erected by the assignor of the defendant, so the verdict is not excessive under a proper theory."

1. Under the statutory provisions the removal of the improvements, repairs, and additions specified, which were in the premises when originally rented from the Malleable Iron Works, or constructed by the B. Roth Forge & Machine Company prior to the 15th day of March, 1897, when plaintiff executed the lease to defendant's assignors, was waste and injury committed upon the premises, re-

coverable by plaintiff. Rev. St. 1890, § 3335. The elaborate discussion of the law governing the removal of fixtures between landlord and tenant, submitted on behalf of defendant, is not applicable, for all rights, if any existed, of removal of such additions or improvements, were waived and abandoned by the acceptance from plaintiff by defendant's assignors of the instrument of lease in March, 1897, under which defendant was in possession, and which confessedly was silent respecting the removal of such fixtures and property. The new lease evidenced a new contract of tenancy defining the mutual rights and obligations of the lessor and lessee. The possession of these lessees, from and under whom the defendant claimed, was under the new contract, and, in the absence of any reservation of right of removal or claim to the improvements and fixtures, all such rights must be held terminated and relinquished. *Williams v. Lane*, 62 Mo. App. 66; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173.

2. The complaint that the trial court should have received the first verdict without investigating how the result was reached, and awarded a new trial, if deemed proper, is not without some force. The functions of the jury are as distinct and independent as those of the court, and the latter should refrain from any encroachment upon the domain of the jury. Until the rendition and record of the verdict, the jury remain in control of it, with power to alter or withdraw it. *Proffatt, Jury Trial*, § 456. The power, however, has long been exercised to correct obvious errors in substance as well as in form. 2 *Thompson on Trials*, § 2642; *Proffatt, supra*, § 457. The rule has been amplified to the extent of authorizing the court, before the recording of the verdict and before the discharge of the jury, and while their relation to the case as jurors continues, to require a reconsideration of the verdict, not merely to correct error or remove obscurity in the verdict, but to alter it substantially if the jury so agree. *Abbot's Trial Brief*, p. 536, and authorities cited. In this state the Supreme Court has held that the court may direct the jury to amend an imperfect or informal verdict, and that in every case the judge should supervise the form and substance of the verdict so as to prevent a doubtful or insufficient finding from passing into the records. *Cattell v. Dispatch, etc., Co.*, 88 Mo. 356. But it is obvious and unmistakable that in the verdict first returned the jury was involved in error and confusion, and what would have been the verdict had the jurors not been so wrapped in perplexity and misconception is beyond the ken of man. The parties are entitled to a clear and intelligent trial, and, if by jury, embracing a deliberate verdict absolved from any imputation or suspicion of misapprehension or bewilderment in the mind of any juror in its consideration and rendition. That such trial may be accorded

to and had by them, the judgment is reversed, and the cause remanded.

BLAND, P. J., and GOODE, J., concur.

**JERSEY FARM DAIRY CO. v. ST. LOUIS
TRANSIT CO.***

(Court of Appeals at St. Louis, Mo. Dec. 1,
1908.)

**STREET RAILROADS—INJURIES TO WAGON—
ACTIONS — EVIDENCE — NONSUIT—INSTRUC-
TIONS — UNCOMPLETENESS — CONFLICTING.**

1. In an action against a street railroad for injuries to a wagon a nonsuit was properly denied where, on plaintiff's evidence, the wagon was visible for the length of a block on the same track as that on which the car was running, and the motorman might have avoided the collision.

2. In an action against a street railroad for injuries to a wagon, an instruction to find for plaintiff if the motorman saw or could have seen the wagon in time to warn the driver and enable him to drive off, or in time to stop the car, before collision, was incomplete in that it failed to also state that the motorman must have neglected to warn plaintiff's driver, and that such neglect must have been the proximate cause of the accident.

3. In an action against a street railroad for injuries to a wagon, an instruction to find for plaintiff if the motorman could have seen the wagon in time to warn the driver and enable him to drive off, or in time to stop the car, before collision, was in conflict with instructions given for defendant to the effect that it was not liable if its servants used ordinary care to stop the car as soon as they saw, or might have seen, plaintiff's wagon in a position of danger, and which accepted that theory as the only ground of recovery.

Appeal from St. Louis Circuit Court; J. R. Kinealy, Judge.

Action by the Jersey Farm Dairy Company against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Boyle, Priest & Lehman, for appellant. F. A. Wind, for respondent.

Opinion.

GOODE, J. Action for injuries to a team of horses, harness, wagon, and contents of the wagon, caused by a rear-end collision with an electric car. While plaintiff's employé, John Walton, was driving one of plaintiff's milk wagons on November 24, 1902, the wagon was hit by a car of the transit company. It was about 5 o'clock of a drizzly morning that the accident occurred. Walton had driven north on Eleventh street to Chouteau avenue, turned west on Chouteau to Twelfth street, then again north on Twelfth, intending to leave that street and go west on Gratiot. He had reached Gratiot street, and was in the act of turning into it, when the car hit the wagon behind, inflicting the damages complained of in this case, and knocking Walton, the driver, into unconsciousness. Walton's testimony is that he was driving

partly on and partly off the north track, in a trot; that 20 feet back of where he was struck he looked to the rear before he turned westward, to see if a car was coming, but saw no car, and as he was turning west the crash came. Three passengers on the car testified they heard no gong nor any sound of brakes prior to the collision; that the car was going at a moderate speed—five or six miles an hour. It stopped immediately after hitting the wagon, which was then faced west; that the morning was dark and rainy, but a wagon could be seen easily a block away. The motorman testified he followed the same route Walton had, running west to Chouteau and then north on Twelfth; that his speed was six miles an hour, and the grade downward; that he could see about a block ahead; saw the wagon of the dairy company as soon as he turned into Twelfth street; it was then five feet outside the track on the right hand; when the car drew near, the team and wagon turned westward, and crossed the track; that he immediately rang his bell, applied the brake, and reversed the power, but was unable to stop the car before it crashed into the vehicle.

We can order no nonsuit in this case, as the defendant insists we should; for, accepting the testimony for the plaintiff as true, the wagon was visible the length of a block on the same track the car was running on, and the motorman might have stopped or slackened speed, and thus have avoided the collision. *Klockenbrink v. R. R.*, 81 Mo. App. 351; *Shanks v. Traction Co.* (Mo. App.) 74 S. W. 386; *Noll v. Transit Co.* (Mo. App.) 73 S. W. 907. The circuit court did right to submit the case to the jury; but erred, we think, in this instruction given at the instance of the plaintiff: "If the jury find and believe from the evidence that a car of defendant in charge of one of its motormen ran into a wagon of plaintiff while the driver of said wagon was driving along Twelfth street and partly in defendant's car track, or while he was attempting to leave said track with his team, the jury will return a verdict for plaintiff, provided the jury further find and believe from the evidence that the motorman saw, or by the exercise of reasonable care and diligence could have seen, the wagon upon the track in time to have warned said driver and enabled him to drive his team off, or in time to have brought said car to a stop, before a collision, by the use of such skill, diligence, and care as a person of ordinary prudence would exercise under the same circumstances, and that the driver of plaintiff's wagon was at the time exercising a like degree of care to avoid a collision." It will be seen that the foregoing instruction authorized a verdict for the plaintiff if the jury found the motorman, by the exercise of reasonable care, could have noticed the wagon in time to warn the driver and enable the latter to drive off, or in time to stop his car before a collision. The first hypothesis was,

*Rehearing denied December 15, 1908.

to say the least, incomplete. It is not enough to justify a recovery that the motorman saw, or could have seen, the wagon on the track in time to warn the driver; but it must appear that he did not warn him. That is to say, the motorman must not only have had time to sound the warning, but must have neglected to do so, and the neglect must have been the proximate cause of the accident. The better way to give the charge is to leave it to the jury to say whether the defendant's servant was guilty of failing to clang the gong or give warning by whatever means he could, and whether that negligent omission was the proximate cause of the catastrophe. It is to be remarked further that said instruction conflicted with two given for the defendant, which told the jury, in effect, that the defendant was not liable if its servants in charge of the car, as soon as they saw, or might have seen, plaintiff's wagon in a position of danger, used such care as a person of ordinary prudence would have used, in like circumstances, to stop the car. The instructions given for the defendant accepted the theory that the only ground of recovery was failure to stop the car as soon as possible after seeing the vehicle in an exposed condition, while plaintiff's instructions hypothecated also a failure to give warning of the approach of the car.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

LAUMEIER v. HALLOCK.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

NOTES—INDORSERS—PROTEST AND DEMAND—
WAIVER—RELEASE OF LIABILITY—EX-
TENSION OF TIME.

1. An indorser on a note does not waive demand of payment of the makers or notice of dishonor by procuring extension of the note as agent of the person who had assumed payment, his agency being known by the holder of the note.

2. The makers of a note are released from liability, and with them the indorser, where, without their knowledge or consent, the holder grants an extension to the person who had assumed payment of it.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by Christiane Laumeier against Leander Hallock. Judgment for defendant. Plaintiff appeals. Affirmed.

F. M. Estes, for appellant. F. J. McMaster, for respondent.

Opinion.

GOODE, J. Action against the respondent, as indorser of a promissory note. Said note was dated February 8, 1901, was for \$2,000, due three years after date, payable

to the order of Leander Hallock, the respondent, and bore interest at the rate of 10 per cent. per annum. It was executed by John A. Laird and Belle W. Laird under these circumstances: John A. Laird purchased a parcel of ground in St. Louis from a man by the name of McClain. Laird wanted to build a house on the lot, and applied to Stewart & Co., a firm of real estate brokers, to borrow the money. Hallock was a member of that firm, and procured the loan through Henry Helmenz. The note in suit was given for the loan, being made payable, as stated, to Hallock, and secured by a deed of trust on the lot. Christiane Laumeier advanced the money which Helmenz lent, and the note and deed of trust were immediately turned over to her. A few months after these transactions, to wit, June, 1901, Laird sold the premises to Elias Yerkes, conveying the title by a deed which recited that Yerkes assumed and agreed to pay as part of the purchase price of the lot the debt of \$2,000 which incumbered it. At the time of his purchase Yerkes executed a second deed of trust for \$1,300, payable in monthly installments of \$30 each. The arrangement was that he was to pay eight of these monthly installments each year in reduction of the balance of the purchase price over and above the assumed incumbrance, and to pay four of them, or \$120 each year, in liquidation of the interest on said incumbrance. When the original note first matured in 1894, it was renewed for three years. When it fell due in 1897, it was again renewed for two years, and four interest notes were executed by Yerkes, payable to the order of Philip Betz, for the semiannual interest during the two-years extension. At the end of that time the note was again extended for three years, Yerkes executing six interest notes payable to the order of Henry H. Laumeier, son of the appellant. All said interest notes were indorsed and delivered by Betz and Henry Laumeier to the appellant. The evidence shows that John A. and Belle Laird knew nothing of these extensions of the original note, and that no demand for payment was made of them at maturity, or notice of dishonor given to Hallock. At the expiration of the last extension Yerkes still failed to pay, so the deed of trust securing the note was foreclosed, and the property sold for \$1,000, which sum was credited on the note, and the present action begun against Hallock for the balance. This attempt to hold Hallock as indorser, in the face of the facts that there was no demand for payment of the makers, or notice of dishonor given, is based on the assumption that Hallock himself procured the extensions for his own benefit; wherefore it is contended he waived demand and notice.

An indorser of negotiable paper may waive demand and notice, not only by an express promise to pay after he knows the paper has been dishonored, but by acts from which it

may be implied fairly that he promised to pay, or led the payee to believe he did not require demand and notice. *Wilson v. Huston*, 13 Mo. 146, 53 Am. Dec. 138; *Dorsey v. Watson*, 14 Mo. 59; *Clayton v. Phipps*, Id. 399; *Banking Co. v. Biell*, 57 Mo. App. 410; 2 *Randolph, Commercial Paper*, §§ 1383-1391. When the claim of implied waiver is put forward, the question is, what was the intention of the indorser and payee in doing the acts asserted to constitute the waiver? Were the acts such that the payee was justified in concluding the indorser relinquished his right to demand notice? In the present case the appellant's counsel requested the following declaration of law, which was refused: "If the court finds from the evidence that the defendant, Hallock, when the note sued on became due and payable in 1894, requested that same be extended, and same was extended at his request, and that said note was extended at the request of the defendant in 1897, and that defendant made the arrangement whereby said note was extended in 1899; and if the court finds that defendant, Hallock, requested and arranged to have said note extended each and every time it became due and payable, and that said note was extended at such times at the instance and request of defendant, and that at the expiration of the last period of extension in 1899 said defendant, Hallock, knew that said note was not paid, and that he paid at that time all interest which had accrued, the back taxes due on the property, and paid \$200 on the principal—then said defendant, Hallock, is liable on said note." That declaration was justly refused, because every fact hypothesized in it might be true without compelling the finding that Hallock waived demand and notice. What Hallock did toward procuring the extension and paying \$200 was done, he testified, as agent for Yerkes, to prevent the latter's home from being sold under a foreclosure. He swore, too, that the appellant knew he was acting for Yerkes, and was distinctly informed that he would no longer stand bound to pay the note. Yerkes' testimony corroborates Hallock in some measure, and it is certain that Hallock refused to indorse the interest notes which were given to the appellant when the several extensions were granted. Now, if Hallock was acting all along as Yerkes' agent, and Mrs. Laumeier knew he was, Hallock could have done and known everything recited in the above declaration of law as sufficing to fasten liability on him without intending to waive his

rights as indorser, or leading Mrs. Laumeier to believe he waived them.

An instruction was asked and refused in *Wilson v. Huston*, *supra*, which stated certain facts that were supposed to retain Huston's liability as indorser of a note by showing he had waived demand and notice. Huston contended he had acted as agent, and in commenting on the refusal of the instruction the Supreme Court said: "There are circumstances and facts not alluded to in the instruction, which would control the liability of Huston upon the hypothesis stated. He may have taken the note as a mere agent for collection, and without considering himself as having any personal interest in the result. He may have taken it after it was due, and after his release had resulted from the failure of the plaintiffs to make a demand upon the Smiths. In either event he was no longer responsible, and his acting as agent for collection, either *ex gratia* or for reward, would not revive his liability." So here the circuit court was justified in refusing the declaration prayed by the appellant, because it made Hallock answerable on the theory that the hypothecated facts amounted to an absolute waiver of his rights as an indorser, regardless of the possibility that he was merely an agent for Yerkes, and known to be by Mrs. Laumeier.

But there is more. The makers of the note—the two Lairds—were released by the extensions granted to Yerkes without their knowledge or consent. When they conveyed the property to Yerkes, and the latter assumed payment of the incumbrance on it, he became, as between him and the Lairds, the principal debtor, and they became sureties, and when Mrs. Laumeier granted Yerkes an extension without their knowledge the effect was to discharge them from liability on the note. *Nelson v. Brown*, 140 Mo. 580, 41 S. W. 960. 62 Am. St. Rep. 755. But the relation between the Lairds and Hallock was then that of makers and indorser, and the release of the makers released the indorser. *Eggemann v. Henschen*, 56 Mo. 123; *Brown v. Croy*, 74 Mo. App. 462.

The theory was put forward on argument that Hallock was really the principal maker of the note, and that the Lairds and Yerkes acted merely for his accommodation. This theory is unsustained by any proof.

The judgment was for the right party, and is affirmed.

BLAND, P. J., and KEYBURN, J., concur.

BESS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 2, 1903.)

MURDER — MOTIVE — ADMISSIBILITY OF EVIDENCE — DECLARATIONS OF DECEDENT — INSTRUCTIONS.

1. In a prosecution for the murder, on March 6th, of a paramour, where the proof is circumstantial, evidence that on December 23d decedent obtained insurance on her house and its contents, which were burned on January 20th, a few days prior to which defendant procured the removal of some of the goods, gratuitously paying the truckman's license fee to the city in addition to his regular charge, and that the loss was paid on February 28th, prior to which defendant had attempted to collect it on the false representation that the policy had been assigned to him, is admissible to show motive for the homicide.

2. In a prosecution for murder, the declaration of decedent a few days before the homicide, to a police officer, that defendant had \$220 of her money which he refused to pay, and to recover which she spoke of getting a warrant out against him, is admissible, having been reported to defendant by the officer before decedent's demise.

3. In a prosecution for homicide, in which evidence was introduced tending to show that the motive was to obtain or retain money belonging to decedent, defendant's declaration that he wished to borrow \$20 of decedent, but that she made him a present of it, and gave him \$200 more to keep, and that he afterwards, at her request, returned her \$100, is admissible.

4. In a prosecution for murder, an admonition from the trial judge to the jury that "there may have been" evidence to show some other crime (the evidence not being indicated), and that, if such evidence proved defendant guilty of some other offense "against law or against morals," the jury should not "allow that fact, whatever it may be," to bias them or make them find defendant guilty under the indictment, except in so far "as the fact itself, whatever it may be," conduced to prove him guilty of the crime charged, and that it was the court's duty to tell the jury of the "rejection of certain testimony and the purposes for which other testimony was admitted" (without further identification of the evidence referred to), is so indefinite and ambiguous as to constitute error.

5. Where evidence is ordered rejected after it has gone to the jury, the court, in admonishing as to its exclusion, should specify it in detail, and should name the witnesses from whom it has been elicited, in order to identify it.

6. Where evidence otherwise incompetent is admitted for a specific purpose, the court, without quoting it in detail or giving undue prominence to particular facts, should admonish the jury for what purpose alone the evidence is to be considered.

Appeal from Circuit Court, Fayette County.
"To be officially reported."

J. W. Bess was convicted of murder, and appeals. Reversed.

H. G. Snyder and J. N. Elliott, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

SETTLE, J. The appellant, J. W. Bess, having been tried, convicted, and given the death penalty in the Fayette circuit court, under an indictment charging him with the murder of Martha McQuin Martin, by this appeal seeks a reversal of the judgment of conviction.

His motion for a new trial, which was overruled by the lower court, contains four grounds, viz.: First, that the court misinstructed, and refused to properly instruct, the jury; second, that the court admitted incompetent evidence, and rejected competent evidence; third, that the verdict is against the law and the evidence; fourth, that the commonwealth's attorney, in his closing argument to the jury, stated facts not in the record—by all of which the appellant's cause is alleged to have been prejudiced to such an extent that he did not have a fair or impartial trial.

As to the first ground it is only necessary to say that no error in the instructions has been pointed out in the elaborate briefs filed by counsel for appellant, and we are of opinion that none could be suggested, for they present with exceptional clearness and brevity all the law applicable to the facts brought out by the evidence. By them the jury were told in what state of case they would be authorized to find the appellant guilty of murder, voluntary or involuntary manslaughter, and what punishment appertained to each; also what would authorize a verdict of acquittal, and what would justify the application of the law of self-defense; while in and through them, separately and as a whole, ran the admonition to the jury to allow appellant the benefit of every reasonable doubt in the matter of determining his guilt or innocence, or, if they found him guilty, in determining the degree of his offense.

As the evidence in the case was in the main circumstantial, in order that we may satisfactorily pass upon the second alleged error complained of, it will be necessary to briefly review the facts upon which appellant's conviction was secured. On Tuesday, March 10, 1903, the body of Martha McQuin Martin was found in the reservoir on Eddy street in or near the city of Lexington, and was identified by persons who knew her well. When the body was removed from the water it was discovered that it contained several scratches on the forehead, and finger prints on the neck. According to the evidence of medical experts, the bruises on her neck were caused by violent pressure of her flesh, and the neck was limber, showing that it had been wrrenched or strained. There was an abrasion of the skin over the left eye, sand or earth between the eye lids, and the eyeball was bloodshot. The body was not bloated, and the post-mortem examination made by the surgeons showed that there was no water in either the lungs or stomach. They were in fact practically normal, and therefore in a healthy condition at the time of the woman's death. The contents of the stomach failed to show the presence of any poisonous substance or opiate. According to the testimony of the surgeons, the bruises on the neck and face, the absence of water in the stomach and lungs, and the fact that the body was shriveled, instead of bloated, all

went to prove beyond question that the woman's death did not result from drowning, but was caused by violent external means, such as suffocation from choking, or by the wrenching or straining of the neck; and, if her death was thus produced, it would seem to follow that her body was thrown into the reservoir by her slayer, to make it appear that she had committed suicide. It appears from the evidence that an illicit intimacy had existed for two years between the appellant and the deceased, during which time he had often spent his nights with her at her house, and she had frequently stayed at night with him in the room which he occupied away from his wife and children. On Friday before the finding of the body of the Martin woman the appellant, about the hour of noon, procured a horse and buggy at the livery stable of B. O. Horene, saying he was going out about the reservoir. There was a woman in the buggy with him when he left the stable. She was, as testified by the stable men, unknown to them, but answered well in personal appearance and dress the description of the woman whose dead body was found in the reservoir. Others who saw appellant and the woman in the buggy that day after they left the stable testified to her resemblance to the body of the woman found in the reservoir. These witnesses seem to have given special attention to the hat and cape worn by the woman riding with appellant, and expressed the opinion that these articles of apparel were the same found on the body of the dead woman. One witness (J. H. Marshall, a letter carrier who knew Mrs. Martin) met appellant on the Friday in question as he and the woman who left the stable in the buggy with him were driving in a suburb of the city, and recognized her as Mrs. Martin. When appellant returned the horse and buggy to the stable about 7 o'clock in the evening, the woman who had accompanied him when he drove from the stable was not with him. The buggy in which he took the afternoon ride had red wheels and body and a black top. When he returned it the top was down, and about 10 inches of the back torn out. He called the attention of the owner to the rent, but did not explain to him how it had been made. The same buggy was hired to one Ed Murray soon afterwards, who found in it in the rear of the seat two hair pins and a hat pin, and also a strand of lady's hair. The hair was the color of Mrs. Martin's, and the hair pins and hat pin were afterwards identified by two of her acquaintances as like some that were owned by her. According to the evidence, no other woman besides the one with appellant rode in the buggy between the time of its return by him and the hiring of it to Murray, and it was not used by a woman while in Murray's possession. After returning the buggy mentioned, the appellant, about 10 o'clock of the same night, hired at Horene's stable another horse and

buggy, for the purpose, as he then stated, of going to a dance in the country after his son, whom he wished to have return home that night. He did not go that night for his son, but returned the horse and buggy to the stable at 11 o'clock, after an hour's use of it.

The evidence fails to show that Mrs. Martin was seen alive by any one after the buggy ride of Friday afternoon. It is true that one witness testified he knew her by sight, and was of opinion that he saw her pass on the opposite side of the street on Saturday, the day following the buggy ride, but his statement was indefinite, and by no means convincing. Three other witnesses—two of them dentists, and the third a lawyer—testified that they saw in their respective offices, at 5 o'clock Friday afternoon, a woman whom they took to be Mrs. Martin, and one of the dentists said she told him her name was Martin; but the commonwealth introduced in rebuttal Georgia Driscoll, who it was proved strongly resembled Mrs. Martin, and she testified that she was the woman who went to the offices of the dentists and lawyer on Friday afternoon. The latter were recalled, and all three of them, upon seeing Georgia Driscoll, positively identified her as the woman they took to be Mrs. Martin, the dentists being able to identify her by a decayed tooth of peculiar shape, which they found in her mouth, and which had been examined by them on the Friday afternoon in question.

Further evidence that the death of Mrs. Martin occurred on Friday afternoon or night was furnished by the testimony of a witness living near the reservoir that he saw the clothing of the dead body floating on the surface of the water on Saturday morning, the day following the buggy ride with appellant, but without knowing or taking the trouble to ascertain what it was. What was supposed to be a bundle of old clothes was also seen in the reservoir by others on Sunday, Monday, and Tuesday, but they, too, were ignorant as to what the object was, until the body was removed from the water.

The medical experts and others informed on the subject testified that in case of death by drowning the body invariably sinks, and will not arise to the surface earlier than three days, but that a dead body thrown into the water will not sink; and the physicians further testified that, in their opinion, the woman whose body was found in the reservoir had been dead from 24 to 72 hours when the body was removed from the water. There was much testimony to the effect that appellant after the death, and before the finding of the body of the deceased, informed a number of his acquaintances that she had gone from Lexington to Seattle, Cincinnati, or Indianapolis in company with another man, and that he (appellant) had quarreled with her, and they had agreed to have nothing more to do with each other. He also informed one or more persons that

the deceased had, on one occasion, tried to shoot him, and that she was a "morphine dope," and was liable to commit suicide. One George Bradley testified that he had a conversation with appellant on Wednesday or Thursday before the finding of the body of the deceased, in which he (appellant), in speaking of the deceased, who was then in his room over the barber shop, said he wanted to get rid of this woman up there, and upon being asked "what for," he said he was "afraid she might kill herself up these stairs, and it might be pretty bad." There was also other evidence that after the death and before the finding of the body of the deceased he took some of her personal effects that were in his room, such as a sewing machine and wearing apparel, and distributed them among the colored female residents of the neighborhood. It was also proved that the appellant, after his arrest, voluntarily made several contradictory statements that were inconsistent with his innocence, and on the trial a note was introduced in evidence, which he had written, while in jail, to a Mrs. Porter, in which he tried to induce her to testify in his behalf that she was the woman with whom he drove in the buggy from the livery stable on the Friday afternoon before the finding of the dead body of Mrs. Martin, and that it was on her account, and to carry her home through the rain, that he again procured of the same stable the buggy at 10 o'clock that night; but she refused to make the desired statements, and on the witness stand denied their truth.

The trial court permitted the commonwealth to prove that the deceased, on December 23, 1902, obtained a policy of fire insurance of \$350 on her house and its contents, that the house and what was in it was destroyed by fire on January 20, 1903, and that the loss was compromised on February 28th by the payment to the deceased of \$225 by the insurance company. The commonwealth was also allowed to prove that the appellant, only a few days before the house was burned, procured a wagon and driver, and at night hauled away from the house various articles of furniture and other property, including the sewing machine that he gave away, after the death of Mrs. Martin, which he had caused to be taken to the room occupied by him as a sleeping apartment, and for the services then rendered him by the driver and team he paid the driver \$1, and shortly thereafter and after the burning of the house, without any request from the driver to do so, he offered to and did pay for him to the city government \$6 for a license to carry on the business of hauling with his express wagon in the city of Lexington. The commonwealth was further allowed to prove that the appellant attempted to collect of the agent of the insurance company the \$225 which it had agreed with the deceased would be paid her for the loss of her house and contents. The agent testi-

fied that appellant informed him that he had an order from the deceased for the sum due her, and that the policy had been transferred to him, but the agent refused to pay the money to him, and shortly thereafter paid it to the deceased, who then surrendered to the agent the policy, which had not been assigned to appellant, as claimed by him. The payment was made to her on February 28, 1903. Her dead body was found on March 10th following. So if, as the evidence strongly conduces to prove, her death occurred on Friday of the previous week, which was March 6th, it is apparent that the insurance money was received by the deceased only eight days before her death. If there was fraud or crime in the burning of Mrs. Martin's house, the evidence referred to conduces to show that the appellant had some guilty connection therewith.

The agent of the insurance company testified that the sum due the deceased on her loss was paid in two \$100 bills, a \$20 and a \$5 bill, and it was stated by the appellant on the witness stand that he informed the deceased that he wished to borrow the \$20 bill which she received of the insurance agent, but she made him a present of it, and gave him the \$100 bills to keep, and that when he went to his room that night he found her there, and at her request returned her the two \$100 bills.

Luke Doyle, a policeman, testified that the deceased, about a week before her death, complained to him that appellant had her money, and she could not get it, and they had some talk about causing his arrest. Shortly thereafter he saw her intercept appellant on the street, and what appeared to be an angry altercation took place between them. On the afternoon of that day appellant went to the witness, and asked him what Mrs. Martin had said to him, and was told by the witness of his conversation with Mrs. Martin, and that she had said he had \$200 of her money. Appellant did not deny that he had her money, but said it was merely a breach of trust, and that she could not do anything unless he wanted to give it back to her. On several days in succession the witness said he was talked to by appellant about the matter, and at one time was told by him that he had not given her back the money, but thought he would, and later told him that he had given her \$100 of it. On Thursday appellant again met the witness on the street, and asked him if he had seen deceased, and said he was afraid she would shoot him, and on Friday morning (which was the day on the afternoon of which the deceased, according to the evidence, lost her life) appellant inquired of witness whether he had seen deceased, and informed him of her having tried to commit suicide, and was told by the witness that she had probably done so, and nobody knew anything about it. To one or two others appellant said he had returned to the deceased

\$100 of her money, but no money was found on her body when removed from the water, though one of her stockings was found to be released from the suspender and pulled down, and one of her female acquaintances testified on the trial that she had known deceased to carry money in her stockings.

The appellant, in testifying before the jury, made a general denial of nearly all of the facts brought out by the witnesses for the commonwealth, but seemed to have but little support from other witnesses introduced in his behalf.

It is insisted for appellant that it was error to allow the introduction of evidence in regard to the insurance upon the house and household effects of the deceased, and of the conduct of the appellant in removing the furniture and other property from the house, to which the driver of the express wagon testified, or to allow the introduction of evidence as to what passed between the appellant and the driver in regard to the payment by the former of the latter's license, and likewise error to permit the introduction of evidence in regard to the burning of the house, or as to the payment to the deceased of the insurance money, or the attempt on the part of the appellant to collect it. We are of the opinion that all of the evidence mentioned was competent to show a motive for the homicide. If the appellant took the life of the deceased, the crime was not committed without motive. There are, indeed, few motiveless crimes, and among the motives impelling men to crime is gain. In *Burwell on Cir. Ev.* § 285, it is said: "The motive of gain, in a stricter sense of the term, may exist by two different classes of objects: First, by something visible and tangible, which the party meditating the crime desires to possess; and, secondly, by some substantial benefit which is expected to accrue as a result of the contemplated act." In *O'Brien v. Commonwealth*, 80 Ky. 354, 12 S. W. 471, this court said: "Necessarily, where the commission of crime can be shown only by proof of circumstances, the evidence should be allowed to take a wide range, otherwise the guilty would often go unpunished. It is true there must be some connection between the fact to be proved and the circumstances offered in support of it, yet any fact which is necessary to introduce or explain another, or which afforded an opportunity for any transaction which is in issue, or shows facilities or motives for the commission of the crime, may be proved. Even evidence tending to prove a distinct offense is therefore admissible if it shows facilities or motives for the commission of the one in question. * * *" In a more recent case decided by this court, the style of which is also *O'Brien v. Commonwealth*, 74 S. W. 666, the authorities bearing on the question under consideration are elaborately reviewed, and no better statement of the principle involved can be found

than is contained in *Bishop's New Crim. Proc.* vol. 1, § 1128, quoted with approval in the opinion in that case: "The intent, knowledge, or motive under which the defendant did the act charged against him not generally admitting of other than circumstantial evidence, may often be aided in the proof by showing another crime actual or attempted, then it is permissible." We find, therefore, that the true doctrine deducible from the foregoing authorities is that all the evidence admitted must be pertinent to the point in issue, and, if it be pertinent to the point, and tends to prove the crime alleged, it is not to be rejected, though it also tends to prove the commission of other crimes, or to establish collateral facts. If there was a conspiracy between the deceased and the defendant to insure her property and then destroy it to secure the insurance, and by that means the insurance money, or some part of it, went into appellant's hands, when it became apparent to him that deceased would compel its return to her even by his arrest, who can say whether the murder, if committed by him, resulted as a means of preventing his arrest for some connection with the burning of her house or to enable him to keep the money? In either event the motive would be manifest. At any rate, it was for the jury to determine from all the evidence whether or not either motive existed, and we think for this reason that the evidence complained of was competent.

We are, however, of opinion that the trial court erred to the appellant's prejudice in not explaining to the jury the full purpose and effect of this evidence. The admonition of the trial judge to the jury on this point, as found in the bill of evidence before us, is as follows: "Gentlemen of the jury, there have been certain witnesses who have testified in this case about statements purporting to have been made by Mrs. Martin. As to that evidence, and whatever evidence has been given to you as to any statements made by Mrs. Martin, that evidence ought to be altogether disregarded by the jury, as if it had not been heard. Her statements, if made as detailed by any witnesses, are not competent testimony, and the jury should disregard it entirely. There may have been evidence in this case tending or not, as the jury may think, to show that the defendant has been guilty of some other crime or offense than the one charged in the indictment. In so far as any evidence of that kind has been admitted, it should not bias the mind of the jury; nor your belief, if any you have, that this defendant committed some other offense than the one charged in the indictment, lead you to find a verdict against him upon this charge, except in so far as the fact itself, whatever it may be, throws light upon the charge in this indictment. That is to say, if you believe from the evidence that some other offense, either against the law or against morals, has been proved against the defend-

ant, you ought not to allow that fact, whatever it may be, is competent evidence for you to consider in so far as it bears upon this charge, but it should not bias your mind, and make you find this defendant guilty in this indictment, any more than if it had not been admitted, except in so far as the fact itself, whatever it may be, conduces to prove the defendant guilty of this charge; and it is my duty that I should tell you as to the rejection of certain testimony, and the purpose for which certain other testimony is admitted, and you owe it to yourselves as jurors to maintain your solemn oath, and be governed by the injunction of the court." By this charge the jury were directed to disregard all statements detailed by the witnesses as emanating from Mrs. Martin. The greater part of her statements were incompetent for any purpose, but some of them were manifestly competent; such as her conversation with the policeman, Luke Doyle, but a few days before her death, in which she complained to that officer that appellant had \$220 of her money, which he refused to pay her, and to recover which she spoke of getting out a warrant against him, for that conversation was reported by Doyle to appellant before the death of Mrs. Martin. The ruling of the court likewise excluded from the consideration of the jury the statements of the appellant relative to the alleged declarations of Mrs. Martin as to her purpose in placing in his hands the money received by her of the insurance company, made to him at the time the money was given him. We think these declarations were competent for the purpose of explaining the circumstances under which appellant received the money, and also to contradict the statement made by Mrs. Martin in her conversation with Doyle which the latter subsequently reported to appellant. It is true that the exclusion of the testimony of Doyle as to the statements made to him by Mrs. Martin was not prejudicial to the appellant, but we are unable to say that the exclusion of the latter's testimony as to the declarations of Mrs. Martin accompanying the placing of the money in his hands was not so. We are of the opinion that the admonition of the circuit judge was so indefinite and ambiguous that it was, on the whole, more calculated to confuse than to enlighten the jury. It was an attempt by the court to instruct the jury as to the consideration to be given evidence that "may have been" admitted in the case, which, in their opinion, might or might not tend to prove the appellant guilty of some crime or offense other than that charged in the indictment, without indicating what evidence had been introduced that was likely to superinduce such an opinion, or what crime or offense other than that named in the indictment was referred to. The jury were also told, in effect, that, if the evidence thus vaguely referred to proved the appellant guilty of some other offense "against the

law or against morals," they ought not to "allow that fact, whatever it may be," to bias their minds, or make them find the appellant guilty under the indictment, any more than if it had not been admitted, except in so far "as the fact itself, whatever it may be," conduces to prove him guilty of the crime with which he was charged. This part of the charge is but a repetition of what went before, and is well calculated to further obscure the meaning of the court and mislead the jury.

Near the conclusion of the admonition the jury were further told by the court that it was his duty to tell them of the "rejection of certain testimony and the purpose for which certain other testimony was admitted"; but neither in that connection, nor elsewhere in the admonition, except as to the statements of Mrs. Martin, already referred to, was it stated what evidence was rejected, although there was other evidence rejected by the court. The trial judge should have admonished the jury in explicit language what evidence was excluded from their consideration, specifying it in detail; and, if its rejection was not ordered until after it had gone to the jury, it would have been proper for the court, in excluding it, to name the witnesses from whom it had been elicited, in order that the jury might the better understand what evidence, and how much of it, was not to be considered by them. But when evidence otherwise incompetent is admitted for a specific purpose, a somewhat different rule should obtain. In that event, the trial judge in apt language, and without quoting it in detail, or giving undue prominence to particular facts, should inform the jury for what purpose alone the evidence is to be considered by them. Pursuant to this rule, the jury in the case at bar should have been told by the court that, though they might believe from the evidence beyond a reasonable doubt that the burning of the house of Mrs. Martin was done, or procured to be done, by her, with the felonious intent to thereby defraud the insurance company of the amount for which the same or its contents was insured, and further believe from the evidence beyond a reasonable doubt that the appellant, with like intent and purpose, did aid, assist, and advise her in such burning, if any, such of the evidence, if any, as tended to prove that fact, might be considered by the jury, in connection with all other evidence in the case, only in determining whether or not the appellant had, or was thereby furnished, a motive for the murder of Mrs. Martin. As a further safeguard to the rights of the appellant, and by way of putting the admonition in another form, the court might also have told the jury that none of the evidence in regard to the burning of the house, the removal of its contents, or any part thereof, by the appellant, before the fire, or as to the payment by the insurance company of the loss thereon—though they might be

lieve from such evidence beyond a reasonable doubt that appellant was a guilty participant in the crime, if any, of burning the house, or the fraud, if any, thereby practiced upon the insurance company—should be considered by them, except for the sole purpose of determining whether or not it conduced to prove a motive on the part of appellant for the murder of Mrs. Martin. In the same manner, and with equal circumspection, the court should have admonished the jury as to the purpose for which they might consider the evidence in regard to the illicit relations that existed between the appellant and Mrs. Martin at the time of her death and for the previous two years.

We find but little merit in the objection urged by the appellant to the statements of the commonwealth's attorney set forth in the bill of exceptions. The language complained of was severe in its arraignment of the appellant, but not abusive, and we are unable to say that it was not warranted by the evidence. The conduct of the appellant, as shown by the evidence, his admissions, while upon the witness stand, of moral turpitude, much of which was voluntary and unnecessary, afforded justification for what was said by the commonwealth's attorney.

Because of the error of the trial court in failing to properly admonish the jury as to the effect and purpose of the evidence that was competent only to show motive, and of its further error in rejecting evidence of certain of the statements of Mrs. Martin, the judgment is reversed, and cause remanded, with directions to the lower court to set aside the verdict and judgment, and grant appellant a new trial, and for further proceedings consistent with the opinion herein.

THRUSTON'S ADM'R et al. v. PRATHER et al.

(Court of Appeals of Kentucky. Dec. 3, 1903.)

WILLS — EXECUTION — EVIDENCE — SUFFICIENCY — REVOCATION — LETTERS — APPEAL — PREJUDICIAL ERROR.

1. Where the only evidence as to the execution of a will claimed to have been executed after a will admitted to probate was that of a person who claimed to have been present at the time it was dictated, and there is no evidence that the amanuensis wrote down what the decedent dictated, or that any of the supposed witnesses signed the paper in question, and the paper was not produced, the evidence is insufficient to establish a will, under St. §§ 4828, 4833, providing that the will must be in writing, subscribed in testator's presence, and acknowledged by him in the presence of two witnesses, and that no will shall be revoked unless by a subsequent will executed in the manner in which a will is required to be executed, or by destroying the same.

2. In order to establish a letter as a testamentary instrument, so as to modify or supplant a will duly executed, it must be shown that such letter was written subsequent to the date of the will.

3. A letter written by testator to his wife, recommending her, after his death, to sell her home and his property, and, if necessary, all

he had, to maintain her, and stating that all he asked was that she would not leave all to her family, but that she would share some of it with T., especially in view of the fact that testator was a learned lawyer, was nothing more than a letter of advice or recommendation. It did not establish a precatory trust in favor of T., nor was it sufficient to overcome the plain language of the will previously executed, leaving all the rest of his property absolutely and in fee simple to his wife.

4. Where the propounder of a will was entitled to a peremptory instruction on issues raised, the contestant was not prejudiced by a ruling submitting such issues to the jury.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

In the matter of the probate of the will of Hamilton Pope, deceased; Mary T. Pope and others, contestants. From a judgment of the circuit court on appeal from an order of the probate court establishing the will, contestants appeal. Affirmed.

Bodley, Baskin & Morancy, A. T. Burgwin, and Matt O'Doherty, for appellants
W. S. Hogue, for appellees.

BARKER, J. Hamilton Pope died at his residence in Jefferson county, Ky., in 1893. He left two holographic wills, the first of which is as follows:

"In the name of God, Amen: I, Hamilton Pope, of the City of Louisville and State of Kentucky, do make this will, knowing as I do, my dear wife will make at her death such disposition of my property as would be acceptable to me were I alive, I give and devise to her, my said wife Henrietta, all the real and personal estate I may die seized of or possessed in fee simple and absolutely and as fully as words can express it, and I appoint her executrix of this will, and request no security be required of her.

"In witness whereof I hereto set my hand this 9th June, 1868.

"[Signed] Hamilton Pope."

The will of 1868 was probated by order of the county court on the 6th day of December, 1893. Subsequently, a later will having been discovered, the order probating that of 1868 was set aside, and the latter instrument was admitted to probate on the 27th day of March, 1894. It is as follows:

"In the name of God, Amen:

"I, Hamilton Pope, of the City of Louisville and State of Kentucky, make this my last will.

"First. I give and devise to Hamilton Pope Prather my watch (which his father presented to me) with its accompaniments to be handed to him when my wife, his grandmother, shall deem it advisable.

"Second. All the rest and residue of my estate, real, personal, or mixed, legal or equitable, I devise absolutely and in fee simple to my dear wife Henrietta, and I appoint her my executrix, and request the County Court not to require security of her, and also request that she will not return any

inventory or appraisement of my personal estate.

"In witness whereof, I hereto set my hand this 8th day of September, 1891.

"[Signed] Hamilton Pope."

Among the papers of the decedent was found the following letter, wholly written by himself, and addressed to his wife:

"To My Dear Wife: I am now old, in bad health, and feeble, and have been hard run and despondent. I have maintained you in some style, and have tried to gratify your desire for travel. I have helped your family, and more so than I have done mine. I recommend when I am gone—which shall not now be long—you will sell your home, my 20 acres, and my office, and, indeed, all I have, if necessary to maintain you. I am under no obligations to your family or mine. All I ask, when you go, you will not leave all to yours; but that you will share some of it with Ellen Thruston. * * *

"[Signed] Hamilton Pope."

Contending that the decedent, who died childless, had executed a will subsequent to that of 1891, which revoked that instrument, and that the latter will had been suppressed or destroyed, Mary T. Pope, Curran Pope, Pendleton Pope, and A. T. Pope, who were heirs at law of the decedent, together with Ellen Thruston, appealed from the order of the Jefferson county court, admitting to probate the will of 1891, to the Jefferson circuit court; and, upon a trial there had, Ellen Thruston's administrator (she having in the meantime died) sought to establish the letter left by the decedent, addressed to his wife, as a part of his will. The contestants, Mary T. Pope et al., undertook to establish by evidence that the decedent had executed a will subsequent to that of 1891, which, in effect, at least, revoked that instrument; they claiming that the will, the execution of which they sought to establish, had been destroyed or suppressed. The trial of the questions thus raised resulted in the court peremptorily instructing the jury that there was no evidence which would warrant them in finding that Hamilton Pope had executed a will subsequent to 1891, as claimed by the contestants. The question as to whether or not the letter addressed by the decedent to his wife constituted a part of his will was submitted to the jury, who found adversely to that paper. Of the ruling of the court and the verdict of the jury, Ellen Thruston's administrator and the contestants, Mary T. Pope and others, are now complaining.

The execution of the will sought to be established by Mary T. Pope and others depends upon the evidence of Annie Wilson, a colored woman, who was in the employ of the decedent, who states that, some time before his death, Hamilton Pope sent her with a note to his office; that, in response to this note, three gentlemen came to the house of the decedent, and were ushered into his presence, in his sickroom; that, with his

consent, she remained in the room, and heard all that transpired; she did not know who the three gentlemen were, but describes one of them as being tall and dark-complexioned, who addressed the decedent as "Uncle Hamilton"; that she heard the decedent tell this gentleman that he desired to write a "codicil" (codicil), and wished him to write down what he (the decedent) should dictate; that thereupon the decedent directed him to write that Hamilton Pope Prather was to have \$12,000, and that the balance of his estate should go to his wife for life, with remainder to his heirs at law; that she saw the tall, dark gentleman apparently write on a piece of paper in response to this dictation; that after it was finished the amanuensis handed the paper to Hamilton Pope, who thereupon took a pen and wrote something on the paper; that the other two gentlemen, who came with the amanuensis, also wrote something on the paper; and that she was then called on to attest the instrument thus written. The witness describes herself as being wholly illiterate. She could not, of course, have read what was written on the paper which she claims to have attested. She did not hear it read, as it was merely handed by the amanuensis to the decedent, who read it himself. She does not, therefore, know what was written upon the paper. She does not know whether or not the decedent signed it. She saw him take a pen and go through the motion of writing; but, being unable to read, she did not and could not know what he had written. For the same reason, she did not know whether either of the other witnesses to the instrument signed their names. She saw them do as the decedent had done, but could not state whether their names were subscribed to the paper or not. She does not even know that her own name was written as a witness. She saw something written, and she was called on to touch the pen. And this is all that she knows as to the formal execution of the will.

Section 4828 of the Kentucky Statutes provides: "No will shall be valid, unless it is in writing, with the name of the testator subscribed thereto by himself, or by some other person in his presence, and by his direction; and, moreover, if not wholly written by the testator, the subscription shall be made, or the will acknowledged by him in the presence of at least two credible witnesses who shall subscribe the will with their names in the presence of the testator." Section 4833: "No will or codicil, or any part thereof, shall be revoked, unless * * * by a subsequent will, or codicil, or by some writing declaring an intention to revoke the same, and executed in the same manner in which a will is required to be executed, or by the testator, or some person in his presence, and by his direction, cutting, tearing, burning, obliterating, canceling or destroying the same, or the signature thereto, with

intent to revoke." The testimony of Annie Wilson fails to show the execution of a will, within the provisions of the statute. Giving everything that she said upon the subject its utmost force and effect, there is no evidence that the amanuensis wrote down what the decedent dictated to him, or that Hamilton Pope or any of the supposed witnesses signed the paper in question. If the paper had been produced, and the witness had identified it as the paper which she saw before her when she touched the pen, then the instrument would have spoken for itself, and been worthy to be submitted to the jury; but, in the absence of the paper, we think the evidence falls short of the requirements of the statute, and that the trial judge properly excluded this issue from the consideration of the jury. This conclusion is fully sustained by the reasoning of the court in the cases of *Chisholm's Heirs v. Ben*, 7 B. Mon. 408, and *Mercer's Adm'r v. Mackin*, 14 Bush, 434.

The ruling of the trial judge as to the letter sought to be established by the administrator of Ellen Thruston was more favorable to him than he was entitled. The paper bears no date, and there was no evidence as to when it was written.

The will of Hamilton Pope, executed in 1891, was fully established by the evidence. Indeed, there was no attempt to dispute its validity as a testamentary instrument at the time of its execution. All that was contended by the contestants was that it had been revoked or modified by a subsequent will. In order to establish the letter as a testamentary instrument which would modify or supplant the will of 1891, it was necessary to be shown by some evidence that it was written subsequently to the 8th day of September, 1891. This the evidence bearing upon this issue wholly failed to do. Moreover, we think the letter was not testamentary in character. In the first place, it was a letter written by the decedent to his wife, and does not purport upon its face to be anything more than an expression of advice and recommendation, leaving to her the question of compliance. The very fact that the testator, who was a learned lawyer, based his wish with regard to his property after the death of his wife in a confidential letter directed to her alone, which she was under no obligation or duty to exhibit or show to any one, strongly tends to show that the decedent did not intend it to operate as a testament. The expressions contained in the letter are more usually found in instruments about whose testamentary character there exists no doubt, and when so found they are perhaps entitled to more weight, as establishing precatory trusts, than when written in private letters. But had the words in question been written by Hamilton Pope in the will of 1891, they would not, in our opinion, have established a precatory trust. In the case of *Bryan v. Milby* (Del.

Ch.) 24 Atl. 333, 13 L. R. A. 563, the will of the testator contained the following: "I give and devise to my wife, Mary Bryan, all of my estate, both real and personal; and I do hereby authorize and direct my executrix hereinafter named to sell my real estate as soon as it can be sold to advantage, and to invest the money in good stocks and bonds. And I do request my wife, if she should not require the whole of my estate as a support, that she will will at her death the remainder to the children of my brother Charles A. Bryan, of Cecil county, Maryland." This was held not to create a precatory trust. In the case of *Marti's Estate* (Cal.) 61 Pac. 964, the precatory words of the will were: "Upon the death of my wife, I desire one-half of the property bequeathed to her shall be devised by her to my relatives." These words were held not to constitute a trust. The court said: "The words themselves fall far short of a command, or direction, and are rather in the nature of an expression of the testator's feelings, and a suggestion or recommendation to be considered by her in making a testamentary disposition of her estate, or as a reason to influence her therein." In the case of *Hopkins v. Glunt*, 111 Pa. 287, 2 Atl. 183, the language of the will was: "I give, devise and bequeath to my beloved wife, Margaret Hopkins, her heirs and assigns forever, all my property, real, personal and mixed, of whatever nature and quantity so ever, and wherever the same shall be at the time of my death. * * * My further request is, that at the death of my wife, Margaret aforesaid, that she will so devise what she may have among our daughters, Martha's and Eliza's, children, share and share alike." This was held not to constitute a precatory trust. In the case of *Igo v. Irvine* (Ky.) 70 S. W. 836, the precatory words were: "I make it as a request of my children, that if any of them should die without issue, that in so far as they may have received any estate from me, that at their death they will the same to my surviving children, or the issue of those who may be dead. I think this is but a reasonable request, and I have confidence that it will be complied with by my children." The court held that the language in question did not constitute a trust. In its opinion the court cited with approval the following language from *Hess v. Singler*, 114 Mass. 56: "It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing the assurance, entreaty, or recommendation that he will apply to the benefit of others, may be held to create a trust, if the subject and obligation are sufficiently certain. Some early English cases had a tendency to give to this doctrine the weight of an arbitrary rule of construction; but by the later cases, in this, as in all other questions of interpretation of wills, the intention of the testator, as gathered from the whole will, con-

trols the court. In order to create a trust, it must appear that the words were intended by the testator to be imperative. And when the property is given absolutely and without restriction, a trust is not to be lightly imposed by mere words of recommendation." In the case of *White and Others v. Irvine* (Ky.) 74 S. W. 247, the words were: "I make it as an earnest request of my said son, I. Shelby Irwin, that if he should die without having issue, he give said 305 acres of land, or its value, to my daughter, Sarah I. White, if living; if not, then to her children; if any of her children should be dead, having issue, in that event, said issue is to receive one equal share." This language was held not to create a trust.

The principle established by the cases cited makes it clear that the letter written by Hamilton Pope to his wife was not intended as a will, or a codicil to a will; its language merely indicates his wishes, without any intention on his part to hamper the devise to his wife by any absolute conditions. His will is: "All the rest and residue of my estate, real, personal and mixed, legal or equitable, I devise absolutely and in fee simple to my dear wife Henrietta." This strong language is not to be modified or revoked by words which on their face are simply advisory or recommendatory. The propounder of the will of 1891 was entitled to a peremptory instruction, as against the administrator of Ellen Thruston, on the issues raised by the letter; and, this being true, he was not prejudiced by the ruling which submitted the paper in question to the jury.

Perceiving no error in the record, the judgment is affirmed.

SCHERM v. SHORT, Sheriff, et al

(Court of Appeals of Kentucky. Dec. 2, 1908.)
SPECIAL ASSESSMENTS—DRAINAGE DITCHES—
LIEN—ENFORCEMENT—LIABILITY
OF ONE ASSESSED.

1. Act March 23, 1900; Laws 1900, p. 110, c. 30 (Ky. St. § 2400), relative to the construction of drainage ditches, etc., provides that on the completion of an allotment of a ditch the county surveyor shall give the land owner a certificate, which shall state the amount due the contractor for constructing the ditch, which amount shall be a lien on the land; and that, if any land against which an assessment has been made shall change hands, the sheriff shall give the new owner notice of the amount due, and, on failure to pay, that the land shall be sold to satisfy the tax. *Held*, that the assessment is not a claim against the owner individually, but against the land itself, which is liable to sale for satisfaction of an assessment, notwithstanding that the one to whom it was assessed has personal property from which the assessment might be satisfied.

Appeal from Circuit Court, Daviess County.
"To be officially reported."

Action by Mike Scherm against W. I. Short, as sheriff of Daviess county, and others. From a judgment dismissing the peti-

tion as to defendant Short, plaintiff appeals. Affirmed.

R. G. Hill, for appellant. Sweeney, Ellis & Sweeney, for appellees.

BURNAM, C. J. The appellant, Mike Scherm, brought this suit in the Daviess circuit court against the appellee Sam Jones, as administrator of Jessie Garrett, deceased, and W. I. Short, sheriff of Daviess county, to set aside and vacate a sale of land made by the appellee Short, as sheriff of Daviess county to Jessie Garrett, to satisfy an assessment for a drainage ditch made pursuant to the provisions of the act of March 23, 1900, and which is recited between sections 2380 and 2417, inclusive, of the Kentucky Statutes. Appellant alleges in his petition that he purchased the tract of land sold by the sheriff on the 15th day of February, 1902, and that on the 20th of October, 1902, the defendant, as sheriff, levied upon and sold this land to satisfy an assessment against Thomas S. Pettit, as owner thereof, for the construction of a drainage ditch; and that the defendant Sam Jones, as administrator of Jessie Garrett, became the purchaser thereof; and that Short certified the sale and purchase to the clerk's office of the county court for record. A copy of the certificate of sale made by the sheriff is filed with the petition as a part thereof, and is as follows:

"Commonwealth of Kentucky, County of Daviess. No. 7,174. This is to certify that I have an assessment due and unpaid against the land hereinafter described, in the action of J. B. Bryan on petition for a ditch, listed with me for collection, and I did levy on that certain tract of land assessed in the name of T. S. Pettit, lying in Daviess county, bounded on the north by the land of the Mutual Life Insurance Co., of Kentucky, on the East by the land of Frank Ebelhar, on the South by the Louisville and Nashville R. R., containing forty acres, more or less, being assessed as the land of Thomas S. Pettit, and afterwards conveyed to Mike Scherm by J. G. Hill, and advertised according to law for the 20th of October, 1902, it being county court day, and between 10 A. M. and 2 P. M., did sell the land above levied on after offering a less number of acres for the amount of said assessment, levy and commission, when Sam Jones, Jr., administrator, became the purchaser thereof. Given under my hand this 20th day of October, 1902.

W. I. Short, Sheriff.

"Assessment \$146.75, cost \$14.20,—total \$160.95.

"Commonwealth of Kentucky, County of Daviess. I, J. T. Griffith, clerk of the Daviess county court, do certify that the foregoing certificate of land sold for assessment, assessed in the name of Thomas S. Pettit, in proceedings of J. B. Bryan, etc., on petition for a ditch, was this day lodged in my

office, and admitted to record. Witness my hand, this 10th of November, 1902.

"J. T. Griffith, Clerk."

The plaintiff further alleges that at the time of the levy and sale Thomas S. Pettit had sufficient personal property out of which the taxes could have been made; that the land levied on and sold by the sheriff to satisfy the ditch assessment had been assessed as the property of Thomas S. Pettit, but that he was not in fact the owner thereof at the time of such assessment, or liable for the assessment against such land; and prayed that the levy and sale made by the sheriff should be set aside. The defendant Short interposed a general demurrer to plaintiff's petition, which was sustained, and the petition as to him dismissed. Plaintiff asks a reversal of the judgment upon the ground that it was the duty of the sheriff to have collected the assessment by a sale of the personal property of Thomas S. Pettit, the alleged owner against whom the assessment was made. Section 21 of the act of March 23, 1900 (Laws 1900, p. 110, c. 30), provides: "It shall be the duty of the county surveyor or engineer, on being notified by any land-owner that his allotment, or by any contractor that his job is completed, to inspect the same; and if he find that it is completed according to the specifications of the report on which the ditch was established, he shall accept it and give the land-owner, or, in case the job has been sold to the contractor, a certificate of acceptance, stating that said allotment or job is completed according to such specifications. And if any share or allotment has been sold to a person, not the owner of the land assessed therefor, he shall in addition, state the amount due the contractor for constructing the same from the owner of the land, which certificate shall be a lien on the land assessed for such share or allotment, and shall be due and payable immediately by the owner of the land; and if the allotment sold belongs to a non-resident of the county, the clerk shall state such fact when he offers it for sale. And when the county surveyor or engineer, heretofore provided accepts it and issues his certificate of acceptance, he shall file with the county clerk a copy thereof, whereupon the clerk shall charge the amount mentioned in said certificate on the tax book against the land assessed with such allotment to be collected as other taxes are collected, together with six per cent. for the holder of the certificate after the same becomes delinquent, and when collected, it shall be paid to the person holding the certificate by the tax collector, and said tax collector shall receive four per cent. for collecting the same, to be paid by the certificate holder." It will be observed that the assessment is against the land, and a lien is given by the statute on the land to secure the payment of such assessment. There is a marked distinction between local assessment of this character and taxes levied for gen-

eral revenue purposes. They are not levied for the purpose of sustaining the government, but are charges against specific property, because the property itself is supposed to receive a special benefit therefrom different from the general one which the owner enjoys in common with other citizens of the commonwealth. This question was very fully considered by this court in *Gosnell v. City of Louisville* (Ky.) 48 S. W. 722, and it was there held that an assessment of this character was not a tax within the meaning of sections 157, 171, 172, and 174 of the Constitution, limiting the tax rate of cities, and requiring equality and uniformity of taxation. A very full discussion of the question is found in *Elliott on Streets & Roads*, c. 25. The assessment for the construction of the ditch under the statute was not a claim against the owner of the land in his individual capacity, but an assessment against the land itself. And the statute provides that, if any land against which such an assessment has been made shall have changed hands, the sheriff shall give the new owner notice of the amount due and assessed against the property, and, in the event of his failure to pay, that the land shall be sold to satisfy the tax. It follows, therefore, that the demurrer was properly sustained.

Judgment affirmed.

SANDERS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 9, 1903.)

SALE OF MILK FROM COWS FED ON "STILL SLOP"—STATUTORY PROHIBITION—VALIDITY.

1. Ky. St. 1899, § 1274, prohibiting the sale of milk from cows fed on "still slop," being a regulation within the police power of the state, is not in conflict with the fourteenth amendment to the federal Constitution, declaring that no state shall deprive any person of life, liberty, or property, though there is no evidence contradictory of the claim that still slop is a wholesome food for dairy cows.

Appeal from Circuit Court, Jefferson County, Criminal Division.

"To be officially reported."

Fred Sanders was convicted of crime, and appeals. Affirmed.

Norton L. Goldsmith, Alfred Selligman, and Gibson, Marshall & Gibson, for appellant. Warwick Miller and C. J. Pratt, for the Commonwealth.

BURNAM, C. J. The appellant, Fred Sanders, was indicted, tried, and convicted in the Jefferson circuit court for having knowingly sold milk from animals fed upon "still slop," in violation of the provisions of section 1274 of the Kentucky Statutes of 1899, which reads as follows: "Whoever shall knowingly sell, or cause to be sold, to any person in this state, milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or sell milk commonly known as 'skimmed milk,'

with intent to defraud, or shall knowingly sell any milk, the product of a diseased animal, or from animals fed upon 'still slop,' 'brewers' slop,' or 'brewers' grains,' or shall knowingly use any poisonous or deleterious material or milk from animals diseased or fed as aforesaid, in the manufacture of butter or cheese, shall be fined in any sum not less than twenty-five nor more than two hundred dollars." A reversal of the judgment of the circuit court is asked upon the ground that so much of the statute as prohibited the sale of milk from animals fed upon still slop is obnoxious to the fourteenth amendment to the Constitution of the United States, which provides, in section 1, that "No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant's contention is based upon the claim that still slop, when used under proper conditions, is a wholesome and innocuous food for dairy cows, and that the milk from cows fed thereon is a pure and wholesome article of food for human beings. Our attention is called to the fact that there is nothing in the statute, nor the indictment which is the foundation of this prosecution, which negatives either of these contentions, and that no testimony was introduced by the commonwealth upon the trial of the case for the purpose of establishing that such was the fact; that the whole proceeding rests upon the naked prohibition contained in the statute itself. The section upon which the prosecution is based is one of the provisions of the statute aimed at offenses against the public health, and was exercised under the police power of the state for the protection of the health of its citizens. No exact definition of the extent of this power has, or perhaps can be, given. Judge Cooley, in his work on Constitutional Limitations, has approved that given by Chief Justice Shaw in *Commonwealth v. Alger*, 7 Cush. 53, as the most satisfactory and complete to which his attention has been called. It is as follows: "All property in this commonwealth is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other usual and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. * * * The power is vested in the Legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repug-

nant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and source of this power than to mark its boundaries and limit its exercise." "And this power, under the American constitutional system, is left with the individual states. It cannot be taken away from them, either wholly or in part." See *United States v. Dewitt*, 9 Wall. 41, 19 L. Ed. 593. "Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the states. All that the federal authority can do is to see that the states do not, under cover of this power, invade the sphere of the national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of the rights guaranteed by the federal Constitution." See Cooley on Constitutional Limitations (7th Ed.) 831, and authorities there cited.

The fourteenth amendment of the federal Constitution was first called to the attention of the Supreme Court of the United States in the *Slaughterhouse Cases*, 16 Wall. 36, 21 L. Ed. 394. In construing a statute of Louisiana vesting in a slaughterhouse company the sole and exclusive privilege of conducting a live stock landing and slaughterhouse business, and requiring that all animals should be landed at the stock landing and slaughtered at the slaughterhouse of the company, and nowhere else, it was held that the statute did not conflict with the provisions of the fourteenth amendment. The scope of this amendment, in so far as it relates to the question before us, has been very clearly stated by Judge Cooley as follows: "The guaranteed equal protection is not to be understood to require that every person in the land shall possess the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is deemed to be equal if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed. The classification must be based on reasonable grounds. It cannot be a mere arbitrary selection." Cooley's Constitutional Law. And the text is supported by numerous adjudged cases.

It is a canon of statutory construction that every presumption must be indulged in favor of the validity of the statute, as the Constitution confers upon the General Assembly the lawmaking power. But notwithstanding this general presumption, the courts must obey the Constitution, and determine in a particular case whether its limits have been passed. As was said in *Marbury v. Madison*, 1 Cranch. 137, 2 L. Ed. 60: "To what purpose are powers limited, and to what purpose is that limitation committed in writing, if these limits may at any time be passed by

those intended to be restrained." "If, therefore, a statute purporting to have been enacted to protect the public health is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge, and thereby give effect to the Constitution." See *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. In *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253, it was held that the fourteenth amendment to the Constitution was not designed to interfere with the exercise of the police power by the state for the protection of health, prevention of fraud, or the preservation of the public morals, and that it was competent for the state of Pennsylvania to prohibit the manufacture of oleomargarine butter. In that case the defendant offered to prove that he made large profits from the sale of the prohibited article, and that it was a wholesome and innocuous food; that the statute upon which the prosecution was founded was not a lawful exercise of the police power, because it deprived him of the lawful use of his property without compensation. The court sustained an objection to the evidence, and the defendant was adjudged to pay a fine and the cost of the prosecution. The judgment was affirmed by the Supreme Court of Pennsylvania. 114 Pa. 265, 7 Atl. 913, 60 Am. Rep. 350. Upon appeal to the Supreme Court of the United States, the question was whether the prohibition of the sale and manufacture of oleomargarine—a wholesome article of food—was a lawful exercise by the state of the power to protect by police regulations the public health. In discussing this question, the court, through Judge Harlan, said: "As it does not appear from the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of the question is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will embodied in statutes as they may happen to approve or disapprove its determination of such questions. The power which the Legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large. * * * Both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property. * * * The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds, other than those produced from

unadulterated milk, or cream from unadulterated milk, * * * will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the Legislature or to the ballot box, not to the judiciary. The latter cannot interfere without usurping the powers committed to another department of the government."

In *State v. Layton*, 61 S. W. 171, 83 Am. St. Rep. 487, the Supreme Court of Missouri had before it an act of the General Assembly prohibiting the sale of "alum baking powders," as unhealthy. In this case there was no question of deceit in the sale of the prohibited article. The statute upon which the prosecution was based embodied no idea of imitation of a superior article, and the court said: "No baking powder is recognized as the standard, as is butter from unadulterated milk in the oleomargarine statute. Here the statute must be upheld, if at all, upon the right of the Legislature to make all needful laws to preserve the public health. * * * While it is true that there are limits, under our system, to this power, we must start with the presumption in favor of the act. While we do not accede to the proposition that the Legislature can arbitrarily declare any article of food in general use, and concededly wholesome and innocuous, to be unhealthy, and its production and sale a crime, and would have no hesitancy in declaring such an act void when the act on its face discloses its arbitrary and unreasonable character, * * * if it be an article so universally conceded to be wholesome and innocuous that the court could take judicial notice of the fact, the Legislature has no right to prohibit its sale. But if there is a dispute as to the fact of its wholesomeness for food or drink, then the Legislature can either regulate or prohibit it. The act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubts." Citing *Cooley's Constitutional Limitations* (6th Ed.) and numerous opinions.

It was decided in the case of *Maryland v. Henry A. Broadbelt*, 43 Atl. 771, 45 L. R. A. 435, 73 Am. St. Rep. 201, that the Legislature could, "under the police power," require the registration with "the live stock sanitary board" of all herds of cattle of persons selling milk for food, and prohibit the sale of milk from premises found in an unsanitary condition.

The development in the science of bacteriology in recent years has conclusively proven that the microbe is a most potent agent in the propagation of contagious diseases, and that there is no more favorable element for their absorption, growth, and development than milk, and that milk contaminated by their presence communicates diphtheria, ty-

phoid fever, tuberculosis, and other kindred contagious diseases, to human beings, especially to the young. And it is a matter of common knowledge that the conditions usually prevailing around places where "still slop" is produced are also highly favorable to the development of many forms of bacilli. The heat, dampness, and fermentation—all essential elements in the production of still slop—are favorable to germ growth. So that we may fairly assume that the General Assembly, in the enactment of this statute, had sufficient information to justify the belief that milk from cows fed on still slop had ample opportunity to become impregnated with elements dangerous to the public health. Nearly every police regulation affects to some extent property rights, and, whilst this power cannot be made the excuse for oppressive and unjust legislation, the courts are not permitted to say that the Legislature may not enact laws apparently necessary for the public health. We have reached the conclusion that, under the facts of this case, this court has no power to hold that the General Assembly did not have under the "police power" authority to enact the statute under which appellant was convicted.

Judgment affirmed.

HART COUNTY et al. v. LOUISVILLE & N. R. CO.

LOUISVILLE & N. R. CO. v. HART COUNTY.

(Court of Appeals of Kentucky. Dec. 9, 1903.)

"To be officially reported."

On petition for rehearing. Petition overruled.

For former opinion, see 75 S. W. 288.

PAYNTER, J. It is not a difficult matter for zealous counsel to conclude that a court has not fully understood the record, when its conclusions on the facts and the law do not accord with their views. This is unfortunate, but it has always been so, and will continue to be, so long as courts exist, and lawyers are unsuccessful in the prosecution of cases before them. The alleged inaccuracy of the court in summarizing the purpose of the action had not the slightest effect on the conclusion of the court. On the contrary, the court accurately states the claim of the county as to its alleged right to dividends on stock issued to taxpayers or their assignees before such certificates of stock were so issued. Notwithstanding the criticism which counsel saw proper to make of the opinion of the court, wherein the purpose of the action was stated with reference to the claim to which we have just referred, counsel who filed the petition for a rehearing were so impressed with the opinion of the court on that question that they were moved to say in the petition for rehearing, "We have regarded the

right of the county in this particular as doubtful, and will not further insist upon the same."

In the opinion of the court it is stated that in *Hardin County v. Louisville & Nashville Railroad Co.*, 92 Ky. 412, 17 S. W. 880, "the interest did not cease to run on the subscription until the cash dividend was declared, in June, 1884," and "the conclusion of the court is now adhered to." Counsel criticize the opinion because they seem to conclude that the court did not follow the *Hardin County Case*. The court did adhere to it in holding that the stock dividend of one-quarter of 1 per cent. did not stop the running of interest, and that the interest was not stopped until the payment of a cash dividend. However, on the question of estoppel the court said the facts of this case are essentially different from those of the *Hardin County Case*. The court in the *Hardin County Case* refused to apply the doctrine of estoppel. In this case the court did apply it to an essentially different state of facts. The criticism of counsel could only be justified upon the theory that, because the court refused to apply the doctrine of estoppel against one county, it cannot do it against another county on a different state of facts. The court admits an error in saying that Hart county was represented at a certain meeting of stockholders, but the correction of this error does not render it improper to apply the doctrine of estoppel to the facts of this case. It might be conceded that the court reached an erroneous conclusion on all the questions adjudged, save the one wherein the court held that the assignment of the principal stock carried with it the claim for interest stock; still Hart county was not entitled to recover. The court adheres to the conclusion reached on that question.

The whole court (except Judge HOBSON, who did not sit in the case) considered the petition for a rehearing, and overruled it.

MORSE v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. Dec. 9, 1903.)

NEGLIGENCE—INJURY FROM FRIGHT—LIABILITY.

1. No recovery can be had for personal injury resulting from fright occasioned by the negligence of another, where there is no immediate personal injury, trespass to real estate, or some contract relation.

Appeal from Circuit Court, Lewis County.

"To be officially reported."

Action by Zona B. Morse against the Chesapeake & Ohio Railway Company. From a judgment of dismissal on sustaining a general demurrer to the petition, plaintiff appeals. Affirmed.

W. C. Halbert and S. J. Pugh, for appellant. W. H. Wadsworth and E. L. Worthington, for appellee.

BURNAM, C. J. The appellant, Zona B. Morse, sought in this action to recover damages from the Chesapeake & Ohio Railway Company for "fright and mental suffering," and superinduced subsequent nervous prostration and injury, although there was no contemporaneous physical injury inflicted by the appellee. The facts which the plaintiff relied upon to support her cause of action are, in substance, that she owns a house and lot located on the west side of Main street, in the village of Quincy, in Lewis county, in which she resided at the time of her alleged injury; that the street was 30 feet wide, and that appellee's depot grounds and switchyards were located immediately opposite her residence, on the west side of Main street; that, a short time previous to the commission of the acts complained of, the appellee constructed upon its yards a switch from its main track to the east side of the street, directly opposite her residence; and that it failed to erect and maintain a bumping post at the end of this track, and that, as a consequence thereof, several of appellee's cars were backed over the end of this switch out into the street, and within 15 feet of her yard, and towards her residence, where she was at the time, which greatly frightened and alarmed her, and in consequence of which she suffered such nervous prostration and physical disability as confined her to her home for more than two months under medical treatment, and at great expense; that the injuries had been and would continue to be permanent. The petition further alleges that appellee was grossly negligent, both in the construction of the switch, and in the operation of its trains thereon. The court sustained a general demurrer to appellant's petition as amended, and adjudged that her petition be dismissed, and she has appealed.

The exact question presented by the appeal has not been heretofore decided by this court, but it has been decided in a number of well-considered opinions that damages cannot be recovered for mental suffering alone in an action for personal injuries based on negligence, unaccompanied by some direct contemporaneous injury to person or property, or growing out of some contract relation between the parties. See *Dawson v. L. & N. R. Co.*, 4 Ky. Law Rep. 810; *N. L. & M. V. Co. v. Gholson*, 10 Ky. Law Rep. 938; and *City Transfer Co. v. Robinson*, 12 Ky. Law Rep. 555. These decisions are practically in accord with the great weight of authority on this question. In fact, our attention has been called to only one case which may be considered as holding the contrary doctrine—that of *Mack v. R. R. Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913. On the other hand, *Thompson on Negligence*, §§ 156, 157; 2 *Shearman & Redfield on Torts*, § 761; *Jaggard on Torts*, 369, 370; 2 *Wood on Railroads*, 1739—assert the contrary doctrine. In the note to the case of *Gulf, etc., R. Co. v. Hayter*, 77 Am.

St. Rep. 860, Judge Freeman, in an elaborate note, has collected practically all the authorities on the point up to January, 1900; and they unanimously hold that there can be no recovery for fright alone, unaccompanied by actual injury traceable directly to contemporaneous physical injury. And they are almost equally harmonious that no recovery can be had for injuries resulting from fright caused by negligence of another, when no immediate personal injury is received. This question was fully considered by the Court of Appeals of New York in *Mitchel v. Rochester Ry. Co.*, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604. In that case the court said: "If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondents' concession would seem to be not only that no recovery can be had for mere fright, but also the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. * * * To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are ordinary and natural results of the negligence charged, and those that are usual, and therefore to be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental and unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to authorize a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury." And the conclusions reached are supported by numerous authorities cited in the opinion. Besides, it is a well-settled rule

of law that "a plaintiff who grounds his action upon the negligence of the defendant must show not only that the conduct of the defendant was negligent, but also that it was a violation of some duty which the defendant owed to him." See Thompson on Negligence, 3; Whitaker's Smith on Negligence, 3. The law requires that there shall be no intentional or negligent trespass upon the person or property of another, and, if this duty is violated, a cause of action exists in favor of the party whose person or property has been invaded against the violator. But there is no obligation to protect from fright, and the consequence thereof, when disconnected with or unaccompanied by a legal duty. If so, a man whose house caught on fire by negligence would become liable in damages to his neighbor who became frightened for fear that the fire would spread and consume his own house. Or in case a horse was negligently permitted to escape in the streets of a town, and in consequences thereof a woman standing on the sidewalk became frightened to such an extent as to result in nervous prostration, although not in fact suffering any physical contact or injury, she would be entitled to sue the owner of the horse for damages. These cases illustrate the danger of opening the door to imaginary claims, if the rule should be adopted, and a recovery permitted for mere fright and its consequences. While the authorities are not absolutely uniform, we have reached the conclusion that no recovery should be allowed for injuries resulting from fright occasioned by negligence, where there is no immediate personal injury, trespass to real estate, or some contract relation.

Judgment affirmed.

TINES v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 11, 1903.)
CRIMINAL LAW—EVIDENCE—CONFESSIONS—INSTRUCTIONS.

1. The affidavit procured from one by the acting county attorney under the guise of using it as evidence against unknown perpetrators of a crime is not admissible against the affiant on his trial, charged with the crime.

2. An instruction in a criminal case which groups certain facts shown by the evidence, and which unduly accentuates them, is erroneous.

3. An instruction in a criminal case which tells the jury what presumption arises from stated facts is erroneous, as invading the province of the jury.

4. Under Cr. Code, § 223, subsec. 1, providing that the failure of one on trial for crime to testify shall not be commented on or be allowed to create any inference against him, it is error for the court, on the accused's failure to testify, to charge that the jury should not comment on his failure to testify, nor should they draw any presumption of guilt therefrom; the accused being entitled to absolute silence on his failure to testify.

Appeal from Circuit Court, Graves County.
"Not to be officially reported."

Tom Tines was convicted of crime, and appeals. Reversed.

B. C. Seay and Saml. H. Crossland, for appellant. Clifton J. Pratt, for the Commonwealth.

BARKER, J. The appellant, Tom Tines, was indicted by the grand jury of Graves county, charged with the offense of feloniously breaking into the warehouse of Will Ryburn, and taking and carrying away therefrom one set of buggy harness, the personal property of Ryburn. Upon trial he was convicted, and sentenced to one year in the penitentiary.

It was conclusively shown by the commonwealth that Ryburn's warehouse or barn was feloniously broken into, and his harness stolen therefrom, in July, 1901, and that about a year afterward the harness was found in the possession of one Hicks. The only evidence in any way tending to connect appellant, Tines, with the affair, is his own affidavit, which the acting county attorney procured from him under the guise of using it as evidence against the unknown perpetrators of the crime. This affidavit is as follows: "T. J. Tines, being sworn, states: 'Last fall I went to see one of the Mangrums—I think his name was Ed—about buying some hogs to fatten, and I met a man here at the church southwest of Boaz Station, who said he had sold his buggy, and wanted to sell his harness. He had the harness in his hack or buggy. Said he wanted to sell me a pair of harness. I told him that I didn't particular need the harness, and he said he would sell me a pair cheap. I told him that, while I didn't particularly need a pair, I would buy a pair. He offered to sell them to me for five dollars. I finally bought them at that figure, and paid him the money for them. I think probably I had the harness more than a month when I sold them to Hicks, but I am not sure as to the time. I was coming towards home when I met the man that I got the harness from. He was traveling south, I think. He was a medium-sized negro. Seemed to be a middle-aged man. Don't know that I ever met him before or not. I traded it to U. S. Hicks for a double-barreled shotgun—breech-loading shotgun. I give him seven dollars to boot. This trade took place with Hicks some time after Christmas—something near a month after Christmas. I got the gear some time in the fall from the negro. Couldn't tell when. Don't know the month. Couldn't say whether it was the fore part or the latter part of the fall. Don't know whether it was in the middle of the fall or not. Don't know whether it was in September, October, or November. Can't remember positively as to what time it was in the fall. I simply know it was in the fall, and before Christmas. Don't remember whether the negro I got the gear from was well dressed or not. I made the trade—It was in the road that runs from the schoolhouse to Boaz Station that the trade was made. I believe it was about two miles

¶ 4. See Criminal Law, vol. 14, Cent. Dig. § 1902.

from the schoolhouse. I had done been to see one of the Mangrums, when I met this darkey. After seeing Mangrum, I went on down to see Preacher Wilkes. Just went to see Wilkes on a visit. T. J. Tines." Wharton, in his work on Criminal Evidence (section 668), says that "the testimony of an accused party, taken as such, is not admissible when such accused party is put on his oath and sworn and examined. This rule is founded upon the unreliable as well as the inquisitorial character of such statements; and therefore, when a man, having been arrested by a constable, without warrant, upon suspicion of having committed murder, was examined as a witness at the coroner's inquest, it was held that the statements thus made by him were not admissible against him on his trial for the murder. The same rule obtains where the defendant is compelled to answer under oath questions by the committing magistrate." We think the affidavit introduced in this case clearly comes within the rule of law above stated, and, as it constituted the sole link in any way connecting appellant, Tines, with the commission of the crime, the court should have peremptorily instructed the jury to find him not guilty.

Neither of instructions Nos. 2 and 4 should have been given. Nos. 1 and 2 contained the whole law of the case. No. 2 is objectionable because it groups and accentuates certain portions of the evidence, and undertakes to tell the jury what weight to give the same. This court has often held it to be error to group certain facts shown by the evidence, and to unduly accentuate them; and, when the court tells the jury what presumption arises from certain stated facts, it invades the province of the jury, who should be left to weigh the evidence themselves, and to draw their own conclusions therefrom.

In No. 4, the jury were instructed "that they shall not comment upon the failure of the defendant to testify; neither shall they draw any presumption of his guilt from his failure to testify." The jury's mind was thus directed to the fact that appellant had not testified in his own behalf, and no comment by the commonwealth's attorney could have been more injurious to his interest than was done by this instruction. The court, by the instruction in question, did appellant the very injury which it is the object of the law to prevent. Appellant was entitled to absolute silence on his failure to testify in his own behalf. Subsection 1, § 223, Cr. Code.

For the reasons above indicated, the judgment is reversed for proceedings consistent with this opinion.

KENDALL v. CRAWFORD.

(Court of Appeals of Kentucky. Dec. 11, 1903.)
REFORMATION OF DEEDS—PARTIES—DECREE—MARKETABLE TITLE.

1. A decree reforming on the ground of mistake a deed conveying land to a trustee for the

sole use of a wife for life, with remainder over to her heirs, so as to convey to her the estate in fee rendered in a suit by her against the sole heir and trustee in the deed, is conclusive, and vests in her, as against her unknown or possible heirs, an estate in fee, so as to enable her to convey a marketable title.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by Isabella Crawford against A. T. Kendall. From a judgment for plaintiff, defendant appeals. Affirmed.

A. T. Kendall, in pro. per. D. M. Rodman and E. L. McDonald, for appellee.

BARKER, J. In 1865 the Louisville & Frankfort Railroad Company, which was then the owner in fee simple of a lot of ground situated in Louisville, Ky., conveyed it to Isabella Younger (now Crawford) and her husband, Gilbert Younger, and to the survivor of them, during their natural lives, and then to the legal heirs of Isabella. Afterwards the husband and wife conveyed the property to E. D. Prewitt, in trust for the sole use and benefit of the wife. Subsequently the husband died, and his widow adopted C. W. Johnson as her heir at law. On the 7th day of February, 1903, appellee, Isabella Crawford, having learned that the property in question had been conveyed to her in such manner as that she held only a life estate therein, with remainder over to her heirs, instituted an action in the Jefferson circuit court, chancery division, in which she made Charles W. Johnson, her heir, and E. D. Prewitt, her trustee, parties defendant, and alleged, in substance, that the property had been purchased with her money, and it was intended that it should be conveyed to her in fee simple, but by mistake of the draftsman only the life estate had been conveyed to her, with remainder to her heirs; that she was ignorant of this mistake, and had always supposed that she owned the fee; upon which state of facts she prayed for a judgment reforming the deed by which the property was conveyed to her, so as to give it to her in fee simple, and that the trust created by the deed to E. D. Prewitt be terminated and adjudged to no longer exist; and that the commissioner of the court be directed to execute a deed conveying the property to her in fee simple. To this action both E. D. Prewitt and Charles W. Johnson filed answers, confessing the allegations of the petition to be true, and consenting to the relief prayed for. The deposition of appellee was taken, and tends to establish the truth of the allegations of the petition. The case having been submitted, the chancellor rendered a decree granting the relief as prayed for in the petition, and in pursuance thereof the commissioner of the court conveyed the property in fee simple to appellee, which deed was duly and legally recorded in the proper office. On the 26th

day of October, 1903, appellee addressed the following communication to appellant:

"Louisville, Ky., October 26th, 1903.

"To A. T. Kendall, Esq.: I offer to sell you my lot on east side of Floyd street in the city of Louisville, Jefferson county, Kentucky, beginning 123 feet south of the S. E. Cor. Floyd and Jefferson streets fronting 19½ feet on Floyd street and running back eastwardly at right angles to Floyd street 90 feet the same conveyed to me by L. & F. R. R. Co. by deed dated 23rd April, 1865, recorded in D. B. L. 22, page 195, J. C. C. Clerk's office, and referred to in judgment in action 33,403, Chy. Br. 1st Div. Jefferson Circuit Court, for the sum of \$2600.00, ¼ cash, balance in (1) and 2 years, lien notes by general warranty deed fee simple and marketable title taxes and \$150.00 mortgage to S. E. Johnson to be paid out of purchase money.

her
"Isabella X Crawford."
mark.

This proposition was accepted in the following words, indorsed upon the paper containing it:

"I accept the above offer when deed for lot conveying fee simple title and a marketable title is tendered, ten days time being given to examine title.

"This 27th October, 1903.

"A. T. Kendall."

Having examined the title, appellant reached the conclusion that appellee could not convey to him a "fee-simple and marketable title," and thereupon refused to accept the conveyance and carry into effect the contract, whereupon this action was instituted to enforce the specific performance of the contract. The petition contains substantially the facts hereinbefore enumerated. Appellant's answer expresses a willingness to take the property, provided he can get a marketable title, which he denies appellee is able to convey him. Upon the trial of the case the chancellor entered a decree enforcing a specific performance of the contract of purchase. From that judgment this appeal has been prayed.

The sole question involved in the litigation is whether or not the chancellor had jurisdiction to correct the mistake of the draftsman of the original deed in the suit instituted for that purpose; it being objected on the part of appellant that the decree in question does not bind the unknown or possible heirs of appellee. It is too late at this day to question the right of the chancellor to correct mistakes in deeds conveying real property; nor can it be doubted that the judgment of the court in the suit for correction, if the proper parties in interest were before it, is conclusive of the question decided. In the leading case of *Worley v. Tuggle*, 4 Bush, 168, it is said: "This case presents a mutual mistake of law and fact by both the contracting parties and draftsman, and, though the land was conveyed to the minor children

of the purchasers, yet, as they are mere volunteers, they stand in no more favorable attitude, nor have they higher equities, than if it had been conveyed to the parents." In order to correct the mistake in the deed under discussion, appellee brought before the court all of the parties in being who were interested in the question. In *Calvert on Parties* (page 251) it is said: "If a suit is instituted which affects an entire fee, the general rule is that it is sufficient to bring before the court the persons whose several interests combined make up the first estate of inheritance." In *Faulkner v. Davis*, 18 Grat. 651, 98 Am. Dec. 698, it is said: "In respect of the first estate of inheritance and of all interests depending upon it, it is sufficient to bring before the court the person entitled to that first estate, and, if there be no such person, then the tenant for life. * * *

This rule of representation often applies to living persons who are allowed to be made parties by representation, for reasons of convenience and justice, because their interests will be sufficiently defended by others who are personally parties, and who have motives both of self-interest and affection to make such defense; and they therefore consider it unnecessary to make such persons parties, and, indeed, improper to do so, and thus compel them to litigate about an interest which may never vest in them." In *Freeman on Judgments* (section 172) it is said: "If several remainders are limited by the same deed, this creates a privity between the person in remainder and all those who may come after him, and a verdict and judgment for or against the former may be given in evidence for or against any of the latter. Between a tenant for life and a reversioner no privity exists, and a judgment against the former does not bind the latter. If there be ever so many contingent limitations of a trust, it is an established rule that it is sufficient to bring the trustees before the court, together with him in whom the first remainder of inheritance is vested; and all that may come after will be bound by the decree, though not in esse, unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested." See, also, *Barnes v. Barnes* (Ky.) 15 S. W. 1; *Park v. Humpech* (Ky.) 47 S. W. 768; *Robinson's Sons v. Columbia Finance & Trust Co.* (Ky.) 44 S. W. 631; and *Brown v. Ferrell*, 83 Ky. 417.

In this case the appellee is a widow 61 years of age. She has been twice married, and borne no children. The record shows that she has no collateral kindred of whom she has any knowledge. In the suit to correct the mistake of the draftsman her adopted heir and her trustee were parties defendant, and consented in writing to the decree of correction. The court had jurisdiction of the subject, and had all of the parties in being who were interested in the question before it, and it seems to us that the decree

rendered invests the appellee with the fee-simple title to the property.

If the chancellor had no jurisdiction to correct the mistake involved in this litigation, then it follows that there is a large class of mistakes in the conveyance of real property which cannot be corrected at all; for, until the death of the grantee, it cannot be known who are his heirs, and therefore, if one purchases real property, and undertakes to have it conveyed to himself, but by mistake the draftsman conveys it to him for life, with remainder to his heirs, then, in the face of this calamity, he is helpless, because he can never obtain a decree of correction binding those who may be his heirs at his death. We are of opinion that appellee acquired a fee-simple title to the property by the decree of correction, and that the judgment enforcing a specific performance of the contract between appellant and appellee was proper.

Wherefore the judgment is affirmed.

WHITE-BRANCH-McCONKIN-SHELTON HAT CO. v. CARSON & CO.

(Court of Appeals of Kentucky. Dec. 11, 1903.)

ORDER FOR GOODS—FAILURE TO DELIVER IN SPECIFIED TIME—ACCEPTANCE—FREIGHT PAID BY MISTAKE.

1. Where one orders goods to be delivered by a certain time, he need not accept them when delivered later.

2. Goods ordered by a merchant having been delivered after the time specified, in his absence, the mere receipt thereof, and opening of the boxes, to see if they were in good condition, by his salesman, does not constitute acceptance; they not having been offered for sale, and no other act of ownership over them having been exercised, but they having been promptly returned as soon as he was apprised of their arrival.

3. A merchant, not having accepted goods delivered after the time specified in the order, may recover of the shippers the freight paid by him by mistake.

Appeal from Circuit Court, Ohio County.

"Not to be officially reported."

Action by the White-Branch-McConkin-Shelton Hat Company against Carson & Co. Judgment for defendants. Plaintiff appeals. Affirmed.

G. B. Lykins, for appellant. Glenn & Ringo, for appellees.

BURNAM, C. J. On the 14th day of January, 1902, the appellees, Carson & Co., who were conducting a retail store in Hartford, Ky., gave a written order to a traveling salesman of appellant, the White-Branch-McConkin-Shelton Hat Company, of St. Louis, Mo., who were doing business as jobbers, for \$376.15 worth of hats and caps, which were to be shipped on the 15th of February following. Upon the receipt of this order, appellants wrote appellee as follows: "We will give your order our careful attention." The

bill of goods not having been delivered on time, appellees, on the 27th day of February, wrote appellants as follows: "Suppose you do not intend to ship. Will buy more while in Louisville. Will not need yours in case you mean to. Sorry that we were disappointed." Appellant replied to this letter by telegram on February 28th, as follows: "St. Louis, 2/28, '02. Carson & Co., Louisville, Kentucky, c/o of Kentucky Jeans Clo. Co.: Letter 27th received. Goods were shipped on the 26th." Appellees responded as follows: "Louisville, Ky., Mar. 4, 1902. White-Branch-McConkin-Shelton Hat Co.—Gents: We got your message yesterday when we came in from Cincinnati. We had bought and the bill had been shipped, before we heard from you. We want to know when our bill was ordered shipped. We thought that we had ordered the bill shipped from 10th to 15th. But, if it was later, we are up against it. Write us at Hartford, Kentucky, as we will leave here Wednesday." On March 8th, appellees wrote appellant as follows: "White-Branch-McConkin-Shelton Hat Co., Gents: We are returning all hats bought of you. Sorry you did not ship on time, as we missed business, had to pay the freight on the hats, as well as some labor. We like your Mr. Williams, and only gave him the order on that account. Yours, Carson & Co." It appears from the testimony that this bill of goods arrived at Beaver Dam, Ky., the nearest railway station to Hartford, about the 1st day of March, and were delivered by the railroad company to Henry Fields, who conducted a transfer business between Beaver Dam and Hartford, and were by him delivered in due course to the firm of Carson & Co., in Hartford, Ky., during the absence in Cincinnati and Louisville of Henry Carson, the member of the firm who gave the order for the goods, and that they were taken in charge by a salesman in the employ of the firm, and opened for the purpose of ascertaining whether they were in good order or not. But none of them had been sold or placed on the shelves for sale before the return of Henry Carson, who at once directed that they should be reboxed and returned to appellant, in St. Louis. On this state of facts, appellant sued appellees for the contract price of the hats. Appellees, in their answer, denied liability, because the goods were not delivered by the 15th of February, and made their answer a counterclaim for \$4.80 freight charges which they had paid. Appellant pleaded in its reply that appellees had waived the condition as to time in the shipment by the acceptance of the goods. A jury trial resulted in a verdict and judgment for the defendants, which we are asked to reverse principally upon the ground that the trial court erred in the instructions given to the jury, which are as follows:

"(1) The court instructs the jury that if they should believe from the evidence that the goods, the price of which is sued for in this action, were received and accepted by

¶ 1. See Sales, vol. 43, Cent. Dig. § 424.

the defendants by opening said goods, and displaying them for sale, they should find for plaintiff the price of said goods sued for.

"(2) But if they believe from the evidence that said goods were not received and accepted by defendants, but were refused, and promptly reshipped to plaintiff, or within a reasonable time returned or reshipped said goods to the plaintiff, they should find for the defendants.

"(3) If they find from the evidence that the defendants did not accept the goods sued for, and paid the freight under mistake, they should find for defendant the amount of said freight bill."

Where an order or contract for the purchase of goods fixes the time for their delivery, this controls, and a failure by the seller to comply with this provision of the contract releases the buyer from his obligation to accept and pay for the goods, if subsequently delivered. See *Story on Sales* (4th Ed.) § 310; *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920. Appellee was therefore under no legal obligation to accept the goods delivered on the 1st of March, which should have been delivered at least 10 days earlier. But the proof in this case shows that appellee never received notice of an unequivocal acceptance of their order from appellant. The only notice which he did receive was that appellant would give his order careful attention. When more than 10 days had elapsed after the expiration of the day when the goods should have been delivered, he had the right to assume that appellant did not intend to ship them, and to supply his stock by purchase elsewhere. Nor do we think that the mere receipt by the salesman of appellee of these goods in his absence, and the opening of the boxes in which they were packed, for the purpose of ascertaining whether they were in good order, amounted to an acceptance of the goods. What constitutes an acceptance is a mixed question of law and fact, and is usually for the jury to determine in view of the particular circumstances of the case. See 24 A. & E. En. of Law (2d Ed.) 1088. It appears from the evidence in this case that appellee never offered the goods for sale, in any way, or exercised any other acts of ownership over them, but, on the contrary, promptly directed their return to appellant as soon as he was apprised of their arrival. It seems to us that the instructions in the case are not objectionable, and that the testimony supports the finding of the jury.

Judgment affirmed.

MOORE v. POTTER.

(Court of Appeals of Kentucky. Dec. 10, 1903.)

NOTES—PAYMENT—EXECUTION OF NEW NOTE —EVIDENCE—SUFFICIENCY.

1. In an action on a note, evidence held sufficient to justify a dismissal of the petition on

the ground that the note sued on was one which had been paid by the execution of a new note.

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by S. K. Moore against Levi Potter. From a judgment for defendant, plaintiff appeals. Affirmed.

Bart Belcher, for appellant. Roscoe Vanover, for appellee.

BURNAM, C. J. On the 3d day of October, 1898, the appellant, S. K. Moore, brought this suit against the appellee, Levi Potter, on the following obligation:

"Note \$300.00. This 19th of March, 1895. On or before the first of October, 1896, I bind myself to pay to S. K. Moore the sum of \$300.00 in cash, it being for purchase money on land lying on Shelby Creek, with interest from date. Interest on note \$45.80. Jerry Osborne deeded said land to S. K. Moore.

"Attest: T. J. Mullins.

his
"Levi X Potter."
mark.

—Alleging that the note was executed as a part consideration of a tract of land sold by plaintiff to the defendant, to secure the payment of which a lien was retained in the deed which plaintiff made to the defendant, and which had been accepted by the defendant, and was on record in Deed Book No. 13, p. 146, of the Pike county court clerk's office. The defendant, Potter, for answer, admitted the execution of the note, but pleaded by way of avoidance and defense that he had purchased from plaintiff the tract of land described in the petition at the price of \$1,500, \$500 of which was paid in live stock and \$300 in money at the date of the trade, and that he had executed three notes for the unpaid purchase money, two of which were for \$200 each, and the \$300 sued on; that he paid off each of the \$200 notes; that one James Soward had recovered a judgment against the plaintiff, and against him as garnishee, in the Pike quarterly court, for \$35; that the plaintiff thereupon asked him to execute a new note, in lieu of the \$300 note sued on, to his wife, Tabitha Moore, and his two sons, Alfred and Taubly Moore, which was to take the place of the \$300 note sued on; that plaintiff represented that the \$300 note was in Montgomery county, but that, if he would execute the new note, he would destroy the old one upon his return to Montgomery county, where he then lived; that, in compliance with this request, he executed a \$300 note, as requested, to the wife and children of plaintiff, and that plaintiff subsequently sent this note to one Esaw Moore for collection, and that he paid the whole of it, after deducting the \$35 for which Soward had obtained a judgment—and asked that the note sued on be canceled, and that he be quieted in the title to the land. In

his reply the plaintiff denied that the \$300 note executed to his wife and children by the defendant was in lieu of the \$300 note sued on, but alleged that it was in lieu of another note for \$300, which was also a lien on the land. Plaintiff testified that defendant promised to pay \$500 in live stock and \$1,000 in money for the land sold to him; that the live stock were delivered, and that four notes, two for \$200, and two for \$300, were executed by defendant for the unpaid purchase money; that both of the \$200 notes were paid by the defendant, and that for one of the \$300 notes defendant substituted, by agreement, his note to his wife and two sons of plaintiff; that the other \$300 was the note sued on, and had never been paid. Defendant, on the other hand, testified that, in addition to the \$500 in live stock, he paid \$300 in cash at the date of the purchase, and only executed three notes, aggregating \$700 (two for \$200, and one for \$300); that by agreement he subsequently executed a note for \$300 to the plaintiff's wife and two sons for the \$300 note, under promise from the plaintiff that he would destroy the note sued on. The testimony of Potter is corroborated by that of T. J. Mullins, who testified that he wrote three notes for the deferred payments, and that they only aggregated \$700, two being for \$200, and one for \$300; also by S. W. Powell, who testifies that he wrote the \$300 note payable to plaintiff's wife and children in lieu of the original note, and that, at the date of this transaction, plaintiff claimed that the defendant still owed him a balance on one of the \$200, and some smaller notes which he had given for furniture; and that plaintiff agreed to extend the time for the payment of the \$300 at the time of the change. Wilburn Belcher testifies that he heard the parties talking to each other about their land trade, and that his recollection was that defendant paid \$300 in cash, in addition to the live stock, and that he loaned defendant \$210 of this amount. W. B. Vanover also testifies that he was present when Mullins wrote the notes for the deferred payment, and that they aggregated only \$700, two of them being for \$200, and one for \$300, and that it was his understanding that defendant paid the balance of the \$300 in cash, in addition to the live stock. Plaintiff introduced his son as a witness—a boy 18 years old—who testified that some 3 years before he had seen his father destroy a note for \$300 executed by defendant as a part of the purchase money for the tract of land, but he also testified upon cross-examination that he knew his father had received some money in cash, in addition to the live stock, at the time of the trade. The deed to the property, which would probably have thrown some light upon the transaction, was not introduced in evidence. Under this state of the testimony, the circuit judge dismissed the plaintiff's petition, and he has appealed. It seems to us that the clear preponder-

ance of the testimony supports the contention of the defendant and the judgment of the trial court. Judgment affirmed.

LOUISVILLE GAS CO. v. KENTUCKY HEATING CO.

CALOR OIL & GAS CO. v. McGEHEE.

(Court of Appeals of Kentucky. Dec. 11, 1903.)

NATURAL GAS—RIGHTS OF WELL OWNERS—WASTE—LEASES—FRAUD—RESCISSION.

1. Though natural gas underlying the soil is not subject to absolute ownership in its natural state, a lessee of natural gas land is limited to a reasonable use of gas obtained from wells sunk on the land, and is not entitled to waste the supply from such wells for the purpose of cutting off the supply and injuring the owners of other wells on adjoining land.

2. Plaintiff, who was the owner of gas land, leased certain of it to a corporation for the purpose of drawing gas therefrom. Thereafter T. applied to him to lease certain other lands for the same purpose. Plaintiff refused to make a lease if it was intended to do anything to injure the other lessee, but, on being assured that such was not the intent, leased the land to T., and thereafter defendant corporation was organized, and expended \$20,000 putting down gas wells and establishing a lampblack factory on the ground. Gas in large quantities was obtained from defendant's wells which was wasted by defendant to the injury of the other lessee. Held, that such facts did not justify a cancellation of defendant's lease on the ground of fraud, plaintiff and the other lessee being protected by statute against defendant's further waste of the gas.

Appeals from Circuit Court, Meade County.

"To be officially reported."

Actions by the Kentucky Heating Company against the Louisville Gas Company, etc., and by W. C. McGehee against the Calor Oil & Gas Company. From a decree in favor of plaintiffs in each case, defendants appeal. Decree in first case affirmed, and reversed in the second.

Humphrey, Burnett & Humphrey, J. S. Wortham, F. M. Sackett, and Alexander G. Barrett, for appellants. Matt O'Doherty, Edward L. McDonald, J. W. Lewis, and J. Morgan Richardson, for appellees.

HOBSON, J. There is a natural gas field in Meade county, from which the gas is piped to Louisville by the Kentucky Heating Company, and there sold for heating and illuminating purposes. The Louisville Gas Company claimed the exclusive privilege of selling illuminating gas in the city of Louisville. There was a long litigation between it and the Kentucky Heating Company, resulting in a judgment of this court on June 20, 1901, that the heating company has the right to sell natural gas for heating and illuminating purposes; also the right to make and sell artificial gas for fuel, but not the right to sell artificial gas alone or in mixture with natural gas for purposes of illumination

*1. See *Mines and Minerals*, vol. 34, Cent. Dig. § 244.

without violation of the gas company's exclusive privilege. Kentucky Heating Co. v. Louisville Gas Co. (Ky.) 63 S. W. 751. On September 8, 1901, or about three months after this judgment was rendered, the Calor Oil & Gas Company was incorporated. Its capital stock was fixed at \$1,000, divided into 100 shares of \$10 each. John A. Gray, Harry Wirgman, and W. A. Jones were the incorporators, subscribing for the entire stock of the company; but neither of them paid anything therefor, or really owned the stock. They subscribed for it for A. Hite Barrett, the chief engineer of the Louisville Gas Company, Udolpho Sneed, the president of the gas company, and Will Speed, the son of J. B. Speed, a stockholder in the gas company. The stock was paid for by A. Hite Barrett, Udolpho Sneed, and J. B. Speed, who were the real organizers of the company. The articles of incorporation were drawn by a son-in-law of J. B. Speed, and he is now the president of the company. The money which was paid in for the stock was placed in bank to the credit of the company thus formed, and has since remained there. In the winter before this corporation was formed John H. Trent, a lawyer living in Meade county, who seems to have been in the employ of the gas company previous to that, began taking leases of land for gas in the gas field, and took quite a number. In doing this he acted, it appears, as the agent of Barrett, Sneed, and Speed, and after they organized the Calor Oil & Gas Company these leases were assigned to it. It is also shown that for some time before the organization of this company they had been considering the gas field in Meade county, from which the Kentucky Heating Company obtained its gas, and one of their objects in getting the leases and organizing the Calor Oil & Gas Company was to interfere with the supply of that company, and thus cripple it as a rival of the Louisville Gas Company. They put up between them about \$10,000, which they spent in Meade county in boring wells and in erecting what is called a "lampblack factory." In addition to this, when the depositions were taken they had incurred liabilities for about \$10,000 more, which were then unpaid. They succeeded in getting several good gas wells, from which the gas was piped to their lampblack factory. When they began operations, the Kentucky Heating Company had a gas pressure of something over 60 pounds. In five or six months this was run down to less than 30. On these facts the chancellor, on the petition of the Kentucky Heating Company, enjoined the operation of the lampblack factory on the ground that it was operated only to waste the gas, and thus destroy the Kentucky Heating Company. From this judgment the defendants appeal.

A close fence 12 feet high was built around the lampblack factory, and no one was admitted within the inclosure. It stood

on a half acre of ground leased for that purpose, and no one was permitted to come on this half acre. Firearms were discharged there to deter the neighbors from coming about. The structure was out in the country where such inclosures are unusual, and, as shown by the evidence, unnecessary. The man in charge of the factory was the lawyer Trent, who lived at the county seat, and knew nothing of the manufacture of lampblack. There were only two other persons employed—one, the day man, was a boy 18 years old; the other, the night man, somewhat older, but both entirely ignorant of the manufacture of lampblack. During the five months the factory was operated they manufactured about 300 pounds of lampblack, worth 4 cents a pound. In this time they burned all the gas they could obtain, the total amount being about 90,000,000 of feet. No lampblack was shipped away from the factory. The gas was burned night and day, and it is evident from the proof that in a short time more the pressure upon the pipes of the Kentucky Heating Company would have been so low as to destroy its usefulness. Other facts might be stated, but the testimony of the defendants themselves, whose depositions were taken by the plaintiff, is sufficient to show that they conceived the idea of securing leases on territory connected with the gas reservoir from which the Kentucky Heating Company obtained its supply, and by boring numerous wells to draw off the gas, and practically destroy the business of the Kentucky Heating Company. The organization as the Calor Oil & Gas Company and the establishment of the lampblack factory was a part of the plan to evade the statute against the wasting of natural gas and to waste the gas.

It is earnestly maintained that the statute does not apply to the case, and that at common law there is no remedy. We cannot concur in this conclusion. Independently of the statute, the common law affords an ample remedy for a wrong like this. While natural gas is not subject to absolute ownership, the owner of the soil must, in dealing with it, use his own property with due regard to the rights of his neighbor. He cannot be allowed deliberately to waste the supply for the purpose of injuring his neighbor. While a bad motive will not render that unlawful which is lawful (*Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165), a man is only allowed to make a reasonable use of those natural supplies which are for the common benefit of all. The gas under the ground may go wherever it will, but the defendants cannot be allowed to draw off the gas from under the plaintiff's lands simply for the purpose of injuring it, for the plaintiff's lands are thus clandestinely sapped, and their value impaired. These principles have often been applied in the case of underground waters, and we see no reason why the same rule should not apply to

natural gas. *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511; *Greenleaf v. Francis*, 18 Pick. 117; *Walker v. Cronin*, 107 Mass. 562; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Bassett v. Salisbury Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. In 21 Am. & Eng. Ency. of Law (2d Ed.) p. 417, it is said: "Though gas is a mineral, the decisions governing ordinary minerals apply to it only with many qualifications, and it is governed by rules analogous to those governing water percolating beneath the surface. Water, oil, and still more strongly, gas, may be classed by themselves, and have been not inaptly termed minerals *feræ naturæ*." See, also, to same effect, 2 *Snyder on Mines*, § 1171. The doctrine that an act which is legal in itself, and violates no legal right, cannot be made actionable on account of the motive which induced it, has no application, because the acts of the defendants in wasting the gas violated the plaintiff's legal rights. Both the parties drew gas from the same reservoir. It was incumbent on each to exercise his right so as not to injure the other unnecessarily. If one wasted all of the gas from the reservoir, there would be nothing left for the other. Every owner may bore for gas on his own ground, and may make a reasonable use of it; but he may not wantonly injure or destroy the reservoir common to him and his neighbor. This principle has been often applied. Thus each riparian owner may make a reasonable use of a lake or stream of water flowing through his land, but he cannot make an unreasonable use of it. Every traveler may make a reasonable use of a highway, but not an unreasonable use to the detriment of another. No one may make an unreasonable use of the atmosphere. In all these instances the party aggrieved by the unreasonable use may maintain an action for redress. In the case before us the plaintiff and the defendant have each the right to take gas from the common source of supply, but neither may by waste destroy the rights of the other; and, as in the case of other like wrongs, the action for redress may be brought in the name of the real party in interest. *Mfg. Gas Co. v. Ind. Gas Co.*, 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768; *Ohio Oil Co. v. Ind.*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729, and cases cited. We therefore conclude that the circuit court properly granted the injunction complained of, and the judgment in that action is affirmed.

W. O. McGehee, who leased the land on which the wells referred to, or part of them, were situated, filed also an action to cancel the lease, on the ground that it was obtained by fraud. McGehee had leased other lands to the Kentucky Heating Company, and was getting \$700 per year from the Kentucky Heating Company therefor. He told Trent this when the latter applied for the lease in question, stating that he did not want to

do anything that would injure the Kentucky Heating Company. Trent thereupon said to him that the people he represented were law-abiding men, and that they would do a lawful business. The proof warrants the conclusion that the wasting of the gas and the consequent injury to the Kentucky Heating Company was a motive inducing the defendants to get the leases, and this purpose was in view when they obtained the lease. McGehee would not have leased them the land if he had understood the facts. The chancellor canceled the lease on the ground that it was obtained by fraud, and that fraud vitiates any contract obtained thereby. The defendants have spent something like \$20,000 in putting down their wells, perfecting their rights, and erecting their buildings and other structures. This will be a total loss to them if their lease is canceled. As has been recently held in the case of *Commonwealth v. Trent*, it is incumbent on them to confine the gas in the wells until such time as it may be utilized, and, if they fail to do this, they become liable to the penalties denounced by the statute. It cannot be presumed that the defendants will willfully violate the statute. When McGehee leased them the ground, he intended them to have the benefit of the gas, if they found any, and intended them to use the gas. If, notwithstanding the statute, they should hereafter use the gas unlawfully, he, or any other person aggrieved, may maintain an action for the protection of his rights. Under the circumstances, and in view of all the facts, the court concludes that a rescission of the lease should not be decreed.

The judgment in the action of W. C. McGehee against the Calor Oil & Gas Company is reversed, and cause remanded, with directions to dismiss the petition.

SALYER v. ELKHORN LAND IMP. CO.

et al.

(Court of Appeals of Kentucky. Dec. 10, 1903.)

PARTITION — PLEADING — PETITION — INTEREST OF PARTIES—WRITTEN EVIDENCE OF TITLE.

1. One bringing action for partition under Civ. Code, § 499, providing that "the written evidence of the title to the land, or copies thereof if there be any, must be filed with the petition," need not file the written evidences of defendants' title.

2. One bringing action for partition under Civ. Code, § 499, providing that the petition shall contain the names of those having an interest in the land, and the amount of such interest, should allege the interest of each of the parties—both plaintiff and defendant—if such facts are known to him, or can be ascertained from the records.

3. A petition in partition, under Civ. Code, § 499, providing that the petition shall contain the names of those having an interest in the land, and the amount of such interest, was insufficient, which alleged that the number of certain co-tenants of the property was un-

¶ 2. See *Partition*, vol. 23, Cent. Dig. § 152.

known to plaintiff, that he could not then find out such number, and that it would take an immense amount of time and labor to ascertain the same.

Appeal from Circuit Court, Pike County.
"Not to be officially reported."

Action by L. H. Salyer against the Elkhorn Land Improvement Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Roscoe Vanover, for appellant. W. H. Flannery and Hager & Stewart, for appellees Northern Coal & Coke Co. and J. J. C. Mayo.

NUNN, J. This appeal is from a judgment of the Pike county court sustaining a demurrer to the petition and amended petition of appellant, refusing appellant's motion to take the allegations of the petition as true as against the defendants therein not demurring, and, upon the failure of appellant to plead further, dismissing his petition.

The appellant, in his original petition, claimed that he owned $\frac{1}{48}$ interest in a tract of about 600 acres of land (describing it), and that the defendants, Elkhorn Land Improvement Company (a corporation), Northern Coal & Coke Company (also a corporation), A. E. Auxier, James Hatcher, J. C. C. Mayo, Steth B. Spragins, Samuel B. Buck, Ballard Weddington, and George Pinson, Jr., owned the other $\frac{47}{48}$ in this land; that he did not know the amount of the interest that each of the defendants owned; and that he had no means of ascertaining the same; and he asked the court to compel the defendants to answer and set forth their respective interests therein. The Northern Coal & Coke Co., the Elkhorn Land Improvement Company, and J. C. C. Mayo filed a demurrer to this petition. The court sustained the demurrer. The appellant then amended his petition, and in his amendment gave an additional description of the land, and a more particular derivation of title, and alleged that one Ramey devised this piece of land to Rebecca Osborn for life, and at her death to go to her children; that appellant's title was derived from Perry Ramey, who was a child of Pricy Ramey, a daughter of Rebecca Osborn; that Pricy Ramey had died, and left eight children, Perry Ramey being one of them. He further stated in his amended petition, "that all of the children and real representatives of the said Rebecca Osborn, to whom the tract of land herein described descended, five of same are dead, and the number of children to whom their several parts descended is unknown to this plaintiff, and he cannot now find out same, and it would take an immense amount of time and labor to ascertain same." This action was instituted by appellant, under section 499 of the Civil Code, for the purpose of having a division of this land between the joint owners thereof. This section of the Code is as follows: "A person desiring a division of land held jointly with others, or an allotment of dower, may file in the circuit

court or county court of the county in which the land or the greater part thereof lies a petition containing a description of the land, a statement of the names of those having an interest in it, and the amount of such interest, with a prayer for the division or allotment; and, thereupon, all persons interested in the property who have not united in the petition shall be summoned to answer on the first day of the next term of the court. The written evidences of the title to the land, or copies thereof, if there be any, must be filed with the petition." The appellant filed with his amended petition the evidence of his title, and stated that he only owned $\frac{1}{48}$, instead of $\frac{1}{45}$, as alleged in his original petition.

We do not deem it the duty of the plaintiff in an action under this section of the Code to file the written evidences of the title of the defendants to their interest in the land. It is his duty, however, if known by him, or can be ascertained from the records, to set forth the interest of each of the parties to the action, both plaintiff and defendant. The appellant, by stating in his amended petition that six of the descendants of Rebecca Osborn had died, leaving children, and the names of these descendants being unknown to him, and that he could not ascertain their names, and the amount of their respective interests, without the loss of much time, labor, and expense, made his pleading defective and insufficient. The court could not have made a division of this land without knowing the interest of each joint owner. If the appellant had stood by the allegations of his original petition—that he did not know and had no means of ascertaining the interest of each of the defendants—and had the court to compel them to answer and disclose their interest, then the case would have been different.

In view of these facts, we are of opinion that the lower court was right in sustaining the demurrer. Therefore the judgment is affirmed.

KENTUCKY RACING & BREEDING ASS'N v. GALBREATH et al.

(Court of Appeals of Kentucky. Dec. 10, 1903.)

CORPORATIONS — INSOLVENCY — RECEIVERS —
APPOINTMENT — RIGHTS OF CREDITOR —
JUDGMENT — EXECUTION — NECESSITY —
PLEADING.

1. Where the assets of an insolvent corporation will probably be lost or fraudulently disposed of unless a receiver is appointed, and the creditor has no adequate remedy at law, he is entitled to the appointment of such receiver before reducing his claim to judgment and obtaining a return of nulla bona.

2. In an action by a creditor against an insolvent corporation, a petition and certain cross-petitions construed, and held to state sufficient facts to justify the appointment of a receiver, though plaintiff's claim had not been previously reduced to judgment, and a return of nulla bona obtained.

¶ 1. See Corporations, vol. 12, Cent. Dig. § 2220.

Appeal from Circuit Court, Kenton County.
"To be officially reported."

Action by Leslie Galbreath against the Kentucky Racing & Breeding Association. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. J. & W. W. Helm, for appellant. Galvin & Galvin, for appellees.

BURNAM, C. J. This is an appeal from a judgment of the Kenton circuit court appointing a receiver for the Kentucky Racing & Breeding Association, a corporation organized under the laws of West Virginia, and the Queen City Jockey Club, a corporation organized under the laws of the state of Kentucky, at the instance of the appellee Leslie Galbreath, a creditor of the racing association. The plaintiff alleges in his petition that he is a creditor of the Kentucky Racing & Breeding Association; that the company is hopelessly insolvent; that it owns a majority of the stock of the Queen City Jockey Club; that Clem Creveling, the president of the association, had, with the knowledge and consent of the officers of the jockey club, instituted a suit for the recovery of \$2,330 alleged to be due to him for services as president, and had sued out an attachment, which had been levied upon the interest of the racing association in the jockey club for the purpose of securing to Creveling a fraudulent preference over the other creditors of the racing association, as operator of the jockey club. He also alleges that the racing association was, in violation of law, selling pools upon the result of races, and was thereby subjecting itself to fines and the forfeiture of its charter under the laws of the commonwealth; that its indebtedness was daily increasing; that it was indebted to numerous other persons, and that its property would be entirely consumed if not taken in charge by the court; and that he and they would lose their debts. Upon the averments of the petition, the circuit judge of the Kenton circuit court appointed George M. Keefer receiver, and directed that he should take possession of the books, accounts, and other assets of the company, and hold them subject to the future orders of the court. George M. Keefer and West B. Wilson filed their petition to be made parties to this proceeding, and alleged that the Queen City Jockey Club was also insolvent; that there had been no meeting of its stockholders or election of directors for more than a year; that the directors last elected had failed and refused to qualify or meet for the purpose of electing officers of the company; that there was a judgment against the jockey club for \$30,000, and that an attachment had been issued against its property; that it had disposed of a part of

its personal property, and its assets were in danger of being dissipated—and asked that a receiver should also be appointed to take charge of the assets and property of the jockey club for the benefit of the creditors. Keefer was also appointed receiver of the jockey club, and executed bond as required by law. The defendant the racing association filed an answer, in which they deny that the plaintiff was a creditor of the association, or that the officers of the jockey club had consented to the suing out of the attachment of Creveling, or that the association had sold pools in violation of law. They alleged that the only assets of the racing association was a small amount of furniture in Newport, Ky., not exceeding in value \$200, and the stock in the Queen City Jockey Club, which they alleged is of no value, as it is hopelessly insolvent. A number of other creditors filed their petitions to be made parties to the proceeding, and united in plaintiff's prayer for the appointment of a receiver. The defendants excepted to the orders appointing a receiver, and have prosecuted an appeal to this court, and ask a reversal on the ground that a general creditor of a corporation is not entitled to obtain a receiver of the corporate property until he has reduced his claim to judgment, and had execution issued, and return of nulla bona thereon.

As a general rule, a creditor of a corporation is not entitled to have its property and assets put in the hands of a receiver until he has reduced his claim to judgment, and procured a return of nulla bona. But there are exceptions to this rule, as where the assets of an insolvent corporation, which a creditor is entitled to have applied in satisfaction of his demands, will probably be lost or fraudulently disposed of by improvident or corrupt officials unless a receiver is appointed, and the creditor has no adequate remedy at law. When this is made to appear, the courts will take charge of the assets of the insolvent company, and apportion them among the creditors entitled thereto. 3 Clark & Marshall on Private Corporations, § 785; Beach on Private Corporations, § 715; 3 Cook on Corporations (4th Ed.) § 863; 2 Morawetz on Private Corporations, § 860; Smith on Receiverships, § 227, and authorities there cited.

We are of the opinion that the allegations of the original and cross petitions in this case presented such a state of fact as made out a prima facie case for the appointment of receivers for the defendant corporations. Defendants have made no showing by motion to set aside the order appointing the receiver, or otherwise to negative the averments of the original and amended petitions. We therefore conclude that the trial court did not err in the appointment of a receiver.

Judgment affirmed.

**WESTERN & SOUTHERN LIFE INS. CO.
v. BRENNAN.**

(Court of Appeals of Kentucky. Dec. 10,
1903.)

**APPEAL—VERDICT—CONFLICTING EVIDENCE—
REVIEW.**

1. Where the only issue between the parties on which the evidence was conflicting was submitted to the jury by an instruction to which neither party objected, a verdict for plaintiff would not be reversed as against the weight of evidence.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by Thomas Brennan against the Western & Southern Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

B. F. Graziani, for appellant. W. H. MacKoy and J. N. Hutchins, for appellee.

NUNN, J. The appellant is an insurance company incorporated under the laws of the state of Ohio. Its home office was in the city of Cincinnati. The appellee resided in Covington, Ky. In the year 1898 appellant issued a policy in the sum of \$500 on the life of Mary Brennan, payable at her death to appellee, Brennan. The premiums of 35 cents were payable on Monday of each week, and in case of a failure to pay these premiums the policy should lapse and become void after the expiration of four weeks from the last payment. Mrs. Brennan died on March 30, 1900. Appellee demanded of appellant company the payment of the \$500. The company refused payment, and this action was instituted for the recovery of the amount of the policy, which was resisted by appellant. The pleadings were completed, a trial was had, which resulted in a verdict for appellee.

The facts, as they appear from the record, are in substance as follows: Appellant paid all premiums until the 18th day of December, 1899, as is shown by a book which appellee was required to keep. By the terms of the policy it was made appellee's duty, when he paid a premium, to see that the agent of the company entered the payment in this book, giving the date of the payment. Appellant claimed that the policy had lapsed, and was void by reason of his failure to pay any premium after the 18th day of December, 1899. Appellee, to avoid the effect of this plea, alleged that on or about the 12th day of January, 1900, and before the policy had lapsed or become void, one King, the superintendent of appellant company, called upon him at his place of business in Covington for the payment of premiums due upon this policy, and that some contention or dispute arose as to the amount of the premiums that had been paid upon the policy and the date of the payment of the last premium; that at the request of King he (appellee) turned over to him this book and the policy upon the promise of King to inves-

tigate the matter further and correct the book, and that he would return the book and policy, and receive from appellee the actual and true amount due for premiums upon the policy. Appellee claims that at that time he paid to King 85 cents; that under this agreement with King the latter took and carried away the book and policy, and did not return same; that on or about the 10th of February, 1900, he (appellee) met King in Cincinnati (naming the street and corner), and paid him \$1.50, to be applied to the payment of the premiums upon this policy, and that on or about the middle of February of the same year he paid the said King \$1.70 as premium on this policy. Appellee claims that King assured him at all times that this policy was in force, and promised him time and time again to return him this policy and book; and that on the morning on which his wife died he called at the office of appellant to see King, and to ask for the return of this book and policy. King was not at the office. On the afternoon of the same day, and after the death of his wife, appellee called again, and found King, and, as he (appellee) claims, informed King of the death of his wife; that he was then informed that the book and policy were at the residence of King in Covington; that King then made some calculations, and stated to appellee that the balance of premiums due on the policy was \$2.10, but that if he (appellee) would pay him \$2 he would remit the 10 cents, which was done, and a receipt was executed therefor by King. Appellee, in his testimony, stated, in substance, the above alleged facts. King, in his testimony, disputes all of these statements. He stated that when he took the book and the policy appellee fully understood that the policy had then lapsed, and that he declined to pay any further premiums thereon. He denied that appellee paid him the 85 cents at that time, or that he paid him \$1.50 in Cincinnati, or that he paid him \$1.70 about the middle of February, but admits that he paid him the \$2 on the 30th of March, but that it was paid without the knowledge on his part that appellee's wife was dead; that appellant concealed that fact from him until after the payment of the money and execution of the receipt, and that when the \$2 was paid it was understood that that was not in full satisfaction of the past premiums; that it was agreed, when the \$2 payment was accepted, that the physician representing the company was to visit Mrs. Brennan on the next day, and make an examination as to the condition of her health, and, if satisfactory, then the remaining amount of due premiums was to be paid; that when appellee informed him that his wife was then dead he tendered to him the \$2 which he had just received from appellee, who refused to accept it. There was other evidence introduced that tended to corroborate the statements of both appellee and Superintendent

King. Then the court gave the following and only instruction: "If the jury believe from all the evidence that in January, 1900, there existed a question or doubt as to the state of payments on the policy of insurance mentioned in the proof, and that at said time the superintendent, King, of defendant company, took from the possession of plaintiff the said policy and the receipt book or books mentioned in the proof for the purpose of investigating the said state of payments, and that they were taken for that purpose by said superintendent by agreement between plaintiff and said superintendent, and that the said superintendent retained said papers, and that the plaintiff requested the return of same to him, but that said superintendent failed to return same; and if the jury believe that by reason of the retention of said papers by said superintendent the said plaintiff did not regularly keep up the payment of premiums on said policy during January, February, and March, 1900, and that said superintendent during said months of January, February, and March accepted money from said plaintiff as payment or part payment of premiums on said policy, and that during said months of January, February, and March, 1900, the said superintendent represented to said plaintiff, and induced said plaintiff to believe, that the said policy was then continuing in force, and that the said plaintiff believed and relied upon said representations—then the jury should find a verdict for plaintiff for \$500, with interest from May 5, 1900; otherwise the jury will find a verdict for the defendant." Neither party objected or excepted to this instruction, and no other instruction was offered. The jury returned a verdict in favor of appellee for the amount of the policy. The only question at issue between the parties was submitted to the jury under this instruction. The jury found against appellant, and we do not feel authorized to disturb the verdict, as it is not palpably against the weight of the evidence. We deem it unnecessary to refer to and to discuss the other questions raised on the motion for a new trial, as they are without merit.

The judgment must be affirmed.

LEE v. GRANT COUNTY DEPOSIT BANK.

(Court of Appeals of Kentucky. Dec. 10, 1903.)

PRINCIPAL AND SURETY—NOTES—RELEASE OF SURETY BY CONDUCT OF PAYEE—PREJUDICIAL ERROR—EVIDENCE.

1. Where the maker of the note sued on by plaintiff bank never had in the bank any money to pay the note—his overdraft in the bank existing all the time the note was in existence, and exceeding the amount of such note—the defense of a surety thereon that he was released from liability by reason of the conduct of the bank's officers in permitting the maker, after maturity of the note, to withdraw from the bank funds which should have been applied to the payment of the note, was unsupported by the evidence.

2. Where a bank sued the maker of a note, and it appeared that he was insolvent, and had at the time a large overdraft, and the cause was referred to the special commissioner to settle the accounts between the parties, and the evidence showed that, after allowing defendant all credits, he was overdrawn at the maturity of the note for about \$6,000, failure to allow him an alleged claim for usury for \$234 was not prejudicial.

Appeal from Circuit Court, Grant County. "Not to be officially reported."

Action by the Grant County Deposit Bank against J. L. Lee and another. Judgment for plaintiff, and defendant Lee appeals. Affirmed.

Montgomery & Lee, for appellant. W. W. Dickerson, for appellee.

SETTLE, J. Appellee sued the appellant, J. L. Lee, and D. W. Williams, his surety, in the lower court, upon a \$1,250 note. The surety, by separate answer, among other defenses, interposed the plea of non est factum. The appellee, by reply, pleaded the want of knowledge as to this defense of the surety, and further that as the note sued on was but a renewal of a former one of the same amount, which was signed by the surety, he was liable for one or the other of them. This fact was not denied by the surety, and so the plea of non est factum was eliminated from the case. The appellant, Lee, admitted the execution of the note sued on, but, in avoidance of a recovery thereon, pleaded a set-off, based upon the following alleged state of facts: He avers that he had been a depositor of the appellee bank for eight or ten years, during which time his account was considerable, and that he made frequent discounts of negotiable paper with the bank, and often borrowed of it, being all the time dependent upon those in charge of the bank to keep a correct account, which he alleges they did not do, and that in his account he is wrongfully charged with various checks with which he was not properly chargeable, and that further that he was charged with usury upon many items of the account, and not credited with several notes executed or paid by him to the bank. The averments of the appellant's answer and set-off were denied by reply, and, in addition to such denials, the reply contained the averment that the appellant, by permission of appellee's cashier, and without the knowledge of its directors, wrongfully overdraw his account in a large amount, which was unsecured, and that appellant was then and is now insolvent, and further that the amount of his overdraft due the bank was between \$5,000 and \$7,000 at the time of the execution of the note sued on, a large part of which remained unpaid at the maturity of the note, and when the action thereon was instituted. After the completion of the issues by further necessary pleadings, the cause was referred to a special commissioner to audit and settle the accounts between the appellant and ap-

pellee, who, after taking all the proof offered by the parties, made his report, which shows that after correcting all errors in appellant's account, and allowing all credits to which he was entitled, he was overdrawn in the appellee bank at the date of the maturity of the note sued on, viz., January 2, 1896, \$6,103.16. His deposits made after the maturity of the note did not materially lessen this overdraft. It appears that the sureties on the bond of Nesbitt, the cashier, were liable to the bank for \$4,759.41 of the appellant's overdraft, as the same, to that extent, was created without authority from the directors of the bank, and contrary to law. This sum of \$4,759.41 was paid by the sureties, and that much of the appellant's overdraft was assigned to them by the bank. Thereafter, and after the maturity of the note sued on, the appellant paid the sureties the \$4,759.41, in whisky; but this payment still left a considerable part of the appellant's overdraft in the appellee bank unpaid, and his indebtedness for this remainder of overdraft is in addition to what the appellant owed upon the note sued on. The special commissioner seems to be a lawyer of skill and experience, for his report manifests the care with which he passed upon the questions of fact and matters of account presented for his consideration. We find no error in the conclusions contained in his report. They show beyond question that the appellant's overdraft in the bank existed all the time the note sued on was in existence, and that it exceeded the amount of the note. It follows, therefore, that there was never a time when he had to his credit in the bank a sum sufficient to pay the note, or any part thereof. Consequently there was no negligence or failure of duty on the part of the bank whereby injury or loss resulted to the surety on the note, and therefore the surety's defense that he was released from liability by reason of the conduct of the bank's officers in permitting appellant, after maturity of the note, to withdraw from the bank funds which should have been applied to the payment of the note, is unsupported by the evidence.

We have not gone into a consideration of the question of usury set up by the appellant, for the reason that the commissioner only found \$234 of usury in the appellant's entire account; and, as there is more than that amount of his overdraft yet due the bank, he has not been prejudiced by the failure of the commissioner to allow credit by the usury on the note sued on. There was no usury in the note. It only bore interest from its date, and the judgment rendered by the lower court for the amount of the note only allows 6 per cent. interest thereon from its date.

The lower court did not err in overruling the exceptions to the commissioner's report, or in the judgment rendered in appellee's favor, and the judgment is therefore affirmed.

MASON v. ILLINOIS CENT. R. CO.
(Court of Appeals of Kentucky. Dec. 10, 1903.)

RAILROADS—NEGLIGENCE—CONTAGIOUS DISEASE—COMMUNICATING SAME—HEALTH OFFICERS—REGULATIONS—DUTY OF CARRIERS.

1. Where a boarding train of defendant railroad standing on a spur track near plaintiff's residence, and a number of section hands affected with smallpox, and occupying such train, were taken in charge by health officers, and there was no evidence that defendant was thereafter guilty of negligence in the management of its hands, or that it did not in good faith comply with the directions of such health officers, defendant was not liable in damages for a case of smallpox communicated to plaintiff at least six weeks after such health officers assumed charge.

2. It is the duty of all persons in charge of any railway train, passenger coach, or steamboat, or other private conveyance, to obey the regulations of the board of health.

Appeal from Circuit Court, Carlisle County.
"Not to be officially reported."

Action by John D. Mason against the Illinois Central Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Shelbourne & Kane, for appellant. Pirtle, Trabue & Cox and J. M. Dickinson, for appellee.

BURNAM, C. J. The appellant, John D. Mason, brought this suit against the appellee, the Illinois Central Railroad Company, for damages for a case of smallpox, which he claims was communicated to him in consequence of the negligence of the railroad company. He alleges in his petition that his residence is close to a spur track of the defendant, leading from its main line to a gravel pit, and that the defendant placed certain of its cars on this spur track, in which it lodged and boarded a gang of section hands; "that during the months of November and December, 1901, some three or four of these employes of defendant on said cars became afflicted with smallpox, and of which defendant had knowledge; and that defendant, knowing at the time that its said employes were afflicted with smallpox, carelessly and negligently placed two of its said boarding cars in which its said employes were sick and afflicted with the smallpox, and in which it was nursing and caring for its said sick employes, and in which it did so use and care for its said employes, in front of and within a few feet of plaintiff's said residence on its said branch road, and suffered and permitted the same to be and remain there for several days, and left the doors thereof open next to and adjoining his said residence, and when said employes became well of said disease it further carelessly and negligently threw out and burned up within a few feet of said residence all the beds and bedding and furniture that it and its said employes had used while they were sick with said disease; and that plaintiff contracted smallpox from the said cars, the said employes, and the said furni-

ture and bedding that was so destroyed by the defendant; and that by reason thereof he was made dangerously sick and ill for a long time, and suffered great physical pain and mental anguish, and expended large sums for physicians and nursing, and was by said disease permanently marked and disfigured; and that said disease was from him communicated to other members of his said family; and that he expended large sums of money in caring for and nursing the said members of his family." In its answer the defendant traversed all of the affirmative allegations of the petition charging negligence, and for further answer stated that about the 11th of October, 1901, it had a gang of men working for it under the charge of one Dunlap; that about this time one of these men became sick; that Dunlap sent for Dr. W. L. Mosely, a practicing physician, who diagnosed the disease to be smallpox, and that Mosely at once notified Dr. J. S. Petrie of the existence of the disease; and that on the 11th of October, 1901, Dr. Petrie, as health officer, took charge of the cars in which the smallpox prevailed, as well as the other cars which constituted the boarding train on the switch; and that, by virtue of his authority as health officer, he ordered these cars placed on the siding, equidistant from the house of plaintiff and that of one Brown, who lived on the siding. It also alleges that Dr. Petrie, as health officer, caused all of the bedding, bunks, and other paraphernalia of the cars to be burned without the assistance of the defendant or any of its employes, and fumigated the cars. It further alleges that plaintiff did not take the smallpox until about the 10th day of December, 1901, about sixty days after the train of boarding cars and the section hands had been taken in charge by the health officer of Carlisle county; that the period of incubation of smallpox does not exceed two weeks, and that plaintiff therefore contracted the disease while these cars and their inhabitants were under the authority and control of the health officers of the county; that it and its employes obeyed the directions given to them as to the location of the cars, and the handling, nursing, and treatment of the afflicted. It further pleads that plaintiff was guilty of contributory negligence, in that he persistently refused to be vaccinated himself, or to cause the other members of his family to be vaccinated, although so warned by the health officer. The reply controverted the alleged contributory negligence.

The testimony introduced by the plaintiff in the case conduces to show that the "spur track" leading from the defendant's main line to the gravel pit is about — feet in length; that in September, 1901, the defendant placed a train of boarding cars on this spur track, which were occupied by about 25 men who were employed as laborers by the railroad company, and were under the charge of a boss by the name of Dunlap;

that the boarding cars were stationed not very far from the main line; that when they were placed there a vacant car stood in front of plaintiff's residence; and that about two weeks after the arrival of the train of boarding cars a sick man was taken out of one of these cars, and placed in the car in front of plaintiff's residence; and that shortly afterwards they rolled a second car from the boarding train down next to the car in front of plaintiff's residence; that a sick man was in it; and that a week afterwards Drs. Mosely and Petrie came out, and pronounced the disease to be smallpox; and that they had the two cars in front of appellant's residence moved up towards the main track about 300 feet, and directed that the section hands be confined to the cars. Plaintiff testified that no closets were provided for the use of these men near the cars, and that they went for this purpose to a point in the woods near the right of way, and in so doing passed in front of his house. Nearly all of the section men had the disease, including Dunlap, the boss. On the 30th of November, Dr. Petrie had all the beds, bedding, and other paraphernalia of these cars thrown out and burned on the side of the track, and the cars fumigated, and all the boarding train, with its occupants, were taken away, except the foreman, Dunlap, a cook, and negro boy, who waited upon him. The testimony conduces to show that at this time all of them had recovered from the smallpox except, perhaps, Dunlap; that after its fumigation the same car which had stood in front of plaintiff's residence at the beginning was rolled back to its old place, and on the 5th of December, Dr. Petrie, the health officer, came down and had the bunks, which were made of plank, knocked out and burned in front of the plaintiff's house. Plaintiff also testified that after the health officer took charge he went to see Dunlap's straw boss, after he had taken sick. At the close of plaintiff's testimony the circuit judge gave to the jury a peremptory instruction to find for the defendant, and this appeal is prosecuted from the judgment dismissing plaintiff's petition.

The testimony in the case seems to show conclusively that appellant contracted the smallpox at least six weeks after the boarding train and section hands of the railway company had been taken in charge by the health officers of Carlisle county; and that the burning of the beds, bedding, and bunks occupied by the section hands was all done under the personal direction of Dr. Petrie, the health officer. While the evidence shows that the section men did leave the cars in answer to the calls of nature, there is no evidence which conduces to show that the defendant did not in good faith comply to the best of their ability with the direction of the health officers; or that, after their boarding train was taken charge of by the health officers, they were guilty of negligence in the management of their hands. In fact, they

had no way of controlling the movements of these men after they became sick. The duty of establishing quarantines at places where smallpox is prevalent is imposed by law upon the health authorities of the state. They are authorized to make and enforce rules and regulations to obstruct and prevent the introduction or spread of smallpox, and for this purpose are by law authorized to establish quarantines, to erect temporary hospitals necessary for the medical treatment of any persons who may be kept in quarantine and affected with smallpox, and to assign the charge and control of such person to competent physicians and nurses. It is the duty of all persons in charge of any railway train, passenger coach, or steamboat, or other private conveyance, to obey the regulations of the board of health. In our opinion, the testimony in this case entirely fails to show that appellant's attack of smallpox was superinduced by any negligence or carelessness on the part of the defendant, and that the trial court properly instructed the jury to find for the defendant.

Judgment affirmed.

CHAPLIN & BLOOMFIELD TURNPIKE ROAD CO. v. NELSON COUNTY.

(Court of Appeals of Kentucky. Dec. 9, 1903.)

TURNPIKES—ACQUISITION BY COUNTY—VALUE—FREE TURNPIKE ELECTIONS—EFFECT—BURDEN OF PROOF—EVIDENCE—INSTRUCTIONS.

1. In an action by a turnpike company to recover the value of its turnpike at the time it was placed in possession of the defendant county in accordance with a contract, evidence that it was of no value because the county voted for free turnpikes, and that the company was not getting any income from it on account of tollgate raiders having destroyed the tollgates, and that the stock had no market value by reason of such facts, was inadmissible.

2. Instructions that the jury should find for plaintiff the actual value of the turnpike on the date the county contracted to take it, and that by actual value is meant such a price as the property would have sold for at a fair, voluntary sale, were erroneous, where the county had voted for free turnpikes, and raiders had destroyed the tollgates.

3. The inquiry should have been confined to the ascertainment of the actual or real value of the property, which included the franchise, to which end evidence was admissible with reference to the original cost of construction of the pike, its condition when turned over to the county, the income from its previous use, the probable profits which might be derived from its continued use, and as to the cost of constructing it at the time the contract was made.

4. When two-thirds of those voting on free turnpikes voted therefor, it was a vote in favor of incurring the necessary debt for the purpose, and authorized the county to incur a debt in excess of the revenue provided for the year in purchasing turnpikes in the county.

5. Under Civ. Code, § 526, providing that the "burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side," where, in action against a county to recover the price of a turnpike, the character of defendant's negative defense that the pike was of no value was not changed by the supplementary averment

that by reason thereof the writing on which the action was based was without consideration, and the burden of proof remained the same.

Appeal from Circuit Court, Nelson County.
"Not to be officially reported."

Action by the Chaplin & Bloomfield Turnpike Road Company against Nelson county. Judgment for defendant, and plaintiff appeals. Reversed.

Geo. S. & John A. Fulton, J. S. Kelley, and J. A. Barlow, for appellant. Nat W. Halstead, Eli H. Brown, W. S. Pryor, Morgan Yewell, and C. C. McChord, for appellee.

PAYNTER, J. While the court has not overlooked any of the points or questions raised, which were so ably and elaborately discussed by counsel, it will consider in this opinion only such as it regards as controlling in the case.

The question as to the effect of the contract between the Nelson fiscal court and the appellant, which is the basis of this action, was determined in *Bardstown & Louisville Turnpike Co. v. Nelson County (Ky.)* 60 S. W. 862. The answer does not contradict the fact that the proceeding in the Nelson county court to condemn the road was dismissed by the county. Thereupon the right accrued to the appellant to have the value of its road ascertained in a court of competent jurisdiction. The principal question in the case was the ascertainment of the actual value of the appellant's turnpike at the time it was turned over to the county. This court, in *Richmond & Lancaster Turnpike Road Co. v. Madison County Fiscal Court*, 70 S. W. 1046, said: "It proposed to take appellant's pike, and when it did so it must pay appellant the real value of the property at the time of the taking." The record shows that the tollgate raiders had destroyed the tollgates on the road, and that the company was not collecting tolls at the time the turnpike was turned over to the county. The purpose of this action was to recover the value of the turnpike at the time it was placed in the possession of the county. The chief defense of the county is that the turnpike was not of any value at the time. The evidence introduced shows that it was a valuable turnpike; that it had been kept in a fine state of preservation for 20 years; that it was very much used because of its favorable location and the feeders constructed to it. Some witnesses gave opinions that the foundation of the pike was not as good as it should have been, but it is difficult to understand how it could have been kept in such a fine condition for travel if it did not have a suitable foundation. It cost \$11,500 to build it. The travel on it had been increased by the construction of new roads to it. It had been paying dividends for some years before the county took possession of it. Notwithstanding this evidence, the jury found that it was without value when it was turned over to the county.

The verdict can only be accounted for upon the theory that it was superinduced by prejudice or passion, or by the admission of testimony which was prejudicial to the rights of the appellant. There was evidence tending to show that the turnpike was of no value because the county voted for free turnpikes, and that the company was not getting any income from it on account of tollgate raiders. This testimony was clearly erroneous and prejudicial to the rights of the appellant. The action of tollgate raiders and the voting of free turnpikes did not damage the roadbed, or diminish the use of it by the traveling public. The voting of free turnpikes would rather add to the market value of the road, if it had any, as it gave the county authorities the right to purchase it, thus placing a purchaser in the field, where perhaps there were none before who desired to purchase it. The testimony, which tended to show that the pike was without value for either of the reasons stated, should have been excluded from the jury. If any witness testified that the road was without value for the reasons given, and gave other reasons for the opinion which were proper to be considered by the jury, the court should have instructed the jury that they could not consider, as affecting the value of the pike, or in fixing its value, the action of the county in voting free turnpikes, or the action of lawless persons in destroying tollgates on it. No evidence should be admitted tending to show that the stock in the road had no market value after the November election, 1897, and on the 26th of February, 1898, when the contract on which this action was brought was made. With the knowledge that the county contemplated acquiring the turnpikes and making them free, no one would probably want to invest in turnpike stock, because the investment would not be permanent. The mere fact that the stock was not then selling in the market did not furnish evidence that it did have an actual value.

The court instructed the jury that by "actual value" is meant such a price as the property would have sold for "at a fair, voluntary sale." By the first instruction the court told the jury to find for the plaintiff the actual value of the property on the 26th of February, 1898, unless the jury believed from the evidence that the property was of no value at that date. We will consider the two instructions together in determining whether the court erred in giving them. The jury evidently understood from these instructions that if the property was offered at a voluntary sale, and if no one bid on it, it had no actual value. Ordinarily, the value of property may be determined by what it would bring at fair, voluntary sale. It is made perfectly manifest that it would work a great injustice to allow the value of appellant's property to be determined by that rule. From the nature of the property and the circumstances surrounding it, the rule stated by

the court was wholly inapplicable. It was said in the case of *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206: "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that perhaps it is impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule, but, as a general thing; we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." The court is of the opinion that the inquiry should be confined to the ascertainment of the actual or real value of the property, which includes its franchise. The value of property depends largely upon the profitable uses to which it may be put. The owners enjoyed the right to charge those who used it tolls, which enabled it to reap a profit in its use. To ascertain the real value of the property, the court should allow evidence to be introduced with reference to the original cost of the construction of the pike, its condition when turned over to the county, and the income from its previous use; and as to the probable profits which might be derived from the continued use of the pike; and also as to the cost of constructing it at the time the contract was made. When two-thirds of those voting on free turnpikes voted therefor, it was a vote in favor of incurring the necessary indebtedness for that purpose, and authorized the county to incur an indebtedness in excess of the revenue provided for the year in purchasing turnpikes in the county. *Whaley, etc., v. Commonwealth (Ky.)* 61 S. W. 35.

Defendant denied that the turnpike was of any value. The burden of proof was on the plaintiff to show its value, and unless it did so judgment would have gone against it. Section 526, Civ. Code, provides that the "burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." When the defendant denied that the turnpike was of any value, it presented a negative defense. The character of defense is not changed by the supplementary averment which was to the effect that, as the turnpike was of no value, the writing on which the action was based was without consideration. If from the state of the pleadings, the averment of want of consideration was an affirmative defense, it did not change the burden of proof. When a defendant pleads both an affirmative and a negative defense, though the burden is on him as to the former, the burden of proof in the whole action is on the plaintiff. The averment as to the want of consideration under the statement of the pleadings did not change the issue that had been made by the denial that the turnpike was of any value.

The instructions of the court do not conform to the conclusions reached herein, but should be made to do so at the next trial. If the court sustained the verdict, it would be allowing private property to be taken for public uses without any compensation. The Constitution forbids the taking of private property for public uses without just compensation, and courts should preserve the rights thus guaranteed.

The judgment is reversed for proceedings consistent with this opinion.

**DANVILLE, DIX RIVER & L. TURNPIKE
ROAD CO. v. LINCOLN COUNTY
FISCAL COURT.**

(Court of Appeals of Kentucky. Dec. 9, 1908.)

**CONTRACT WITH FISCAL COURT—PAROL
EVIDENCE.**

1. As a fiscal court is a court of record, and can contract only through its order, which Ky. St. 1899, c. 52, § 1842, requires to be read, approved, and signed before it adjourns, one contracting with it, having been present, and not objected, when it was so read, approved, and signed, cannot, in the absence of fraud or mistake, prove that there was an oral agreement containing a different stipulation.

2. Plaintiff's sale of part of its road to defendant's fiscal court and its sale of another part to the fiscal court of another county being separate and distinct transactions, it may not, to show what was its contract with defendant, prove what its contract with the other fiscal court was, or what construction such fiscal court placed thereon.

Appeal from Circuit Court, Lincoln County.

"Not to be officially reported."

Action by the Danville, Dix River & Lancaster Turnpike Road Company against Lincoln county fiscal court. Judgment for defendant, and plaintiff appeals. Affirmed.

Jno. T. Hays, for appellant. H. Helm and P. M. McRoberts, for appellee.

BARKER, J. The appellant, Danville, Dix River & Lancaster Turnpike Road Company, is a corporation which owned and operated a turnpike road $12\frac{3}{4}$ miles long, running through the counties of Lincoln, Boyle, and Garrard. Three and three-fourths miles of the road lay in Lincoln county. The capital stock of the corporation is 466 $\frac{1}{4}$ shares, of the par value of \$50 each, of which appellee owns 41 shares. During and prior to April, 1898, there had been an uprising of the people of the three counties, in favor of free turnpikes, which found expression in deeds of violence, known as "tollgate raiding," which, of necessity, resulted in a great depreciation in the value of turnpike roads. Appellant in the spring of 1898 entered into negotiations with the fiscal courts of the three counties in which its road lay, with the result that it sold to these several courts so much of its road as lay in the respective counties, for the purpose of establishing free turnpikes therein. These three sales were entirely separate and distinct, and had, so

far as the record shows, no connection whatever with each other. The sale to appellee took place on the 15th day of April, 1898, and is evidenced by the following order entered upon appellee's order book on the day named: "Lincoln county fiscal court met pursuant to adjournment this 15th day of April, 1898. Hon. Jas. P. Bailey, Judge, presiding with the following justices of the peace, to wit: J. A. Singleton, W. D. Wallin, W. A. Coffey, and J. H. Raines. Moved and seconded that this court accept the proposition of J. S. Robinson, president of the Danville, Dix River & Lancaster Turnpike Road Company, at the price of twelve hundred and fifty (\$1,250) dollars, for $3\frac{3}{4}$ miles of said road in Lincoln county, for the individual stock owned in said road, it being $\frac{1}{2}$ part of the whole road, including one-half of two bridges—one across Dix river, and the other over Hanging Ford creek. The same to be paid for as follows: \$312.50 to be paid out of the levy of 1898, \$312.50, out of the levy of 1899, \$312.50 out of the levy of 1900, and \$12.50 out of the levy of 1901; all sums to bear interest at the rate of five per cent. until paid. The insurance on the bridges is to be transferred at once, there being \$1,000 on each bridge." Afterwards appellee paid off and discharged the first three installments of the purchase money. When the fourth became due, it refused to pay; claiming that, as it owned 41 shares of the capital stock of appellant, its share of the proceeds of the sale of the road to Boyle and Garrard counties was greater than the unpaid balance due from it to appellant, and that appellant was really indebted to it on its counterclaim. Whereupon appellant instituted this action for the recovery of the last installment of the purchase price, amounting to \$312.50, with interest from the date of sale until paid; alleging that, under the contract of sale, appellee had agreed, in addition to the sum of \$1,250, which was to be paid in cash, that it would surrender up and cancel its 41 shares of the capital stock which it owned in appellant's road. Appellee filed an answer traversing the fact that it had ever agreed to surrender up and cancel its 41 shares of stock, alleging the sale by appellant of parts of its road to Boyle and Garrard counties, and claiming that its distributable share of the proceeds of these sales amounted to more than the sum it owed appellant, and prayed for a judgment over on its counterclaim. The issues were made up on these lines. The action was in equity, and upon trial the chancellor rendered a judgment in favor of appellee for the sum of \$232.35 on its counterclaim, from which judgment this appeal is prosecuted.

There is but one question in this case, and that is whether or not, under the contract between appellant and appellee, the latter agreed, as a part of the consideration for the purchase of the $3\frac{3}{4}$ miles of appellant's road, to surrender up and cancel its 41 shares

of the capital stock. If it did not, then it is conceded that the judgment of the chancellor is correct. If it did, the case must be reversed. There is no pretense that there is any fraud or mistake in the contract as written. On the contrary, appellant relies on it, as written, as the basis of its action.

The statute organizing, empowering, and regulating fiscal courts is contained in chapter 52 of the Kentucky Statutes of 1899. The fiscal court consists of the county judge and the justices of the peace of the county, and it possesses the corporate powers of the county. Section 1842 provides: "Before every adjournment, the minutes of the proceedings of said court shall be publicly read by the clerk of the court, and corrected, if necessary; and the same shall be signed by the county judge, or presiding judge, with the approval of the justices of the peace present when the court was held." Section 1843: "No minute or order of the fiscal court shall be valid until the same be read and signed, as before said, nor unless the record shows by whom the court was held." The fiscal court of Lincoln county being a court of record, it can only speak by its record. The contract it made with appellant, of necessity, was set forth in its orderbook. It could bind itself in no other way. *Fletcher v. Leight, Barrett & Co.*, 4 Bush, 303, and *Commonwealth v. Williams, etc.*, 14 Bush, 297. When appellant contracted with appellee, it had to take notice of the law limiting the latter's contractual powers; and when the contract between the parties was reduced to writing by the clerk, and publicly read, and approved by the members of the fiscal court, and signed by the judge, without objection on the part of appellant, whose chief officer and attorney were present, this order must be considered as constituting the contract between the parties. Therefore, in the absence of an allegation of fraud or mistake, no evidence of any verbal agreement or contract prior to the signing of the order containing the stipulations of the parties was admissible. Nor was it competent for appellant to prove what contract it made as to the cancellation of the stock of Garrard county, or what construction the fiscal court of that county placed upon the contract between it and appellant. This was an entirely separate and distinct transaction, and what the contracting parties did in reference to it throws no light whatever upon the contract between the parties litigant here; and the court properly sustained exceptions to the evidence introduced by appellant on these questions.

It follows, then, that the merits of this controversy turn upon the proper construction of the contract between the parties, evidenced by the written order on the books of the fiscal court. An examination of this fails to show any indication of an intention on the part of appellee to surrender up or cancel its 41 shares of stock. There is not

a word which tends to such a conclusion. The minute clearly states that the sum of \$1,250 paid in cash is to be participated in only by the individual stock owned in the road; but it is nowhere stated or intimated that the county's stock is to be surrendered up for cancellation, or that it should not participate in the assets resulting from the sale of the balance of the road to the counties of Boyle and Garrard. In order to reach the conclusion contended for by appellant, it would be necessary to interpolate into the written contract words which it does not now contain, the effect of which would be to take from appellee money which would otherwise be due it. No better evidence could exist of the utility of the rule that where parties have reduced their contract to writing, in the absence of fraud or mistake, no verbal evidence will be heard to alter or modify it, than is afforded by the case at bar. Here are all the officers of the fiscal court, who were present when the contract was made, deposing positively that nothing was said during the entire time the contract was being negotiated on the subject of the county surrendering its stock for cancellation; and, on the contrary, the president of appellant and several of its large individual stockholders depose with equal positiveness that such was the agreement. The rule in question was established to obviate just such difficulties. But were we less sure of the legal principle enunciated, we are of opinion that the preponderance of the evidence is against the proposition that appellee agreed to the cancellation of its stock. The burden of proving this was on appellant, and there is no reason to suppose that the officers of the fiscal court are less accurate or truthful than the officers and stockholders of the turnpike company.

For the reasons indicated, the judgment is affirmed.

NEW YORK LIFE INS. CO. v. HORD.

(Court of Appeals of Kentucky. Dec. 11, 1903.)

INSURANCE—FRAUD—RATIFICATION OF CONTRACT.

1. An insurance company, by paying the insurance after knowledge of the fraud inducing it to issue the policy, ratifies the contract, so that it may not afterwards recover the money paid by it.

Appeal from Circuit Court, Mason County. "Not to be officially reported."

Action by the New York Life Insurance Company against W. H. Hord. Judgment for defendant. Plaintiff appeals. Affirmed.

Allan D. Cole, for appellant. L. W. Robertson and E. L. Worthington, for appellee.

BURNAM, C. J. This action was brought by the appellant, the New York Life Insurance Company, against the appellee, W. H.

¶ 1. See *Insurance*, vol. 23, Cent. Dig. § 1085.

Hord, and the personal representative of Mary L. Weaver, deceased, for damages, in which it charges that appellee and the deceased, Mary L. Weaver, by deceit, misrepresentation, and fraud, procured the issue of an insurance policy upon the life of Mary L. Weaver for \$10,000, which was paid at her death to her personal representative. The personal representative of Mary L. Weaver demurred to the plaintiff's petition, which was sustained, and the action, as to him, dismissed. The plaintiff appealed in that case to this court, and the judgment of the circuit court was affirmed. *New York Life Ins. Co. v. Weaver's Adm'r*, 70 S. W. 628. Upon that appeal, attention was called to the fact that plaintiff did not allege that it did not know of the existence of the alleged deceit, misrepresentation, and fraud before it paid its money to the personal representative of Mary L. Weaver after her death, and it was decided that these were necessary averments in order for appellant to recover damages for the deceit alleged to have been practiced upon it. Nor is there any allegation in this case upon this appeal that appellant did not know of the alleged falsity of the statements made to it by appellee and Mrs. Weaver in the procurement of the issue of the policy before it paid the money, or that it was paid in ignorance of the alleged deceit. We still adhere to the opinion that these were necessary averments in order to support a cause of action.

We find no fault with the contention that, in an action for damages in a sale, the vendee may affirm the contract and recover damages for the deceit, or he may disaffirm the contract and sue for the price with offer to return the property. For instance, one who has been deceived in the purchase of a horse which has been delivered to him may sue for the rescission of the contract of sale, with an offer to return the horse, or he may, at his election, keep the horse and sue for damages for the deceit practiced upon him. But it will not be contended that he could, after discovering that the vendor had made false and fraudulent representations to him as to the soundness or qualities of the horse, consummate the trade by the acceptance of the horse and payment of the purchase price, and then sue for deceit and misrepresentation. Nor do we see how this well-settled rule of law can be made available in this case. Appellant lost nothing by the mere issue and delivery of the policy of insurance. It was only the evidence of an agreement on its part to pay a stipulated sum at the death of the insured. If it learned of the alleged deceit and fraud which had been practiced upon it to induce the issue of the policy before its maturity, or the payment of the indemnity contracted for, it cannot be well said that it did so because of appellee's misrepresentation and deceit, but rather in spite of it. Having elected, with their eyes

open to the facts of the situation, to pay the contract of indemnity, they cannot then turn around and sue upon the theory that they had paid it in ignorance of the true state of fact, or because of the alleged deceit. If they had availed themselves of their legal rights after the discovery of the alleged deceit which was practiced upon them to induce the issue of the policy, it would have been unavailing; but, when they paid with full knowledge, it was a ratification on their part of the original contract of insurance, and they cannot subsequently complain of deceit in the issue of the policy.

For the reason indicated, the judgment is affirmed.

BEREA COLLEGE v. POWELL.

(Court of Appeals of Kentucky. Dec. 11, 1903.)

LIBEL—PLEADINGS—AIDED BY ANSWER—CONSTRUCTION OF LANGUAGE—APPEAL—ERRORS REVIEWABLE—BILL OF EXCEPTIONS—SUFFICIENCY.

1. On denial of a new trial defendant was given until the first day of the next term to file a bill of exceptions. He presented it that day, but the judge died during the term without signing the bill, and an order was entered giving defendant till the third day of the next term to complete and tender the bill. Without doing so, or taking any further step, defendant appealed. *Held*, that the bill of exceptions should be stricken out as not properly a part of the record or authenticated.

2. Where there is no bill of exceptions, there is nothing to review on appeal except the sufficiency of the petition which was demurred to, and the sufficiency of the pleadings to support the judgment.

3. A petition in slander alleged the publication of a statement that certain persons would testify in the case of plaintiff for burning a schoolhouse. The answer pleaded a rumor that plaintiff had burned the school for a certain reason, and that the publication was made under the impression that he would be charged with the burning. *Held*, that the answer made the petition good.

4. After verdict for plaintiff in libel, the court will construe the libelous language in that sense, if it is susceptible thereof, which will support the verdict.

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by D. I. Powell against the Berea College. From a judgment for plaintiff, defendant appeals. Affirmed.

Smith & Bush, for appellant. H. C. Hazelwood, for appellee.

HOBSON, J. Appellee filed this action to recover of appellant damages for an alleged libel published concerning him in a paper owned and issued by appellant. The publication complained of is in these words: "John W. Cope and Mr. J. W. Vanwinkle, both of Berea, stopped over Thursday night at J. B. Hatfield's. They were going to McKee, where they will testify in the case of the Powell Brothers and Frank Gay for burning the Powell schoolhouse." The defendant demurred to the petition. Its demurrer was

overruled. It then entered a motion that the court rule the plaintiff to verify his petition, but no action was taken on this motion, and the defendant filed answer. The jury found for the plaintiff in the sum of \$250. The defendant's motion for a new trial was overruled, and time given until the first day of the next term for it to tender a bill of exceptions. On the first day of the next term the defendant tendered a bill of exceptions. The circuit judge died during that term without signing the bill, and an order was entered allowing until the third day of the next term to complete and tender the bill of exceptions. Without any further order in the case, the defendant has brought the record here, and the plaintiff has entered a motion to strike out the bill of exceptions because it is not signed by the circuit judge, or proved by bystanders, and was not filed in the circuit court, but only tendered. The motion must be sustained, for the paper is not properly a part of the record, or authenticated in any way. This leaves for consideration only the question of the sufficiency of the petition on demurrer and the sufficiency of the pleadings to support the judgment.

The demurrer to the petition is based on the idea that the words charged were not libelous. It is insisted that they do not import any charge against the Powell brothers, and that on the face of the publication it may be that the case against them was for a negligent burning of the schoolhouse, and not for an intentional act. McKee is the county seat of Jackson county. The statement that the persons named were going to McKee, where they would testify in the case of the Powell brothers for burning the Powell schoolhouse, naturally imported a trial in court, and that the subject of this trial was the case of the Powell brothers for burning the Powell schoolhouse. If it was supposed that the burning was from negligence or accident, and not by design, and this was meant by the publication, the defendant might have pleaded and proved the facts. This it did not do. On the contrary, it pleaded that there was a general rumor that the plaintiff Gay had burned the schoolhouse for a certain reason, and that the publication was made under the impression that he would be charged with burning the schoolhouse; and that, when it was found out that this was a mistake, it retracted the publication. The answer certainly made the petition good. In the construction of language all the circumstances of its publication must be considered, and that meaning will be given it which, in the light of the circumstances, it may be fairly presumed to have conveyed to those to whom it was published. Townsend on Slander, § 133. The words are to be

taken in their natural meaning. Courts formerly construed language in *mitiori sensu*; but this is no longer the rule, and where the words are capable of two constructions, one actionable and the other not, the court will adopt that construction which the circumstances show the words naturally bore (Id. § 142); and after verdict it will usually construe the language in that sense which will support the verdict (Id., section 143). In the absence of a bill of exceptions, we therefore conclude that there is no ground for disturbing the verdict.

Judgment affirmed.

BEREA COLLEGE v. POWELL.

(Court of Appeals of Kentucky. Dec. 11, 1903.)

PLEADINGS—VERIFICATION — LIBEL—APPEAL — SUBSTANTIAL RIGHTS.

1. Under Civ. Code Prac. § 116, which requires all pleadings, with certain exceptions, to be verified, and which omits the provisions of Myers' Code, § 143, providing that verification of pleadings in actions for injury to person or character should not be required, a petition in an action for libel must be verified.

2. The right to require a verification of pleadings is substantial, and neglect of verification cannot be regarded as nonprejudicial in the absence of a bill of exceptions.

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by W. A. Powell against Berea College. From a judgment for plaintiff, defendant appeals. Reversed.

Smith & Bush, for appellant. H. C. Hazelwood, for appellee.

HOBSON, J. Appellee instituted this action against appellant to recover for an alleged libel published of him by appellant. Appellant moved the court to require the plaintiff to verify his petition. The motion was overruled, and the plaintiff excepted.

By the Code of 1854 it was provided that verification of pleadings affecting injuries to persons or character should not be required. Myers' Code, § 143. This provision has been omitted from our present Code, which requires all pleadings, with certain exceptions, not here material, to be verified by an affidavit to the effect that the affiant believes the statement of the pleadings to be true. Civ. Code Prac. § 116. The court therefore erred in overruling the motion to require the petition to be verified. The right to require the plaintiff to verify his petition is substantial, and, in the absence of a bill of exceptions, we cannot say that the defendant was not prejudiced thereby.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

DOVEY v. LAM et al.

(Court of Appeals of Kentucky. Dec. 9, 1903.)

WITNESSES — COMPETENCY — WIFE OF JOINT DEFENDANT—TORT—SEVERABLE JUDGMENT—REVERSAL IN PART—EVIDENCE—BURDEN OF PROOF—MATTER IN AVOIDANCE.

1. The fact that the wife of one of the joint defendants in an action for tort testified for defendants could not furnish ground for reversal of the judgment in favor of defendants, except as to witness' husband.

2. Under Code Prac. §§ 605, 606, rendering all witnesses of sufficient understanding competent to testify, except certain classes, among which are husband and wife for or against the other, a wife of one of several defendants in an action for tort, in which, by Ky. St. 1899, § 12, the verdict may be for some defendants and against others, is a competent witness for defendants other than her husband.

3. In an action for tort, when the answer did not controvert the petition, but pleaded in avoidance, the burden of proof was on defendants.

Appeal from Circuit Court, Muhlenberg County.

"To be officially reported."

Action by George B. Dovey against James W. Lam and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Jonson & Wickliffe and W. H. Yost, for appellant. W. L. Reeves, for appellees.

HOBSON, J. George B. Dovey, appellant, instituted this action against James W. Lam, W. N. Eads, G. W. Roark, Flint McDowell, and John G. Love, appellees, to recover for an assault and battery. They pleaded self-defense, and the jury found for them. The court entered judgment on the verdict, and the plaintiff appeals.

The difficulty occurred over the possession of a coal shaft and engine; the defendants claiming that Mrs. Rachel McNeill was in possession, and that the plaintiff undertook to interfere with her possession, the defendants being her agents and servants. The court held the burden of proof to be on the defendants, and each of them was thereupon sworn in his own behalf. After the difficulty, and before the trial, Mrs. McNeill intermarried with the defendant John G. Love. The other four defendants offered her as a witness in their behalf. The court ruled that she could not testify for her husband, but that she could testify for the other four defendants. He therefore allowed her to testify, instructing the jury that her testimony could only be considered as to the defendants other than her husband. Of this action of the court, the plaintiff complains. It is insisted for the plaintiff that the jury could not disabuse their minds of the effect produced by her evidence, and would necessarily consider it as to her husband. If this is true, it would be no reason for reversing the judgment, except as to John Love, her husband, for, if the other defendants only had been sued, she would undoubtedly have been a competent witness; and these defendants were in fact more or less affected by her

testimony being given when her husband was a party to the action, and it might be supposed that this would warp her judgment. But aside from this, by section 605 of the Code of Practice, every person is competent to testify, unless incapable of understanding the facts concerning which his testimony is offered, subject to the exceptions contained in section 606. By section 606, neither husband nor wife shall testify for or against the other, except in certain cases not material here. There is no other provision of the statute affecting the competency of the witness. As by section 605 every witness may testify who has sufficient capacity to understand the facts concerning which his testimony is offered, Mrs. Love was a competent witness, unless she was cut out by section 606. The only thing in section 606 affecting her is that she shall not testify for or against her husband. Under our statute, in cases of this character the jury may find in favor of one of the defendants and against the others, or may find a larger amount against one than the others. Ky. St. 1899, § 12; Railroad Co. v. Kuhn, 86 Ky. 593, 6 S. W. 441, 9 Am. St. Rep. 309. If five separate actions had been brought against each of the defendants, the wife might have testified in all cases except her husband's; but, when all were sued in one suit, the proceeding was substantially the same as if five separate suits had been brought, and all by consent heard together. The wife did not, therefore, testify for her husband. She testified only for the other defendants, and her evidence cannot be rejected because the jury might unconsciously give it effect as to him. In tort cases against several defendants, it often happens that evidence is admitted against some of the defendants, or in their favor, which cannot be considered as to the other defendants. Thus an admission may be made by some after the wrong has been committed, and this may be proved against them, but not against the other defendants. One may be released, and others not. One may by conduct show malice, and this may be done without the knowledge of the others, so that these facts are not competent against them. It therefore often happens in cases of this character that evidence is admitted which is only to be considered by the jury as to some of the defendants. In Shields v. Ruddy, 2 Idaho, 884, 28 Pac. 405, the plaintiff in a tort action offered to introduce the wife of one of the defendants as a witness against the other defendant under a statute substantially the same as ours. The circuit court refused to admit the evidence, but on appeal the judgment was reversed; the court holding that, inasmuch as a separate judgment might have been rendered in the case against each defendant, the wife of one was competent against the other, under instructions from the court that her testimony should not apply to her husband. In Albaugh v. James, 29 Ind.

398, the husband and wife were sued for a joint tort, and each was offered as a witness in his own behalf. The wife was not allowed to testify. On appeal this was reversed. The court said: "The defendants had each the right to testify in their own behalf. Because the testimony of the husband might benefit the wife, and that of the wife might benefit the husband, is no reason for excluding the evidence. It would, however, be the duty of the court, by instructions, if asked, to limit the effect of the testimony to the case of the party testifying. When a party is sued, he or she has the right to testify in his or her own behalf, and a plaintiff cannot deprive a defendant of this right by joining husband and wife in the same suit. A husband could not call a wife to testify for him, nor could a plaintiff call her to testify against her husband, but a husband and wife jointly sued may each testify in their own behalf." The tendency is to do away with the old restrictions, and to let the jury hear the evidence and judge of its credibility. In England, by statute, a man's wife may testify for him, just as his children, and the same rule prevails in many of the states. Our Code was intended to broaden the rule for the admission of witnesses, and its proper construction requires that every witness shall be allowed to testify, with the exceptions named in the statute. We therefore conclude that, the statute not forbidding the wife of one defendant to testify for another, she is a competent witness, where a separate judgment may be rendered as to each of the defendants.

The answer not controverting the allegations of the petition, but pleading matter in avoidance, the burden of proof was on the defendants. The other matters relied on in the admission or rejection of evidence were of minor consequence, and were properly ruled by the circuit court. The instructions fairly submitted the issue to the jury, and, on the whole case, we find no reason for disturbing the verdict.

Judgment affirmed.

FIDELITY MUT. LIFE INS. CO. v. PRICE.

(Court of Appeals of Kentucky. Dec. 9, 1903.)

LIFE INSURANCE—PAYMENT OF PREMIUMS—WAIVER OF FORFEITURE—REVIVAL.

1. Forfeiture of a life policy for nonpayment of an annual premium when due is not waived for the whole year by the company extending time for payment and taking a note therefor, payable four months after date, providing that, if it is not paid at maturity, the policy shall be void.

2. Forfeiture of a life policy for nonpayment at maturity of a note for a premium is not waived by a demand for payment of the note after its maturity, this being accompanied by a certificate of health, which showed that the company claimed there was a forfeiture, and

insured being informed that the certificate would have to be sent to the home office for approval.

3. Even if the statutory provision that no insurance company shall make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon applies to a note given for a premium on extension of time for payment thereof, and providing that, if it is not paid at maturity, the policy shall be void, all of the agreement is void; so that there is no valid extension of time of payment and waiver of the forfeiture provided by the policy for nonpayment of the premium then due.

4. Insured cannot complain that a certificate of health sent to the company for the purpose of having the policy revived was kept six days, and then returned not approved.

Appeal from Circuit Court, Warren County.

"To be officially reported."

Action by Sue E. Price against the Fidelity Mutual Life Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

F. H. Calkins, Sims & Crider, and Fairleigh, Straus & Fairleigh, for appellant. Lewis McQuown, for appellee.

PAYNTER, J. On the 22d of April, 1896, in consideration of \$217.80, and the payment of a like sum annually thereafter on the 22d of April of each year, the appellant issued a policy on the life of George T. Price for \$10,000, payable at his death to Sue E. Price, wife of the insured. Before the annual premium became due April 22, 1900, the insured asked the company to grant an extension of four months in which to pay the premium. The manager of the appellant's Louisville office notified Price that he had no authority to grant the extension without the approval of the home office, and inclosed a note for his signature, stating that the matter would be submitted to the home office, and that he would be advised of the result. The note was dated April 22, 1900, payable four months after date, and it was accepted by the company. It matured on August 22, 1900. Before this note matured, Price requested the Louisville office to extend the time for its payment. He was again advised that the home office alone had the authority to grant the extension. The home office declined to waive the payment of the note, but agreed to accept \$50 and a new note for \$174.74, payable three months after date. This note matured November 20, 1900. He failed to pay that note, and died on the 10th day of December, 1900.

Among other provisions, the policy contained the following:

"Provided, any moneys required to be paid under this policy, during the continuance of the contract, must be actually paid when due to the said association, and no dues or premiums on this policy shall be considered paid, unless a receipt shall be given therefor, signed by the president and treasurer, and countersigned by the agent or person to

whom payment is made, as evidence of such payment to him; otherwise, this policy shall be ipso facto null and void, and all moneys paid hereon shall be forfeited to the said association."

"With the written approval of the president or vice president, the beneficiary herein named may be changed upon the written request of the member, by the surrender of this policy."

"In case of lapse or forfeiture of this policy, it may be revived upon the approval of the president or vice president and medical director subject to the rules of the association."

"No agent of the association has any power or authority to make, alter or discharge contracts, waive forfeitures, or grant credit; and no alteration of the terms of this contract shall be valid, and no forfeiture hereunder shall be waived, unless such alteration or waiver be in writing and signed by the president of the association."

This action was instituted by the beneficiary, Sue E. Price, to recover the amount of the policy, to wit, \$10,000. Questions raised by counsel will be made to appear in this opinion, hence it is unnecessary to summarize them.

The failure to pay the note executed for the balance of the premium, which matured November 20, 1900, is admitted. Counsel for the appellee urge that the appellant waived the forfeiture, and when once waived it could not be exercised during the ensuing year; that this right of forfeiture existed on the 22d day of April, 1900, and the acceptance of the four-months note for the annual premium due that day was an election to waive the forfeiture for the entire year. By the terms of the policy it becomes ipso facto null and void unless the moneys required to be paid by it are actually paid when due. At the request of the insured the company extended the time for the payment of the premium for four months which matured April 22, 1900. This was done as an accommodation to the insured. Except for that act, he would either have been forced to pay the premium, or have allowed his policy to lapse. The company did not agree to waive its right of forfeiture, or relieve the insured from his obligation to pay the premium. It simply agreed to postpone the payment of the premium for four months, and that it would not exercise its right of forfeiture for that period. It did not agree that it would not exercise its right of forfeiture upon the failure of the insured to pay the note at its maturity. On the contrary, the company and Price agreed that the execution of the note was simply setting forward the time of forfeiture, and that the right to forfeit was to be exercised at the maturity of the note unless it was then paid, for it is recited in the note: "If this note is not paid at maturity, policy D67,852 issued by the Fidelity Mutual Life Insurance Company, of Philadel-

phia, for which it is given, shall be null and void, without notice to the maker thereof, and without any act on the part of the company, and shall remain so until restored by its terms." It was said in *St. Louis Mutual Life Insurance Co. v. Grigsby*, 10 Bush, 310: "Where, as a matter of favor to the insured, credit is extended him for some portion of a cash premium, the failure to pay the note representing such portion is regarded as a failure to pay the premium, and the policy will be forfeited." The same doctrine is announced in *Manhattan Life Insurance Co. v. Myers*, 109 Ky. 372, 59 S. W. 30; *Same v. Pentecost*, 105 Ky. 642, 49 S. W. 425. The same doctrine is recognized in *Moreland v. Union Central Life Insurance Co.*, 104 Ky. 129, 46 S. W. 516, and *Union Central Life Insurance Co. v. Duvall* (Ky.) 48 S. W. 518. The parties had the same right to agree to the extension of the time for the payment of the premium and the setting forward of the time of forfeiture as they had to enter into the original contract of insurance. The beneficiary named in the policy had no vested rights in it, because it is expressly provided therein that the insured may change the beneficiary by the surrender of the policy. Besides, under the express terms of the policy, if the beneficiary was not changed, she did not have any rights under it, unless the premiums were actually paid. She could not complain because the company as a matter of grace extended the time of payment of the premium and the time for the exercise of the right of forfeiture. It is contended by counsel for the appellee that the case of *Johnson v. Southern Mutual Life Insurance Co.*, 79 Ky. 403, supports his position. That case expressly recognizes the doctrine which we here enunciate, for the court said in that case: "The execution of the note for \$107, and the extension of time for its payment beyond the day on which the annual premium was agreed to be paid for the year ending October 21, 1875, did not constitute a waiver of the forfeiture of the policy upon the part of the company, but it was an agreement not to enforce the consequences of the forfeiture for ninety days after the period at which it was originally agreed the forfeiture should take place. [*St. Louis Mut. Life Ins. Co. v. Grigsby*], 10 Bush, 314." The court, however, seems to hold in that case that an unconditional demand for the payment of the note and the retention of it by the company amounted to a waiver of forfeiture for the premium year.

It is urged that the forfeiture was waived by an unconditional demand for the payment of the note of \$174.74 after maturity. The question presented is not one of preventing the lapse of a life policy, but of the revival of one which has already been forfeited. Both the appellant and Price understood that the failure to pay the note operated as a forfeiture of the policy. Under the doctrine which this court has repeatedly announced,

if there had been an unconditional demand for the payment of the note after its maturity, unaccompanied by an explanation showing a different intent, it would be evidence in itself of an intention to waive the forfeiture. *Moreland v. Union Central Life Insurance Co.*, 104 Ky. 129, 46 S. W. 516. In that case the court said: "We can see how, without a waiver of the forfeiture being manifested, the note might not be returned to the assured through oversight or negligence, or even be retained for the purpose of allowing the assured to reinstate the policy by its payment; but a demand of payment, unaccompanied by an explanation showing a different intent, is evidence in itself of an intention to waive the forfeiture. It seems to us that to send the note to its attorneys for collection, and to demand its payment, are evidence of an intention to waive the right to insist on a forfeiture." *Union Central Life Insurance Co. v. Duvall* (Ky.) 46 S. W. 518. In passing upon the question of waiver of the right of forfeiture in *Phoenix Insurance Co. v. Stevenson*, 78 Ky. 156, the court said: "The act or conduct of the company, in order to operate as a waiver of its right to rely upon the breach as a release from liability, must be such that the insured might reasonably infer therefrom that the company did not mean to insist upon the forfeiture. The insured must have been misled to his prejudice." Price well knew from the terms of his policy and previous transactions under it that when the policy lapsed for the nonpayment of premiums the forfeiture could only be waived at the home office in the prescribed way. It is true the Louisville office demanded the payment of the note, but that demand was accompanied by a request that he sign a certificate of health, which was to be approved by certain officers of the company at its home office. When the manager of the Louisville office demanded the payment of the note, he inclosed a certificate of health, which showed that the company claimed the policy was forfeited. So the demand was not unconditional, but was accompanied by the claim that a forfeiture of the policy was claimed. In addition to that, Price was advised that the certificate of health would have to be sent to the home office for approval. Price, on December 1, 1900, signed a certificate of health containing the following language: "Policy No. D67,852 on my life, issued by the Fidelity Mutual Life Insurance Company, being void by reason of the non-payment of the note 6,419, due and payable thereon the 20th day of November, 1900: Now, therefore, for the purpose of obtaining a revival of said policy, and as a basis of such a revival, * * *." This shows that Price understood that the company claimed that the policy was forfeited, and he applied to it to have the forfeiture waived. We are of the opinion that there was no unconditional demand for the payment of the note.

It is claimed for the appellee that the note for the premium containing the forfeiture clause for failure to pay is a contract as to insurance, and void under the Statutes, unless attached to the policy. In support of that contention *Provident Savings Life Assurance Society v. Puryear's Adm'r* (Ky.) 59 S. W. 15, is cited. The statute referred to, among other things provides that no insurance company "shall make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon." Ky. St. 1899, § 656. This clause evidently is not applicable to the facts of this case. It relates to the time the policy was issued. If it had the effect, as contended by counsel, that the note was void, and likewise its provisions, because it was not attached to the policy, the appellee could not get any benefit from the execution of the note. If it was void because it was not attached to the policy, its terms would not be binding on either party. The logic of counsel's position would be that, as there was no valid agreement between the parties as to the extension of time for the payment of the premium, the policy was forfeited on the 20th of November, 1900, and the insured was never relieved from the forfeiture. If the contract was void, then the court would not uphold the part that was beneficial to the insured, to wit, the extension of time for the exercise of the right of forfeiture, and deny the company the right to insist upon the forfeiture upon the failure to perform that part of the contract which induced the company to extend the time for declaring the forfeiture.

The certificate of health was signed December 1, 1900, mailed to the home office in Philadelphia, where it was received and retained for about six days before it was returned not approved. It was a matter for the company alone to determine whether it would approve the certificate of health and waive the forfeiture, and the insured could not complain of the delay of the company in rejecting the application for the restoration of the policy. There is no conflict in the evidence. The material part of it was in letters and writings. Therefore we are of the opinion that the court should have given a peremptory instruction to find for the defendant.

The judgment is reversed for proceedings consistent with this opinion.

LEE & HESTER v. HUGHES et al.

(Court of Appeals of Kentucky. Dec. 10, 1903.)

HOMESTEAD — SALE ON EXECUTION — ACTION TO SET ASIDE — MARRIED WOMAN — STATUTE.

1. An intention to remove from the state, without a completion of the act, does not constitute an abandonment of a homestead.

2. Money which is the proceeds of the sale of a homestead, preserved as such, is not subject to seizure on execution for the debt of the owner.

3. The owner of a homestead, who sells it and reinvests the proceeds in other lands, on which she resides, has a homestead right in the latter, against debts existing at the time of its purchase.

4. Ky. St. 1899, § 1702, provides that there shall be exempt from all debts or liabilities land, not exceeding the value of \$1,000, owned by debtors "who are actual bona fide housekeepers with a family," resident in the state. *Held*, that a married woman living with her 15 year old son, apart from her husband, but undivorced from him, is "an actual bona fide housekeeper," within the statute, entitling her to homestead exemption.

5. Where the pleadings in an action to set aside a sale of homestead property under execution do not aver that the owner's right to the homestead is in any way affected by the fact that her husband owned an undivided half of a previous homestead, the proceeds of which, so far as they belonged to the wife, had been transmuted into the property in controversy, title to which was in the wife alone, that question cannot be raised.

6. Where husband and wife sold homestead property which was held in their joint names, and the wife transmuted not more than her half of the proceeds into homestead property, taking title in her own name, the question whether her right to the homestead in her own name is affected by such circumstances is not necessary to be decided in an action by her to set aside a sale thereof on execution; her husband joining with her in the action, and asserting no claim to the homestead in his own behalf.

7. Where a husband unites with his wife to set aside a sale under execution of homestead property, title to which is in the name of the wife, and he asserts no claim to the homestead in his own behalf on the ground that it was bought with the proceeds of a homestead owned by them in their joint names, he is estopped thereby from making any future claim to such homestead for himself.

8. Where a husband and wife are living apart, but undivorced, it does not affect her status as a bona fide housekeeper with a family, under Ky. St. 1899, § 1702, entitling her to a homestead right in property which she owns and occupies, that he contributes to the support of the family.

Appeal from Circuit Court, Graves County. "Not to be officially reported."

Action by M. A. Hughes and another against Lee & Hester. From a decree for plaintiffs, defendants appeal. Affirmed.

Lee & Hester and W. H. Hester, for appellants. Robbins & Thomas, for appellees.

SETTLE, J. This action was instituted by the appellee in the Graves circuit court to set aside the sale of a house and lot in the city of Mayfield, made under an execution in favor of the appellants amounting to \$88; it being alleged in the petition that she is the owner of the house and lot, and was occupying the same as a homestead at the time of the sale, and that she was then, and is now, a bona fide housekeeper, with a family. The judgment upon which the execution issued was rendered against her for a fee due from her to the appellants for services which they rendered in a suit instituted by her against her husband for divorce and alimony. The amount of the fee was \$75;

the costs of the action and of the sale \$13; making altogether \$88, as stated. It appears that the appellee, M. A. Hughes, was formerly the wife of R. T. Anderson, with whom she resided for many years on a farm near Lynnvile, in Graves county. Anderson died owing certain debts, which were secured by a lien on the farm mentioned. These lien debts were purchased by the appellee with her own money, and after thus acquiring them she brought suit in equity for the purpose of subjecting the land to their payment, and for the further purpose of obtaining a settlement of the decedent's estate. While this action was still pending, she intermarried with one T. A. Hughes. When the land was sold by the master commissioner, it was bought by her to satisfy her lien debts, and under an agreement with her husband T. A. Hughes, whereby he was to pay certain of her debts—perhaps a part of what she was to pay for the land—in consideration of which she caused the land to be conveyed by the commissioner to herself and husband jointly. The land was continuously occupied by them as a homestead until about August, 1900, and was then sold by them for \$2,400. They paid some debts out of the sum realized for the land, amounting to about \$400, and the \$2,000 remaining of the money realized from the sale they deposited in a bank in the town of Murray. This sum remained in the bank until December, 1900, at which time domestic trouble arose between the appellee and her husband; and he, without her knowledge or consent, drew out of the bank \$750 or \$800 of the amount they had on deposit, and at the same time apparently abandoned his wife. She then secured possession of what was left of the money in bank, amounting to \$1,200 or \$1,250. About that time she employed the appellants (lawyers) to bring for her the suit for divorce and alimony against her husband T. A. Hughes, and the suit was filed by them December 24, 1900. But the case appears to have been settled by the parties. At any rate, it was never prosecuted to judgment, and the fee which they charged her for their services in that case is the same for which they obtained a judgment against her, as already stated. On the 4th of January, 1901, the appellee bought from F. W. Bagby a small tract of land near Sedalia, Ky., in which she invested not less than \$1,000 of the purchase money which she had received from the Lynnvile farm. The title to the Sedalia land was conveyed to appellee alone by deed from Bagby, and she at once moved on the land with her family, composed of herself and her son, Hugh Anderson, who was then 15 years of age. Her son-in-law, John Jenkins, and his wife also moved upon the Bagby land, and lived with her. Appellee continued to live upon and occupy the Bagby land as a homestead until the 3d day of June, 1901, when she exchanged it for the lot in the city of Mayfield in controversy in

this action, which lot has been occupied by appellee and family as a homestead from the 3d day of June down to the present time. According to the evidence found in the record, the fair market value of the lot will not exceed \$800.

It seems to be conceded by the appellants that the Sedalia or Bagby land, which was exchanged for the house and lot in Mayfield, was purchased by the appellee with the proceeds realized from the sale of the Lynnville tract, and that the Sedalia land was acquired by the appellee for use as a place of residence and homestead; and it is not denied by them that the house and lot in Mayfield has been so used by appellee and her family. It is, however, contended by the appellants that their debt against the appellee was created before her purchase of the Sedalia farm, and after her sale of the Lynnville farm, and that the sale of the latter farm was made by appellee and her husband with the intention of leaving this state, and for the purpose of permanently locating in the state of Arkansas, to which state her son, Charles Anderson, soon thereafter removed, to engage in the business of manufacturing brooms, and that the money with which to engage in that enterprise was furnished him by the appellee with the understanding that, upon the removal of herself and husband to the state of Arkansas, they would become partners with Charles Anderson in that business. It is further contended that the sale of the Lynnville farm by appellee and her husband for the purpose of taking up their residence in Arkansas amounted to an abandonment upon their part of their homestead. That is to say, that the appellee thereby lost her right to be longer regarded as a housekeeper with a family, which right could not be revived by a subsequent determination to remain a resident of the state of Kentucky, or by the purchase of another tract of land with the intention of living upon and occupying it as a homestead. Unfortunately for the appellants, this contention does not receive the support of the Kentucky authorities, for, under the law as held in this state, even if appellee had sold the Lynnville farm with the intention of moving permanently to Arkansas, she would still have been entitled to all of her exemptions until her expectation had been accomplished, or, at all events, until she reached the border of the state. In other words, the intention to remove without a completion of the act does not constitute abandonment. *Hemphill v. Haas*, Lyons & Co., 88 Ky. 495, 11 S. W. 510; *Carroll, etc., v. Dawson, etc.*, 103 Ky. 738, 46 S. W. 222. The evidence in the case does not sustain appellants' contention. Upon the contrary, it shows that appellee had no intention whatever of removing from the state of Kentucky to permanently reside in Arkansas or elsewhere. She did contemplate a visit to her son in Arkansas, but not for the purpose

of remaining there, or of going into business with him. It is true that she furnished him \$400, but only as a loan, evidenced by his note taken at the time the loan was extended; and it is shown by the testimony of S. R. Doughtie, Erwin Palmer, and John Canter that she talked with each of them about buying land of them. These conversations occurred in part about the time of and soon after the sale of the Lynnville farm, and in part some months after its sale; and it is shown by the testimony of appellee herself, that of her son, Hugh Anderson, and her son-in-law, Jenkins, that she began negotiations looking to the purchase of the Sedalia farm from Bagby shortly before the institution of the suit for divorce against her husband, and consequently before the creation of the debt for which her house and lot was attempted to be sold. It is true that the appellants both testified that, in a conversation with them at the time of instituting the divorce suit, they received from appellee statements to the effect that she was going to Arkansas to reside permanently, and they embraced in the petition for a divorce a statement to the effect that such was her purpose. But one of them (Hester), in giving his deposition, declined to state that she used the word "permanent" or "permanently" in connection with her going to Arkansas. It is also true that Bagby, from whom she purchased the Sedalia farm, in giving his deposition, stated it as his recollection that the first conversation that he had with appellee in reference to the sale to her of the land occurred the day before the sale was consummated; but in this he is contradicted by appellee, her son, Hugh, and son-in-law, Jenkins, the latter of whom testified that the first conversation between appellee and Bagby on that subject occurred about a week before the trade was made; and appellee and her son, Hugh, both testified that negotiations with Bagby for the purchase of the Sedalia land began before the institution of the divorce suit. It is not, however, material whether the purchase of the Sedalia land was made before or after the creation of the appellants' debt, as it appears from the record that, though the Lynnville farm had been sold some four or five months before the Sedalia farm was purchased, it was the intention of appellee at the time of its sale to reinvest its proceeds in other real estate in Kentucky, to be occupied by her as a homestead, that this purpose continued in her mind down to the time of the purchase of the Sedalia farm, and that she preserved at least as much as \$1,000 of the proceeds of the sale arising from the Lynnville farm to be used in purchasing the desired homestead. The money so held and preserved by her could not at any time before its investment in the Sedalia farm have been subjected to the payment of any debt owing by the appellee. *Brooks v. Collins*, 11 Bush, 622; *Rulo v. Mur-*

phy (Ky.) 51 S. W. 312. Such seems to have been the ruling of this court in the case of *Cooper v. Arnett*, 28 S. W. 811, wherein it is said: "As to Arnett, it is evident that, as he had a homestead in the Henderson county farm, he had one in the land bought in Hopkins county with the proceeds of its sale. It is said that the answer does not disclose that he sold the first farm with the intention of reinvesting in a homestead, and the purchase of the latter must be regarded as an original purchase of the homestead, and therefore the debt of the appellant was created prior to the purchase. We think this contention demands too strict a construction of the homestead act. Before any effort was made to reach the proceeds of the sale of the lands in Henderson county, or while such proceeds were in the hands of the debtor, at which time the inquiry might be material as to the intention with which the proceeds were held, the debtor does in fact invest it in a homestead; and this, we think, was not an original obtention or purchase of a homestead, or one obtained or purchased after the creation of the debt set up in this case." We find, therefore, that, under the rule announced in the case, *supra* (*Cooper v. Arnett*), the owner of land in which a right to the homestead exists, who sells and reinvests the proceeds in other land, on which he resides, has a homestead right in the latter against debts existing at the time of its purchase. Such a purchase of land is but the continuance of the original homestead right, and is not the obtention of a new homestead.

But it is insisted for the appellants that the husband is the head of the family, and that he alone can claim a homestead, and that such a right cannot exist in behalf of both husband and wife at the same time; in other words, that, as the husband of appellee is still living and undivorced from her, the right to a homestead exists in the husband alone, if it exists at all in this case, and cannot, therefore, be asserted by the wife, although the lot sought to be subjected to the appellants' debt was paid for with the wife's money exclusively. Section 1702, Ky. St. 1899, provides that there shall be exempt from all debts or liabilities "so much land, including the dwelling house and appurtenances owned by debtors, who are actual bona fide housekeepers with a family resident in this commonwealth, as shall not exceed in value \$1,000.00." The homestead exemption here allowed is not for the head of the family, but it is for the benefit of debtors who own land, and who are actual, bona fide housekeepers, with a family, resident in this commonwealth. Undoubtedly the wife may own land, and also be a debtor, and why may she not also be an actual, bona fide housekeeper, with a family? Unquestionably, such would be her status if the husband should fail to provide a home for the family. In *Johnson v. Kessler*, 87 Ky. 458, 9 S. W.

394, it was held that, where the husband and wife jointly own property in which homestead exists, the husband, as against his debts, is entitled to have the entire homestead allotted out of his interest. And this rule applies although the house occupied is on the land of the wife. In *Herring v. Johnston*, 72 S. W. 793, a common-law judgment was rendered against husband and wife on a note executed by them since 1894, and an execution issued thereon, which was levied on a tract of land belonging to the wife. She insisted that, even if the land were subject to the execution, she was entitled to a homestead in it, and that none had been set apart to her. In passing upon the claim of the wife to the homestead in that case, this court said: "Appellant at the time of the levy of the execution upon her land, and of its sale thereunder, was a married woman, with a family. The family was composed of appellant, her husband, and a number of infant children. Appellant was the debtor in this case. * * * The statute [section 1702, Ky. St. 1899] exempts from ordinary debts a homestead. Unlike the statutes of many of the states, this exemption is not to 'the head of the family,' nor to 'the householder,' but it is 'so much land, including the dwelling house and appurtenances owned by the debtors, who are actually bona fide housekeepers, with a family, resident in this commonwealth, as shall not exceed in value \$1,000.00.' It is true, where the husband is living, he is still bound, notwithstanding the removal of the most of the former legal disabilities of married women, to provide a home and support for his family, his wife included. But many of them do not do it. Married women have been given more and more rights over their property, and more power to contract and trade as if single. The design of the Legislature has been to enlarge their opportunities and privileges, to the end that their conditions might be improved. It could never have been their purpose to give married women the almost unrestricted right to contract debts, and not to afford them the same exemptions from debt that are given to men. If the woman assumes debts, having a family, she ought to be, and is, entitled to just the same exemptions as a man with a family. If her husband cannot or will not support her and her children, she must do it herself. When she becomes the debtor, the statute is for her protection, and for the protection of those dependent upon her. *Wapples, Homestead & Exemption*, 125. The Legislature has expressly recognized that the married woman may own a 'homestead' in her own right, by section 1708, Ky. St. 1899, providing that 'the homestead of the woman shall, in like manner, be for the use of her surviving husband, and her children.'" It is true that the court held that it was unnecessary to determine in the case *supra* (*Herring v. Johnston*) the question of whether or not the

wife and her husband were entitled each to a homestead in their lands; and the point was not, therefore, decided, because not presented, although the husband owned a small tract of land adjoining his wife's but without a dwelling house on it, and which had never been occupied by either of them as a homestead. In the case at bar, although it appears that the husband and wife were joint owners of the Lynnville tract of land, it is not averred in the petition, or in any subsequent pleading filed by the appellant, that the wife's (appellee's) right to the homestead in the lot in controversy is in any way affected by the fact that the husband owned an undivided half of the Lynnville farm at the time of its sale, though the question is attempted to be raised in the brief of counsel for appellants, so that question is not before us for decision, nor is its decision necessary, because it is manifest that not more than appellee's half of the proceeds of the Lynnville farm went into the Sedalia tract which was exchanged by her for the lot in controversy. It is further manifest that the husband is asserting no claim in this case to a homestead in his own behalf, and, as he unites with the wife in this action for the purpose of confirming her title to the homestead in controversy, he will by reason thereof be estopped from making any future claim to such a homestead for himself.

In our opinion, it is not material whether or not the husband of appellee contributes to any extent to the support of the family. In view of the fact that she owes the debt due the appellants, and that she is a bona fide housekeeper, with a family, resident in this commonwealth, and the owner of the lot in controversy, and was occupying it as a homestead at the time it was levied upon and sold under the appellants' execution, we know of no reason why she should not be entitled to it as a homestead. We are therefore of the opinion that the judgment of the chancellor allowing her the homestead is sustained by the evidence and authorized by law.

The judgment is therefore affirmed.

COMMONWEALTH v. TRENT et al.

(Court of Appeals of Kentucky. Dec. 9, 1903.)

PETROLEUM—PREVENTION OF WASTE—LEGISLATIVE CONTROL—PLUGGING WELLS—STATUTES—CONSTRUCTION—PENAL ACTS—LEGISLATIVE INTENT.

1. Acts 1891-93, pp. 60, 61 (Ky. St. 1899, §§ 3910-3914) provide (1) for the confinement of gas in wells until its utilization; (2) for the plugging of abandoned wells; (3) that landowners adjacent to wells, the owners of which fail to comply with section 1, may enter on their lands and plug the wells; (4) that owners of land adjacent to abandoned wells may enter and plug them; (5) declare an emergency, on account of the number of abandoned wells in the state. *Held*, that since sections 2 and 5 provide expressly and sufficiently for abandoned wells, and sections 1 and 4 are not so lim-

ited, those latter sections provide for wells not abandoned, although the emergency was declared to exist only as to abandoned wells.

2. Acts 1891-93, pp. 60, 61 (Ky. St. 1899, §§ 3910-3914), enacted for the purpose of preventing the waste of gas, provide, in section 1, that owners, etc., of gas wells, shall confine the gas until such time as it shall be utilized, and in section 4 that owners of lands adjacent to unplugged wells may enter and plug the wells if their owners neglect to do so. Abandoned wells are provided for in sections 2 and 5, and section 4 makes no provision for a well that is shut in, the gas escaping from another point than the well itself. *Held*, that section 1, being broader than section 4, imposes a duty on the owners to confine the gas, irrespective of the point of its escape, and such owners are liable for permitting gas to escape through pipes at a point other than the well, independently of the liability imposed by section 4 for permitting the gas to escape at the well.

3. Under Ky. St. 1899, §§ 459, 460, providing that statutes shall be construed to effectuate legislative intent, and providing for a liberal construction, in the light of the common and approved usage of language, except in the case of technical words and phrases, penal enactments must be construed as other statutes, with a view to carrying out the intention of the Legislature; all untechnical words and phrases being construed according to the common and approved use of language.

4. In construing a statute, the court will look to the whole act, and the purpose of the makers in its enactment.

5. Under Acts 1891-93, pp. 60, 61 (Ky. St. 1899, §§ 3910-3914), enacted for the prevention of the waste of gas, and enjoining the plugging of wells not in use, it cannot be contended that the owners of wells may do as they please with gas after reduced to possession by them, for the gas coming from the gas meter is replaced by other gas coming from the well.

6. Acts 1891-93, pp. 60, 61 (Ky. St. §§ 3910-3914), enacted for the prevention of the waste of gas, and enjoining the plugging of wells not in use, was within the legislative power to enact, as a protection of the natural resources of the state, to the rights of the public in which the rights of individual owners are subject.

Appeal from Circuit Court, Meade County.
"To be officially reported."

Penal action by the commonwealth against J. H. Trent, Jr., and others. From a judgment of dismissal, plaintiff appeals. Reversed.

J. D. Hardin, Clifton J. Pratt, and J. W. Lewis, for the Commonwealth. Humphrey, Burnett & Humphrey, F. M. Sackett, and Alexander G. Barrett, for appellees.

HOBSON, J. This is a penal action instituted by the commonwealth against appellees. The court sustained a demurrer to the petition, and dismissed the action. The only question on the appeal is whether the facts stated constitute a cause of action. It is averred in the petition that the defendants conspired and confederated together for the unlawful purpose of obtaining and wasting natural gas from lands embraced in the gas belt of Meade county, Ky.; that, to effectuate and carry out this purpose, they bored six wells in this gas belt, four of them proving to be fine, producing gas wells, and yielding about 800,000 feet of gas per day; that

these wells were in the possession and under the absolute control of the defendants, either as owners, agents, or managers, and that the defendants, under the pretense of manufacturing lampblack, but really with the unlawful purpose to waste the gas and destroy the gas territory in Meade county, Ky., willfully and maliciously burned and wasted all of the gas from the four wells after it had been piped into a general tank or gasometer from the — day of December, 1901, to the 14th day of June, 1902, in violation of the rights of the owners of the gas land, and contrary to the provisions of the statute. It is also alleged that the wells were not utilized by the defendants within three months after they were bored, nor shut in so as to prevent the product from wasting by escape, but that the defendants suffered and permitted the gas to escape and waste as above set out. It is insisted for the appellees that the facts stated make out no cause of action under the statute, for the reason that it is not charged that the gas was allowed to waste by escape at the well, and that the Legislature did not mean to make criminal the use by the citizen of his own property, even though that use brought him no pecuniary profit or was unwise. On the other hand, it is insisted for the state that, if the defendants willfully and maliciously wasted the gas, the form in which they did so is immaterial, under the statute. The question turns upon the proper construction of the act, which is as follows:

"An act to prevent the wasting of petroleum, natural gas, salt water, and to provide for the plugging of all abandoned wells.

"Be it enacted by the General Assembly of the commonwealth of Kentucky:

"Section 1. That from and after the passage of this act, any person or corporation, and each and every of them, in possession, whether as owner, lessee, agent or manager, of any well in which petroleum, natural gas or salt water has been found, shall, unless said product is sooner utilized, within a reasonable time, not, however, exceeding three (3) months from the completion of said well, in order to prevent said product wasting by escape, shut in and confine the same in said well until such time as it shall be utilized: provided, however, that this section shall not apply to gas escaping from any well while it is being operated as an oil well, or while it is used for any fresh or mineral water.

"Sec. 2. That whenever any well shall have been put down for the purpose of drilling or exploring for oil, gas or salt water, upon abandoning or ceasing to operate the same, the person or corporation in possession as aforesaid shall, for the purpose of excluding all fresh water from the gas-bearing rock and before drawing the casing, fill up the well with sand or rock sediment to the depth of at least twenty (20) feet above the rock which holds the oil, gas or salt water, and drive a round seasoned wooden plug, at least

three (3) feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five (5) feet below the bottom of the casing; and immediately after drawing the casing, shall drive a round seasoned wooden plug, at a point just below where the lower end of the casing rests, which plug shall be at least three (3) feet in length, tapering in form, and of the same diameter, at the distance of eighteen (18) inches from the smaller end, as the diameter of the hole below the point at which it is to be driven. After the plug has been properly driven, there shall be filled on top of the same sand or rock sediment to the depth of at least five (5) feet.

"Sec. 3. Any person or corporation who shall violate any of the provisions of the first or second sections of this act shall be liable to a penalty of one hundred dollars (\$100) for each and every violation thereof, and the further penalty of one hundred dollars (\$100) for each thirty (30) days during which said violation shall continue; and all such penalties shall be recovered, with costs of suit, in the name of the state, for the use of the county in which the well shall be located.

"Sec. 4. Whenever any person or corporation in possession of any well in which oil, gas or salt water has been found, shall fail to comply with the provisions of the first section of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the neighborhood of said well, may enter upon the lands upon which said well is situated, and take possession of said well from which oil, gas or salt water is allowed to escape, or waste, in violation of said first section, and tube and pack said well, and shut in said oil, gas or salt water, and may maintain a civil action in any court of this state against the owner, lessee, agent or manager of said well, and each and every of them, jointly and severally, to recover the cost thereof. This shall be in addition to the penalties provided by the third section of this act.

"Sec. 5. Whenever any person or corporation shall abandon any well, and shall fail to comply with the second section of this act, any person or corporation lawfully in possession of lands adjacent to or in the neighborhood of said well, may enter upon the land upon which said well is situated, and take possession of said well, and plug the same in the manner provided by the second section of this act, and may maintain a civil action in any court of this state against the owner or person abandoning said well, and every of them, jointly and severally, to recover the cost thereof. This shall be in addition to the penalties provided by the third section of this act: provided, this section shall not apply to persons owning the lands on which said well or wells are situated and drilled by other parties; and in case the person or corporation drilling said well or wells is insolvent, then, in that event, any per-

son or corporation in possession of lands adjacent to or in the neighborhood of said well or wells, may enter upon the land upon which said well or wells are situated and take possession of said well or wells, and plug the same, in the manner provided for in the second section of this act, at their own expense.

"Sec. 6. Inasmuch as large quantities of petroleum, natural gas and salt water are now flowing to waste in this state from wells which have been abandoned and never plugged up, and inasmuch as the said waste is likely to be greatly increased by developments now in progress, therefore an emergency exists; and on account of such emergency, this act shall take effect and be in force from and after its passage."

Acts 1891-93, pp. 60-62 (Ky. St. 1899, §§ 3910-3914).

It is argued with much force that as by section 4 the adjoining owner is allowed to take possession of and plug up any well from which gas is allowed to escape by waste, and as by section 6 the act is made to take effect from its passage, because of the gas then flowing to waste from wells which had been abandoned and never plugged up, the whole act applies only to abandoned wells, or those left open, and not to waste of gas elsewhere than at the well. Sections 2 and 5, by their terms, apply to abandoned wells, and the existence of these abandoned wells is the reason given in section 6 for making the act take effect from its passage; but sections 1 and 4 are not by their terms limited to abandoned wells, and, as abandoned wells are fully provided for in sections 2 and 5, it must be concluded that in sections 1 and 4 the Legislature was providing for wells that were not abandoned. The fact that certain cases were deemed by the Legislature a sufficient reason for making the act take effect from its passage does not show that only these cases were intended to be remedied. Nor does the fact that a remedy is given in a certain class of cases to the owners of the adjacent land indicate that appellees might not be liable in another class of cases for the penalty of wasting the gas under section 1. Section 4 applies only to a well "from which oil, gas or salt water is allowed to escape or waste," and, from its phraseology, applies only to waste at the well or to wells left open. It does not apply to abandoned wells, for these are provided for by section 5; nor does it apply to any well that is shut in, for the adjoining owner is authorized by the section to "tube and pack said well, and shut in said oil, gas or salt water." The section does not contemplate that the adjoining owner may commit a breach of the peace, or take possession of a well which is shut in, and from which the gas is piped to another point. But section 1 requires that every person in possession as owner, lessee, agent, or manager of any well in which petroleum, natural gas, or salt water

has been found "shall, unless said product is sooner utilized, within a reasonable time, not, however, exceeding three months from the completion of said well, in order to prevent said product wasting by escape, shut in and confine the same in said well until such time as it shall be utilized." This section looks to the utilizing of the product of the wells. It requires the product to be shut in and confined in the well until such time as it shall be utilized, in order to prevent its wasting by escape. The person in possession of a well, who fails to shut in and confine the product in the well until such time as it shall be utilized, violates the letter of the statute, regardless of how the product may be destroyed after its escape from the well, for, if the product is confined in the well until such time as it shall be utilized, as required by the statute, it cannot be wasted in any way, and to allow it to waste by escape in any way is not to shut it in or confine it in the well until such time as it may be utilized. Section 4 applies only to wells from which the gas is allowed to escape, but section 1 is not limited to waste at the well, and is violated if the gas is not confined in the well until such time as it may be utilized. Section 1 is much broader than section 4, which covers only a part of the ground covered by section 1. If the gas is confined in the well until such time as it may be utilized, it cannot escape from the well; but it may not escape from the well, and yet waste by escape elsewhere, if not confined in the well until it is utilized. The words "wasting by escape" are very broad, and apply equally whether the escape is at the well, or at the end of a pipe leading off from the well. The statute must be given a reasonable construction, with a view to the mischief intended to be reached. The purpose of the act is to prevent the waste of the natural products referred to, and, if the defendants maliciously and willfully wasted and intended to waste the gas from their wells, it is immaterial whether they suffered the gas to escape at the well, or piped it off to another place, and there allowed it to escape. It is well known that the supply of gas is limited, and may be exhausted. The act is intended to protect the supply from waste. Under the act, it is conceded, a person, to exhaust the supply of his neighbor, cannot put down wells on his own land, and allow the gas to escape at the well. To allow him to pipe it off a short distance from the well, and let it escape, would be to sustain an evasion of the statute. And if he went through the form of burning it, but simply for the purpose of wasting the gas, and as a pretense to evade the statute, this, too, would not affect his liability.

The defendants had the right to use the gas in any sort of lawful business done or attempted to be done in good faith, but, if the use of the gas was a mere pretext for wasting it, they are none the less responsi-

ble than they would have been if they had allowed it to escape at the well. By sections 459-460, Ky. St. 1899, it is provided: "There shall be no distinction in the construction of statutes between criminal or civil or penal enactments. All statutes shall be construed with a view to carry out the intention of the Legislature." Section 459. "The rule of the common law that statutes in derogation thereof, are to be strictly construed, is not to apply to this revision; on the contrary, its provisions are to be liberally construed with a view to promote its objects. All words and phrases shall be construed and understood according to the common and approved usage of language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such meaning." Section 460. These are the provisions of "An act concerning construction of statutes," approved December 3, 1892, enacted by the same Legislature as the act in question. See Acts 1891-93, p. 372. This act materially changes the common-law rule as to the interpretation of statutes. It was within the competency of the Legislature to enact the statute, and it is incumbent on the judiciary to enforce it. Under it, penal enactments must be construed, as other statutes, with a view to carry out the intention of the Legislature, and all untechnical words and phrases must be construed according to the common and approved usage of language. This has been often announced by the court, and there is nothing in the cases relied upon for appellees (*McMasters v. Burnett*, 92 Ky. 358, 17 S. W. 1021; *L. & N. R. Co. v. Com.* [Ky.] 66 S. W. 505) that was intended to conflict with the provisions of the statute which is the law of the state. *Commonwealth v. Gale*, 10 Bush, 488; *Bailey v. Commonwealth*, 11 Bush, 688; *Commonwealth v. Davis*, 12 Bush, 242; *Williams v. Commonwealth*, 78 Ky. 93. The common-law rule as to the strict construction of penal statutes has in modern times been much relaxed. In *Endlich on Interpretation of Statutes*, § 329, it is said: "A court is not at liberty to put limitations on general words which are not called for by the sense or the objects of the mischiefs of the enactment; nor to so narrow the construction as to exclude cases which the words of the statute, in their ordinary acceptation and plain meaning, or in the sense in which the Legislature obviously used them, would comprehend; and no construction is admissible which would sanction an evasion of an act, or would defeat the obvious intention of the Legislature. In order to avoid such a result, as has been seen, it is even allowable to reject what is clearly surplusage in an act. It is true that a penal law must be construed strictly and according to its letter. But this strictness, which has run into an aphorism, means no more than that it is to be interpreted ac-

cording to its language." It is true that the Legislature, not the court, must define crime, and ordain its punishment. The intention of the Legislature is to be collected from the words employed, but, in construing a statute, as in the case of other instruments, the court will look to the whole act, and the purpose of its makers in its enactment. The court cannot depart from the plain meaning of the words in a penal act, and adjudge that punishable under the statute which its language does not fairly cover. *U. S. v. Wiltberger*, 5 Wheat. 95, 5 L. Ed. 37. But in determining what may be punished under the words of a statute, the court must apply the rule that every statute shall be construed liberally, with a view to carry out the intention of the Legislature and promote its objects, taking all ordinary words and phrases according to the common and approved use of language.

In the case before us it was incumbent on the appellees, under the express language of the statute, to confine in their wells the product until such time as it should be utilized, and, if they violated this provision of the act, they became liable to its penalties. They did not confine the products in the wells if they piped it off and allowed it to waste by escape. The case therefore falls within the words of the statute, as well as its spirit and purpose. It must be presumed that appellees knew the law, and, when they knew that they could not leave their wells open, and thus exhaust the supply, they cannot be allowed, as alleged, willfully to accomplish the same result by piping it away from the well, not for the purpose of utilizing it, but as a pretext to avoid the statute, and thus willfully to destroy the gas, notwithstanding its provisions. To hold such a state of facts not within the statute would be to allow a mere evasion to defeat it, and to so limit its application as practically to destroy it.

The position that the defendants may do what they please with the gas after it is reduced to possession by them cannot be maintained. For, as the gas goes out of the gasometer, its place is taken by other gas coming from the well. Property is the creation of law. The use of property may be regulated by law. The Legislature may protect from waste the natural resources of the state, which are the common heritage of all. The right of the owner of property to do with it as he pleases is subject to the limitation that he must have due regard for the rights of others. To allow the storehouse of nature to be exhausted by the waste of the gas would be to deprive the state and its citizens of the many advantages incident to its use. That the Legislature may prevent this is well settled. *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729; *State v. Ohio Oil Co. (Ind.)* 49 N. E. 809, 47 L. R. A. 627; *Donahue on Petroleum & Gas*, § 23.

Judgment reversed and cause remanded for further proceedings consistent herewith.

OWSLEY v. OWSLEY.

(Court of Appeals of Kentucky. Dec. 10, 1903.)

TRUSTS — EVIDENCE — TRUSTEES — LIABILITY FOR INTEREST — CHARGES AGAINST ESTATE — MAINTENANCE — PARENT AND CHILD — ADVANCEMENTS — GIFTS — LIABILITIES — MARRIED WOMAN — DEBTS OF HUSBAND — FAMILY SUPPORT — APPEAL — FINDINGS — REVIEW.

1. Evidence examined, and held to show that appellant, the father-in-law of appellee, received her property under an agreement to hold and employ it for appellee's sole use.

2. A trustee who had possession of securities of his cestui que trust, bearing a high rate of interest, which he admitted belonged to her, and who made no statement showing when he sold her bonds, how he invested her money, or what income he derived therefrom, was properly charged with legal simple interest from the time the principal was received.

3. A trustee, who was the father-in-law of, and who lived with, his cestui que trust and her husband, could not charge against her sums used in maintaining the family, where it was not shown that she was ever informed of or consented to such a use of her means, where such charges were not made or intended to be made at the time the sums were used, and long after the funds would have been exhausted by such use the trustee recognized his possession of the funds in trust for her, and she contributed her labor and oversight to the home.

4. Sums advanced by a parent to his son cannot be considered as technical "advancements" so long as the parent is alive.

5. Under Ky. St. 1899, § 1407, providing that any property given or devised by a parent or grandparent shall be charged to the descendant in the division of such parent's or grandparent's undivided estate, but that money given without any view to a portion or settlement in life shall not be deemed an advancement, to constitute an advancement, it is necessary that the donor die totally or partially intestate, and that the gift shall have been with a view to a portion or settlement in the donee.

6. Property given by a parent or grandparent with a view to a portion or settlement will, if the donor die intestate, constitute an advancement, whether intended for one or not.

7. A father who made gifts of large sums of money to his children, which he did not charge against them or intend to collect, and which were in the nature of portions in life, could not by subsequent change of purpose alter such portions into debts or payments on his liabilities.

8. So long as an express trust exists, and is recognized by the trustee, it never becomes stale.

9. It cannot be presumed that payments by a trustee of a wife's estate to her husband, and applied to the support of the family, were made by the wife's direction, in the face of her positive testimony, and the trustee's admission, to the contrary.

10. Debts of a husband to a trustee of his wife's estate cannot be set off by the trustee against the wife's estate in his hands.

11. The appellate court will not interfere with the chancellor's findings of fact, upon which credits allowed to a trustee are based.

Appeal from Circuit Court, Cumberland County.

"Not to be officially reported."

Action between W. F. Owsley, Sr., and Sarah A. Owsley. From a judgment for the latter, the former appeals, and the latter prosecutes a cross-appeal. Affirmed on both appeals.

J. H. C. Sandidge, Allen Sandidge, W. P. Sandidge, and Carroll & Carroll, for appellant. Allen & Ewing, Hazeltig & Chenault, and J. E. McMurtry, for appellee.

O'REAR, J. The controversy in this case is as to whether appellant became the trustee of an express trust in behalf of appellee. He denied the trust. The circuit court found and adjudged that appellant took the property in question under an agreement with appellee, and by the consent of her husband, to hold and employ it for her sole and separate use. This appeal seeks to reverse that judgment.

There was no writing between the parties concerning the alleged agreement. The subject-matter was personal estate only. Counsel for appellant truly urges the great danger in allowing the establishment of an express continuing trust, against which the statutes of limitation do not avail, by oral evidence. After the lapse of many years, by reason of the death of contemporaries to the transaction, and of forgetfulness of other witnesses, and of the temptations to perjury, as well as that it is very hard to prove a negative at any time, particularly long after the date of the alleged arrangement, it is argued that the result must be uncertain and unsatisfactory to the judicial mind. Admitting the dangers and the trouble, we do not understand that it has ever been denied that a valid trust as to personal estate may not be created by parol agreement. Lewin on Trusts, 53, 54, 60. The dangers alluded to are probably as threatening to the cestui que trust as to the trustee. The history of this case proves that. Still, the courts may well bear in mind the very difficulties suggested, and, as the time of the creation of the alleged trust becomes more remote, they may maintain the balance by requiring that the evidence upon which the erection of the trust depends be so certain as to fully persuade the cautious mind of its existence. *Parker v. Parker* (Ky.) 11 S. W. 91. It is upon this basis that we have proceeded in the examination of the facts of this case.

Appellant is now about 90 years of age. He early in life had accumulated a considerable fortune. He was a forceful man in business and otherwise. He had three living children—two daughters and one son. His son bears his full name, and has since his earliest childhood been his constant companion. Though about 50 years of age now, until after this suit was begun they had never lived apart. Their affection for each other was manifested in innumerable ways. Yet the younger Owsley was just the opposite of his father in the quality of self-assertiveness and independence. Though not lacking in mental ability, apparently, he yielded unquestioningly to his father's will and direction in everything. About a year before the marriage of the son to appellee, his father gave him \$10,000 in secured notes. He

turned them back to his father to keep and manage for him. He took no memorandum of the payors, dates, amounts, or of the father's agreement to hold them for him, or other evidence of the fact of his ownership than his father's good faith. Appellant had for many years been a banker and merchant. He was associated in the banking business with his neighbor and friend, F. W. Alexander, and was one of the executors of his will. In October, 1874, appellant's only son was married to appellee, the daughter of appellant's deceased partner, Alexander. Appellant was much pleased with the match, and at once took the young couple to live at his home upon his farm on the Cumberland river, near Burksville. Appellee's guardian then held her estate. Shortly after her marriage, appellee says, she proposed to her husband that he take charge of her estate, but that he declined, saying that he could not manage his own. She says that it was then suggested that it be put in the hands of his father. She testified that they went to appellant, and she repeated to him what had transpired between her and her husband on the subject; that, after canvassing the matter, appellant agreed to take and manage her estate for her sole use. Appellant denies that the agreement as alleged was made. But he admits that there was turned over to him directly about \$11,258 of her property. This consisted about one half of railroad bonds and cash, and the other half the proceeds of lands situated in the state of Missouri, which were sold shortly thereafter. As appellee's husband is incompetent to testify in this case, either for or against her, the two principals to the transaction were the only witnesses to the original agreement. Appellant's contention is that he received the money and bonds as appellee's general estate, and on behalf of her husband; that the husband had the right then or thereafter to reduce it to his possession, and thereby make it his own; and that he did in fact so reduce it, by having appellant pay it out for him and on his account. That appellant did receive appellee's property—all of it—is beyond question. It is not reasonable, and therefore not probable, that he took it without her request, or in the absence of some sort of agreement or understanding about what was to be done with it. In view of W. F. Owsley, Jr., having given back to his father, to keep and manage for him, his estate of \$10,000, above alluded to, and of his refusal to receive his wife's, it is probable, when he took charge of appellee's money and bonds, that appellant also undertook to keep and invest them for her. Appellant, as stated, had the young couple living at his home. The manner of his treatment of his son, though then 22 years of age, and while evincing great fondness for him, rather indicated a lack of faith in the son's business capacity and ability to manage his own without oversight and assistance. It is not likely,

then, that a man of just instincts, under the circumstances, would have done otherwise than to secure a favorite daughter-in-law her patrimony, where it would be safe from the business errors of an inexperienced, if not an incompetent, husband. At least, such a course was perfectly natural and wise. The circuit court would scarcely have been justified in adopting appellee's version of this transaction, instead of appellant's, if rested alone upon the testimony of the two witnesses, although the failing memory of appellant, consequent upon his extreme age, and his violent dislike brought about by a business disagreement with his son just before this suit, were circumstances tending to weaken the effect of his statements.

But that was by no means all of the evidence. We will notice some of the corroborative evidence:

Before all of appellee's estate had been reduced to possession by appellant, and at the termination of an arbitration between appellee and her former guardian involving some part of it, which was managed, even to the employment of the lawyers, by appellant, he said to one of the attorneys, in speaking of the property: "William is not worth killing, and will not be as long as I live. He has no confidence in himself, and depends on me for everything. Don't you think, he has refused to take charge of or control of any of Sallie's money! And at her solicitation, I have agreed to take her money and invest it for her; and I intend to invest it so it will not get mixed with my estate, and so William can't get it. I despise to handle anybody's money, but, as he is so contrary, I will fix it so he can't get hold of it." One of the arbitrators in the litigation just mentioned testified: "I have heard Judge Owsley [appellant] say that he had received, and intended to receive, all the money that was coming to Mrs. Owsley from the Alexander estate; that he was going to manage it for her, and not let William have anything to do with it; that he [William] did not know how to handle money; that William invested his money in [live] stock; and that he would invest Mrs. Owsley's money in something that would produce a greater income for her." To another witness (Mrs. Skinner) appellant told substantially the same. To Dr. Plumlee he said, in speaking of appellee on one occasion: "She is the best woman living. She intrusted every dollar her father left her to my care, and I have it safely invested for her. I don't intend this fellow [indicating W. F. Owsley, Jr.] shall ever touch a cent of it." To L. T. Neat and W. G. Simpson he made substantially the same statement, but at different times. The record shows no reason for discrediting these disinterested witnesses. The effect of this testimony corroborates appellee that appellant took her money to keep it for her sole use, free from the control and claim of her husband. Her husband was shown to have been present at

some of these conversations, acquiescing in what was said, as well as in what had been done; thereby assenting to the arrangement, even if he had not done so before.

Appellant kept a system of books, in the nature of a financial diary, rather than books of account. He called them "headbooks," and entered in them from day to day every transaction—even the most trivial—where money was involved. In these books are numerous entries concerning appellee's property received by him. He generally entered the item as appellee's. A few illustrations will suffice, as follows:

Jan'y 17, 1887. Louisville City National Bank, Dr. 1 coupon of Sallie's, Short Line R. R.....	\$ 35 00
July 16, 1888, Louisville City National Bank Dr. 1 coupon belonging to Sallie.....	35 00
Cut 3 coupons off of R. R. bond, Sallie's, payable April 1, 1890.....	105 00
April 5th, 1892. Bank of Cumberland, Dr. To Sallie, 3 J. M. & I. coupons.....	\$70 00
Do. Do. 1 L. & N. Do.....	35 00
Nov. 23, 1894.	
Also started with Sallie's bond on Louisville, Frankfort & Lexington Railroad, Cincinnati Branch, bond No. 371, for \$1,000 due and payable to James Guthrie, Jan'y 1, '97, in. on said sum at rate of 7 & 1/2 per cent. per annum payable semiannually on first days of Jan'y and July in each year on presentation to them in City of New York. Coupons all cut off, said bond deposited in Louisville City National Bank \$1000 int....	
	35 00

It is also true that in these books appellant sometimes made the entries to show that the fund was "William's and Sallie's," and occasionally "William's." In nearly every instance—there are but few exceptions—the entries show that appellant was not only intending to keep these funds separate from his own, but generally they were earmarked so as to indicate appellee's title to them. It may be doubted if the entries in appellant's favor are evidence for any purpose, while undoubtedly those in the nature of admissions against his interests are. *Brannin v. Foree's Adm'rs*, 12 B. Mon. 508; *Poor v. Robinson*, 13 Bush, 292.

Appellant made out yearly the taxing lists of his own and his son's property. They show that for some years he listed appellee's funds on her husband's list. She knew nothing of that, nor did her husband. We do not regard the circumstance as material, as affecting the nature of appellant's holding.

We have no doubt, from the record, that appellant received appellee's property under an agreement to hold and employ it for her sole use, and that he has done so. As late as the entry copied above, dated November 23, 1896, appellant recognized appellee's title, and had the possession of an interest-bearing security at a high rate, which he admitted was hers. He made no statement showing when he sold her bonds, nor how he had invested her money (though it appears some of it was loaned), nor what income he derived from it. Consequently it was not improper for the chancellor to charge him with at least legal simple interest from the time the principal was received. Appellant claims that he has paid out for appellee, and

at her instance, and for her use, the whole of the fund, principal and interest.

Some items were shown, and were allowed by the chancellor, which were paid out at appellee's direction. Appellant was also allowed credit for the taxes paid by him, assessable against her property, and by certain other sums which had been paid out on merchandise accounts for the family, which the trial court found had been paid by appellee's coupons with her knowledge and assent.

Appellant and his son lived in the same house, in the same family. During the time from 1874 till 1899 the farm of 235 acres was conducted. A partnership in dealing in and breeding fine horses was carried on by appellant and his son. These matters entailed heavy expenses and outlays of money. In an itemized account filed, appellant showed that he had paid out a considerable sum of money, probably as much as \$90,000 in gross, during the 25 years, consisting mainly of expenses for maintaining the family, including servants' hire, clothing, provisions, fuel, etc.; also wages paid for farm laborers and workmen about the stables, and repairs upon the buildings, fencing, etc. He now says that all this was paid out for or to appellee's husband, and that, at least to the extent that it was used in maintaining the family, it was paid out for appellee. We think not. It was not shown that she was ever told that her means were being used in that way, or that she ever consented that they should be so used. The duty to support the family was not hers. It was her husband's. The expenses were enormously augmented by the nature of the stock business being conducted by appellant and his son. Appellee contributed her labor, care, and oversight as housekeeper—no inconsiderable item—to this. It is not contended that appellant at the time ever charged her with any of these expenses advanced by him for his son, nor that he intended then that she should pay them. In truth, his own book entries show that, at a time long after both her and her husband's funds in appellant's hands would have been exhausted by his advancements of the nature named, appellant had in his possession her securities, which he was then recognizing as hers. He also told numerous persons that he yet had her funds safely invested and accumulating for her. That appellant paid out the great sum, in the aggregate charged, is admitted. But it is claimed that this was done as an advancement by appellant to his son. For the purposes of this case, it is necessary—at least, proper—that we should notice this feature of the case. Strictly speaking, whatever may have been the nature of the payments made by appellant, and whatever may have been his purpose at the time, they cannot be "advancements" so long as appellant is alive. An advancement is that bestowment of property by one standing in loco parentis to another, in anticipation of the latter's share in the donor's estate. It

may in one sense be a gift. But its treatment in law as an advancement depends upon two facts—one, that the donor shall die intestate, totally or partially; the other, that the gift shall have been in fact with a view to a portion or settlement in life upon the donee. Section 1407, Ky. St. 1899; *Bowles v. Winchester*, 13 Bush, 1. Though the donor may have intended it as a gift, not to be charged in the settlement of his estate, it will nevertheless be treated as an advancement, if he die intestate, if it is in fact of the nature fixed by the statute. The donor's purposes in the matter can be made effectual only by his leaving a will disposing of all his estate, and therein treating of the gift. Still that transfer by the parent which may or may not be an advancement need not create a debt, either. An examination of the innumerable transactions between appellant and his son, and between appellant and his other children, considering the amounts given and paid out for them by appellant, evince not only a purpose to give to them the various sums and items of property, generally speaking, but they are, in the aggregate, so large—amounting to from \$30,000 to \$50,000, approximately, to each child—that appellant evidently contemplated them as, and they in fact partook of, the nature of, settlements or portions in life to his children. He says it was never intended by him to collect them from his children. He did not charge them as matters of account. They were in fact, apparently, treated by him and the children as gifts. He cannot, therefore, by any subsequent change of purpose, alter them into either debts or payments on his liabilities. A child may be willing to accept property as a gift which he would not take under an obligation to pay for it. Under the evidence, we cannot find that appellant paid out any of appellee's money, other than that credited to him in the judgment, for her or her husband's support. It may be that appellant has been too generous with his son. But if that be so, he ought not to charge his lavishness to his daughter-in-law. We have not concerned ourselves with looking to an equalization of appellant's children in the division of his estate. We have noticed the fact of his gifts in the way of settlements in life to his other children, in connection with the relation and situation of the parties to this suit, only as an aid in determining whether appellant, at the time he made the payments for his son, intended them, too, as similar gifts—to see what appellant has already done, not what he should have done.

It is said for appellant that appellee's claim is stale, and therefore is not favored in equity. So long as an express trust exists, and is recognized by the trustee, it never becomes stale. Up to within four years of the beginning of this suit, appellant, by his deliberate entries in his memorandum books, and by his treatment of the property, as well as by repeated declarations, recognized

the title and claim of the cestui que trust. He never denied it, so far as this record shows, till within a few months before this suit was filed. Authorities are cited to the effect that when a husband and wife are living amicably together, and the trustee pays the income of the wife's separate trust estate to the husband, and it is applied by him in the support of his family, his wife included, it will be presumed that the payment was by the wife's direction. In this case, however, there is no room for indulging a presumption on that subject. For the wife positively testified that she did not request the payments to be made to or for her husband (further than as credited in the judgment), and, furthermore, that she never knew of it or suspected it. Appellant admits that appellee did not give such direction. A presumption of a fact can be indulged only in the absence of proof as to the existence of the fact. We have just found, too, that the payments made by appellant were not made as payments of a debt or obligation, but were in the nature of gifts by appellant to his son. Even if they were debts from the son to appellant, they could not be set off against the wife's separate estate in the appellant's hands.

While the credits given appellant by the judgment of the circuit court are liberal, we will not undertake to interfere with the chancellor's finding of the facts upon which they were based.

From what has been said, it follows that the judgment on the original appeal must be affirmed, with damages, and that the judgment on the cross-appeal will also be affirmed.

SETTLE, J., not sitting.

OWSLEY v. OWSLEY.

(Court of Appeals of Kentucky. Dec. 10, 1903.)

ADVERSE POSSESSION—REQUISITES—JOINT OCCUPANCY—EFFECT—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MATERIALITY—DILIGENCE—EJECTMENT—EVIDENCE—DECLARATIONS AGAINST INTEREST.

1. Admissions by plaintiff that he had given defendant his farm, and that defendant was in possession thereof, and his testimony in a lawsuit to the same effect, do not conclude plaintiff, or preclude a jury in ejectment from finding for him, if he had not in fact surrendered possession and control.

2. A private memorandum or account book, in the handwriting of a party to a litigation, containing admissions damaging to his cause, the existence of which is concealed, is material evidence, which the ordinary diligence of his adversary could not have produced at the trial, when he not only did not know of the existence of such account, but was misled by the testimony of his opponent into supposing that no such book was in existence.

3. Where newly discovered evidence is unerring and convincing, satisfying the mind of the judge that it will probably have a preponderating influence upon another trial, a new trial should be granted.

4. In ejectment by a father against his son, where the son claimed by adverse possession under a parol gift, newly discovered evidence, after judgment against the son, developing from testimony of the father in an action between him and the son's wife, to the effect that for some 25 years the father had kept an account, in which all the expenses of maintaining and operating the farm had been charged to the son, in the way of advancements to him, authorized a new trial.

5. Possession by the donee of land under a parol gift will ripen into a fee-simple title.

6. Possession, to toll the right of entry by the legal title holder, must be an actual physical entry or control of the premises, continuous, open, so as to afford notice of its hostile character, adverse, in defiance of the title holder, and such as to exclude his authority, and accompanied by a claim of title.

7. The fact that a father, who has made a parol gift of land to his son, remained on the premises with his son, was not such a breach of the son's possession as to stop the running of limitations in his behalf, where the father did not accompany his presence by any claim or act of ownership, but disclaimed ownership, admitting it to be in his son.

Burnam, C. J., dissenting.

Appeal from Circuit Court, Cumberland County.

"To be officially reported."

Action by W. F. Owaley, Sr., against W. F. Owaley, Jr. From an order setting aside a judgment for plaintiff he appeals. Affirmed.

J. H. C. Sandidge, Allen Sandidge, W. P. Sandidge, and Carroll & Carroll, for appellant. Allen & Ewing, Hazelrigg & Chenault, and J. E. McMurtry, for appellee.

O'REAR, J. W. F. Owaley, Sr., a retired banker and merchant, and a man of wealth, owned and lived upon a farm of 235 acres on Cumberland river, near Burksville, Ky. The farm was well improved, and was then worth about \$10,000. His family in 1874 consisted of his wife, single daughter, son (appellee), and mother-in-law. His wife was frail, and died about 1881. His mother-in-law was an invalid. The single daughter married Dr. Grant, and removed to Louisville in 1886. Appellant had only three children. Another daughter had married a Mr. Baker before appellant moved to the farm in question, and was living with her husband. The only son had never lived away from his father. He had been reared indulgently, and had all his life been the close companion of his father. The day he was 21 years of age, his father gave him \$10,000 in secured notes, which were immediately redelivered by the son, with the request to his father to hold them, and collect and reinvest them, which was done. In October, 1874, the son married the daughter of an old friend and business associate of his father, and, at the latter's invitation, brought his wife to his home to live. The son claims that within a few weeks thereafter he and his father walked out on the farm one morning, when his fa-

ther inquired of him his purpose as to a vocation in life. He answered that he wanted to engage in farming; that he was not qualified for anything else; besides, that was in accord with his taste. He says that his father expressed gratification at his choice, and thereupon told him that he would, and did then and there, give him that farm, and all its stock, and for him to take charge of it; that he did then and there assume charge and took entire control of the farm; that, upon returning to the house, appellant repeated in the presence of his wife and daughter-in-law what had occurred; that, continuously from that time to the present, appellee has occupied, used, and controlled that farm, laboring upon it and improving it, under claim of title, as his own, exclusive of all others. The father continued to live in the house. His wife lived there, too, till her death. His mother-in-law lived there till her death. His youngest daughter lived there till her marriage to Dr. Grant.

The son (appellee) began to handle horses. The father (appellant) suggested to handle them on a larger scale and of a finer quality. So they embarked in that business about 1887 under the style of W. F. Owaley & Son. The father claims he had no interest in that partnership; that he merely loaned his name to give credit to his son. The son claims that the partnership did exist; that he and his father agreed that the father would put into the enterprise the use of three other farms which he owned, lying adjacent to the home place, and the son agreed to put in the use of his farm, the home place; that the father agreed to advance the necessary cash to conduct the business. It was continued about eight or ten years, and then abandoned. Whether it made or lost money is not clearly shown. An incident connected with the firm's bank account, in which the son took a position contrary to his father's views, and hostile to his interests, as he thought, produced strained relations between them about 1899. Up to that time all the expenses of running the farm, maintaining the family, even to clothing and schooling the son's children, were paid by appellant. Appellee claims that that occurred this way: That his father had the possession of all his money—the \$10,000 and its accumulations; that every dollar of produce and stock sold from the place was taken by him and delivered to his father, who made, or was supposed to make, proper entries of it on his books. The purchase price of horses and other live stock brought to the place was likewise paid by appellant, and when they were sold by appellee he handed the money to appellant. Appellee says his father was cashier, as it were, and was helping him in his business; telling him all the time that he was keeping an accurate account of all that he paid out for him, and that it would be charged against appellee in the final settlement and distribution of appellant's estate. The father's sa-

¶ See Adverse Possession, vol. 1, Cent. Dig. § 351.

gacity and success as a business man were well known, and appellee says he relied on these qualities as aid given him by his father; that the daughters had been abundantly provided for by similar gifts, aggregating from \$30,000 to \$50,000 each; and that he understood from his father that he was, by this conduct of his affairs, giving him an equivalent sum. Following the difference above alluded to, appellant refused to pay certain bills contracted for the family in the usual course, including the payment of the tuition and board of one of appellee's daughters at college, which appellant had been theretofore paying. Appellee's wife then said she would pay it, and for him (appellant) to charge it to her account out of her money that he had. Appellant denied that she had any money, and denied that either of them had any money or any other property. Appellee and his wife had evidently been under the impression that they had considerable property. So she brought a suit to compel an accounting by appellant of her estate which she says he had received for her from her former guardian directly after her marriage. The facts of that controversy and its result may be seen in an opinion this day delivered in the appeal of *W. F. Owsley, Sr., v. Sallie A. Owsley*, 77 S. W. 394. Thereupon appellant left the home, electing, so he says, to be dispossessed, and brought an action of ejectment against appellee to recover the possession of the home farm of 235 acres. The case came on to trial regularly before a jury, resulting in a verdict and judgment in favor of appellant. Upon that trial, appellee testified to the facts in his favor above stated. Appellant denied that he had ever given to his son the home farm, or that he had ever surrendered the possession of it to him. A great many witnesses were introduced, whose testimony tended to show that appellee had been in the possession, claiming the farm as his own, and that they had heard appellant during many years state that he had given the farm to his son, who was in possession and control of it. Appellee's defense relied upon an adverse possession for 15 years under the parol gift, thereby vesting him with the title to the land. So that the whole case turned upon the question of who was in fact in the possession of the place during the time from 1874 till the suit was filed in 1900. The fact that both appellant and appellee had during the whole time lived there complicated the question. The further fact that appellant paid all the expenses, including farm hands, servants at the house, for fuel, grocery bills, clothing bills, for repairs in the way of fencing, new buildings, etc., was, unless explained satisfactorily, crushing evidence to defeat the son's claim of possession. To offset that, appellee testified and proved that his father had the \$10,000 mentioned of his (the son's) money in possession, and that it had been used in paying these very expenses. But it

was shown that the money so paid out by appellant was largely in excess of the son's money which he held. This was explained by the son—that he also turned back to his father, as cashier, all money derived from sales of the produce of the farm and stock. Still, that fact, by itself, proved little or nothing, for it was not incompatible with appellant's claim of ownership and possession. Indeed, it proved about as much one way as the other. The son then claimed that some part of these expenses had been charged to his wife, whose money his father held. If appellant was using appellee's money and his wife's money in paying the family and farm expenses, it amounted to the fact that the family and farm were being managed and run by appellee, and not by appellant. But the amount expended exceeded in the aggregate both the son's and wife's personal estates which appellant had. Appellee also testified that his father at the time and at various times told him that he was giving him the sums so paid out for him; that they were in the nature of advancements, and would be, and were being, charged against his interest in appellant's estate; that in this way he was being equalized with his sisters. If this is true, it would amount to this: Appellant had given his son \$10,000 in money, and paid out for him about \$40,000 additional, net, which he at the time intended as, and which was in fact of the nature of, a settlement in life. It does not matter that the sums were paid out at different times and in small amounts. If the aggregate sum of \$40,000 had been turned over to the son, and he had used it as it was used, it would not be questioned that it was his money, and that, in so employing it, he had defrayed his own expenses, and would thereby have tended strongly to prove his possession of the farm upon which it was expended. Or if the \$40,000 had been turned over to the son in one lump, and he had intrusted it to his father precisely as he did the \$10,000, and then the father, at his son's instance, had paid the latter's bills and accounts for managing and running the farm, it would be the same thing, in fact and in law, as if the son had done the paying in person. So it will be appreciated that the question of appellant's intent, and of his statements to his son that he was giving him, as a portion in life, these various expenses, was not only of material, but might be of controlling, importance in fixing the question of who was actually in possession of the farm. Appellant testified in that action as a witness on his own behalf. He claimed that he had managed the farm during all those years, claiming it as his own, and that he had not paid any of the expenses mentioned either out of his son's or daughter-in-law's money, and had not told his son that these payments were gifts to him, and that he had not charged or intended them as such. Admissions against interest are not of the highest order of evidence, and,

when they do not amount to an estoppel, are by no means conclusive. So, although many witnesses, 15 or more in number, testified that appellant had told them at various times running through the period of 25 years in question, and although appellant in a certain lawsuit had testified under oath, that he had given appellee the farm, and that appellee was in the possession of it, yet, if in fact appellant had not surrendered the possession and control, the jury in the ejectment suit were authorized in finding for him.

After the term of the court at which the ejectment action was tried, appellant gave his deposition as a witness in his own behalf in the suit pending in the same court of *Sallie A. Owsley v. Wm. F. Owsley, Sr.* That case has been referred to above. To understand the question here presented, it is enough to state that in that action Mrs. Owsley claimed that she had delivered to appellant, to be held by him in trust for her, about \$11,000 in cash, derived from her father's estate, and that he refused to pay it over to her or to account for it. He denied the existence of the trust agreement, and averred that he had already paid it to her and to her husband at her instance. In testifying in that action in support of that defense, he stated that the money was paid out to the husband, and at his instance (but comparatively little of it was paid to her directly), in the matter of paying his accounts. These accounts were put in evidence. They were for merchandise for his family, grocery supplies, fuel, servants' hire, wages of farm laborers, purchase price of the horses and other live stock bought and brought to the farm; for fencing and other improvements put upon the farm. Indeed, it embraced every conceivable item of expense in managing and operating that farm, including all the household expenses, throughout the term in question. She denied that appellant paid these sums either for her or her husband, otherwise than as gifts by way of advancements to W. F. Owsley, Jr. Appellant, in testifying, said that they were accounts charged to her husband—every dollar of it. He was confronted on cross-examination by his statement on the trial of the ejectment suit that none of these matters had been charged to her husband or to her, and asked to explain it. He answered that the question involved in that suit was one of possession, and that he made the statement on the trial of the ejectment suit "for the purpose of possession," whatever that may mean. But the important fact was developed in the examination that appellant had kept certain books, which he called "headbooks," and cashbooks. On these he undertook to enter every financial transaction of his life, as it occurred daily, from about 1861 to that time. These headbooks were small pocket memorandum books. They were more in the nature of a diary of his money transactions. They were in no sense books of account, or

what is known as "shopbooks." From these books appellant drew off in or about the year 1894 an account against his son, Wm. F. Owsley, Jr., charging him thereon with all the items constituting the expense of running the farm and the household from 1874 down to the date the account was stated. He says that he was then engaged in drawing off the accounts of all his children, with the view to seeing what he had advanced or paid out for them. About that time he made a will. This statement and these books, with appellant's testimony in the *Sallie A. Owsley Case*, show indisputably the following facts: That appellant did keep a memorandum of every item paid to or for any of his children; that he had, before this suit, and before any controversy, drawn off an account against each of his children, setting down the item he deemed it proper to be charged to each, not with any intention or expectation of having them account for them, but to "see how much he had advanced to them," as he put it; that on Wm. F. Owsley, Jr.'s, account were included the items which the son claims were paid for him as gifts to become advancements. These books and accounts are all in the handwriting of appellant, and show what was probably his intention at the time of the payments made by him. The will made by him at or near the time these accounts were drawn off was not produced. Appellant says that since this controversy he had destroyed it and written another. When asked what the destroyed will contained, his counsel objected, and advised him not to answer. Though pressed, he refused to answer. It may be that that will would have shown conclusively the purpose of drawing off the accounts, as well as the purpose in carefully keeping a diary of money and property paid for or given to his children. Upon these developments in the *Sallie A. Owsley* suit, appellee filed his petition in the Cumberland circuit court for a new trial of the ejectment suit, alleging newly discovered evidence, to wit, the fact that his father had kept an account in which all the expenses of maintaining and operating the farm since 1874 had been charged to appellee, that the fact of the existence of the books and accounts was unknown to appellee till after the term of court at which the ejectment case was tried, and that he could not have learned of it sooner by any sort of diligence. The circuit court granted the new trial. This appeal is prosecuted to reverse that judgment.

A private memorandum or account book, in the handwriting of a party to a litigation, containing admissions damaging to his cause, the existence of which is concealed, if discovered after the trial, are clearly of that character of material evidence which the ordinary diligence of his adversary could not have produced at the trial. The adversary party not only did not know of the existence of such an account, but was further misled

by the testimony of his opponent into supposing that none was in existence.

It is objected, though, that the newly discovered evidence is merely cumulative, and, as this court has repeatedly held that a new trial will not be granted upon the discovery of evidence that is only cumulative, the circuit court should not have granted this new trial. The newly discovered evidence was of a higher grade and different character from any heard on the original trial. It was not cumulative in the sense of the term as generally employed in opinions passing on that question. The trial court is enjoined to disregard those matters of practice that do not affect the substantial rights of the parties. Section 134, Civ. Code. It is because of this policy, and the phrase in section 340, Civ. Code, "material to the party applying," that this court holds that the discovery of more evidence of the same character and grade as that already heard and considered by the trial court, and which would not, in all probability, affect the result of another trial, will not justify the granting of a new trial. But where the newly discovered evidence is of a character that is unerring and convincing, satisfying the mind of the judge that it will probably have a preponderating influence upon another trial, a new trial should be granted. If appellant's position in the Sallie A. Owsley suit as to charging these items to and furnishing them for his son is true, it would follow that, if appellant died intestate, these items, or the great bulk of them, could be charged against appellee's interest in his father's estate as advancements. Appellee would in that event be made to pay for them. Yet in the ejectment suit they were necessarily treated by the jury, because of W. F. Owsley, Sr.'s, statements when testifying, as not being appellee's accounts. If the truth is that these items were given to him by his father as advancements, for which he will ultimately have to account, then appellee ought to have the benefit now of that fact, as bearing on the question of his possession and control of the farm in dispute.

But the question most seriously urged is whether the evidence upon the former trial, even when considered with that newly discovered evidence, does not show that, as a matter of law, appellant was never out of the possession of the farm. It is conceded that by the parol gift no title passed to appellee. Nor did appellant's admission that he had given his son the property, nor did even his oath to that effect in a trial in another case, divest appellant of his title. If that has been done, it is solely because appellee has, by a continuous adverse possession for 15 years under claim of title, thereby acquired it. It has been decided a number of times by this court that such possession by the donee under a parol gift will ripen into a fee-simple title: *Commonwealth v. Gibson*, 85 Ky. 666, 4 S. W. 453; *Thomson v. Thom-*

son, 98 Ky. 435, 20 S. W. 373; *Creech v. Abner*, 106 Ky. 239, 50 S. W. 58; *Gilbert v. Kelly*, 57 S. W. 228.

But it is urged with great force that appellant has never been dispossessed; that he has daily entered upon the premises in dispute, and has exercised acts of dominion over them; and that the law attaches the actual possession to the holder of the legal title when both he and an adverse claimant are upon the disputed premises. The character of possession for the statutory period necessary to toll the right of entry by the legal title holder must be such as amounts constantly to a trespass against the true title (that is, it must be an actual, physical entry upon or control of the premises, and be continuous); it must be open (that is, it must of itself be such as to afford notice to the rightful owner of its hostile nature); it must be adverse (that is, it must be against and in defiance of the claim of the real title holder, and be such as to exclude his authority); and it must be accompanied by the claim by the occupant that it is his property. This claim may be by speech, or by such acts of authority as indicate it. It is obvious that two persons claiming against each other cannot at the same time be in the actual possession of the same premises, either in law or in fact. If both are present, claiming the title, the possession is his who has the title. The possession of the wrongful occupant in that case would be restricted to that space over which he wields an exclusive physical dominion. But it does not follow by any means that the mere presence of a person upon a piece of property gives him the possession of it, either in fact or in law, for any purpose; e. g., a guest in my house, or the presence of my servant or of a bare licensee. It is equally essential that the physical entry should be accompanied by a claim of right. So that if one enters, admitting the title and possession of another as owner, the latter's possession, in law, is not disturbed. To oust the actual possession of a claimant, another must enter, also claiming the right of entry. When the owner sells or gives his land by parol, he is not forced to repudiate his act. He may recognize it as valid if he chooses. If his vendee is in possession, claiming the title as a right, the owner of the legal title may admit, when subsequently entering upon the land, that both the title and possession are in his vendee, and that his presence is in no wise hostile thereto. If he does, then by what principle of law can there be ascribed to his presence an effect which he neither designed nor at the time desired? Why should the law claim for him that which he failed to claim, and claim it in spite of his intent? Therefore, if appellant, though present on the land which he is alleged to have given to appellee by parol in 1874, and put him in the possession of, was not claiming the land as his own, but was, on the contrary, disclaiming it, and if he in fact exer-

cised no act of ownership, in authority as owner, but was there as the guest of his son, the latter's possession was not thereby interfered with.

In *Thomson v. Thomson*, 98 Ky. 435, 20 S. W. 373, it was held that an entry by a donee under a parol gift was hostile to the legal title, and, if possession was held thereunder for 15 years, the title in the donee was perfected. In that case the court, in most emphatic language, approved this instruction as embodying the law of adverse possession: "If the jury believe from the evidence that the plaintiff, Patrick Henry Thomson, made an absolute and unconditional verbal gift of his entire title to the land described in the petition to his son Rodes Thomson, and, in pursuance of such gift, he, the said Rodes Thomson, entered into the possession thereof, claiming title thereto according to such gift, and that such possession of said land continued for a period of fifteen years previous to Rodes Thomson's death, and during said period his possession was actual, visible, and notorious, then such possession is adverse, and the jury will find for the defendant." In *Commonwealth v. Gibson*, 85 Ky. 666, 4 S. W. 453, where a parol gift of land was made by a father to his children, and they had occupied it adversely for more than 15 years, it was said: "If one in fact enters under a purchase or a gift, although it may be verbal, and holds the land by actual, open possession, claiming it as his own, such possession is adverse. * * * The moment such possession begins, the owner is disseised. * * *

If, after entry, the newcomer claims the land as his own, and the owner has notice of it, either actual or constructive, then there is a disseisin." It is not shown by either of the two foregoing opinions whether there was or not an entry meantime by the donor. But in the later case of *Ward v. Edge*, 100 Ky. 757, 89 S. W. 440, it does appear that the gift by parol was executed by the donee taking possession, while the donor, a widower, continued to reside upon the premises for many years thereafter. The question was whether the donee had been in the adverse possession for 15 years. The court cites without disapproval the character of evidence heard, which was in many particulars substantially the same as in this case as to the donee's claim and acts of ownership, and of the donor's disclaimer and recognition of the title of the donee. The court observed: "It seems to us the issue in this case is simply whether defendant had acquired title to the land in dispute by gift from Walter Ward, and whether, under such gift, he had held same adversely to the donor, and with the knowledge of donor, for the fifteen years." The court approved the following instruction as correctly stating the law applicable to the foregoing facts and issue: "If the jury believe from the evidence

that Walter Ward, fifteen years or more before the institution of this action, gave the land in controversy to the defendant, and he, under or by reason of said gift, took possession of said land, claiming as his own adversely to Walter Ward, with his knowledge, and continuously held and occupied it adversely to and with the knowledge of said Walter Ward for a period of fifteen years or more before the institution of this suit, they should find for defendant."

There was evidence before the jury in the instant case of appellant's contemporaneous claim of title and exercise of ownership, with his presence upon the land, during the 15 years. It was a question for the jury whether there had been in fact a disseisin of appellant. The only point we feel called upon to decide just here is that the mere fact of appellant's presence upon the premises now in dispute during the time of appellee's claim of possession and title was not ipso facto a breach of appellee's possession, and that if appellant did not accompany his presence by some claim or act of ownership, or if, on the contrary, he disclaimed ownership, admitting it was in appellee, then the statute would not be stopped in its running in the latter's behalf. The newly discovered evidence discussed above was of such material character, bearing on the question as to who was in the actual possession of the farm, that appellee was entitled to have it considered by the jury trying that question.

The judgment awarding the new trial is affirmed.

BURNAM, C. J., dissents. SETTLE, J., not sitting.

OWSLEY v. OWSLEY.

(Court of Appeals of Kentucky. Dec. 10, 1903.)

APPEAL—FROM WHAT—VACATED JUDGMENT.

1. One against whom a judgment was rendered cannot prosecute his appeal therefrom when, after the appeal was granted, a new trial was awarded, and the judgment set aside.

Appeal from Circuit Court, Cumberland County.

"Not to be officially reported."

Action by W. F. Owsley, Sr., against W. F. Owsley, Jr. From a judgment for plaintiff, defendant appeals. Dismissed.

Hazellrigg & Chenault and Allen & Ewing, for appellant. W. P. Sandidge, for appellee.

O'REAR, J. In an ejectment suit brought by appellee against appellant, the verdict and judgment were for the former. The latter prosecutes this appeal from that judgment. After the appeal was granted, the circuit court awarded a new trial of the action, and set aside the judgment. There is nothing yet from which appellant can appeal. This appeal is therefore dismissed.

AUSTIN & N. W. R. CO. et al. v. CLUCK.

(Supreme Court of Texas. Dec. 14, 1903.)

ACTION FOR INJURIES—EXAMINATION OF DEFENDANT—ORDER FOR EXAMINATION—AUTHORITY OF COURT—CONSTITUTION—EVIDENCE OF REFUSAL.

1. Const. art. 5, § 8, declares that the district court shall have original jurisdiction of all suits, complaints, and pleas, without regard to distinction between law and equity. Rev. St. 1895, art. 3258, declares that the common law of England, where not inconsistent with the Constitution and laws of the state, shall be the rule of decision. Bill of Rights, art. 1, § 9, declares that the people shall be secure in their persons, houses, and possessions from all unreasonable searches and seizures; and by Rev. St. 1895, art. 1451, all views, vouchers, essoins, etc., are repealed. *Held*, that a district court has no authority to make an order compelling plaintiff in an action for injuries to submit to an examination by physicians.

2. Where plaintiff, in an action for injuries, refuses to submit to an examination by physicians, such fact is proper for the jury as bearing on the credibility and sufficiency of the testimony on which he seeks to recover.

3. In an action for injuries plaintiff was asked by defendant whether a proposition had been made to him to have the court appoint a committee of physicians to examine him, which question was objected to on the ground that it was prejudicial to plaintiff's case, and that the matter had been ruled on by the court in denying a motion for such an examination, and the objection was sustained. *Held*, that the ruling was error, as equivalent to telling the jury that the matter was not to be considered by them.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by John O. Cluck against the Austin & Northwestern Railroad Company and others. From a judgment of the court of Civil Appeals (73 S. W. 569) affirming a judgment for plaintiff, defendants bring error. Reversed.

S. R. Fisher and Baker, Botts, Baker & Lovett, for plaintiffs in error. John Dowell and H. N. Swain, for defendant in error.

BROWN, J. From the opinion of the honorable court of Civil Appeals we copy the following statement of the facts as found by that court:

"This is a suit for damages caused by the plaintiff's falling into a well dug, operated, and controlled by the Austin & Northwestern Railroad Company. There was a jury trial, resulting in a verdict and judgment for the plaintiff for \$2,000, and the defendants have appealed.

"The testimony shows that the Houston & Texas Central Railroad Company, since the accident occurred, has succeeded to all the rights and liabilities of the Austin & Northwestern Railroad Company, and, if one company is liable, both are. The accident occurred at night, and the verdict of the jury involves a finding that the Austin & Northwestern Railroad Company was guilty of negligence in failing to keep the well properly covered, and that the plaintiff was not

guilty of contributory negligence, as charged in the answer of the defendants, and that, as a direct result of the defendants' negligence, the plaintiff was injured to the extent of \$2,000. The record contains evidence sufficient to support all of these findings, and therefore the objections to the verdict are overruled.

"The plaintiff charged in his petition that as a result of his falling in the well he was permanently injured in his back, sides, kidneys, hips, hip joints, spine, bladder, stomach, and bowels. Within proper time the defendants made a motion, stating that the plaintiff had been examined by two physicians of his own selection, who would testify in his behalf; that he had not been examined by physicians selected by the defendants, or by any other physicians; and requested the trial court to appoint a committee of two or more competent physicians, and compel the plaintiff to submit to an examination by the physicians so appointed, in order that the defendants might have the benefit of the testimony of such physicians. In support of the motion it was shown that the plaintiff had refused to consent to the appointment of such committee and to the examination requested. The court overruled the motion, and that ruling is assigned as error."

The plaintiff in error asserts that it had the right at the trial to have the court appoint a committee of physicians to make a physical examination of the defendant in error to qualify them to testify before the jury as to the injuries received by Cluck, and their effect. The right to have such examination is supported by the greater number of decisions of the courts of the states of this Union and by the text-writers. The following cases support the right asserted: *R. & D. Ry. Co. v. Childress*, 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. Rep. 189; *Shepard v. M. P. Ry. Co.*, 85 Mo. 629, 55 Am. Rep. 390; *Alabama, G. S. Ry. Co. v. Hill*, 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764; *White v. Milwaukee City Ry. Co.*, 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154; *A. T. & S. F. Ry. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Schroeder v. O. R. I. & P. Ry. Co.*, 47 Iowa, 375; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *M. & M. T. Co. v. Baily*, 87 Ohio St. 104; *Lane v. S. F. & N. Ry. Co.*, 21 Wash. 119, 57 Pac. 367, 48 L. R. A. 153, 75 Am. St. Rep. 821; *Wanek v. City of Winona (Minn.)* 80 N. W. 851, 46 L. R. A. 443, 79 Am. St. Rep. 354; *Graves v. City of Battle Creek*, 95 Mich. 268, 54 N. W. 757, 19 L. R. A. 641, 35 Am. St. Rep. 561; *City of South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; *Brown v. C. N. & St. P. Ry. Co. (N. D.)* 95 N. W. 153. The Supreme Court of Missouri first held that the courts had no power to compel a party to a civil case to submit to a physical examination. *Lloyd v. H. & St. Joe R. R.*, 53 Mo. 515. After vacillating and qualifying

¶ 1. See *Damages*, vol. 15, Cent. Dig. § 531; *Discovery*, vol. 16, Cent. Dig. § 92.

their decisions in various particulars, that court, in *Shepard v. M. P. Ry. Co.*, before cited, announced the doctrine contended for by the railroad company in this case. The decisions of the Supreme Court of the state of Indiana cover all phases of this question from an absolute denial to the assertion of the right in a qualified sense as announced in the case of *City of South Bend v. Turner*, above cited. That case has been since greatly qualified, and their decisions are in such conflict on the question that they are of little value as authority. The case of *R. & D. Ry. Co. v. Childress*, 82 Ga. 719, 9 S. E. 802, 3 L. R. A. 808, 14 Am. St. Rep. 189, rests upon the following statutory provision: "Every court has power to control in furtherance of justice the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." This statute authorized the examination in the state of Georgia; hence that case is not authority upon the question of power under the common law. The authorities above stated, as well as many cases which we have not cited, fully sustain the conclusion of the Supreme Court of Indiana in the case of *City of South Bend v. Turner*, which is embodied in the following propositions: "(1) That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; (2) that a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; (3) that the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; (4) that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts, which can only be disclosed or fully elucidated by such an examination, and such an examination may be made without danger to the plaintiff's life or health or the infliction of serious pain; (5) that the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated, is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; (6) that such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding."

Counsel for the defendant in error deny the authority of the court to require the plaintiff in this case to submit to a physical examination by a committee to be appointed by the court, in which they are supported by these authorities: *Parker v. Enslow*, 102 Ill. 279, 40 Am. Rep. 588; *McQuigan v. D. L. & W. Ry. Co.*, 129 N. Y. 50, 29 N. E. 235, 14 L. R. A. 466, 26 Am. St. Rep. 507; *Stack v.*

N. Y., etc., *Ry.*, 177 Mass. 155, 58 N. E. 650, 52 L. R. A. 328, 83 Am. St. Rep. 269; *P. D. & E. Ry. Co. v. Rice*, 144 Ill. 232, 33 N. E. 951; *Roberts v. O. & L. C. Ry. Co.*, 29 Hun, 154; *U. P. Ry. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734. The question has been before this court in these cases: *I. & G. N. Ry. Co. v. Underwood*, 64 Tex. 463; *M. P. Ry. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325; *G. C. & S. F. Ry. Co. v. Norfleet*, 73 Tex. 321, 14 S. W. 703; *G. C. & S. F. Ry. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583. In each case this court declined to decide the question now before us; therefore it is practically a new one, which we must determine by the weight of authority, or upon the sounder reasoning, as derived from the provisions of our Constitution, the statutes, and the common law.

After citing a number of cases to support their decision in the case of *City of South Bend v. Turner*, the Supreme Court of Indiana said: "These cases assert the doctrine that courts are instituted by the state to administer impartial justice to contending parties. In such contests it is the duty of the court to bestow upon the litigants equal and exact justice. This cannot be done without the court first obtaining the exact and full truth concerning the matters in controversy. Hence from this duty of the court to dispense exact justice is essentially implied all power necessary to its performance, which includes the power to make subservient to its order all persons and things that will afford the most reliable evidence." That honorable court gives no source from which it is claimed the courts derive the power to compel a party to submit to examination, but asserts that the duty to administer justice implies "all power necessary to its performance, which includes the power to make subservient to its order all persons and things that will afford the most reliable evidence." If this proposition be well founded, then, indeed, the power of a court over the persons of parties who apply to it for adjustment of their rights is unlimited. This statement of judicial power is too broad to be accepted as correct, but that line of decisions cannot be sustained by less comprehensive authority. The point we wish to call attention to is that the court does not claim to derive its authority from either the common law, the Constitution of that state, or from the statutes of Indiana. Comment upon *City of South Bend v. Turner* is equivalent to a comment upon the other cases, because it is perhaps the best reasoned of all, and fairly represents them.

Article 5, § 8, of the Constitution of this state, defines the jurisdiction and powers of the district courts in the following language: "The district court shall have original jurisdiction of all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to

five hundred dollars exclusive of interest;" and the Legislature has defined the jurisdiction of the district courts in the same language. The common law was adopted by the congress of the republic by enactment embraced in the following article 3258 of the Revised Statutes of 1895: "The common law of England (so far as it is not inconsistent with the Constitution and laws of this state) shall, together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature." Whatever may be the powers of courts of other states, there can be no doubt that the courts of Texas must look to the Constitution of this state, the enactments of the Legislature, and the common law for their authority to proceed as requested in this case; and, if the authority did not exist at common law, and has not been conferred by the Constitution nor by the statutes of this state, then no court in Texas has the power to force any citizen to submit to a physical examination under such circumstances. In the case of *Messner v. Giddings*, 65 Tex. 309, a judgment of the district court, which had assumed to exercise authority over the estate of minors, was under review. It was claimed that the authority was given by the Constitution, wherein it conferred on the district court all the powers of courts of equity. Speaking by Judge Stayton, the Supreme Court said: "If it is claimed that in the court, as a court of equity, under that clause [of the Constitution], the power existed, it must be replied that the district court, whether as a court of law or a court of equity, had only such power as the Constitution gave it. There is no such thing as the inherent power of a court, if by that be meant a power which a court may exercise without a law authorizing it. That clause of the Constitution empowered district courts to exercise all the power given, whether the procedure necessary to accomplish that purpose be such as pertains to a court of law or a court of equity; but it in no manner conferred upon such courts the power to exercise any and every power which at any time may have been exercised by courts of chancery in England or elsewhere." In *Railroad v. Botsford*, before cited, Judge Gray said: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person free from all restraint or interference of others, unless by clear and unquestionable authority of law. So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history." Not one of the cases which declare the existence of the right cites a case from the English courts. To this Justice Brewer, in the dissenting

opinion filed on behalf of himself and Justice Brown of that court, replied: "The silence of common-law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages in early days was, compared with later times, limited; and very few of those difficult questions as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute." The reply of Justice Brewer does not answer the argument of Justice Gray. The better rule was laid down in *Russell v. Men of Devon* (2 Term R. 673), where it was sought to maintain the action by argument from necessity and by reason of the analogy to other actions which were authorized by statute; but Justice Ashurst said in that case: "It is a strong presumption that that which never has been done cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion must have frequently happened. But it has been said that there is a principle of law on which this action may be maintained, namely, that, where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case—that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." We are of the opinion that the fact that no such examination was ever authorized by a court at common law in England is conclusive that those courts had no authority under the common law to make such order. Judge Brewer's suggestion that all persons who were ordered by the common-law courts to be examined must have submitted without contention is contrary to the record of those courts, which show a stubborn resistance by the English people to every encroachment upon their personal liberty. It is more consistent with the facts to presume that lawyers and courts recognize that no such power existed; therefore there was no attempt to secure the examination. In his dissenting opinion Judge Brewer said: "Certainly the power of the courts and of the common-law courts to compel a personal examination was in many cases often exercised and unchallenged. Indeed, whenever the interest of justice seemed to require such examination, it was ordered. Instances of this are familiar, and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered." The learned judge does not cite a case to support his statement of the frequency of similar proceedings in the common-law courts of England, but we presume he refers to three exceptional cases mentioned by Judge Gray: First. In divorce

proceedings upon the ground of impotency the court might order the examination of either party, but the exercise of this power "rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction, and is derived from the civil and canon law as administered in spiritual and ecclesiastical courts not proceeding in any respect according to the course of the common law." Second. In case a woman was convicted of a capital crime, the court might order an examination of her to determine whether she was quick with child, to prevent taking the life of the unborn infant. Third. If a widow claimed to be with child, the heir to the estate might cause her to be examined to ascertain whether she was or not with child, to protect the heirs against the fraud of having a false heir presented to inherit the estate. "But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered in any part of the United States, as suited to the habits and conditions of the people." Comments in quotation marks are from the main opinion in *Railroad Company v. Botsford*, and furnish complete answers to the arguments based upon the exceptional cases. The exceptions are the sole reliance of all cases which uphold the authority of the court to order such an examination for a precedent showing that the right existed and was exercised by common-law courts. They do not establish the fact, and the answers made by Judge Gray in the main opinion are so conclusive as to leave no doubt that in truth and in fact no such practice ever prevailed in the common-law courts of England.

Since the common law furnishes no precedent for such proceeding, we must look to our Constitution and statutes for authority in our courts to order the examination. The provisions of our Constitution and of our statutes with regard to the practice and jurisdiction of courts are antagonistic to the spirit and purpose of such proceedings. To make sure of the immunity of the person of citizens from improper interference by any authority, the convention which framed our Constitution adopted, as a part of the Bill of Rights, this section 9 of article 1: "The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches and no warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation." Whether, under this guaranty of immunity from interference with the person, the Legislature might authorize the physical examination of a party to a suit, is not before us for determination; but we are of the opinion that our Constitution secures every citizen of this

state against any seizure or search of his person which is not plainly authorized by some law of this state. In organizing the district courts the Legislature has with great particularity prescribed what its powers shall be, and the writs and processes which may be issued. Among other things which may be done to secure testimony for the trial is the propounding of interrogatories by one party to the other for the purpose of getting a full and complete statement of his cause of action or ground of defense. By this method a person or corporation sued for damages for personal injury may secure a complete statement of all the symptoms and a description of all the external injuries for which compensation is sought. It has been held by this court that the right to examine the opposite party by interrogatories is a substitute for a bill of discovery, which does not exist in our practice. *Cronin v. Gay*, 20 Tex. 460; *Cargill v. Kountze Bros.*, 86 Tex. 386, 22 S. W. 1015, 25 S. W. 13, 24 L. R. A. 183, 40 Am. St. Rep. 853. The argument that the examination may be ordered as upon a bill of discovery is fully met by the fact that we have no such proceeding.

The common-law proceeding most analogous to physical examination is the right of view, by which a party sought to have his witnesses examine the premises to qualify them to testify. "There are but two such cases reported in the English Reports. *Newman v. Tate*, 1 Arnold, 244, and *Turquand v. Strand Union*, 8 Dowling, 201." The request was refused in both cases. *R. R. Co. v. Botsford*. It is significant that the Legislature of this state, after adopting the common law of England, within a short time after those cases were decided, repealed the right of view by this article 1451, Rev. St. 1895: "All vouchers, views, essoins, and also trials by wager of battle and wager of law, shall stand repealed." Thus we see that the Legislature has not only failed to provide for a physical examination of parties, but has actually repealed from the common law in this state the only proceeding that bore the slightest resemblance to it.

The claim that the duty rests upon each court to administer exact justice between parties is not supported by any authority, nor is it consistent with the general law of this state nor with the common law upon these questions. It is the province of a court to try issues formed by the pleadings of parties according to the rules of procedure, to furnish all process authorized by law to secure evidence, and to administer justice according to the evidence adduced on the trial. The common law and our statutes provide all of the means which courts are authorized to use in the administration of justice between parties, and no court has authority to originate and introduce a new process to enable parties to secure evidence in support of their cases. A court with power "to make subservient to its order all persons and things

that will afford the most reliable evidence" would be an anomaly in constitutional republican government. It is better for the common good that courts should be restrained within prescribed limits than that judges be invested with unlimited and irresponsible power over the persons and property of the citizen. In this state, by our Constitution and the common law, the person of a citizen is so sacred that an officer may not disregard the right of personal freedom even to satisfy an execution by levying upon property which is on the person of the defendant. To show the fallacy of the claim, made by those that uphold the right of physical examination, we will suppose A. has instituted a proceeding against B. for damages on account of personal injuries inflicted by B. upon the plaintiff; and the defendant asks that a committee be appointed to examine the plaintiff as to his injuries that witnesses may be furnished to testify of his condition. The court, in order "to administer exact justice," orders the examination, takes forcible control of the person of plaintiff, and makes an examination, produces evidence, and at the trial a judgment is rendered in favor of the plaintiff against the defendant for damages. When execution issues, the officer calls upon the defendant for satisfaction; but, with a valuable diamond in his shirt front and \$10,000 in his pocket, the defendant defies the officer to make a levy. The court would have made the person of the plaintiff "subservient to its order" to enable defendant to have an examination of plaintiff's person, and to use the private parts of it as evidence, but would, if called upon, enjoin the invasion of the person of defendant to satisfy its judgment. This would be the practical working of the doctrine contended for. Many illustrations might be given of court proceedings which would show the fallacy of the claim that courts in Texas have power to order a person to submit his or her person to examination in civil suits; but we feel it is unnecessary. It is sufficient to say for the courts of Texas that the authority to order such an examination and force a party to submit to it is found neither in common law nor in the statute laws of this state, and therefore does not exist and cannot be exercised by the courts of Texas.

The plaintiff in error contends that new conditions have arisen in connection with this class of litigation, which make it necessary for the courts to adopt this method so as to enable the defendants to secure necessary evidence. In support of this contention counsel for the plaintiff in error has injected into his argument matter which is wholly irrelevant in this court, and might be more appropriately addressed to the Legislature. We cannot better express our views upon this matter than to quote from the opinion of Chief Justice Holmes of the Supreme Court of Massachusetts in the case of *Stack v. Railroad Company*, 177 Mass. 158, 58 N. E. 687, 52 L. R. A. 328, 83 Am. St. Rep. 269:

"We appreciate the ease with which, if we were careless or ignorant of precedent, we might deem it enlightened to assume that power. We do not forget the continuous process of developing the law that goes on through the courts in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made almost invariably by very slow degrees and by very short steps. Their general duty is not to change, but to work out, the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds with such consistency as he may be able to attain." It may be true that evil practices by plaintiffs in these cases have grown up, but it is equally true that to establish such a rule of practice would place in the power of defendants in damage cases the means of annoying plaintiffs, and of intimidating the most worthy of the complainants in such suits.

At the trial of the cause, after the testimony of physicians who had treated Cluck for his injuries had been introduced, and Cluck had himself testified as to his injuries and the circumstances under which he received them, the attorney for the railroad company propounded to him this question: "Are you willing, in the presence of some reputable person, or by yourself, and subsequently to be supported by your affidavit that it is urine voided by you into a vessel which is absolutely free from any foreign matter, to furnish a specimen of your urine, voided under the circumstance stated, to a committee of competent physicians to be appointed by the court, so that an analysis of that urine may be made?" To which counsel for plaintiff objected on the ground that same was irrelevant and immaterial, and a useless consumption of time, which objection was by the court sustained. The same objections apply to this procedure as to that which sought a physical examination of the plaintiff. The court could not enforce such an order without taking possession of the person of plaintiff and exercising coercive power to compel him to perform the act. For the reasons before given, we hold that the objection was properly sustained.

The plaintiff, Cluck, being on the stand as a witness in his own behalf, and having testified of his injuries and their effect, the railroad company propounded to him the following question: "I will ask you whether or not a proposition has been made to you to have the court, without the suggestion of counsel for defendants, appoint a committee or board of skilled physicians to examine you physically with a view of ascertaining the nature and extent of the ailments of

which you complain and their cause?" To this question counsel for plaintiff objected on the ground "that the same was incompetent, irrelevant, and immaterial, and that the purpose of it was to prejudice the plaintiff's case before the jury; that the matter had already been ruled upon by the court, and could not again be inquired into; and that the right to decline to submit himself to a physical examination by physicians to be appointed by the court was a legal right." The objections were sustained by the court. In this ruling the court erred. The reason for refusing a physical examination of the plaintiff is not that the defendant is not entitled to have the benefit of the evidence, but because the court has no power to force the plaintiff to submit to such an examination. He has a right to submit or refuse, but, in case he should refuse, the defendant is entitled to have that fact go to the jury to be considered by them in determining upon the credibility and sufficiency of the testimony upon which he seeks to recover. *Railroad Co. v. Botsford*, 141 U. S. 255, 11 Sup. Ct. 1000, 35 L. Ed. 734. If the jury should believe that the refusal showed a purpose to conceal the truth, they might take the fact into account in weighing the evidence. If a satisfactory reason should be given for the refusal, and other evidence were sufficient, the refusal would not defeat a recovery. The suggestion that the court might enforce its order by refusing to submit the case to a jury is not sound, for in this state a party is entitled to a trial by jury whenever he produces evidence which shows *prima facie* a right to recover. In case of unreasonable refusal to allow examination, the court could and should set aside the verdict, unless the evidence satisfactorily established the right.

It is claimed by the defendant in error that these matters occurred in the presence of the jury, who were fully informed as to the plaintiff's refusal. That is true, but the action of the court had the effect to take it from the jury, which would neutralize any effect that the occurrence, in the presence of the jury, might have had upon their minds. It was equivalent to telling the jury that it was not to be considered by them. The defendant in error would get no benefit from the fact that the question was asked and objected to in their presence by the plaintiff's counsel.

For the error indicated, the judgments of the district court and of the Court of Civil Appeals are reversed, and the cause is remanded.

EDDRINGTON et al. v. HERMANN et al.

(Supreme Court of Texas. Dec. 17, 1903.)

EXECUTION—SHERIFF'S DEED—DESCRIPTION—SUFFICIENCY.

1. A sheriff's deed on execution sale described the land as "all the right, title, and interest

of" a certain person "in a parcel of land comprising 1,400 acres, lying and being situate at and upon the northeast corner of" a certain league of land. Execution defendant did not own 1,400 acres of land in the corner of the survey, but owned several distinct parcels, none of which were in the northeast corner, but which would have been embraced in a square survey of 1,400 acres having the northeast corner for its beginning and the northern and eastern line of the league as two of its sides. *Held*, that as there was no specific tract to which the description could apply, and as it did not authorize the assumption that the quantity specified was to be laid off in a square in the northeast corner of the league so as to include the land which the execution defendant did own, the description was insufficient.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by E. A. Austin against George H. Hermann, in which J. M. Edrington and others intervened. From a judgment of the Court of Civil Appeals (74 S. W. 936) affirming a judgment against the interveners, the latter bring error. *Affirmed*.

H. H. MacNicol, for plaintiffs in error. Wm. A. Austin, E. P. Turner, J. B. Brockman, and Geo. H. Breaker, for defendants in error.

WILLIAMS, J. This action was brought by E. A. Austin, one of the defendants in error, against George H. Hermann, to recover a tract of 84 acres of land, a part of the John Austin league, in Harris county. Hermann disclaimed as to part of the land sued for, and asserted title to the remainder. The plaintiffs in error J. M. Edrington, W. H. Edrington, M. E. Suber, and C. B. G. Counts intervened, claiming all of the land against both plaintiff and defendant. The judgment of the district court was against the interveners, and in favor of plaintiff, for part of the land, and in favor of defendant for the remainder. On appeal by the interveners, this judgment was affirmed by the Court of Civil Appeals, and this writ of error was granted from the judgment of affirmance.

The interveners' title depended upon the validity of a sheriff's sale under execution against William T. Austin, deceased, under whom all the parties claimed. This sale was made in 1854 under execution in favor of Elam Stockbridge and Melinda G. Stockbridge, administrator and administratrix of the estate of C. H. Stearns, deceased, against William T. Austin and J. F. Edrington, and, in the proceedings, the land sold was described as "all the right, title, interest and claim of the said William T. Austin and J. F. Edrington in and to a certain tract or parcel of land comprising 1,400 acres, lying and being situate at and upon the Northeast corner of the league of land upon which the City of Houston is situated, which said league of land was originally granted to John Austin, and conveyed to said William T. Austin by Wm. Pierpont and his wife E. E. Pierpont, which said Elizabeth E. Pierpont was the widow of said John Austin, and which land

¶ 1. See *Execution*, vol. 21, Cent. Dig. § 921.

is the same mentioned in a certain deed of mortgage from Wm. T. Austin to Christopher H. Stearns recorded on Harris County of deeds Book R, pages 139 and 140." The mortgage referred to in this description described the property as follows: "A certain piece, parcel or tract of land comprising 1400 acres lying and situate at and upon the Northeast corner of the league of land upon which the City of Houston is situated, which said league of land was originally granted to my brother, John Austin, and belongs to me by virtue of a certain deed from William Pierpont and his wife Elizabeth E. Pierpont. The said Elizabeth E. was the widow of John Austin, dec'd." The conveyance referred to from Pierpont and wife to W. T. Austin was of all their right, title, and interest in the league.

After the last-named conveyance, and before the mortgage to Stearns was given, a subdivision and plat had been made of the northeast quarter of the league into blocks, which subdivision was designated "German-town"; and W. T. Austin had executed conveyances of some of such blocks, and his ownership in the league was reduced to less than 600 acres in distinct parcels, none of which was in the northeast corner. One of such parcels was the 84 acres in controversy, lying some distance from the corner, but which would be embraced in a square survey of 1,400 acres having the northeast corner for its beginning point and the northern and eastern lines of the league as two of its sides.

The judgments below against interveners resulted from the opinions of the trial judge and of the Court of Civil Appeals that the sheriff's sale was void on account of the uncertainty of the description given of the land sold, and further examination of the subject has led us to the conclusion that this is true. This court is not, however, prepared to assent to the view, expressed by the Court of Civil Appeals, that such a description as that in question of a tract of land of a given quantity as lying in a corner of a larger tract authorizes the laying of it off in a square, but that this particular sale is void because such description does not, owing to the peculiar situation, indicate with sufficient certainty the land which the defendant in execution owned. If the 1,400-acre tract was sufficiently described, it would seem to follow, from the decision of this court in *Smith v. Crosby*, 86 Tex. 22, 23 S. W. 10, 40 Am. St. Rep. 818, that the sale would pass title to any less quantity owned by the defendant and embraced within the tract described. The controlling question under that decision is, was the tract offered for sale sufficiently described? If so, the sale passed title to any part of it which belonged to the defendant. Some exceptions to this rule may exist, as where a town or city is located on the tract described in which the defendant in execution owns lots or

blocks. But we are not prepared to hold that a mere subdivision by plat into lots and blocks, when there is in fact no town or city, would prevent the application of the rule laid down in the case referred to. A definite decision upon this feature of the case is unnecessary, since we are of the opinion that no description of the 1,400 acres sufficient under the facts shown to pass title was given by the sheriff. The land is referred to as a certain tract or parcel of land comprising 1,400 acres lying, being, and situate at and upon the given corner, and not as 1,400 acres to be taken or surveyed out of the league in that corner. It would doubtless have been competent for the sheriff to so describe the land to be sold as to authorize the specified quantity to be taken out of that corner in a square, or such other figure as he chose to designate. Many authorities are cited from other states, where lands are divided by law into square sections which are, in turn, subdivided into smaller squares, holding that calls in deed for so many acres in or out of a certain corner means, in law, that the quantity is to be surveyed in a square from a corner as a base. *Walsh v. Ringer*, 2 Ohio, 328, 15 Am. Dec. 555; *Bowers v. Chambers*, 53 Miss. 259; *Wilkinson v. Roper*, 74 Ala. 140; *Doe v. Clayton* (Ala.) 2 South. 31; *Lego v. Medley* (Wis.) 48 N. W. 375, 24 Am. St. Rep. 706; *Smith v. Nelson* (Mo. Sup.) 19 S. W. 734; *Richey v. Sinclair* (Ill.) 47 N. E. 364. Other authorities to a somewhat different proposition are *Goodbar v. Dunn*, 61 Miss. 618; *Gress Lumber Co. v. Coody*, 94 Ga. 519, 21 S. E. 217; *Pry v. Pry*, 109 Ill. 466; *Douglass v. McCoy*, 5 Ohio, 522; *Ray v. Pease*, 95 Ga. 151, 22 S. E. 190; *Turner v. Crane* (Tex. Civ. App.) 47 S. W. 824.

Whether or not this doctrine is to be applied to sheriffs' and other involuntary sales in this state, where the original surveys are not constructed or subdivided upon any uniform plan, has not, so far as we are now advised, been decided by this court, and we find it unnecessary to decide it now. It has been applied in some cases by the Courts of Civil Appeals. *Wingo v. Jones*, 59 S. W. 916; *Day v. Needham*, 22 S. W. 104. The reason why we regard this doctrine as inapplicable here is that, as before indicated, the sheriff, by his description, did not pursue the method thus pointed out of designating the land to be sold. He described that upon which he levied as a certain tract or parcel covered by a certain mortgage, and containing so many acres, and not as a given quantity to be taken out of the league at the named corner; nor did he use any language appropriate to express that idea. From such a description it was impossible for persons desiring to purchase to see that the tract referred to was to be in a square. To illustrate this, let us suppose that Austin had owned in that corner of the league only a tract of 1,400 acres which was not square. Would it not be evi-

dent, under the decisions in *Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282, and *Piereson v. Sanger*, 93 Tex. 160, 53 S. W. 1012, that the mortgage would have applied, and that the execution sale would therefore have passed title, to the tract thus actually owned? We think this can only be answered in the affirmative. The real question therefore is whether or not a designation of land in such a proceeding appropriate to a specific, segregated parcel can be applied when it is found that the defendant in error did not own such a tract, so as to authorize the laying off of the given quantity so as to include such land as the defendant did own. We think not, for the reason that such a description would lack the certainty required by all of the opinions of this court. Under the principles laid down in those opinions, the mere fact that a description left it uncertain whether the land to be sold had already been separated from the larger tract of which it was originally a part, or was still to be ascertained by further action, would, because of the uncertainty, be fatal to the sale. In the latest case in which there has been an elaborate discussion of the sufficiency of descriptions in sales, this principle was reannounced: "In these sales the policy of the law requires, not that there should exist the means of showing at some future time what is otherwise indefinite and uncertain, but that at the time of the sale it should be within the power of all who are by the notice invited to become bidders to know what was offered, and that it should not be left to be surmised or guessed at some future time as to what the officer intended to sell." *Hermann v. Likens*, *supra*. In that case the court found enough in the record of the probate proceedings to meet this requirement, and to pass, under a general description, the title to a particular tract owned by the estate. It would be inconsistent with the whole theory of that decision to hold that when a like attempt, such as that here in question, to designate by general description a specific tract, fails because no such tract was owned by the defendant in execution, the same description may be differently applied so as to separate from a league a less quantity, not previously segregated, and the chief portion of which is not owned by the defendant in execution, merely for the purpose of including within the boundaries so ascertained a small portion which, it is now found, would have been subject to the writ.

We therefore conclude that the sheriff's sale was void, because, first, there was no specific tract to which the description could apply; and, second, the terms used by the sheriff did not authorize purchasers, and do not authorize the court, to assume that the quantity specified was to be laid off in a square or in any other shape. *Wooters v. Arledge*, 54 Tex. 396. The judgment must therefore be affirmed.

Affirmed.

FIRST NAT. BANK OF CUERO v. SAN ANTONIO & A. PASS R. CO. et al.

(Supreme Court of Texas. Dec. 17, 1903.)

PRINCIPAL AND AGENT—CARRIERS—BILLS OF LADING—PLEDGE—CONVERSION—VALUE—VERDICT—HARMLESS ERROR.

1. In a suit against several defendants, where there was a controversy not only between all the defendants and the plaintiff, but as between the several defendants, each of the defendants was a separate party, entitled to six peremptory challenges.

2. In an action against several defendants, who had conflicting interests as between each other, entitling each defendant to be regarded as a separate party entitled to six peremptory challenges, it was not error to allow the defendants to consult together in exercising their challenges.

3. The sellers of cotton took bills of lading in their own names and send drafts for the price to a correspondent for collection, and the purchaser paid the drafts by checks on a bank, which had agreed to pay the checks and take bills of lading as security, and the purchaser, on so paying the drafts, received the bills of lading, and delivered them to the bank under the agreement. *Held*, that the purchaser of the cotton did not become the absolute owner thereof on paying the drafts of the seller by taking and receiving the accompanying bills of lading, and that by delivery of the bills of lading to the bank it acquired a lien on the cotton.

4. Where the jury was instructed that, if they found for defendant, they should state under what subdivision of the charge they found, and the verdict stated that they found for defendant under a designated subdivision of the charge, error in other subdivisions was harmless.

5. Where bills of lading were pledged to secure advances made to the purchaser of the goods, and on the bankruptcy of the purchaser a part of the property covered by the bills of lading was in possession of a carrier, its refusal to deliver the property to the pledgee of the bills of lading, except on surrender thereof, was a conversion of the property.

6. In an action against a carrier for conversion of 222 bales of cotton, in which it appeared that plaintiff was entitled to recover for 3 bales, the fact that the bales were of different weights and classification, and that it was not shown what the weight and classification of the 3 bales were, did not constitute a failure of proof as to the value of the 3 bales, since their value might be regarded as $\frac{3}{222}$ of the entire value; the burden being on the carrier to show that they were of less than the average value, if such was the case.

7. A bank agreed with cotton dealers to advance money to them to pay for cotton purchased, taking the bills of lading as security, and the uniform course of business had been for such dealers to sell the cotton, and, after sales were made, to receive the bills from the bank, and on receiving payment, to deposit the amount in the bank. *Held* that the bank's lien on cotton which was sold was terminated by the delivery of the proceeds of the sale to it.

Error to Court of Civil Appeals of the First Supreme Judicial District.

Action by the First National Bank of Cuero against the San Antonio & Aransas Pass Railroad Company and others. From a judgment of the Court of Civil Appeals (72 S. W. 1033) affirming a judgment for defendants, plaintiff brings error. Reversed in part.

¶ 2. See Jury, vol. XI, Cent. Dig. § 602.

Lackey & Lewright and Dabney & Lockett, for plaintiff in error. Proctors, A. B. Davidson, and Kleberg, Grimes & Baker, for defendants in error.

GAINES, C. J. This is a writ of error to a judgment of the Court of Civil Appeals of the First Supreme Judicial District, which affirmed judgment in favor of the defendant rendered by the district court of De Witt county in a suit brought by plaintiff in error against the defendant in error the San Antonio & Aransas Pass Railroad Company. We cannot give a better statement of the case than that made by the chief justice of the Court of Civil Appeals in the opinion delivered by that court on the appeal. It is as follows:

"This action was brought by the First National Bank of Cuero against the San Antonio & Aransas Pass Railway Company for the conversion of 222 bales of cotton. The appellant alleged that it held the bills of lading for the cotton, and that the appellee had refused upon demand to deliver the same. It sought to recover the value of the cotton as the owner thereof upon the liability of the appellee in the alternative as common carrier and as warehouseman. It also alleged that, if it were not the absolute owner of the cotton, nevertheless said bills of lading were pledged to it to secure an indebtedness of \$6,241.86 owed to it by the firm of Koenig & Van Hoogenhuyze. Appellee made the members of the firm of Koenig & Van Hoogenhuyze and the Cuero Cotton Compress Company parties defendant, and prayed judgment over against each of them. There was a trial by jury. After the evidence was all in, the appellee took a nonsuit as to the Cuero Cotton Compress Company. The case was then submitted to the jury, and resulted in a verdict and judgment in favor of the appellee.

"At the beginning of the cotton season of the year 1899 the appellant bank and the firm of Koenig & Van Hoogenhuyze entered into an arrangement by which the appellant agreed to advance Koenig & Van Hoogenhuyze money for the purpose of buying cotton, both locally at Cuero and also at different points on the San Antonio & Aransas Pass Railway west of Cuero. As security for the money to be advanced by the appellant, Koenig & Van Hoogenhuyze deposited with them as a margin six shares of the stock of the Cuero Compress Company, and agreed that the appellant should have a lien on the local cotton purchased by them, and that they would turn into the bank the bills of lading for the cotton shipped in by railroad. The stock was deposited as agreed, and the course of dealing in carrying out the agreement for the advancement of the money by the bank to pay for the cotton purchased by Koenig & Van Hoogenhuyze was that the cotton bought in Cuero was paid for by the bank upon checks drawn against it by Koenig & Van Hoogenhuyze, and was sold

by them, and the proceeds paid were deposited by them to their account with the bank. And cotton bought by Koenig & Van Hoogenhuyze at points on the railroad was shipped to Cuero on bills of lading to order of the sellers, with directions to notify the buyers, and the bills of lading were attached to drafts of the sellers on Koenig & Van Hoogenhuyze for the price of the cotton, and the drafts with the bills of lading attached were sent to the bank at Cuero for collection. On presentation of the drafts and bills of lading to Koenig & Van Hoogenhuyze they paid them with their checks on the appellant bank, which were accepted as cash by the collecting banks, and the drafts and bills of lading were delivered to them. The checks of Koenig & Van Hoogenhuyze were charged by the appellant to their account, and they turned in the bills of lading to the bank. The checks were paid on presentation, without waiting for the delivery of the bills of lading, which were afterwards either turned in by Koenig & Van Hoogenhuyze themselves, or sent for to them by the bank. The cotton represented by the bills of lading was sold by Koenig & Van Hoogenhuyze without consultation with the officers of the bank, and whenever a sale was effected Koenig & Van Hoogenhuyze would send to the bank for the bills of lading for the cotton sold, and the bank would deliver them to Koenig & Van Hoogenhuyze. The bank did not require the proceeds of a sale to be deposited before giving up the bills of lading, but trusted Koenig & Van Hoogenhuyze to turn them in, which they usually did. The officers of the bank kept themselves informed as to the condition of the account by noting the daily balances and the number of bales of cotton shown to be on hand by the bills of lading in its possession and the amount of local cotton that appeared to be on hand, which would be ascertained by a casual inspection in riding by the back yard of Koenig & Van Hoogenhuyze's place of business, where it was usually stored. Koenig & Van Hoogenhuyze were also engaged in business as general merchants, and made deposits of money and did their banking business with appellant bank. Their merchandise and cotton accounts were kept separately, but in some instances credits were transferred from the cotton to the merchandise account; the state of the account and the amount of security on hand appearing to the officers of the bank sufficient to authorize the transfer. The account for a balance due upon which this suit is brought began September 1, 1899, but by a deposit on September 2d this balance was reduced to \$550.55. Up to September 27th, when they became bankrupt, and the account was closed, the total amount loaned Koenig & Van Hoogenhuyze by the bank, including interest on overdrafts, etc., was \$87,934.05. They had paid to the bank an amount sufficient to reduce the balance to \$6,241.05, which should be credited with the

proceeds of the compress stock December 22, 1900, \$384. The several bills of lading, seven in number, upon which suit is based, were issued by the railroad company for several lots of cotton, amounting in all to 222 bales, sold to Koenig & Van Hoogenhuyze by parties at Karnes City and Runge stations on the San Antonio & Aransas Pass Railway. They were issued to the sellers of the cotton as the shippers thereof. The cotton was to be carried to Cuero, and was consigned to shipper's order, notify Koenig & Van Hoogenhuyze, Cuero, Tex., and the bills had noted thereon a memorandum, 'Compress in Cuero.' The sellers of the cotton drew drafts on Koenig & Van Hoogenhuyze for the price of the cotton, and attached to them the bills of lading indorsed in blank, and sent them to banks in Cuero other than appellant bank for collection. The several drafts, with the bills of lading attached, were presented to Koenig & Van Hoogenhuyze for payment, and were paid by their checks on the appellant bank, which were cashed on presentation, and charged to the account of the drawers. The bills of lading and the receipted drafts of the sellers of the cotton on Koenig & Van Hoogenhuyze were delivered to the latter by the collecting bank upon the receipt of their checks on the appellant. The bills of lading were not attached to the checks of Koenig & Van Hoogenhuyze on the bank, but they were afterwards delivered to it, and were in its possession when Koenig & Van Hoogenhuyze failed, and were produced by it at the trial below. The original receipted drafts remained in the hands of Koenig & Van Hoogenhuyze, and never went into the possession of the bank. The purchases of the cotton were made September 19th and 20th, and the cotton was immediately shipped and delivered by the railroad to Cuero Compress Company September 24th and 25th, except probably 3 bales, which arrived on September 27th. The drafts for the price of the cotton were paid, as severally presented, on September 20th to September 25th. On September 25th Koenig & Van Hoogenhuyze sold to Inman & Reed 146 bales of the cotton which had arrived on the 24th, and on the 26th they sold them 79 bales, making 225 bales in all, but which included 3, and probably 6, bales that were not covered by bills of lading sued on. This cotton was all marked in the marks of the several shippers, and was capable of identification, and is fully identified as the lot covered by the bills of lading in the possession of the appellant, except as to the 3 bales mentioned. It was delivered by Koenig & Van Hoogenhuyze to Inman & Reed on the cotton platform of the compress, and was shipped out of Cuero on the 24th and 26th days of September over the line of another railroad. Of the proceeds of the first sale of 146 bales, amounting to \$4,398.24, Koenig & Van Hoogenhuyze paid the entire amount to the appellant and of the proceeds of the second sale they paid the

appellant \$1,979.36. The second sale was for 79 bales of cotton, and amounted to \$2,468.26. Koenig & Van Hoogenhuyze filed an application in the federal court of San Antonio for adjudication and discharge as bankrupts on September 27, 1899, and were afterwards discharged."

Our approval of the statement should probably be qualified by the remark that if the court mean by saying that "the bank did not require the proceeds of a sale to be deposited before giving up the bills of lading, but trusted Koenig & Van Hoogenhuyze to turn them in, which they usually did," that the undisputed testimony showed these facts, we are not fully prepared to concur, but deem the matter unimportant for reasons hereinafter given.

In impaneling the jury, the defendant railroad company and codefendant the compress company and Koenig & Van Hoogenhuyze as a partnership, were each allowed six peremptory challenges, over the objection of the plaintiff, and this action is assigned as error. Here, as has been seen from the statement previously made, although the defendants had a common cause as against the plaintiff, there was a controversy between the railroad company and the compress company and also between the former and Koenig & Van Hoogenhuyze. This made the two defendant companies and the partnership each a separate party to the suit, and under the rule recognized in this court entitled each to six peremptory challenges. *McLaughlin v. Carter*, 13 Tex. Civ. App. 694, 37 S. W. 666. The case does not fall within the rule laid down in *Hargrave v. Vaughn*, 82 Tex. 350, 18 S. W. 695, and in *Jones v. Ford*, 60 Tex. 127. But it was further objected to the mode of impaneling the jury that the defendants were permitted to consult and to act together in exercising their challenges and in striking the objectionable names from the jury lists. The statute does not prohibit such action, and we are of the opinion that the court did not err in allowing it.

Upon the trial the defendant railroad company urged three defenses to the action: First, that, since the bills of lading were not delivered to the bank at the time it paid Koenig & Van Hoogenhuyze's checks for the purchase money of the cotton, the former had no lien upon the bills, or the cotton represented by them, second, that, if the bank had a lien, it had authorized Koenig & Van Hoogenhuyze to sell the cotton without procuring from them or producing the bills of lading; and, third, that, if not authorized to sell after the attempted sale, Koenig & Van Hoogenhuyze had paid to the bank the money for which the cotton had been sold. Exceptions were interposed to so much of the answer as asserted the first defense, and were overruled by the court. The court also instructed the jury, in effect, that if Koenig & Van Hoogenhuyze paid the drafts of the sellers of the cotton, and received the accompanying bills

of lading, they became the absolute owners of the cotton; and that, if they subsequently delivered the bills of lading to the bank with intention of giving a lien, the bank was entitled to hold the cotton; but, if such was not their intention, then the bank had no lien, and the defendants were entitled to a verdict. The Court of Civil Appeals held that there was error both in overruling the exceptions and in giving the charge complained of. We concur in that conclusion, and refer to the opinion of that court for the grounds upon which it is based. *Bank v. S. A. & A. P. Ry. Co.*, 72 S. W. 1033, 6 Tex. Ct. Rep. 388. The Court of Civil Appeals, however, held also that the error was harmless, for the reason that the undisputed testimony showed that Koenig & Van Hoogenhuyze had authority not merely to negotiate a sale, but to sell the cotton, and that, therefore, under the evidence, no other judgment would have been properly rendered except one for the defendants. We incline to differ with the court upon that point, but deem it unnecessary to decide it.

The court's charge was divided into paragraphs, which were numbered. In the second paragraph the court submitted to the jury the question as to the authority of Koenig & Van Hoogenhuyze to sell the cotton covered by the bills of lading sued on; and instructed them, in case they found they had such authority from the bank, to return a verdict for the defendants. In the third paragraph the jury were told, in effect, that if they found that Koenig & Van Hoogenhuyze did not have authority to sell the cotton, and they should also find that they had paid the proceeds to the bank, they should deduct the amount of such proceeds from the amount they should find otherwise due the plaintiff. The fourth and sixth paragraphs of the charge contained the instruction mentioned above to the effect that if, by the delivery of the bills of lading to the bank, Koenig & Van Hoogenhuyze did not intend to give the bank a lien upon the cotton, a verdict should be returned for the defendant. But further, in instructing the jury as to the form of their verdict they were charged as follows: "If you find for the defendant, your verdict will be, 'We, the jury, find for the defendant under subdivision —' or 'subdivisions — of the court's charge,' indicating in order under what subdivision or subdivisions, if any, you find in favor of the defendant." The verdict of the jury was as follows: "We, the jury, find for the defendant under subdivision two of the court's charge. We also find in favor of the defendants William Van Hoogenhuyze and Carl Koenig." It is apparent from the verdict that the jury either did not pass upon the issue or issues submitted in paragraphs 4 and 6, or that they found the issues there presented in favor of the plaintiff. The logical effect of their finding is that the bank had a lien, but had waived it by authorizing

Koenig & Van Hoogenhuyze to sell the cotton. Therefore no harm could have resulted to the defendant either by the refusal of the court to sustain the exceptions in question or by the error in the court's charge if it were error. But the evidence disclosed that, after the failure of Koenig & Van Hoogenhuyze, the agents of the bank went to the office of the railroad company to ascertain whether the cotton represented by the bills of lading was still in possession of the carrier, and that three or four bales were found—which the agent offered to deliver upon surrender of the bills of lading. Since he had no right to demand such surrender (*Dwyer v. Ry. Co.*, 69 Tex. 707, 17 S. W. 504), this was a conversion of the property. It is not claimed that these remaining bales were a part of the cotton which was sold, but it is urged on behalf of the defendant in error that they were not shown to be a part of the cotton represented by the bills in controversy; and also that, if identified as such, there was no evidence to justify the jury in finding their value. The point that the plaintiff in error should have had a recovery for the three bales was distinctly made in the motion for a rehearing in the Court of Civil Appeals. That court, in disposing of the motion, held, in effect, that there was not sufficient evidence to go to the jury as to the value of the cotton, and that therefore it was not error to refuse a recovery therefor. We think the testimony of the agent of the railroad company shows that the 3 bales were a part of the 222 bales covered by the bills of lading. It was agreed by counsel, for the purposes of the trial, that the whole 222 bales were worth the sum of \$6,866.50. Then, if the 3 bales were average bales of the lot, they were worth $\frac{3}{222}$ of that sum. But because it appeared from the allegations of the petition that the 222 bales were of different weights and classification, and it was not shown what the weight and classification of these bales were, it was held that the evidence was not sufficient to prove their value. In this we cannot concur. There would be some reason for the ruling if the three bales had ever been in possession of the plaintiff in error. But they were in the hands of the defendant in error, and, if either of the bales was worth less than the average bale of the entire lot, it was incumbent upon the company to show it. It is of frequent occurrence for judgments to be affirmed in this court in similar cases—notably for damages to cattle in course of transportation—where the evidence of the damage is much less satisfactory than that adduced in this case.

It also seems to us that, in so far as the plaintiff received the proceeds of the cotton covered by the bills of lading which were sold by Koenig & Van Hoogenhuyze, it would, in any event, be precluded for a recovery for any of the cotton so sold, except as to so much of it as was represented by the pro-

ceeds which it did not receive. This is especially so in view of the fact that the testimony of its president and cashier both show beyond question that Koenig & Van Hoogenhuyze were authorized to "negotiate a sale"—that is to say, to fix a price and agree upon a sale—and that, according to the usual course of business between them and the bank, they had theretofore sold cotton consigned in the same manner, received the money, and paid it to the bank. The bank had a lien upon the proceeds of the sale, and in so far as it received such proceeds its claim upon the cotton was satisfied.

The point was also made in the argument in this court that, even if there was not sufficient evidence of the value of the three bales of cotton, yet the plaintiff was entitled to receive nominal damages, which would have carried the costs of the suit. We need not decide the question, since we hold there was evidence as to the value of these bales. But we suggest that it occurs to us that, where it is sought to reverse a judgment merely to recover the costs, it is too late to raise the question in this court. The point ought at least to be made in the Court of Civil Appeals in the brief and in the motion for a rehearing, and probably in the trial court.

For the error with reference to the bales of cotton which were not sold by Koenig & Van Hoogenhuyze we think the judgment ought to be reversed as to that cotton. But, since the jury have found specifically that Koenig & Van Hoogenhuyze were authorized to make the sale, we are of the opinion that the judgment with reference to the cotton which was sold by them should not be disturbed. The judgment is accordingly affirmed as to the cotton so sold, but as to that which was still in the possession of the railroad company the judgment is reversed, and as to that matter the cause is remanded for a new trial.

**SAN ANTONIO TRACTION CO. v.
WELTER.***

(Court of Civil Appeals of Texas. Nov. 18, 1908.)

CARRIERS—INJURY TO PASSENGER—NEGLIGENCE—INSTRUCTION.

1. A charge that if the jury believe that plaintiff attempted to alight from a car after it had stopped, etc., is not objectionable as assuming the fact to be that the car had stopped when she attempted to alight.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Suit by Annie K. Welter against the San Antonio Traction Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Houston Bros. and R. J. Boyle, for appellant. Perry J. Lewis and H. O. Carter, for appellee.

*Rehearing denied December 16, 1908, and writ of error denied by Supreme Court.

NEILL, J. This suit was brought by appellee against appellant to recover damages for personal injuries inflicted by the negligence of the company. Appellant answered by a general denial and by a plea of contributory negligence, in which it is averred that appellee negligently attempted to alight from one of appellant's street cars while it was in motion, and thereby caused the injuries complained of. The evidence is sufficient to warrant the conclusions that on the 29th of March, 1902, appellee, a woman 75 years old, boarded one of appellant's street cars as a passenger; that, when it arrived at the point of her destination, the car stopped, and when she was in the act of alighting therefrom it was, by the negligence of the company's servant operating the same, suddenly put in motion, before giving her time to alight, and she was, by such negligence, without any contributory negligence on her part, thrown violently upon the ground, whereby she was seriously and permanently injured, and caused great physical and mental suffering, to her damage in the sum of \$3,500.

The first assignment complains of the following paragraph of the charge:

"If you believe from the evidence that on or about the 29th day of March, 1902, plaintiff boarded one of defendant's street cars, and became a passenger thereon, and that she attempted to alight therefrom after said car had stopped, and if you further believe from the evidence that while she was in the act of alighting from said car the car was suddenly put in motion, without giving her sufficient time to alight, and if you further find from the evidence that the defendant was guilty of negligence in failing to give the plaintiff sufficient time to alight from its car, and in suddenly starting said car, if you so find the facts to be, and that such negligence, if any, directly caused plaintiff to fall, and that she was injured thereby, then your verdict should be for the plaintiff, unless you find, under the charge hereinafter given you, that the plaintiff was guilty of negligence herself that contributed to her injury."

It is urged under the assignment, as an objection to the charge, that it "assumed the fact to be that defendant's car had stopped when plaintiff undertook to alight therefrom," when the existence of such fact was an issue made both by the pleadings and the evidence. We do not think the charge obnoxious to the objection. In our opinion, the question of the existence of such fact, as well as all others essential to plaintiff's recovery, is submitted by the charge for the jury's determination. *San Antonio & A. P. Ry. v. Belt* (Tex. Civ. App.) 59 S. W. 610; *G., H. & S. A. Ry. Co. v. Waldo* (Tex. Civ. App.) 82 S. W. 783, and authorities cited. A charge should be taken as a whole, and, when the part complained of is taken and considered with the fourth paragraph, it is

too clear for argument that it does not assume such fact.

The charge upon the measure of damages is in the very language of numerous charges given in cases of this character, and upheld by all the higher courts in this state.

Our conclusions of fact dispose of the assignment which complains of the verdict being excessive.

There is no error in the judgment, and it is affirmed.

ST. LOUIS S. W. RY. CO. v. DOLAN et al.

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

CARRIER—OBLIGATION OF FORWARDER—NEG-LIGENCE—QUESTION FOR JURY.

1. An allegation that a forwarding carrier received horses from the initial carrier, and forwarded them, is sufficient to fix the obligation of the forwarding carrier, without an allegation of express contract.

2. Under Rev. St. U. S. § 4386 [U. S. Comp. St. 1901, p. 2995], providing that no railroad shall confine animals in cars longer than 28 hours without unloading them, and section 4388 [U. S. Comp. St. 1901, p. 2996], providing that the law shall not apply to transportation in cars in which they can obtain food, water, and an opportunity to rest, it is for the jury to determine whether a railway company was negligent in keeping horses on cars 32 hours without affording an opportunity to unload and care for them.

Appeal from Bee County Court; W. S. Dugat, Judge.

Suit by M. O. Dolan and another against the St. Louis Southwestern Railway Company and another. From a judgment in favor of plaintiff, defendant St. Louis Southwestern Railway Company appeals. Reversed.

E. B. Perkins, A. W. Houston, and Proctors, for appellant. S. J. Lancaster, for appellee.

FLY, J. This is a suit against appellant and the San Antonio & Aransas Pass Railway Company to recover damages resulting from the negligent transportation of 60 horses shipped from Beeville, Tex., to Fordyce, Ark. The court instructed a verdict for the San Antonio & Aransas Pass Railway Company, and the jury returned a verdict against appellant for \$548, and judgment was rendered thereon.

The first assignment of error complains of the overruling of a general demurrer, and the proposition is advanced that where a person sues two railway companies for damages to a shipment of live stock, and alleges a contract of shipment with the initial carrier alone, and sets up no contractual liability on the part of the connecting carrier, no recovery can be sustained against the latter. The petition does not set up any express contractual liability on the part of the connecting carrier, but it alleges that the horses were received and forwarded by it,

and this allegation would form a sufficient basis for its liability for injuries inflicted on its line of railway.

The charge complained of in the third assignment of error is open to the criticism that it gives too much emphasis to the switching, jerking, and bumping of the cars by appellant in the yards at Waco, and is upon the weight of the evidence.

The sixth assignment of error complains of the following charge given by the court below: "You are further instructed that if, from the evidence before you, you find that the St. Louis Southwestern Railway Company of Texas permitted said horses to remain on their cars for a period of 32 hours without affording the plaintiff an opportunity to unload, feed, and water said horses, and that by reason of said horses having gone for so long a time without rest, food, or water, that said horses were drawn and gaunt, and their market value thereby depreciated, then you are instructed that for such negligence said railway company would be liable in such damages to plaintiff, if any, as were the immediate result of said negligence." The charge allows the jury to find certain facts, and then declares that if they are found they constitute negligence. If there is any case in which the court is authorized to instruct a jury that doing or failing to do certain things is negligence, it is when such act or failure to act is declared to be negligence by statute. This being an interstate shipment, article 326, Rev. St. 1895, does not apply, and the statutes of the United States must be looked to for guidance. *Railway v. Gray*, 87 Tex. 312, 28 S. W. 280. In section 4386 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2995], it is provided that no railroad conveying animals from one state to another shall confine them in cars for a longer period than 28 consecutive hours without unloading them for rest, water, and feeding; but it is expressly provided in section 4388 [U. S. Comp. St. 1901, p. 2996] that the law shall not apply to animals that are being transported in cars in which they can obtain food, water, space, and opportunity to rest. It was for a jury to determine whether, under all the circumstances, the railway company had been guilty of negligence; and the court should not have selected some of the facts, and instructed the jury that proof of them constituted negligence. In *Calhoun v. Railway*, 84 Tex. 226, 19 S. W. 341, it is said: "Ringing the bell or blowing the whistle in approaching a public crossing by a locomotive is a duty required by law. The failure to perform this duty is an act that may, in connection with other facts, be considered by a jury in determining if the operatives of the engine have been guilty of actionable negligence. But to say that the performance of this duty, or the failure to observe it, will, in the first instance, be sufficient evidence of such care as will excuse it from liability,

and, in the second instance, be sufficient evidence of such want of care as to charge it with liability, is to give to the statute that creates this duty an effect and meaning evidently not intended by the lawmakers. The court has the right to instruct the jury that it is the duty of the operatives of the engine in approaching the public crossing to ring the bell or blow the whistle, but it is a charge upon the weight of the evidence if it instructs them that the failure to perform or not perform this duty shall be given a certain effect." Under the charge of the court, no matter what the circumstances may have been that surround the transportation of the cattle, if the cattle remained 32 hours in the cars without food and water, the railway company was pronounced guilty of negligence.

There is no necessity for discussing the other assignments of error.

No complaint is made as to the judgment in favor of the San Antonio & Aransas Pass Railway Company, and that part of the judgment will be affirmed.

The judgment as to appellant is reversed, and the cause remanded.

PRICE et al. v. EARDLEY et al.*

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

ADVERSE POSSESSION — VACANT LAND — MIS-TAKE AS TO TITLE OF STATE—EFFECT—PROPERTY NOT INCLOSED.

1. Under the statute giving title to one who has adverse possession of land for 10 years, his possession is adverse to the true owner, though it is under the erroneous belief that it is vacant land, but with the intention of acquiring title from the state under the pre-emption law.

2. Rev. St. 1895, art. 3343, provides that peaceable adverse possession of real estate for 10 years shall be a bar to an action to recover the land. Article 3344 provides that the possession contemplated in the preceding section shall not embrace more than 160 acres, including the improvements or the number of acres actually inclosed, should the same exceed 160 acres. Two persons were in adverse possession of 160 acres, claiming the land as pre-emptors. One inclosed the 80 acres claimed by him, and the other 80 acres of the 80 acres claimed by him. No one else was in possession of the tract not inclosed. *Held*, that by 10 years' possession they acquired title to the entire tract.

Appeal from District Court, Dimmit County; E. A. Stevens, Judge.

Action by Charles R. Price and others against William H. Eardley and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Sanford & Douglas and Winchester Kelso, for appellants. F. Vandervoort and E. R. Lane, for appellees.

FLY, J. Appellants sought to recover 725 acres of land from appellees, but the latter disclaimed as to 640 acres of the land, and the suit resolved itself into a contest as to the title to the land in excess of the 640

acres which was patented to appellants' vendors by the state of Texas. Appellees pleaded "Not guilty" and 10 years' limitation. In answer to the plea of limitations, appellants alleged that until March, 1893, appellees were claiming the land as pre-emptors, believing it to be unappropriated public land. The cause was tried by jury, and resulted in a verdict and judgment for appellees.

This suit was filed on May 27, 1902, and the uncontroverted proof shows that appellees went into possession of the land, and held it until March, 1893, believing it to be vacant public land. On June 9, 1888, each of the appellees presented to the surveyor of Dimmit county his application for a homestead donation of 80 acres, being the land in controversy; the applications being supported by affidavits, and fully complying with the provisions of articles 4162, and 4163 of the present Revised Statutes, which are identical with articles 3339, and 3940 of the statutes in effect when the applications were made. The land was surveyed on January 8, 1889, and the field notes were filed in the General Land Office as provided in article 4166. Appellees continued in possession of the land until March 21, 1893, when each of them applied for patents, in compliance with the requirements of the law. It does not appear that the patents were granted, nor is it shown what action was taken on the applications, although it may be inferred that they were refused on the ground that the land was not vacant land.

The court submitted to the jury the issue as to whether appellees had perfected their title by 10 years' limitation, and it is the contention of appellants that this was error, because, according to the uncontradicted evidence, appellees had not made out an adverse holding of the land for 10 years, as it appeared that up to March, 1893, they had held it under the belief that it was vacant public land belonging to the state of Texas. There is some conflict of opinion, it seems, among Texas decisions on this subject; and it would doubtless be the duty of this court to certify the question of conflict to the Supreme Court, did it not appear to us that the facts in this case differentiate it from the cases sustaining the views of appellants, as a review of them, we think, will demonstrate.

The first case which we think bears upon the subject is that of Schleicher v. Gatlin, 85 Tex. 370, 20 S. W. 120. The facts in that case were that Gatlin moved on the land sued for in 1876, and continued to live thereon until the suit was instituted, erroneously believing until 1879 that the land was vacant public land. He inclosed a part of the land, and placed permanent valuable improvements thereon. He made no effort to obtain the land from the state, but for the three years that he was on it had never claimed the land, because he thought it belonged to the state. The Commission of Appeals, through Judge Garrett, said: "Under the de-

*Writ of error denied by Supreme Court.

defendant's own statements, his holding was not adverse until 1879, for he believed until then that the land belonged to the state." All of the cases that have followed the Schleicher-Gatlin Case were decided by the Court of Appeals of the First Supreme Judicial District, although in one or two instances, as will hereinafter appear, that court has seemed disposed to distinguish the Schleicher-Gatlin Case, if not to question its correctness. The leading case is cited in *Norton v. Collins*, 1 Tex. Civ. App. 272, 20 S. W. 1113, but *Beaumont Lumber Co. v. Ballard* (Tex. Civ. App.) 25 S. W. 920, is the first case in which there is an indorsement of the doctrine of that case. In the *Ballard* Case the person claiming the land by limitation had occupied it for 10 years, but under the mistaken belief for part of the time that the land was the property of the state; and he desired to pre-empt, but did not do so because he was informed that the land was not vacant. The court said: So long as the plaintiff labored under the erroneous impression that the premises were a part of the public domain, his possession was not an adverse possession." In the case of *Cartwright v. Pipes* (Tex. Civ. App.) 29 S. W. 690, it appears that *Windsor Pipes* moved on the land in controversy and erected improvements, and the land was occupied until the suit was instituted—a period of 10 years. *Windsor Pipes*, up to the time of his death, in 1888, erroneously thought the land was public land, and talked of pre-empting it at some time in the future, but took no steps in that direction. It was contended by the appellant "that the mere fact that a person in possession of land belonging to another is of the belief that it is public land, or a part of the public domain of the state, makes his possession, as a matter of law, that of one claiming in subordination, and not adversely, to the true owner." Among the cases cited in support of the contention was the *Schleicher-Gatlin* Case. The Court of Civil Appeals of the First District, speaking through the same judge who wrote the opinion in the *Schleicher-Gatlin* Case, said: "Our opinion is that the fact that a person in possession of land belonging to another believes that it is public land should go to the jury as any other fact showing intent, in order to determine the character of the possession. While *Windsor Pipes* believed that the *John Stewart* survey was a forfeited survey, from which the certificate had been floated, and was public land, the character of his possession was such as to be clearly hostile and adverse to the true owner." In other words, the court held that the question as to the adverse holding was one of fact, and not one of law, as was held in the *Schleicher-Gatlin* Case. The subject came again before the same court in the case of *Hartman v. Huntington*, 32 S. W. 562, *Blume Land Co. v. Rogers*, 32 S. W. 713, and *Flewellen v. Randall*, 74 S. W. 49. In the first-named case,

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James Ducett entered upon the land in 1867, and occupied it until his death, in 1883, believing all the time that it belonged to the state. The state did not own the land, and the only question was whether or not the possession of *Ducett* was adverse to the true owner. The court, through Judge Williams, held that it was mainly a question of fact, and decided that the trial judge had not erred in holding that the possession was not adverse to the owner, because there was nothing to indicate that a claim to the land was being set up by *Ducett*. Stress was laid in the opinion on the fact that *Ducett* had taken no steps to pre-empt the land. In the case of *Blume Land Co. v. Rogers* (Tex. Civ. App.) 32 S. W. 713, the defendant had entered into possession of the land, believing it to be vacant land, and held it for 10 years. No effort was made to pre-empt it. The court in this opinion seems to have gone back to the position occupied in the *Schleicher-Gatlin* Case, and held that, "where the occupant entered and continued to hold during his occupancy under the erroneous belief that the land was a part of the public domain, it is not a possession adverse to the owner, and that consequently such occupant does not acquire title to any part of the land." In the recent case of *Flewellen v. Randall*, above cited, the facts were that *Randall* and *Flewellen* were neighbors, and both erroneously thought the land in controversy was vacant public land, and, at the suggestion of *Flewellen*, *Randall* entered into possession of the land, and held it for 10 years. No effort was made to obtain title from the state. The court reaffirmed the doctrine of *Blume Land Co. v. Rogers*, referring to the fact that a writ of error had been refused in that case by the Supreme Court.

The foregoing constitute all the cases that sustain the doctrine that time will not be computed in the period of 10 years' limitation during which the holder of the land thought it public land, and in every one of them no effort had been made to obtain title to the land from the state.

The first case reported in which the doctrine of *Schleicher v. Gatlin* was attacked was that of *Converse v. Ringer*, 24 S. W. 705, in which the opinion was rendered by Judge Fisher, of the Court of Civil Appeals of the First District, who was a member of the branch of the Commission of Appeals that rendered the opinion in the criticised case. He vigorously attacked the *Schleicher-Gatlin* decision, and held that "possession is not required to be adverse to the world, but it is only needful that it be adverse to the true owner, or one claiming adversely to the defendant." The opinion is a strong one, and fortified by numerous authorities. The facts in that case indicated that the defendant's vendor held the land, believing it to be vacant land, for 10 years, intending to acquire it under the pre-emption laws of the state.

The case does not seem to have been carried to the Supreme Court. In the case of Longley v. Warren, 33 S. W. 304, decided by the Court of Civil Appeals of the Second District, the decision in the Converse-Ringer Case was approved, and a writ of error was refused by the Supreme Court. In the Longley-Warren Case the parties in possession of the land, who pleaded 10 years' limitation, had settled on it, and had made their applications and surveys for a homestead donation. The Longley-Warren Case was decided about two months after the case of Blume Land Co. v. Rogers, and must have been approved by the Supreme Court after a writ of error had been refused in the Rogers Case; and in the later case it was stated that all the judges composing the Commission of Appeals that rendered the Schleicher-Gatlin opinion had since disapproved of it, and it might be looked upon as overruled. The court reversed the judgment of the lower court, and rendered judgment for appellant for the land; and in refusing the writ of error the Supreme Court must necessarily have agreed with the opinion that in the Converse-Ringer Case, the true construction of the 10-years statute of limitation was enunciated, and that, "the state excepted, the possession was undoubtedly adverse to all the world. The statute only requires it to be adverse to 'another,' which, however broad its meaning, evidently was not intended to apply to the state." The court further said: "The evidence of such adverse possession for more than ten years being undisputed, the court might properly have instructed the jury to return a verdict for appellants." On that ground the judgment was reversed and rendered in favor of appellants. The case is strikingly similar to the one under consideration. The facts of this case are unlike those in the Schleicher-Gatlin Case and those that have followed it, and, being almost identical with those in the Longley-Warren Case, the decision in which has been approved by the Supreme Court, and that being the last case involving the question to be brought before the court last named, we conclude that it is the law of the state, and should be followed by this court. This is done the more readily because we believe it and the Converse-Ringer opinion enunciate the true doctrine in connection with the statute of limitations of 10 years.

Appellees conformed strictly to the law in the endeavor to pre-empt the land, and, had it been state land, nothing could have prevented them from obtaining title to it. They were not squatters on land supposed to be public domain, intending to remain only so long as they were permitted by the lawful authorities, but they settled under the law, with the intention of remaining and making the land their homesteads. There is but one interpretation to be put upon their acts in settling upon the land, filing their applications for surveys, fencing portions of it, and

occupying, using, and enjoying it, and applying for patents in the statutory manner. They were holding the land against the world.

It is contended by appellants that appellees should not have recovered the whole of the 160 acres claimed by them, because the evidence showed the inclosure of only 110 acres of it. It is true, as stated by appellants, that appellees had only 110 acres of the land inclosed; being the whole of the 80 acres claimed by W. H. Eardley, and 30 acres of the tract claimed by Arthur Eardley, for 10 years; the remaining 50 acres not being inclosed until 1898. It also appears from the evidence that no one was in possession of and occupying the survey of which appellants claim the land in controversy was a part, and we are of the opinion that appellees' occupancy would, under articles 3343, 3344, Rev. St. 1895 (old numbers 3194 and 3195), be construed to embrace at least the 160 acres claimed by both of them. Pearson v. Boyd, 62 Tex. 541. The facts of this case do not bring it within the scope of those cases where a person seeks to hold by limitation a portion of a survey, another portion of which is occupied by the owner, and where it is held that the man seeking to establish such title can do so only to so much as he has actually inclosed. Carley v. Parton, 75 Tex. 98, 12 S. W. 950; Bracken v. Jones, 63 Tex. 184; Evitts v. Roth, 61 Tex. 81; Claiborne v. Elkins, 79 Tex. 880, 15 S. W. 395. This is not a case of extending a boundary so as to take the land of an adjoining landowner, but it is the "open, visible, notorious, distinct, and hostile" appropriation of a portion of the land of another for 10 years, who does not during the time occupy any portion of the survey. Craig v. Cartwright, 65 Tex. 413; Simpson v. Johnson, 92 Tex. 160, 46 S. W. 628. In the case of *Nativel v. Raymond*, 59 S. W. 311, the subject is fully discussed, and it was said: "Under article 3343, Rev. St. 1895, ten years' possession is a bar, without reference to the existence of inclosure or written memorandum." The statute is, indeed, so plain that no other construction would have been suggested, had it not been for unfortunate expressions in Bracken v. Jones, and perhaps other cases.

Appellees having shown title by limitation by the uncontroverted testimony, errors committed in regard to other issues become immaterial, and need not be discussed.

The judgment is affirmed.

On Rehearing.

(December 16, 1903.)

Appellants, in their brief, grouped three assignments of error, designed to raise the question of the sufficiency of the evidence to sustain the plea of 10 years' limitation: The first is to the effect that the court erred in submitting the issue at all; the second is that the court erred in refusing to submit the is-

sue in the manner desired by appellants, as set forth in a special charge; and the third is that the court erred in refusing a new trial, because the evidence showed that until 1893 the appellees were endeavoring to obtain a patent to the land, and consequently could not have been holding it adversely to appellants. The assignments of error were not followed by a proposition, and neither of them is a proposition of law in itself. This court might properly have refused to consider them at all, but saw fit to notice a matter that might have been raised under the assignments, namely, that the limitation of 10 years was not raised by the evidence. That question was thoroughly discussed by this court. In the motion for rehearing, appellants shift their position, and contend that it was a question of fact that should have been determined by the jury under the law as embodied in a special charge requested by them. The reason for the rule requiring distinct propositions of law under each assignment of error is fully vindicated by this case. If it be conceded that the circumstances indicate that appellees intended to resign possession of the land if the state did not grant a patent to it, and therefore the time while waiting for a patent should not be considered in the time necessary to make up the period of limitation, still the facts in this case fail to raise that issue. On the other hand, the evidence indicates that appellees intended to hold the land, whether the state owned it or not. The true doctrine as to limitation, we think, is stated in the case of *Converse v. Ringer* (Tex. Civ. App.) 24 S. W. 705, as follows: "It is true that limitation will not run when the land is vacated, and title remains in the state; but such is not the case here, and we can perceive no good reason why one in possession of land under the mistaken belief that it is vacant, asserting an exclusive and adverse claim, having the exclusive use and enjoyment of it under a claim that is hostile to the true owner, may not rely upon such possession in order to prescribe under the ten-years statute." If the statute required a possession adverse to the claims of every one, there might be some reason for the contention of appellants, but it does not; the clear intention being to require a possession adverse to the true owner. Just as long as appellees were holding the land for the specific purpose of obtaining a patent under the mistaken belief that it belonged to the state of Texas, they must necessarily have been holding it adversely to every one else, and it is incomprehensible to this court how the true owners of the land can defeat the adverse holding as to themselves because another's title was recognized. No reasons are attempted to be given in the *Schleicher-Gatlin* Case, 85 Tex. 370, 20 S. W. 120, or the cases that follow it, for the rule therein announced, and no authorities are cited that tend to support the doctrine of those cases. Prior to the *Schleicher-Gatlin*

Case, the doctrine was clearly recognized that the adverse possession contemplated by the statute was one against the owner of the land. In the case of *Gillespie v. Jones*, 26 Tex. 313, it was said: "The legal effect and extent of an adverse possession depends, of course, upon the character of title which is sought to be sustained. But in presumption of law, an actual possession must be regarded as adverse to all other titles or claims than that of the possessor, or such as have been recognized by him. And whenever a party permits such possession to be maintained, he does so at his peril."

If our view of the law is correct, a verdict for appellees was bound to be rendered on the evidence as to limitations, and it is absolutely immaterial as to the errors that may have been committed as to other matters.

The motion for rehearing is overruled.

NOWLIN v. HALL.

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

TRESPASS TO TRY TITLE—PLEADING—DEFENSES ADMISSIBLE—HARMLESS ERROR—PUBLIC LANDS—VALIDITY OF PURCHASE.

1. Since, in trespass to try title, it is not necessary to specially plead any defense other than limitations, all other defenses being admissible under the general issue, error in striking out special pleas was harmless.

2. In trespass to try title, a title under which defendant claimed by purchase from the person to whom the land was awarded by the Commissioner of the Land Office was properly ignored by the court, where the testimony was undisputed that such person was not a settler on the land at the time he made his application to purchase, and it was not shown that the Commissioner of the Land Office had issued a certificate of proof of three years' occupancy under such purchase.

Appeal from District Court, San Saba County; Clarence Martin, Judge.

Action by James M. Hall against Henry Nowlin and others. From a judgment for plaintiff, defendant Nowlin appeals. Affirmed.

Chas. L. Lauderdale, for appellant. W. M. Allison and G. A. Walters, for appellee.

KEY, J. This is an action of trespass to try title, brought by appellee Hall against appellant, Nowlin, and three other defendants. The other defendants disclaimed, leaving the controversy between Hall and Nowlin. There was a jury trial, resulting in a verdict and judgment for Hall, and Nowlin has appealed.

The case has been in this court before, and will be found reported in 66 S. W. 116, 851, and 67 S. W. 900. On the former appeal, some of the points now urged were decided against appellant, and we see no reason for changing the views then expressed.

At the last trial the court correctly instructed the jury as to what would consti-

tute an actual purchaser in good faith, and submitted it to and left it for the jury to decide whether or not the plaintiff was such an actual purchaser, and whether or not he had purchased from the state more than four sections of land.

Without considering in detail the several assignments of error, we here state that they have received consideration in the consultation room, and are not regarded as showing ground for reversal. If error was committed in striking out matters specially pleaded by the defendant, such error was harmless, because, this being an action of trespass to try title, it was not necessary for the defendant to specially plead any defense other than limitation; all other defenses being permissible under the plea of not guilty.

Nowlin claimed the land by purchase from one Buckholtz, to whom it had been awarded by the Commissioner of the Land Office. Buckholtz's application to purchase and the award to him were made prior to Hall's application to purchase, which was rejected. But as it was shown by clear and undisputed testimony coming from both sides, and from Buckholtz himself, that he was not a settler on the land at the time he made his application to purchase, and as it was not shown that the Commissioner of the Land Office had issued a certificate showing that proof of three years' occupancy had been made under the Buckholtz purchase, the trial court correctly ignored that title, and refused to submit to the jury any issue concerning it.

In view of the testimony, we hold that there is no reversible error in the court's charge, nor in its rulings upon the admissibility of evidence. No error being shown, the judgment is affirmed.

SAN ANTONIO TRACTION CO. v. DE RODRIGUEZ.

(Court of Civil Appeals of Texas. Oct. 14, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—ASSUMPTION OF RISK.

1. Where a servant, ordered to assist in handling a wooden beam with inadequate assistance, was ignorant, by reason of his inexperience, of the weight of the beam, and the number required to safely handle it, and the master was charged with a knowledge of the danger of the undertaking, the master was liable for the injuries received by the servant while assisting in handling the beam.

2. A servant ordered to take a certain number of men with him, and go to a certain place and get a wooden beam, who knew of the weight of the beam and the number of men required to handle it with safety, assumed the risks arising from undertaking to handle it with an inadequate force.

Appeal from District Court, Bexar County; J. S. Camp, Judge.

Action by Clara Y. De Rodriguez against the San Antonio Traction Company. From

a judgment for plaintiff, defendant appeals. Reversed.

Houston Bros. and R. J. Boyle, for appellant. Robt. T. Neill, for appellee.

FLY, J. Clara Yrizolle De Rodriguez sued appellant for damages resulting from the death of her husband, Utimio Rodriguez, and a trial by jury resulted in a verdict and judgment in favor of appellee for \$3,500. It was alleged in the petition that Utimio Rodriguez was in the employ of appellant, and on September 9, 1901, was ordered, in company with five or six colabomers, to lift, carry, and place on a wagon a very heavy, thick, and long wooden beam or sill; that said beam was so heavy that 12 or 14 men would have been necessary to lift and carry it, but Rodriguez, being inexperienced, did not know the weight of the beam and the number of men necessary to move it, and, in obedience to the orders of his foreman, in conjunction with five or six men, attempted to lift and carry the beam, and in so doing received injuries that caused his death.

The petition was excepted to as presenting no cause of action, and the first and second assignments of error present as error the refusal of the trial court to sustain the exceptions. If deceased was ordered to assist in handling a beam with inadequate assistance, and was ignorant, by reason of his inexperience, of the weight of the beam and the number required to safely handle it, and appellant was charged with a knowledge of the danger of the undertaking, and the death of deceased resulted from an endeavor to perform the labor, appellant would be responsible. The court did not err in overruling the exceptions. *Railway v. Sherwood* (Tex. Civ. App.) 67 S. W. 778, and authorities cited.

Utimio Rodriguez, the deceased husband of appellee, was in September, 1901, in the employment of appellant, and had been for a time, and was engaged in driving a team and in repairing and building roads and bridges for appellant. On that day he was ordered by the assistant foreman to take five men and bring a log on St. Mary's street to Mill Bridge, in the city of San Antonio. Utimio, in company with the five men, drove his wagon to the place where the log was situated, and proceeded to load it on the wagon. While so engaged he complained of being hurt in his stomach or lower bowels. He was carried home, and in about a week died from the effect of his injuries. The log was about 30 feet long, and from 11 to 16 inches in diameter. It was wet from a rain. Utimio had, prior to the time he was hurt, assisted six men in moving the log to St. Mary's street. No foreman was with the men when the injury was inflicted, and it did not result from any inefficiency on the part of the five men assisting in lifting the log. The only two eyewitnesses to the injury, whose evidence appears in the record, testified that they knew that the log was too heavy for six

men to lift, and that it required from eight to ten men to properly handle the log. Utimio, as well as the other men, was accustomed to lifting logs. No objection was made by Utimio to lifting the log with five men. If the traction company is liable for the injury inflicted on Utimio, it must be based on the allegation and proof that he was ordered to perform labor that was dangerous, that his employer was chargeable with knowledge of the dangerous nature of the work, and that deceased was so inexperienced that he did not know the danger attending the work. The allegations in the petition make out that class of case, but they are not supported by the facts, but a case is presented where a laborer willingly undertakes to lift a log that he had assisted in lifting before, and with whose weight it must be presumed that he was as fully acquainted as was his employer. He must have known, as did his fellow servants, that the force provided was inadequate, and yet undertook the work without protest. In the case of *Bonnet v. Railway*, 89 Tex. 72, 33 S. W. 334, which has gone as far on the line of this case as any reported, the liability of the employer was predicated on the inexperience of the deceased, and the failure of the employer to warn him of the danger of the employment. In the case of *Railway v. Sherwood*, 67 S. W. 776, decided by this court, the liability of the master was placed on negligence in failing to furnish a fellow servant physically able to properly assist the injured employé in carrying a piece of timber, and which physical incapacity of his fellow servant was not known to the injured servant. It is undoubtedly the duty of the master to furnish an adequate number of competent laborers to perform his work, and a failure to do so will render him liable for any damages to his employés resulting from such failure, provided such failure was not known to the injured servant, and the risk assumed by him. The servant does not assume the risks arising from the want of a sufficient number of skillful laborers, no more than he assumes the risks arising from the use of defective machinery and appliances; but in either case, when he knows the negligence of the company in providing such labor or appliances, and yet continues in the service, he will be held to have assumed the risks incident to such employment. Or, in other words, if Utimio Rodriguez, with a knowledge of the weight of the log and the number of men required to handle it, undertook to handle it with an inadequate force, he assumed the risks arising from the moving of the log, and the appellant would not be liable.

No Texas case directly in point has been brought to the notice of this court, but similar cases have arisen in other states. In the case of *Ferguson v. Phoenix Mills*, 61 S. W. 53, the plaintiff was ruptured while endeavoring to lift a truck out of a hole. It was shown that he was inexperienced. The

Supreme Court of Tennessee said: "If the wheel of the truck had gone into the hole, and it was the duty of the employé to lift it out, then he cannot hold the master liable for overexerting and straining himself. He is the best judge of his own lifting capacity, and the risk is on him not to overtax it." In the case of *Worlds v. Railroad*, 25 S. E. 646, the Supreme Court of Georgia held that an employé could not recover for a strain to his back from carrying cross-ties, although he had been ordered to carry them, and had protested against doing so because they were too heavy. In the case of *Haviland v. Railway*, 72 S. W. 515, the plaintiff, with four others, was required to shove or slide steel rails up a greased incline, and, while so engaged, strained his back. Prior to that time plaintiff, in company with five others, had moved similar rails on a flat car. The Supreme Court of Missouri cited with approval the Georgia and Tennessee cases above named, and held that the plaintiff could not recover. In the case of *Walsh v. Railway*, 8 N. W. 145, the plaintiff was injured while assisting in moving a millstone. The plaintiff claimed that the negligence consisted in failing to have men and foreman of experience in such matters, in failing to furnish a sufficient number of men, and in having an uneven floor. The Supreme Court of Minnesota, in deciding against the plaintiff, said: "As to the unevenness of the floor, it appeared affirmatively that plaintiff was aware that it was uneven, and though he were not, as he testifies, aware of the degree of its unevenness, this was a matter so open to ocular observation that, in consequence of the length of time during which he had been engaged in handling freight of all kinds in this very warehouse, he would stand in no better position than if he had actual knowledge of it as it really was. He was bound to make use of his eyes to see a source of danger which was open and apparent to anybody who would use his eyes. * * * As to the danger and difficulty of handling the stone on account of its weight, and of the bulge which made it heavier on one side than the other, this is a danger and difficulty which arises from the ordinary operation of familiar laws of gravitation, and from nothing else. With this ordinary operation of the laws of gravitation, every man who has reached the age of twenty-five years, and of ordinary capacity, must be presumed to be acquainted, especially if for years he has been engaged in handling freight of all kinds about a railroad warehouse. If, then, he engages in moving a millstone, as in this case, the form, bulge, and great weight of which are inevitably apparent, he must take notice of the ordinary operation of familiar laws of gravitation, and therefore must, so far as the observation of these laws is concerned, see to it that he engages in moving it with help sufficient in number to move it with safety. Failing to do so, the risk is his

own, and not that of his employer." The foregoing case was cited approvingly by the Supreme Court of Nebraska in the case of *Brewing Co. v. Hansen*, 91 N. W. 279. In the case of *Railway v. Drake*, 35 Pac. 825, the plaintiff, Drake, while engaged in unloading iron rails from a car, with four others, was injured, and sought to obtain damages from the railway companies on the ground that they had been negligent in failing to provide the requisite number of employés to safely and properly perform the work. Drake claimed that it required eight men to properly perform such labor, and a greater number than five had previously been employed by the company. The foreman was not present when the accident occurred. The Supreme Court of Kansas held: "He was an experienced man, of full age, capable of judging what number of employés were necessary to safely do the work; and, if there was an insufficient number, he knew that as well as the company knew it. The work was simple, and the risks and dangers were obvious."

It will be noted that the Tennessee case holds that in case an employé overestimates his strength, and thereby sustains an injury, he cannot recover. We need not express an opinion as to the soundness of that decision, but confine our decision to the limits prescribed by the experience or inexperience of the deceased servant. We think circumstances might arise where the employer would be liable for requiring a servant to perform labor too great for his physical capacity, where the inexperience of the servant was so great that he was incapable of properly measuring his own capacity physically to perform the work.

While it was alleged, there was no attempt to show the inexperience of Utimio Rodriguez, but, on the other hand, the evidence tended to prove that he had been engaged in such service for the defendant for quite a length of time, and that he had actually lifted the same log before, and must have known its weight and the number required to lift it. It is true, it was wet when he last lifted it; but he knew that fact as well as his employer.

Because the evidence was insufficient to sustain the verdict, the judgment is reversed, and the cause remanded.

NEILL, J., did not sit in this case.

On Motion for Rehearing.

(Dec. 16, 1903.)

FLY, J. It is contended by appellee that this court erred in finding that deceased had, before his death, been "engaged in driving a team and in repairing roads and bridges for appellant." Nasario Gonzales, a witness for appellee, swore that the employment of Utimio was usually driving a wagon, and further that he had seen him "assist in loading and unloading wagons before this acci-

dent, while working for the San Antonio Traction Company." Miguel Mazanares, another witness for appellee, swore that he had been engaged in repairing bridges and in lifting logs, and that, "as to Rodriguez's duties, he was working as we all were, and had to do whatever the boss told him to do. He was usually told to drive the wagon—was only difference between his work and ours. He also did our kind of work." There is no doubt about the identity of the log last lifted by deceased with the one he had assisted in lifting before. The testimony of the foreman on this subject is not controverted. He said on cross-examination by appellee: "Utimio Rodriguez carried this log there before. I gave him the same number of men—six men—to carry it before. When I sent him to carry it this time, I told him to go and get the timber—six men. I did that because he knew the particular piece of timber I wanted. This was why I sent him. * * * They handled this piece of timber before with six men, when I sent it over there, and I took the same number of men to take it back." It is contended by appellee that she could not contradict the testimony as to the log having been carried to the place it occupied when the injury was inflicted, because the foreman did not give the names of the persons who were with the deceased when the log was first moved. It would appear from the record that no witness was asked about the matter, except the foreman, and his evidence was brought out by appellee on the cross-examination. No effort was made to contradict the statement. The two witnesses who testified as to the accident may have been with the deceased when the log was first moved. In the Sanchez Case, 85 S. W. 893, relied on as being similar to this case, the foreman was present and personally directing matters, and this court said: "We regard the real issue here as not one of equal opportunity, nor one of experienced employé. Where the employé acts suddenly, as may be said in this case, upon an imperative order enjoining instant obedience, if the danger of injury from obeying is not certain, and can be incurred without injury by exercising care, the issues of negligence, contributory negligence, assumed risk, etc., are for the jury, and not for the court, to determine." In this case Utimio Rodriguez was told to take a certain number of men, go to a certain place, and bring a certain log back. If there was any one in charge, Utimio was; and he was not acting suddenly, but with perfect deliberation, about lifting a log that was so well known by him that he had no difficulty in getting it. No one could have any more knowledge as to the log than Utimio, who had assisted in carrying it before. In the Sherwood Case the plaintiff was injured through the incapacity of a fellow servant. The master knew of this incapacity. The servant did not. In this case deceased was not injured through the in-

capacity of his fellow servants, but by attempting to do a thing that he himself was incapacitated from doing. He made a mistake as to his own strength, and overtaxed himself, knowing the weight of the log and the kind of task imposed upon him. He stood upon an equal footing, at least, with his master with respect to a knowledge of the danger; and, while he was under no obligation to inspect appliances furnished him, he was called upon to exercise ordinary circumspection. *Bonnet v. Railway*, 89 Tex. 72, 33 S. W. 334. *Bonnet* had no experience whatever, and was working under the direct supervision of his foreman. This also constitutes the sharp distinction between this case and that of *Railway v. Langan*, 76 S. W. 32, decided by the Court of Appeals of Kentucky. In the *Langan* Case not only was the foreman present and ordering the work done, but the injury occurred through an iron shaft being dropped by one of the laborers. *Rodriguez* and his companions chose their method of putting the log on the wagon, and it may be inferred from the fact that two were at each end and two in the middle that they attempted to lift the log bodily over the wheels into the wagon. No attempt was made to show that it was a safe method of lifting the log. No complaint is made of the inefficiency of the men who assisted *Rodriguez*, or that the injury occurred through their inability or neglect to perform their duty. The case must be viewed as though deceased attempted alone to lift a log that he was not physically able to lift. If he overrated his strength, being experienced in the line of work undertaken by him, the master cannot be held liable for it. *Railway v. Lemon*, 83 Tex. 143, 18 S. W. 331. The uncontradicted evidence showed that only five men moved the log from the Navarro Street Bridge, where it was carried on the day *Ulmio Rodriguez* was injured.

The motion for rehearing is overruled.

BITTER et al. v. BUTCHERS' & SALOON MEN'S ICE MFG. ASS'N.*

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

NOTE — EXTENSION — ADMISSIBILITY OF EVIDENCE — SUFFICIENCY OF EVIDENCE — APPEAL — RIGHT TO ALLEGE ERROR.

1. Where the manager of an association, who is one of the payees of notes given by the association and the agent of the other payee, extends the time of payment, and before the extension has expired uses the threat of a suit on the notes to compel the adoption of a resolution and execution of a contract continuing his employment as manager, the unexecuted contract and unpassed resolution are admissible, in a suit on the notes, as a circumstance tending to establish the extension and to show bad faith on the manager's part.

2. Evidence in a suit on notes held sufficient to establish an extension of time.

3. A party who secures the giving of a charge submitting a certain issue cannot complain that another instruction was given submitting such issue.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by John A. Bitter and another against the Butchers' & Saloon Men's Ice Manufacturing Association. From a judgment for plaintiffs granting insufficient relief, they appeal. Affirmed.

M. W. Davis and A. W. Seeligson, for appellants. J. E. Webb and M. E. Buckley, for appellee.

FLY, J. On January 22, 1902, appellants instituted suit against appellee to recover on two promissory notes amounting in the aggregate to \$7,000, and 10 per cent. for attorney's fees. Appellee answered, admitting that it owed appellants \$7,042.78, and that it made a tender of this amount to them on the day the suit was instituted, but it was refused, and the amount was tendered into court. It was further answered that the notes were not due until February 1, 1902, the time having been extended by appellants to that date. The contest is really over the attorney's fees. The jury returned a verdict for appellants for the amount tendered into court.

The two notes, on which the suit is founded, were executed on March 1, 1899, one being due on September 1, 1900, the other on September 1, 1901. Each of the notes provided for 10 per cent. attorney's fees if placed in the hands of an attorney for collection or if sued upon. They were secured by deed of trust on certain lots in San Antonio. On the day the suit was filed, January 22, 1902, a tender was made by appellee of the principal and interest of the notes to appellants, and, when refused, was deposited in the court in which the suit was pending. John A. Bitter had been manager of the association for five or six years prior to February 1, 1902, and drew a salary as manager at the rate of \$100 per month, and up to February 1, 1902. He had charge of the books, and was in the habit of collecting the interest on the notes, which he charged the association and credited the holders of the notes on the books of the association. He also collected \$4,000 of the principal. He had possession of the notes, and exercised full control and authority over them, and he caused the suit to be instituted. A. W. Bitter, his brother, one of the payees in the notes, at no time exercised any control over the notes, but was represented by his brother in all transactions concerning the notes. On November 29, 1901, John A. Bitter and A. W. Bitter promised the appellee to carry the notes and not foreclose on them. Afterwards, in January, 1902, when it was suggested that the salary of the manager would be reduced to \$50 a month, John A. Bitter began using the enforcement of payment of

*Rehearing denied December 16, 1903.

the notes as an incentive to a continuance of his former salary. During that month he credited himself and brother with interest on the notes up to February 1, 1902, and charged the same to appellee on its books. He also collected his salary, \$100, for the month of January. The evidence establishes an extension of time of payment of the notes to February 1st, and it follows that the suit was instituted before maturity of the notes.

The first assignment of error complains of the admission in evidence of an unsigned contract and a resolution which was not adopted by appellee. John A. Bitter was using the power given him, through the notes due by appellee, to compel his appointment as manager at a certain salary for another year; and in furtherance of this design he told the president of the association that he would hold open the matter as to the note until after the 21st of January, when a meeting of the directors was held, and at the same time presented a contract by which, if signed, the association agreed to pay him, as manager, \$100 a month for 12 months, and a resolution to that effect to be adopted by the board of directors at the meeting on January 21st. The contract and resolution were clearly admissible, not only as circumstance tending to establish an extension, but as tending to show bad faith upon the part of a man who at the time was an officer of the association, as well as the representative of himself and brother. The pleading justified the admission of the testimony. Two days after giving the contract and resolution to the president of the association, in the face of his agreement to hold the matter as to the notes open until after January 21st, according to his own testimony the manager, on January 17, gave the notes to his attorney and instructed him to institute suit on them.

The propositions under the second and third assignments of error fail to point out any error in the charges of which complaint is made, and under a strict construction of the rules should not be considered, but a consideration of what seems to be the point intended to be raised shows no error. John A. Bitter was the agent of his brother, A. W. Bitter, and had full authority to make any arrangement he saw proper as to the notes, and all the facts, taken with the fact that he credited the holders of the notes and charged the association with interest until February 1, 1902, upon the books of the association, which he had possession of by virtue of his office, would be sufficient to establish an extension of time of payment of the notes until February. Brandt, Sure. & Guar. § 352. His acts in connection with the interest can bear but one explanation, and that is that he had extended the payment until February 1st. He could not afterwards, in a fit of anger and chagrin, repudiate his acts and entail an unnecessary expense on the association, which he should have en-

deavored to protect, in his capacity as manager.

There was no necessity for giving the charge requested by appellants as to the agency of John A. Bitter. The court charged the jury that unless they found that John A. Bitter made the extension, and had authority to bind his brother in so doing, they would find for appellants. The following was also given at request of appellants: "You are charged that John A. Bitter had no authority to extend the notes in question, unless you believe from the evidence that Albert W. Bitter had authorized him to do so, prior to such extension, if any, or after such extension, if any, the said Albert W. Bitter had ratified the said extension." The charge, which was rejected, should not have been given, because there was no evidence that A. W. Bitter created the agency on January 22, 1902, but all the facts show that it had been in existence for years.

Appellants' counsel cannot complain that the requested charge on ratification should not have been given because not pleaded nor proved. They asked, and the court gave, a charge presenting the same issue, and are not in a position to claim error on that point.

The other assignments of error are disposed of by the conclusion of facts.

The judgment is affirmed.

RIVES v. FIRE ASS'N OF PHILA-DELPHIA.*

(Court of Civil Appeals of Texas. Nov. 28, 1903.)

INSURANCE—STIPULATION IN POLICY—VIOLATION—EXCUSE.

1. Where one who had a fireproof safe took no care to place therein a set of books kept by him in compliance with a provision of his fire insurance policy, and they were burned, he was guilty of negligence.

2. Where a provision in a fire insurance policy requires the assured to keep a set of books concerning the insured property, and stipulates that in case of loss he shall produce them, or the policy shall be void, he is not excused from producing them by their destruction in the fire, where his own negligence contributed to cause their loss.

3. A provision in a fire insurance policy requiring the assured to keep a set of books, and produce them in case of loss, is not complied with by producing books kept by others for themselves, though showing the facts required to be shown by plaintiff's books.

Appeal from District Court, Marion County; J. M. Talbot, Judge.

Suit by Herbert Rives against the Fire Association of Philadelphia. From a judgment in favor of defendant, plaintiff appeals. Affirmed, and motion for rehearing overruled.

W. T. Armistead and F. H. Prendergast, for appellant. Finley & Knight and Crane, Greer & Wharton, for appellee.

*Rehearing denied December 12, 1903, and writ of error denied by Supreme Court.

BOOKHOUT, J. H. Rives, as plaintiff, instituted this suit against the Fire Association of Philadelphia in the district court on May 27, 1902, to recover judgment on a fire insurance policy for \$1,500. A trial was had, and the court instructed a verdict for defendant. Judgment was accordingly so entered, and plaintiff appealed.

On the 27th day of December, 1901, the Fire Association of Philadelphia issued to H. Rives its policy of insurance for the sum of \$1,500, by which it insured against direct loss or damage by fire cotton in bales owned or held by the said Herbert Rives, in trust or on commission, or on joint account with others, while contained in the warehouse at 107-108, Block 17, Soda street, Jefferson, Tex. On February 13, 1902, while said policy was in force, 327 bales of cotton contained in said warehouse were destroyed by fire. Seventy-six bales were held on joint account for D. C. Wise and Rives, the appellant. Ten bales were held on joint account for Rives & Sherrill. Fourteen bales were held on joint account for Rives & Hudson. One hundred and eighteen bales were held on joint account for Rives & Segal. One hundred and nine bales held in trust for other parties, whose names are set out in the petition. The policy contained the following provision:

"And it is understood and agreed to be a condition of this insurance, that only actual payment by cash, check or otherwise, together with the passing of a written delivery order and a transfer to purchaser named on books to be kept for that purpose by the management of the compress, warehouse or yard where said cotton is stored, shall constitute delivery of cotton purchased from seller to buyer; and it is further agreed that tickets, checks or receipts for cotton deliverable to bearer shall not be considered full evidence of ownership; but must be verified by written delivery order and transfer on books as hereinbefore provided.

"And it is understood and agreed that the basis for adjustment of any claim for loss or damage to the property covered by this policy shall not exceed the actual cash market value of such property at the time of the loss and at the place of the fire, which cash market value shall in no event be greater than it would then and there cost to replace the property damaged or destroyed with property of the same kind and quality. And it is further understood and agreed that if at the time of fire the whole amount of the insurance on the property covered by this policy shall be less than the actual cash market value thereof, this company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the actual cash market value of such property at the time and place of fire.

"And the assured under this policy hereby covenants and agrees to keep a set of books

showing a complete daily record of the date at which each bale of cotton covered under this policy was purchased or received, from whom purchased or received, in what compress, warehouse or yard stored, together with the original tag number or mark thereon, with its weight and classification, and a complete daily record of all shipments or sales, showing to whom shipped or sold, with date of shipment, from the warehouse, compress or yard so shipped, and the original number of marks, weight and classification of each bale, and in case of loss the assured agrees and covenants to produce such books and records, and in event of failure to produce the same, this policy shall be null and void."

The defendant, in its answer, set up this provision of the policy, and alleged the failure on the part of the assured to comply therewith, and that "the plaintiff did not keep any books or records showing a complete daily record of the date at which each bale of cotton covered under this policy was purchased or received, in what compress, warehouse, or yard stored, together with the original tag number or mark thereon, with its weight and classification. Nor did he keep any books or record showing a complete daily record of all shipments or sales, or showing to whom shipped or sold, with date of shipment, or from what warehouse, compress, or yard shipped, and the original tag number or marks, weight, and classification of each bale; nor did he keep any of the books and records mentioned in said contract. And defendant would further show that the plaintiff wholly failed and refused to produce any of said books and records above mentioned, containing the data and facts above mentioned, though the production thereof has been duly demanded by this defendant, since the fire destroyed said cotton." On the issue thus presented, the plaintiff testified: "I kept two books—a receipt book, and an insurance and shipping book. The receipt book would show every bale of cotton that came into the warehouse. It would be an exact duplicate of the receipts that were given out. In fact, the receipt given out to the man buying the cotton was the original, and the one in the book was the carbon copy made by putting the carbon under the top one. The carbon copy remained in the book. The insurance book showed the date the cotton came in, the number of bales, and who owned it. Nothing but insured cotton went into this book. It was a complete list of all the insured cotton. The shipping book showed all the cotton that went out. The numbers of the bales would show whether the cotton that went out was insured or not. If it was insured, I canceled the insurance. This cotton was average grade, and such cotton the date of the fire was worth in Jefferson seven and three-fourths cents per pound. Rives & Segal had 118 bales there. Wise & Rives

had 76 bales there. Rives & Hudson had 14 bales there. Rives & Sherrill had 10 bales. I held 109 bales in trust for other people, which was insured. When any of that cotton would come in, I would mark on the books, 'Insured,' and mark same on their receipts, and enter it on the insurance books. I do not know what caused the fire. Whenever cotton would be shipped, I would mark on my shipping book the bales that were shipped; and, if I knew to whom they were shipped, I also marked that on my book. Sometimes I would not know to whom the cotton would be shipped, but I always knew to whom the cotton held on joint account was shipped, and so marked it on the books. I kept my own books. I had my office in the warehouse. The warehouse was a brick house, with a wooden partition. I had an iron safe in the office—a pretty fair fireproof safe. Sometimes I kept my books in the safe, but not all the time. I often left them out on the safe or on the table. Nearly half the time. I didn't know I was leaving them out the night of the fire. I never thought of it. Some of the papers in the safe were scorched by the fire. The insurance book showed the date received, the name of the party who put it there, and the warehouse mark for the particular lot of cotton—the ticket number of the bale. Then, when it was shipped, it would be circled off and marked, 'Shipped,' and, when I knew, I marked to whom shipped. I always knew to whom the joint-account cotton was shipped, and so marked it. Mr. Smith, Mr. Florian, and Mr. Price, agents of the insurance companies involved in the case, came here a few days after the fire, and demanded of me the books, and I could not produce them, as they were destroyed by the fire. I could not tell that the cotton covered by the policy was in my warehouse, and not in my yard. I had a cotton yard."

It is held that the provision in the policy requiring the assured to keep a set of books, and stipulating what they shall show, and that in case of loss he will produce such books and records, and, in the event of his failure to do so, the policy shall be void, is binding upon him, and he must show a substantial compliance therewith. *Assurance Co. v. Kemendo*, 94 Tex. 367, 60 S. W. 661. We do not understand that appellant disputes this proposition, but he insists that he did keep a set of books, as required by the policy, and that they were not destroyed by his culpable negligence or fraudulent design or wrongful conduct, and, this being so, his failure to produce the books after the fire would not cause a forfeiture of the policy. The plaintiff's testimony shows that he owned a fireproof safe, and kept a set of books; that nearly half the time he failed to put the books in the safe at night, but left them out on the table. The night of the fire he did not put the books in the safe, but left them out, and they were destroyed by the

fire that destroyed the cotton. By the terms of the contract, the assured contracted to keep a set of books, and in case of loss he "agrees and covenants to produce such books and records, and in the event of his failure to produce the same this policy shall be null and void." This language is clear and unambiguous, and, as stated, must be substantially complied with by the assured. It is no answer to say that, because the books were unintentionally destroyed, he is excused from producing them. The language used in the policy is not capable of any such construction. The fact that appellant left the books out of the safe without any design furnishes no excuse for his failure to produce them. He says he did not know he was leaving them out the night of the fire. He never thought of it. His evidence indicates a clear case of negligence on his part in failing to place his books in the fireproof safe. This negligence made it impossible to produce them. The question of substantial compliance is not in the case. He failed to produce his books, and such failure was due to his own negligence.

It is argued that as to some of the cotton plaintiff sustained the dual capacity of owner and warehouseman, and that the policy only required the assured as warehouseman to keep books and produce them in the event of loss, and does not apply to cotton in which he was interested as part owner. There is nothing in the terms of the policy that would authorize such a construction. The policy insured "the cotton in bales owned or held by the assured in trust or on commission or on joint account with others, or sold but not delivered, while contained in warehouse at 107-108, Block 17, Soda Street, Jefferson, Texas." The terms of the policy expressly refer to cotton owned by the assured.

It is contended that it was a question for the jury to decide whether the books kept by the bank and by Segal, the joint owner of 118 bales of the cotton, was a substantial compliance with the requirements of the policy, and that if, under all the evidence, they could so find, then there was error in instructing a verdict for defendant. B. F. Rogers, after testifying that he advanced the money to buy the cotton to Segal, said: "The method of transacting the business was as follows: J. J. Segal, for example, would buy three bales of cotton. The seller would take the cotton to Rives' warehouse, and have it weighed and put in the warehouse in Segal's name. Rives would give the seller a receipt, giving the date received, the weight of the cotton, and showing that it was for Segal's account, and Segal's warehouse mark, which was (S) (circle S). Segal would then make a calculation on the receipt, showing the total price to be paid for the cotton. The seller would bring that receipt to the bank, and I would pay to him the amount of money indicated; the receipt being used as a check. I would then retain the cotton receipt, and

charge the amount to Rives & Segal. That is, at the end of each day I would charge the day's purchase to Rives & Segal. The same plan was followed with Wise & Rives and Rives & Hudson and Rives & Sherrill; Wise, Hudson, and Sherrill each being a partner with Rives, just as Segal was. It was a part of the agreement with the bank that the cotton was to be kept insured, and at the close of each day either Mr. Rives or I would see B. F. Sherrill, the insurance agent, and have the insurance adjusted—increased or diminished to meet the changed condition. The receipts were considered by us as an order on the warehouse for that bale of cotton. When the cotton was sold, we got the money, and stamped the receipt as paid, and it went to the warehouse to the owner of the cotton, and we credited the amount and the proper account." He further testified that he held receipts for 218 bales of cotton. He did not keep any books showing the amounts of the cotton, other than the receipts. He was not employed by the cotton people to keep books. Segal testified: "H. Rives and I went in together to buy cotton. I was to buy the cotton, and he was to pay for it. I bought all the cotton. I kept a little book in which I set down every bale of cotton I bought. I have the book here. In it I put down the man's name from whom I bought the cotton, the serial number of the bale, its weight, and the price I paid for it. When a man would come to me to sell, we would agree on the price. I would send him to Rives' warehouse with the cotton. H. Rives would weigh it, and put my mark on it, and give the seller a receipt for it, as shown here, which would show its weight, just as the receipt shown here. The seller would bring that back to me, and I would calculate the amount I owed him, based on the weight of the cotton, and put the amount on the receipt, and he would take that to the bank and get the money on it—the amount it called for. I saw my cotton in the warehouse the day before the fire." "I did not keep the warehouse books for Mr. Rives. I kept no memorandum of the classification of the cotton. I kept my book to show how many bales of cotton I had sent Mr. Rives. I expected Mr. Rives to insure the cotton, and told him to do so, and make his entry in the books. In respect to that all the entries in this book are in my handwriting, and I have kept this book in my possession all the time. When I bought cotton, I entered in my book the serial numbers 7, 8, and 9, and when the warehouse receipt came back I entered in my book from the receipt the weight of each bale, and the price paid. The number and weight of each bale on my books will correspond with the number and weight on the warehouse receipt. My book never went out of my possession for one minute. I kept it for the purpose of knowing how many bales of cotton I bought." Sherrill testified: "I do not know how Mr.

Rives kept the records of cotton in his office. He had a one-half interest in the cotton I bought." The contract of insurance was between the Association, on the one part, and H. Rives, the insured, on the other, and bound the insured to keep a set of books, and, in the event of loss, to produce them. After the fire he was called upon by the association to produce his books. He failed to do so. His books had been burned. It is here insisted that the receipts in the possession of the bank, and the books kept by other persons who owned an interest in the cotton, will furnish the information required by the policy to be shown by the books of the assured. We are of opinion that this does not meet the requirements of the policy. Neither the receipts held by the bank, nor the book kept by Segal, was intended as a compliance with the terms of the policy requiring the assured to keep a set of books. Rogers says that he was not employed to keep the books of the warehouse. He kept receipts in connection with the business of the bank. Segal says he had nothing to do with keeping the warehouse books for Mr. Rives. "I kept my book to show how many bales of cotton I bought." Memoranda so kept by other parties is not a compliance with this stipulation of the policy. *Fire Association v. Masterson* (Tex. Civ. App.) 61 S. W. 963; *Robert, Willis & Taylor Co. v. Sun Mutual Ins. Co.*, 19 Tex. Civ. App. 338, 48 S. W. 559.

Again, it is argued that Sherrill, the agent of the insurance association, and who issued the policy, knew the kind of books kept by the bank, and must have known the kind of books kept by Segal, and, having knowledge of their methods of bookkeeping, the policy should be construed in the light of such matters. This argument is not sound. The memoranda kept by the bank and by Segal were for their respective interests, and were not intended to be a record of the cotton insured and in the warehouse. The business of the warehouse, and the manner of insuring cotton therein contained, was conducted by the appellant, H. Rives. Sherrill did not know how the records were kept by Rives.

We conclude that there was no error in instructing a verdict for the defendant. The judgment is affirmed.

On Rehearing.

(Dec. 12, 1903.)

Our attention is called to a mistake in quoting the testimony of appellant, H. Rives, in the opinion. It is stated that appellant testified as follows: "I could not tell that the cotton covered by the policy was in my warehouse, and not in my yard." In copying the testimony, the stenographer inadvertently inserted the word "not" between the words "could" and "tell." The testimony of the witness was, "I could tell that the cotton was in my warehouse, and not in my yard."

This is a clerical mistake, and is now corrected.

It is insisted that the contention of appellant in argument was that the policy did not require the production after the fire of the books kept by Rives as warehouseman, but required only the production of the books kept by the assured, and that the opinion does not fairly state this contention. Conceding that such was appellant's contention, the same is not tenable, for the reasons stated in the opinion.

The motion for rehearing is overruled.

ORANGE RICE MILL CO. v. McILHINNEY.*

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

CONTRACT OF EMPLOYMENT—EVIDENCE—ADMISSIBILITY.

1. An abandoned pleading, referred to in a substituted pleading as the pleading that was amended, is admissible in evidence as admissions against interest, though not bearing a file mark.

2. A letter accepting plaintiff's offer to work for defendant company was properly admitted in an action on the contract of employment, where the evidence showed that the writer assumed to act as manager of the company and did act in that capacity after it commenced operations, and where the proposition accepted appeared clearly from the face of the letter.

Appeal from District Court, Orange County; W. P. Nicks, Judge.

Action by John McIlhinney against the Orange Rice Mill Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Holland & Holland, for appellant. W. J. Wingate, J. T. Adams, and W. O. Huggins, for appellee.

GARRETT, C. J. This action was brought by John McIlhinney against the Orange Rice Mill Company upon a contract for employment for 12 months, beginning August 1, 1901, at a salary of \$1,200, to be paid in equal monthly installments. Plaintiff alleged that he entered upon and performed his duties until November 11, 1901, when he was discharged by the defendant without just cause. The defendant pleaded the general denial, and denied under oath that the plaintiff was employed by its authority, and also pleaded that the plaintiff was discharged for just cause. There was a trial by the court without a jury, and judgment was rendered in favor of the plaintiff for the sum of \$579.35.

The defendant employed the plaintiff as alleged in the petition for one year commencing August 1, 1901, at a salary of \$1,200, and afterwards, on November 9, 1901, discharged him. The conclusion of the trial court that the defendant discharged the

plaintiff on account of a personal difficulty between him and other employes, and that the conduct of the plaintiff was not injurious to the defendant's business, and that he was discharged without sufficient cause, is supported by the evidence, and is approved. Allowance was made for money received by the plaintiff for other employment, and judgment was correctly rendered for the amount above stated.

An abandoned pleading is admissible in evidence as admissions against interest, but they are open to explanation or contradiction like other admissions. *Railway v. De Walt* (Tex. Civ. App.) 71 S. W. 774. The pleading objected to, when offered in evidence on the trial below, although not bearing the file mark, must be considered as a pleading in the case. It was furnished to plaintiff's counsel and put among the papers of the case, and was referred to in the amended pleadings upon which the case went to trial as the pleading that was amended. But even if it had been improperly admitted, there was sufficient evidence without it to show that the defendant had employed the plaintiff at the salary stated, and that it had discharged him; and the case having been tried by the court without a jury, the admission of the evidence, although incompetent, would not be a ground for the reversal of the judgment.

There was no error in the admission in evidence of the letter from the defendant's manager to the plaintiff accepting the terms of his offer to work for the company. The proposition that was accepted appears clearly from the face of the letter. Webster assumed to act for the defendant as its manager, and the evidence shows that he acted in that capacity after the defendant commenced operations. The plaintiff's employment was ratified, and there is in fact no dispute about the terms thereof.

As already stated, there is evidence to support the finding that the plaintiff was discharged on account of the difficulty with Jordan, and not for conduct injurious to defendant's business. The judgment of the court below will be affirmed.

Affirmed.

MANBY v. EYRES et al.

(Court of Civil Appeals of Texas. Nov. 17, 1903.)

PUBLIC LANDS—DETACHED SECTIONS—GOOD FAITH.

1. Where one in making a purchase of public lands, which, in the absence of reason to the contrary, makes certain other sections subject to purchase as detached sections, acts in good faith, the fact that others induce him to buy and assist him in the purchase, that the other sections may become detached, so they may purchase them as such, does not affect their right to so purchase.

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

*Rehearing denied, and writ of error denied by Supreme Court.

Action by J. W. Maney against E. J. Eyres and others. Judgment for defendants. Plaintiff appeals. Affirmed.

R. W. Flournoy and O. S. Kennedy, for appellant. Lanier & Martin, J. N. Votaw, and Nail & Dies, for appellees.

GILL, J. This is an action of trespass to try title and for damages brought by J. W. Maney against E. J. Eyres, as claiming title to the lands sued for, and other defendants, who were alleged to be in possession and committing waste thereon. The allegations are in the usual form, averring title, ouster, and damage in general terms. The defendants' answers consist of general denials and pleas of not guilty.

The lands sued for are school lands sold by the state to one Callaway, the vendor of Eyres, as detached sections. They were first applied for by Callaway, accompanied by a compliance with all the requirements of the law, but the applications were disallowed on the ground that the records did not show the lands to be detached sections. As a matter of fact they were at that time detached by reason of the allowance of an application to purchase the adjoining sections made by one Hooks. After the disallowance of Callaway's application that of appellant's vendor was allowed, he also undertaking to purchase them as detached sections. When the commissioner of the land office learned that the sections were actually detached at the time Callaway's application was filed and at the time it was refused, he set aside the contract of sale with appellant's vendor, and consummated the sale to Callaway after reinstating his application.

Appellant seeks to annul the sale to Callaway, and secure the sale to himself, on the ground that the application of Hook for the purchase of the adjoining sections was not made in good faith, but was procured to be made by him through the active agency of Callaway, the vendor of Eyres, for the purpose of isolating the land in controversy so that it might be purchased by defendants; that the present claim to it by defendants is in furtherance of that fraud and conspiracy; that subsequent to these purchases Hooks abandoned the purchases made by him; that because of this fraud and the bad faith of Hooks, participated in by defendants, the lands were not in fact detached either at the date of his application, its refusal, or reinstatement; that, while this is true, it cannot defeat appellant's right to purchase, because neither he nor his vendor were participants in the fraud, nor had they any notice of the facts at the time his application was allowed, nor at the time appellant became a purchaser for value. The court heard the evidence offered by appellant in support of these contentions, but gave the jury a peremptory instruction in favor of defendants.

The material facts as to the status of the lands in controversy are undisputed, and are as follows: The lands, viz., sections 210 and 220 of the R. & T. O. Ry. Co. surveys, in Hardin county, were lawfully on the market for sale when applied for by the grantors of both plaintiff and defendant. They belonged to the public school fund of Texas, and had been properly classified and appraised. Several applications, dated June 8, 1900, signed by one O. L. Hooks, made, respectively, for a certain section 216 in said county as an actual settler, and for another whole section and certain halves of other sections as additional lands, were received and filed in the general land office on June 11, 1900. These applications were regular, and were accompanied by the first payments, the lands so applied for by Hooks being regularly upon the market for sale. The application of Callaway for section 210 was filed June 12, 1900, and was indorsed, "Not detached," June 26th. The error was corrected, and the award made on October 12, 1900. The application for section 220 has the same history, with a slight variation in dates, and the error was corrected, and the award made on December 18, 1900. Callaway sold and conveyed his right to Eyres on July 21, 1900, by deeds of that date, one of which was filed in the land office February 19, 1902, and the other January 7, 1902. Patents were issued to Eyres, March 6, 1902. On August 1, 1900, Dies, the vendor of appellant, applied to purchase section 210, and on September 7, 1900, made a like application for section 220. He sought to buy them as detached sections, their status as such depending on the purchase of Hooks. These applications were regular, complied fully with the law, and were duly filed. Appellant purchased from Dies. The sections were awarded to Dies on September 20, 1900, and October 12, 1900, respectively. These awards were canceled, over the protest of appellant, on December 18, 1901. On October 29, 1900, Hooks abandoned his purchase, and so advised the land office.

The effect of the purchase by Hooks was to detach the land in controversy. After they were awarded to Callaway, the effect of Hooks' abandonment of his purchases was to detach them so as to subject them to sale without occupancy. The Hooks abandoned purchases were finally bought from the state by persons connected with the Kirby Lumber Company, and probably in the interests of that concern. It is made to appear probable that the two sections in controversy are owned by Eyres in the interest of that company, at least to the extent of the timber upon them. It also appears that persons connected in one way or another with that concern induced Hooks to buy and assisted him in making the purchase.

But Hooks testifies that he bought for himself in good faith; actually lived on his purchase four months; that his belongings remained thereon about four months longer;

and that he abandoned the lands only on account of ill health and inability to meet the payments. This proof stands uncontradicted. If his purchase was made in good faith, that ends the controversy, for no bad faith on the part of others could change the legal effect of his act. It is also true that appellant's right to purchase the sections as detached depended on the Hooks purchase. Waiving, therefore, the question whether this broad inquiry could have been made under the pleadings as they stand, we hold the trial court rightly charged the jury that there was no fact issue for them to determine, and that the plaintiff had failed to make out his case.

On the facts as disclosed by this record, the judgment must be affirmed, and it is so ordered.

ROTAN GROCERY CO. v. DOWLIN.*

(Court of Civil Appeals of Texas. Nov. 21, 1903.)

FIXTURES—ANNEXATION TO REALTY—INTENTION.

1. Where a lessee of property at the expiration of the lease removed from the premises a building which he had erected thereon, and, with the intention of allowing it to permanently remain for a storehouse, and to acquire title by limitation, placed it on land which he supposed was an alley, but which in fact belonged to a private individual, the house became a fixture to which the owner of the property was entitled.

Appeal from Hill County Court; L. O. Hill, Judge.

Action by F. E. Dowlin against the Rotan Grocery Company. From a judgment for plaintiff, defendant appeals. Reversed.

A. P. McKinnon, for appellant. Vaughan & Works, for appellee.

TALBOT, J. The appellee, F. E. Dowlin, brought this suit originally in the justice's court of Precinct No. 1 of Hill county, against appellant, to recover the sum of \$95 as damages for the alleged conversion of a house. A trial was had in the justice's court, resulting in a judgment in favor of appellee for \$52.70, from which judgment it appealed to the county court. On the 3d day of February, 1903, the case was tried in the county court, and judgment rendered in favor of appellee for the sum of \$50 and costs of the justice's court, and judgment in favor of appellant for costs of county court. From this judgment appellant prosecuted this appeal.

Some time prior to the time of the alleged conversion, appellee, Dowlin, had leased and occupied a lot of ground situated in the city of Hillsboro, which was purchased by appellant in April, 1901. During appellee's occupancy of this lot of ground under his lease, he had thereon the house involved in this controversy. At the expiration of his lease, without objection from the owners, he moved

said house on the land where it was situated at the time of the alleged conversion. The land upon which said house was moved was supposed by appellee at the time to be an alley of the said city of Hillsboro, but as a matter of fact it belonged to John Caldwell, so far as this record shows. When appellee moved the house on the land supposed by him to be an alley of said city, he intended the same to remain permanently thereon, with the twofold purpose of using the same to store lime in and to acquire title to said land by limitation. After appellee had placed the house on the land, and in 1902, appellant purchased the same from John E. Caldwell, and received a deed of conveyance from him. A short time after appellant bought the land from Caldwell it sold the house and caused it to be removed from the land. The question for decision is: Was the house, under the facts, a fixture and part of the realty, or personal property subject to removal at the instance of its owner? If a fixture, the title and ownership thereof passed to appellant upon the purchase of the land from Caldwell, and appellee had no cause of action for its appropriation by appellant. If personalty, the title remained in appellee, and he could sue for its conversion and recover the value thereof. In *Hutchins v. Masterson*, 46 Tex. 554, 26 Am. Rep. 286, Judge Moore states: "It is said the weight of modern authorities establishes the doctrine that the true criterion for determining whether a chattel has become an immovable fixture consists in the united application of the following tests: (1) Has there been a real or constructive annexation of the article in question to the realty? (2) Was there a fitness or adaptation of such article to the uses or purposes of the realty with which it is connected? (3) Whether or not it was the intention of the party making the annexation that the chattel should become a permanent accession to the freehold, this intention being inferable from the nature of the article, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and the purpose of the use for which the annexation is made." See, also, *Keating Implement & Machine Co. v. Marshall Electric Light & Power Company*, 74 Tex. 608, 12 S. W. 489.

Let us apply the above test to the facts of this case. The property in question was a house, and placed by appellee in the usual and ordinary way upon the land. That it is an article of property adapted to the purposes and uses of the realty, and the character of fixture most commonly connected therewith, is beyond controversy. That it was the intention of appellee that the house should become a permanent accession to the freehold is established without doubt. The facts show that appellee put the house on the land knowing that he had no right to do so. He cannot escape the consequences of his act,

*Rehearing denied December 12, 1903.

in annexing the house to another's land, on the ground that it was done upon the mistaken belief that it was an alley dedicated to public use and had been abandoned by the city. If his purpose was to annex the house to the land permanently, to be used by him in carrying on his business, or, by adverse possession thereof, to acquire title by limitation, then his belief that one person owned the land, when in fact it belonged to another, cannot affect the question. His purpose was the same, no matter who owned the land. His own testimony shows that his purpose was to make use of the house, after being placed upon the land, in connection with his business, and for the purpose of acquiring title thereto by limitation.

We believe, under the facts disclosed by the record, the house became an immovable fixture to the land, and hence became the property of appellant by its purchase from Caldwell. The judgment of the lower court is therefore reversed, and rendered for appellant.

HARDIN v. FT. WORTH & D. C. RY. CO.*

(Court of Civil Appeals of Texas. Nov. 7, 1903.)

CARRIERS—CARRIAGE OF PASSENGERS—RELATION BETWEEN CARRIER AND PASSENGER—TERMINATION—DUTY OF CARRIER.

1. The fact that a passenger accepting passage on a freight train assumes risks not incident to travel on a passenger train does not relieve the carrier from exercising the utmost care in the operation of the train for the safety of the passenger.

2. Under the contract of shipment, a person rode in the car to look after and care for the property shipped. The car was temporarily stopped at a place where it could not be unloaded, and with the understanding that it would be placed at a more convenient place the next morning. The person left the car during the night, and returned to it in the morning. *Held*, that he had not, as a matter of law, ceased to be a passenger.

3. A person entitled to passage on a train between two points is entitled to the protection of a passenger from the starting point to the appropriate and usual stopping place at the final destination.

Appeal from District Court, Clay County; A. H. Carrigan, Judge.

Action by A. D. Hardin against the Ft. Worth & Denver City Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

L. C. Barrett, Geo. A. Watts, and W. T. Allen, for appellant. Stanley, Spoons & Thompson, for appellee.

SPEER, J. On July 11, 1902, one Toney shipped his household goods, hogs, chickens, etc., over the appellee's line of road from Avondale, Tex., to Henrietta, Tex. Under the contract of shipment with the company, the appellant rode in the car to look after

and care for the property. The car reached Henrietta late in the afternoon of the day—too late to be unloaded—and was cut out of the train and left on a side track until the return of the train from Wichita Falls on the next morning, when it was coupled onto and spotted at the platform where it could be unloaded. Appellant left the car that night, and slept on the depot platform until about daylight, when it began to rain, and he and his son then went into the car. Some time about 8 a. m. or 9 a. m., while the appellant was yet in the car, "fixing to feed the hogs and chickens," the train crew made the coupling which is alleged to have resulted in the injuries sued for.

The trial judge evidently considered that the relation of carrier and passenger had ceased to exist between appellee and appellant at the time of the injuries, for he defined negligence as the failure to do that which an ordinarily prudent person would do under all the circumstances of the case, or doing that which an ordinarily prudent person would not have done under all the circumstances of the case, and refused the special charge correctly embodying a statement of the law applicable to that relation. His action in this particular is presented as error by appropriate assignments, which we think must be sustained. *Arrington v. T. & P. Ry. Co.*, 70 S. W. 551, 6 Tex. Ct. Rep. 69; *Knauff v. San Antonio Traction Co.*, 70 S. W. 1011, 6 Tex. Ct. Rep. 240; *C. T. & N. W. Ry. Co. v. Smith*, 73 S. W. 537, 7 Tex. Ct. Rep. 349. It has been repeatedly held in this state that common carriers must exercise the "utmost care" for the safety of their passengers. *Gallagher v. Bowie*, 66 Tex. 266, 17 S. W. 407; *Railway v. Welch*, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829; *Railway v. Kennedy*, 12 Tex. Civ. App. 654, 35 S. W. 335. And although the expression is sometimes varied, and a different phraseology employed, this is the measure of care in most, if not all, the other states of the Union. *Hutchinson on Carriers*, § 501; 9 Cent. Dig. col. 1014. It can make no difference that the vehicle is a freight car rather than the usual passenger coach; the degree of care is the same. *Mexican C. Ry. Co. v. Lauricella* (Tex. Civ. App.) 26 S. W. 301; *Id.*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103; *Hutchinson on Carriers*, § 538a. Naturally there are risks assumed by the passenger when he accepts passage on a freight train that would not be incident to travel upon a passenger train, but this does not lessen the degree of care to be exercised by the carrier in the operation of such freight train. It follows from what we have said that we are of opinion the evidence was not such as to authorize the trial court to assume in his charge that the appellant had ceased to be a passenger, and that he should at least have submitted that question to the jury, as requested.

In *Ormond v. Hayes*, 60 Tex. 180, it is said:

*Rehearing denied December 12, 1903.

¶1. See *Carriers*, vol. 9, Cent. Dig. §§ 1093, 1192.

"The evidence shows that the deceased was received as a passenger on defendant's train, and that his wife, infant child, and nurse, who were under his charge, were also so received as passengers. The proof also discloses the fact that the defendant's servants, without objection, received from him, at the same time, as baggage to be by them transported, a considerable number of bulky articles of furniture, bedding, and clothing, which they agreed and bound themselves to deliver to him at his point of destination. It does not appear that for this considerable amount of baggage, consisting of a number of articles, the defendant gave him any check, receipt, or any kind of evidence or token of their possession of it. Under all the circumstances disclosed in evidence, when we consider the nature and quantity of the baggage and the absence of any baggage checks or receipt to the deceased, we think he, as such passenger, had a right to go to the baggage car for the purpose of identifying and claiming his property, and receiving it from the employes of defendants, and, if he did no more than simply aid and assist the defendant's employes in identifying and removing his own baggage from the car to the platform, that the court stated the law too strongly against plaintiff when it informed the jury that these acts of his, in relation to his own baggage, constituted him a fellow servant with the employes of defendants. We think, under the special facts of this case, as disclosed in the record, that the relation of carrier and passenger had not entirely ceased, for all purposes, to exist, and that the deceased had the right, under the facts of this case, to look after his baggage, and that by so doing, and by aiding the servants of defendants in selecting and removing it from the car, he did not lose all the rights of a passenger, and thereby become a servant and an employe of defendants."

In *St. Louis & S. W. Ry. Co. v. Humphreys* (Tex. Civ. App.) 62 S. W. 791, the plaintiff, who was a passenger on defendant's train, left the train which had stopped for dinner, and went to the post office, which was about 100 feet distant from the train, on the side opposite from the depot, to purchase some stamps. After getting the stamps she started to return, when she noticed that the train was in motion. She ran, and in her effort to board it she was injured. She was held to be entitled to the protection of a passenger. So, in *Missouri, K. & T. Ry. Co. of Texas v. Overfield* (Tex. Civ. App.) 47 S. W. 684, it is said: "We are of opinion that a passenger is not required to remain upon a train from the starting point to the point of destination, and permitted to alight at an intermediate station only for some purpose connected with his journey. Getting off at

intermediate stations, from motives of either business or curiosity, has been held not to deprive one of his character as a passenger, or of his right to precautions for his safety as such. We conceive the correct rule to be that he remains a passenger, on getting off at intermediate stations, so long as his object in doing so is not inconsistent with the character of passenger." Again, it has been held that the passenger loses none of the rights of a passenger by getting off at an intermediate station to deliver a private message to a person on the platform. *Galveston, H. & S. A. Ry. Co. v. Cooper* (Tex. Civ. App.) 20 S. W. 990.

This court held in *Texas & P. Ry. Co. v. Dick*, 63 S. W. 895, in an opinion by Mr. Justice Hunter, that a passenger while yet upon the premises and depot grounds, though making his departure therefrom, was entitled to the protection due from a common carrier to its passengers.

The testimony as disclosed by the record before us tends to show that the car upon which appellant was riding was stopped temporarily at a point where it could not be unloaded, and with the understanding upon the part of both appellant and appellee that it would be placed at a more convenient point the next morning. It was the duty of appellee to put this car at the usual stopping place for such freight as this car was loaded with, and its duty was not performed until that was done. The evidence further indicates that appellant's absence from the car was temporary only, and that he at no time left the premises of appellee. He was rightfully on the car at the time of the accident. He was entitled to passage, and the protection of a passenger from Avondale to Henrietta. This means all the way from the starting point to the appropriate and usual stopping place at the final destination. Under the contract appellee would have had no right to prevent his presence in the car at the time of the injuries. These things being true, appellee's servants either knew or must be held to have known that he was in the car when they attempted to couple on to it. We think it was in the minds of the parties to the contract that appellant should remain in and about the car until it was delivered at the usual stopping place in Henrietta and a reasonable time for unloading allowed. The assignments raising this question are therefore sustained.

We cannot consider alleged errors which are confessedly in favor of appellant. Nor can we see how appellant has been prejudiced by the failure to charge upon the issue of discovered peril, if such issue can be in the case.

For the errors discussed, the judgment is reversed, and the cause remanded.

PIERSON v. BLANTON.

(Court of Civil Appeals of Texas. Dec. 1, 1903.)

DESCENT AND DISTRIBUTION—PRIORITY OF CLAIMS—COSTS.

1. On petition of an administratrix for direction in paying claims against an estate, the court gave the claim of another creditor priority over her own, but charged the costs against the estate, on a finding that the proceeding was in good faith, and in the prudent discharge of her duties as administratrix. *Held*, on appeal, that the order as to costs will not be disturbed in the absence of a statement of facts showing that the finding was not justified.

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Petition by Mary L. Blanton, administratrix, for direction as to the disposition of the proceeds of the estate of Robert Millich, deceased. From an order charging costs in the proceeding against the estate, claimant, A. L. Pierson, appeals. Affirmed.

Wm. T. Austin, for appellant. S. S. Hanscom, for appellee.

GILL, J. The appellee, as administratrix of the estate of Robert Millich, deceased, filed in the county court of Galveston county, where such administration was pending, a petition representing that she had in her hands, as administratrix, the sum of \$308, proceeds of the sale of property belonging to the estate, which comprised the entire estate; that, after deducting costs of administration, there remained of this sum only \$167.70, which was subject to the payment of two claims which had been previously assigned by this court to the third class, viz., the claim of appellant for \$140, with interest and attorney's fees, and another in favor of petitioner for \$94 and interest. Petitioner, after setting out the nature of the two claims, as affecting the matter of priority in payment out of a fund insufficient to pay both, prayed the court to direct her which claim she should pay first, or whether they should be paid pro rata. Appellant answered, making the point that petitioner was not the sole owner of her claim, but that her two minor children owned a half interest therein, and further sought preference over the entire claim. The probate judge, on the issues thus made, ordered the claims paid pro rata. On appeal to the district court, appellant's claim was given priority, but the costs were adjudged to be paid by the estate. On this point the court found that the proceeding was instituted in good faith, and in the cause of a prudent discharge of her duties as such administratrix. The appeal is solely on the question of costs; the appellant making the point that, as the appellee was pressing a private claim against the estate, her failure to prevail imposed the costs on her, as such a result would on any other litigant. There is no statement of facts. The appellant asserted that the claim was jointly owned by

appellee and her minor children. This may have been shown. The claims had been classified by the probate court as of equal dignity. The administratrix was confronted with the question of priority or pro rata payment. She had the right to seek direction upon the point, and, in the absence of a statement of facts, we are unable to say that the finding of the court, in the light of such facts as he heard, did not justify his course.

The judgment is affirmed.

WESTERN UNION TELEGRAPH CO. v. SHAW et al.*

(Court of Civil Appeals of Texas. Nov. 4, 1903.)

TELEGRAPH—DELAY OF MESSAGE—NEGLIGENCE—MENTAL ANGUISH—JURISDICTION OF CAUSE.

1. A message received by a telegraph company in the evening, under a contract for prompt delivery to plaintiff, was transmitted the following morning, but not delivered until 5 o'clock in the evening, though proper diligence would have secured prompt delivery. The delay prevented plaintiff from reaching her mother's bedside before her death. *Held*, that the company was guilty of negligence which was the proximate cause of plaintiff's mental anguish.

2. The courts of the state have jurisdiction of a cause of action in favor of a nonresident plaintiff against a corporation doing business in the state, though the proceeding is not in rem.

3. In an action for delay in delivering a telegram, it was not prejudicial error to permit the jury to take with them to the jury room a copy of it, where there was other evidence showing clearly the time it was received and delivered by the company.

4. Where evidence tended to show an agreement by a telegraph company to send a particular message on the night it was received, it was for the jury to say whether the company's ordinary rule as to the closing of the office at night should apply.

Appeal from District Court, Bell County; John M. Furman, Judge.

Action by Mrs. Fannie Shaw and others against the Western Union Telegraph Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Clark & Bollinger and J. A. Kibler, for appellant. John B. Durrett, for appellees.

FISHER, C. J. This was an action for mental pain and anguish, alleged to have been suffered by the appellee Mrs. Fannie Shaw by reason of the delay of a message sent from Belton, Tex., to her at Chickasha, I. T., a copy of which is as follows: "Belton, Texas, April 3, 1902. To Mrs. Fannie Shaw, Chickasha, I. T. Grandma is seriously ill. Come if you can. [Signed] Arthur Jacobs." Appellees alleged that said message was delivered to the defendant at Belton at 7 p. m., April 3, 1902, and that, if defendant had used diligence and ordinary care in its transmission and delivery, Mrs. Fannie Shaw would have received the same before 9

*Rehearing denied December 16, 1903.

o'clock p. m. on said date, and that under no circumstances should the delivery of said message have been delayed later than 9 a. m. on April 4th, but that in truth and in fact said message was not delivered to her until 5 p. m. on said April 4th; that, if said message had been delivered at or before 9 p. m. on April 3d, she would have taken a train which left Chickasha for Belton at about 1 a. m. on the morning of April 4th, and would have arrived at Belton at about 4 p. m. on the same day, or, if said message had been delivered to her at any time during the forenoon of April 4th, she would have taken a train which left Chickasha for Belton at 1:45 p. m. on said date, and would have arrived at Belton at about 4 a. m. on April 5th, but that on account of said delay she could not and did not arrive at Belton until 4 a. m. on the morning of April 6th. Appellees also alleged that "Grandma" referred to in said message was her mother; that her name was Mrs. Saphronia Turner; that she died at 7:20 p. m., April 5th, more than seven hours before appellee Mrs. Fannie Shaw arrived at Belton. Plaintiffs' petition also contained the usual allegations of notice of the importance of said message, and the consequent mental pain and anguish resulting to Mrs. Shaw from the delay, alleging damages in the sum of \$1,950.

Appellant, as defendant below, answered by general demurrer, general denial, and special answers, as follows: (1) That it had never received for transmission the message described in plaintiffs' petition. (2) That, if it did receive such message for transmission, the same was delivered by defendant and received by plaintiff Mrs. Fannie Shaw in ample time for her to have arrived at Belton by due course of train anterior to the death of her mother; and, further, that, if she did not arrive at Belton in time to see her mother before her death, such nonarrival was due entirely to her own negligence, and not to this defendant. (3) That if defendant ever received any such message for transmission, as alleged by plaintiffs, the same was to be transmitted from a point in the state of Texas to a point in the Indian Territory, and the same therefore became and was an interstate message, and was not governed by the laws of the state of Texas, but by the laws of the Indian Territory, which were governed by the laws of the state of Arkansas, and that by an act of Congress and the decisions of the courts of the Indian Territory no recovery can be had for mental anguish or suffering for mere breach of contract, unaccompanied with any physical injury or damage; that, therefore, the rights of the parties to the contract for the transmission of said message were governed by the laws of the Indian Territory, and the plaintiffs could not recover in this action for the mental pain and anguish alleged. (4) That defendant at and for a long time prior to the receipt of the message in question had,

under its reasonable rules and regulations, established office hours, to wit, from 8 a. m. to 8 p. m., for the conduct of its business at its Chickasha office, and although it used the utmost care and diligence in the transmission of such message after its receipt at Belton at 7:30 p. m. on April 3d, it was unable to transmit said message before 8 p. m. on said date, the hour at which its office closed; that after the receipt of said message at its Chickasha office, although it used the utmost diligence, it was unable to effect a delivery of said message until 3:45 p. m. on April 4, 1902.

A trial of the cause on February 25, 1903, before a jury, resulted in a verdict and judgment in favor of the plaintiffs for the sum of \$1,325.

There is a further allegation in defendant's answer as follows: "Defendant further shows that after the receipt of said message at its Chickasha office on, to wit, the morning of April 4, 1902, although it used the utmost diligence, it was unable to effect a delivery of said message until about 3:45 p. m. of said date, when the same was delivered."

We find that the message described in the plaintiffs' petition was received by the agent of appellant at Belton at the time alleged, under a contract that the same would be forwarded and promptly delivered at Chickasha, Indian Territory; that the message was received at the Chickasha office on the morning of April 4th, but was not delivered to the appellee until about 5 o'clock in the evening of that day, and that proper diligence was not exercised in order to deliver the same to her, and if diligence had been exercised delivery could have been made in time for the appellee to have taken the train and reached the bedside of her mother before her death, and that the failure of appellant in the respect, as pointed out, was negligence, which was the proximate cause of the mental anguish suffered by the plaintiff, and the cause of her failure to reach the bedside of her mother before her death. If the message had been delivered on the morning of the 4th, or within a reasonable time after it was received at the Chickasha office, the plaintiff would have been enabled to board the train leaving Chickasha for Belton at 1:45 p. m., April 4th, or another train leaving Chickasha at 1 o'clock a. m., April 5th, passage on either of which would have put her in Belton in time to have reached the bedside of her mother before her death. By reason of her condition and the preparations she was required to make for the journey, she was not enabled to take the last-mentioned train, but was required to delay her departure from Chickasha to the 1:45 p. m. train of April 5th; and we find in this connection that the facts and circumstances testified to by Mrs. Shaw authorized the verdict of the jury on the issue that she was not guilty of negligence in failing to take

passage upon the first train that left after she received the message. We also find that there is evidence in the record authorizing the amount of damages found by the verdict of the jury.

The point raised in appellant's first assignment of error was passed upon by this court in the case of *N. Y. Mutual Ins. Co. v. Nichols*, 24 S. W. 911, and it was there held that the courts of this state had jurisdiction of a cause of action in favor of a nonresident plaintiff against a corporation doing business here in Texas, although the proceeding is not one in rem.

The question raised in appellant's third and fourth assignments of error was decided against its contention by the Supreme Court of this state in the case of *Telegraph Co. v. Waller*, 74 S. W. 751.

There is no merit in appellant's second assignment of error. There was no variance calculated to mislead. On the contrary, the evidence clearly shows that the message sent for transmission was received by the Chickasha office in time to have been delivered, and the message described in the petition is clearly identified by the testimony of the agents of appellant.

Appellant's fifth assignment of error complains that the court erred in overruling its motion for a new trial because the jury, without the appellant's knowledge and consent, in retiring to deliberate upon their verdict, carried with them a copy of the message. It does not appear that the jury read this message or considered it whatever, after retiring to deliberate upon their verdict. Consequently it would be mere guesswork to say that they were influenced by anything appearing upon the face of this paper; but however, if they had read the paper, it is difficult to perceive how the knowledge obtained from anything contained in it could have influenced them in reaching the verdict they returned, because it is clear from the evidence that the message in question was received at the Chickasha office on the morning of April 4th, and, if from that time diligence had been used to promptly deliver it, Mrs. Shaw would have been enabled to take a train and reach the bedside of her mother before her death, and it is clear from the evidence that from the time that the message was received the appellant was guilty of an unreasonable delay and negligence in failing to promptly deliver the same.

What we have stated in our findings of fact in effect disposes of the question raised in appellant's sixth assignment of error. Our findings also dispose of the question raised in the seventh and eighth assignments of error.

The charge of the court, as complained of in the ninth assignment of error, was correct. It is true that a message ordinarily sent is governed by the reasonable rules made by the telegraph company, but in this

case there is some evidence to the effect of an agreement that this message should be sent and delivered the night it was received. This is shown by the testimony of the witness Arthur Jacobs, and, in view of this evidence, it was a question of fact for the jury to determine whether the ordinary rule as to the closing of the office during the night should apply and govern in this instance.

We find no error in the record, and the judgment is affirmed. Affirmed.

LEAGUE v. WILLIAMSON et al.

(Court of Civil Appeals of Texas. Dec. 3, 1903.)

EXECUTOR'S DEED—VALIDITY—STATUTE—EVIDENCE—ADMISSIBILITY.

1. Rev. St. 1805, art. 1879a, validating sales made under wills probated in other states, does not, in the absence of proof of administration and order of sale by a probate court, validate a deed made by an executor under such a will, where the will contains no provision exempting testator's estate from administration by the probate court, and grants no power to the executor to sell the property described therein.

2. In the absence of proof that the grantee in an executor's deed had a contract with the testator, recitals in such deed that such grantee had a claim against testator's estate for locating and obtaining patents to various tracts of land, which was the only consideration for the conveyance, are but hearsay declarations, and cannot be used as evidence of any equitable title of the grantee to the land described therein.

Error from District Court, Grimes County; J. M. Smither, Judge.

Action by J. R. Coryell against W. W. Williamson and others, in which J. C. League intervened as purchaser pendente lite of Coryell's interest in the land in controversy. From a judgment for defendants, intervening plaintiff brings error. Affirmed.

Robt. M. Franklin, for plaintiff in error.
W. W. Meachum, for defendants in error.

PLEASANTS, J. This is an action of trespass to try title brought by J. R. Coryell against the defendants in error to recover 160 acres of land, a part of the J. W. Dibrell survey, in Grimes county. Plaintiff in error J. C. League purchased the land in controversy from J. R. Coryell pendente lite, and, by permission of the court, intervened in the suit, and prosecuted same as plaintiff. The title set up by plaintiff is deraigned through a deed from John Thompson, Jr., executor of the estate of J. W. Dibrell, deceased, to William Little, conveying, along with other lands, the tract in controversy. Omitting the description of the land and the habendum clause, this deed, with its certificate of acknowledgment, is as follows:

"The State of Virginia, Amhurst Court House. Know all men by these presents: That whereas William Little of the State of Texas, located in the State of Texas, Land Certificates of twelve hundred and eighty acres, that was owned by James W. Dibrell,

deceased, said land Certificates being located by said William Little in three tracts, one containing six hundred and forty acres in Grimes County, State of Texas, and the other two containing three hundred and twenty acres each, being in Cook County, State of Texas, and patents for said tracts of land having been issued to James W. Dibrell. The patent for the six hundred and forty acres in Grimes County being patent No. 469 in Volume No. 17, dated 12th day of September, 1867, and the patent to one of the 320 acres tract in Cook County being patent No. 4 in Vol. No. 20, dated 27th day of December, 1872. And the patent for the other 320 acre tract in Cook County being patent No. 321 in Vol. No. 9, dated 24th day of October A. D. 1861. And the said James W. Dibrell having departed this life leaving a will which has been probated whereby he appointed one John Thompson, Jr., Executor of his will and estate and having qualified as such Executor and said William Little having a claim against said land for locating and obtaining patents to the same, now therefore in consideration of the premises, and in payment and satisfaction of said William Little said locating interest in said land, I, John Thompson, Jr., Executor of the will and estate of said James W. Dibrell, deceased, have granted, bargained, sold and released, and do hereby grant, bargain, sell and release to the said William Little that certain tract of land * * * This conveyance being without warranty and being in full settlement of said locating interest in the 320 acre tract in Cook County and the remaining 480 acres of the 640 acres in Grimes County and not hereby conveyed. Witness my hand and scroll for seal this 3rd day of July A. D. 1875. John Thompson, Jr., Executor of James W. Dibrell, Deceased. [Seal.]

"State of Virginia, Amhurst County, to wit. I, Sam M. Henry, Judge of the County Court of Amhurst County & State of Virginia, do hereby certify that John Thompson, Jr., Executor of James W. Dibrell, deceased, who hath signed the foregoing deed, being date the 3rd day of July, 1875, this day appeared before me in my County aforesaid and acknowledged the same to be his act & deed. Given under my hand this 3rd day of July, 1875. Samuel H. Henry, Judge of the County Court of Amhurst County.

"State of Virginia, Amhurst County, to wit. I, Charles L. Ellis, Clerk of the County Court of Amhurst & State aforesaid, do hereby certify that Samuel H. Henry who hath signed the foregoing certificate bearing date the 3rd day of July, 1875, is Judge of the County Court of Amhurst County duly commissioned and qualified as such, the same being a Court of record and that his signature to the same is genuine. Given under my hand and seal of my office this 3rd day of July, 1875. Chas. L. Ellis, Clerk of Amhurst County Court. [Seal.]"

"The defendants objected to the introduction

of this deed in evidence upon the following grounds: First, because no order of the probate court authorizing the sale or conveyance of any land belonging to the estate of J. W. Dibrell was shown, and the will of said Dibrell which had been introduced in evidence by plaintiff did not authorize the executor to make said deed, nor to sell the land thereby conveyed, and did not constitute him an independent executor; second, because the certificate of acknowledgment is fatally defective, in that it does not state that the said John Thompson, Jr., was known to the officer to be the person who executed said deed, or that he was proven to be such person, and said certificate of acknowledgment does not purport to have been given under the seal of the officer who makes same, and no seal was affixed thereto by such officer. These objections were sustained by the court, and plaintiff was not permitted to introduce the deed in evidence. The only question presented for our determination is whether the trial court erred in excluding the deed from evidence upon the objections above stated. The will of J. W. Dibrell contains no provision exempting his estate from administration by the probate court, and no authority is conferred upon the executor named in said will to sell any of the property of said estate, except a certain warehouse situated in the city of Richmond, Va., the revenues from which are bequeathed to the testator's wife during her lifetime. The executor is authorized by the will to sell this warehouse in event the rents from the same shall at any time during the life of the testator's wife so decrease that the annual interest on the money for which the property might be sold would exceed the revenue derived from renting same, and said executor is directed, if same had not been previously sold, to sell said warehouse at the death of the testator's wife, and divide the proceeds, together with all the residue of the estate, real and personal, not otherwise disposed of by said will, between the testator's brothers and sisters. Such being the character of the will under which Thompson acted, article 1879a of the Revised Statutes of 1895, validating sales made under wills probated in other states of the United States, has no application, and, no administration of Dibrell's estate and order of sale by a probate court in this state being shown, the act of the executor in making said sale and executing the deed was void, and for this reason the trial court properly refused to admit the deed in evidence.

It is contended by plaintiff that, even if the deed was inadmissible for the purpose of showing that the legal title to the land thereby conveyed passed to his vendor, the recitals therein contained as to the locative interest of Little in the lands rendered it admissible in evidence for the purpose of establishing such interest in Little. There is no evidence in the record tending to show that Little had any contract with Dibrell for the location of

any land, or that he located any land belonging to Dibrell; and the recitals in this deed are but hearsay declarations, and cannot be used as evidence of any equitable title in Little to the land in controversy.

It is unnecessary for us to determine the questions raised by the remaining objections to the deed. We are of opinion that the judgment of the court below should be affirmed, and it is so ordered. Affirmed.

PARSHALL v. CLARK.

(Court of Civil Appeals of Texas. Nov. 28, 1903.)

APPEAL BOND—ALTERATION—PARTIES—VALIDITY.

1. In the absence of evidence that an alteration appearing on the face of an appeal bond was made after its execution, a motion on this ground to dismiss the appeal should be overruled.

2. An appeal bond executed by a party to an action is valid as to him, and binds him to pay any judgment against him, though executed with one not a party as joint principal.

Appeal from Fannin County Court; T. C. Bradley, Judge.

Suit by L. C. Clark against H. E. Parshall. From a judgment of the county court dismissing an appeal from the justice's court, defendant appeals. Reversed.

Gross & Gross, for appellant.

RAINEY, C. J. This suit originated in the justice's court. In the county court a motion was sustained dismissing the appeal on the ground of alleged defects in the appeal bond. The bond is as follows:

"L. C. Clark vs. H. E. Parshall. Justice Court Prec. No. 5 Fannin Co. Texas. No. 4376. Whereas on the 28th day of Oct. 1902 in the above entitled and numbered suit pending in the above named court at a term of said court then in session a final judgment was rendered by said court in favor of L. C. Clark against H. E. Parshall for the sum of One hundred and thirty & ⁸⁹/₁₀₀ dollars, and whereas B. T. Fox & Co. a firm composed of Chas. Hirschorn and L. Hirschorn, have intervened in said suit from which said judgment H. E. Parshall and B. T. Fox & Co. have appealed to the County Court of Fannin County. Now therefore we the said appellant, H. E. Parshall and B. T. Fox & Co. as principals and — as sureties hereby bind ourselves to pay to the appellee, L. C. Clark, the sum of Two hundred and seventy dollars, conditioned, that the above bounden principals shall prosecute their appeal to effect, and shall pay off and satisfy the judgment which may be rendered against them on said appeal. H. E. Parshall (Principal). B. T. Fox & Co. (Principal). E. Eppstein, Surety for B. T. Fox & Co. B. Davis. J. W. Gross. B. W. McKey."

¶ 1. See *Alteration of Instruments*, vol. 2, Cent. Dig. § 224.

The alleged defects were:

First. That the bond shows on its face that it had been materially altered since its execution. The bond, on its face, does not show that the alteration thereon was made after its execution, and no evidence was produced to that effect. In the absence of such evidence, the first ground of the motion should have been overruled.

The other ground alleged in the motion is to the effect that, the judgment being against H. E. Parshall only, he alone should have executed the bond as principal, and that the joinder of B. T. Fox & Co. as principal therein, and the signing of some of the sureties as such for B. T. Fox & Co. only, does not bind Parshall alone to pay off the judgment that may be rendered against him. As far as the record shows, B. T. Fox & Co. were not parties to the proceedings in the justice's court, though appellant, in his brief, states that they intervened therein. But be this as it may, the bond is such as would bind Parshall and his sureties if judgment were rendered against him alone. If B. T. Fox & Co. were not parties to the proceedings in the justice court, their joining in the bond would not affect the liability of Parshall thereon. It is well settled in this state that where two or more parties to a judgment appeal therefrom, and execute a joint bond, on the affirmation of the judgment as to one, and reversal thereof as to the others, the sureties would be liable for the full amount of the judgment against the one.

The judgment is reversed, and cause remanded.

WALKER v. PATTERSON'S ESTATE.

(Court of Civil Appeals of Texas. Dec. 4, 1903.)

LANDLORD'S LIEN—WIDOW'S ALLOWANCE—PRIORITY OF CLAIM.

1. A landlord's lien on the tenant's crop for supplies and advances during the year in which the crop was raised is superior to the claim for an allowance for the support of the tenant's widow and children.

2. A landlord's lien for supplies and advances to his tenant extends only to the crop raised during the year in which they were furnished.

Appeal from District Court, Brazoria County; Wells Thompson, Judge.

Probate proceedings on the estate of Ben Patterson, deceased. From a judgment granting an allowance for a year's support of the widow and children, James C. Walker appeals. Reversed.

Munson & Munson, for appellant.

PLEASANTS, J. During the year 1901, and until his death on the 30th day of September, 1902, Ben Patterson, deceased, was a tenant on the farm of appellant in Brazoria county. At the time of his death Patterson was indebted to appellant in the sum

of \$1,383.04, same being due for advances and supplies furnished him as tenant by appellant during the years 1901 and 1902. Of this amount \$983.04 was for supplies furnished and advances made by appellant to said Patterson in 1901, and the remaining \$400 for such supplies and advances during the year 1902. Ben Patterson left surviving him a widow and several minor children, and his estate is insolvent. Appellee, Jim Patterson, qualified as permanent administrator of said estate on 20th day of January, 1903, and filed an inventory and appraisal of the estate on January 30, 1903. The estate consists entirely of personal property of the probable value of \$1,200. After the death of Patterson it was agreed by appellant and appellee, Jim Patterson, who at the time said agreement was made was temporary administrator of said estate, that the crop raised by the deceased on appellant's farm during the year 1902 should be sold, and the money received for same deposited in the bank, and be held subject to any lien which appellant might have had upon said crop. In pursuance of this agreement the crop was sold, and the proceeds thereof deposited in the Bank of Angleton. On the day that the inventory was filed Mrs. M. E. Patterson, widow of Ben Patterson, for herself and minor children, filed in the county court of Brazoria county, in which the administration of said estate is pending, an application for an allowance for a year's support for herself and minor children. This application shows that Mrs. Patterson has no means of support; that the estate of her deceased husband is insolvent; and that applicant is living in a rented house, and has no money with which to pay her rent. It further shows that the only funds of the estate are the proceeds of the sale of the crop raised by the deceased upon appellant's farm during the year 1902, which amounts to the sum of \$855.15, and asks that the allowance prayed for be ordered paid out of said proceeds. This application was granted by the court, and the allowance fixed at \$600, to be paid out of the funds above mentioned. This action of the court was over the protest of appellant, who contested the application for allowance on the following grounds: "(1) That such application should not be heard and the allowance made at the same term granting the original letters of administration. (2) The allowance should not be paid in whole or part out of the sum of money on deposit in the Bank of Angleton, for the reason that it was the proceeds of a crop of rice grown on appellant's farm, on which appellant had a landlord's lien to secure the payment of his claim of advancements made to decedent as his tenant, and that his right to have said money applied to the payment of his claim was superior to the said claim for allowance. (3) That the estate of Ben Patterson was insolvent, and, unless the said deposit fund was applied to

the payment of appellant's claim, he would lose his debt." Appellant appealed from the order of the county court to the district court of Brazoria county, and upon a trial de novo in that court the same judgment was rendered as in the county court.

We are of opinion that the court below erred in holding that the claim for an allowance for a year's support for the widow and minor children of the deceased was superior to appellant's landlord's lien upon the crop of the tenant for supplies and advances during the year in which said crop was raised. In the case of *Champion v. Shumate*, 40 S. W. 394, our Supreme Court holds that the landlord's lien for rents is superior to the claim of the widow for an allowance in lieu of exempt property. The lien given the landlord by the statute for supplies and advances, teams and tools furnished the tenant is of equal dignity as that given for rents, and the claim of the widow for an allowance in lieu of exempt property is placed by the statute upon the same plane as the claim for a year's support. Such being the relative status of the several liens, it necessarily follows that, if the landlord's lien for rents is superior to the widow's claim for an allowance in lieu of exempt property, the landlord's lien for supplies and advances is superior to the widow's claim for an allowance for a year's support. While the statute does not, in express terms, restrict the lien given the landlord to the crop raised during the year in which the rent accrues, or in which advances are made or supplies furnished, we are of opinion that such is the proper construction to be given the statute. The lien is given for supplies furnished and advances made to the tenant to enable him to make the crop, and only attaches to the crop for the making of which such advances were made or supplies furnished. Of course, the tenant could give a mortgage lien on his crop raised in one year to secure the landlord in the payment of amounts due him for supplies or advancements in previous years, but, unless signed by the wife, such lien would not be superior to her claim for an allowance.

In view of the disposition of this appeal in conformity with the views above expressed, appellant's objection to the allowance being made at the same term of the court at which the administrator was appointed becomes immaterial, and need not be passed upon. We are, however, of opinion that the statute on this subject is merely directory, and a failure to observe it would not of itself authorize a reversal of the case.

From what has been said it follows that appellant has a lien on the fund derived from the sale of the crop for the amount due by the tenant for supplies and advancements during the year 1902 which is superior to the widow's claim for an allowance for a year's support. The judgment of the court below will therefore be reversed, and the

cause remanded for a new trial in accordance with the views above expressed.

Reversed and remanded.

FAUX v. LAMAIRE.

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

APPEAL—DELAY IN FILING TRANSCRIPT.

1. Sayles' Ann. Civ. St. 1897, art. 1015, requiring appellant to file the transcript with the clerk of the Court of Civil Appeals in 90 days after the perfecting of the appeal, provided that, for good cause, filing of it may be allowed thereafter, does not authorize its filing 1½ months after appellant got it, on a showing merely that would have been sufficient had he filed it when he got it, which was after expiration of the 90 days.

Appeal from El Paso County Court; Jos. U. Sweeney, Judge.

Action between Louis Faux and G. Laimaire. From an adverse judgment, Faux appeals. Affirmed.

W. M. Coldwell, for appellant. S. Engelking and L. H. Davis, for appellee.

JAMES, C. J. Before us are two motions—one, by appellee to affirm on certificate; the other, by appellant for leave to file the transcript. Appellant's counsel did not get the transcript from the clerk until September 21st, the 90 days having expired a few days previous. His counsel makes a sufficient explanation, under oath, excusing his failure to obtain it within the 90 days. On November 2d, the transcript not having been filed here, the motion to affirm on certificate was filed. On November 9th appellant's counsel presented the transcript, with a motion to file; also with an opposition to the motion to affirm. No explanation or excuse is offered why counsel, after receiving the transcript on September 21st, failed to have it here until November 9th, and not until after appellee had moved to affirm. Article 1015, Sayles' Ann. Civ. St. 1897, provides that appellant shall file the transcript with the clerk of the court within 90 days after the perfecting of the appeal, or after that time for good cause shown. Article 1016 provides for the affirmance of the judgment if it be not filed in accordance with article 1015. We would recognize the affidavit of appellant's counsel as sufficient to have enabled him to file the transcript, if he had filed it promptly when received. But he has held it for about a month and a half, and how much longer he would have done so, but for the motion to affirm, we do not know. See *Williams v. Walker* (Tex. Civ. App.) 33 S. W. 556. No word of explanation for thus withholding it is offered. The effect of article 1015, we think, is to extend the 90 days, where the circumstances surrounding appellant are such as afford good cause for not filing it within that period, to such time as will admit of his filing it without unnecessary delay.

That is to say, if, when he presents the transcript after the 90 days, he shows to the court that he could not reasonably have had it here sooner, he will be allowed to file it, as if he had done so within the 90 days, and this would result in defeating a motion to affirm. But if he does not show good cause for not presenting it sooner, as he fails in this instance to do, it is otherwise.

Accordingly we conclude that the motion for leave to file transcript should be refused, and the motion to affirm granted.

INTERNATIONAL & G. N. R. CO. v. THOMPSON.*

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

CARRIERS—INJURY TO PASSENGERS—DERAILMENT OF TRAIN—COLLISION WITH CATTLE—DEFECTIVE FENCES—HARMLESS ERROR—PRIMA FACIE NEGLIGENCE—ASSIGNMENT OF ERROR.

1. Where a train collides with cattle on the track, injuring a passenger, it cannot, as a basis for exclusion of evidence that the right of way fence near the place was so defective as not to prevent cattle coming through, be held, as matter of law, that a carrier by rail owes its passengers no duty to fence its right of way, or to use reasonable care and diligence to keep the fence in such repair as will prevent cattle coming through onto the track.

2. Evidence in an action for injury to a passenger by derailment of a train from collision with cattle, as to the distance in which a train with all its equipments in condition could have been stopped, is not prejudicial to defendant, the cattle, when discovered, having been less than that distance from the train.

3. Derailment of a train injuring a passenger makes a prima facie case of negligence, which, unless rebutted, entitles him to recover.

4. An assignment of error raising a question of fact, being without a statement to support it, as required by rule 31 (31 S. W. vii), will not be considered.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by H. M. Thompson against the International & Great Northern Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Hicks & Hicks, for appellant. H. C. Carter and Perry J. Lewis, for appellee.

NEILL, J. Action for damages, brought by appellee against appellant for personal injuries inflicted upon the former by the alleged negligence of the latter. Appellee's petition charges that "on the 12th of August, 1901, while he was a passenger on one of appellant's trains, the train, through defendant's negligence, was wrecked and derailed, and in said wreck and derailment he was seriously, painfully, and permanently injured." The appellant answered by a general demurrer and a general denial. The case was tried before a jury, and resulted in a judgment for appellee in the sum of \$10,000.

*Rehearing denied December 16, 1903, and writ of error denied by Supreme Court.

¶ 1. See *Carriers*, vol. 9, Cent. Dig. § 1174.

Conclusions of Fact.

The evidence is reasonably sufficient to establish as facts the allegations in appellee's petition quoted in our statement of the nature and result of the suit. In considering the assignments of error, evidence germane to them will be recited, and, when necessary, discussed.

Conclusions of Law.

Appellant's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth assignments of error complain of the court's admitting in evidence, over its objections, the testimony of certain witnesses, which strongly tended to show that the fence of appellant's right of way about where the accident occurred was so defective and out of repair as not to prevent cattle coming through and going upon its railroad track. Under these assignments the following proposition is asserted: "A railway company owes no duty to its passengers to fence its track, or, in case its right of way has been fenced, to keep the fence in repair so as to exclude cattle from the track, and its failure to do so is immaterial upon the question of appellant's negligence in the operation of its train." There was testimony tending to show that the derailment and wreck of the train was caused by its engine coming in collision with a calf, which came on the right of way through a defect, near by, of the company's fence. The question therefore presented by the assignments of error is: Can it be said as a matter of law that a railway company owes its passengers no duty to either fence its right of way, nor, if fenced, to exercise reasonable care and diligence to keep the fence in such repair as will prevent cattle from coming through and going upon its track? If an affirmative answer be given this question, the testimony complained of should not have been admitted. On the other hand, if it cannot be said as a matter of law that a railroad company owes its passengers no such duty, it is a question to be determined by the jury, from the nature of the relation of a common carrier to its passengers and all the facts and circumstances, whether such duty rests upon it, and the testimony would be admissible upon such issue of fact. While a common carrier is not an insurer of the safety of its passengers, it is its duty to provide for their safety as far as human care and foresight will go. *Hutch. Car. § 501*. Or, as held in numerous cases in this state, "Common carriers are required to exercise the 'utmost care' for the safety of their passengers." *Knauff v. Traction Co.* (Tex. Civ. App.) 70 S. W. 1011, and cases cited. The duty to exercise this high degree of care, when applied to a railroad, extends to keeping its roadbed free from obstructions endangering its passengers. *Fetter on Car. of Passengers, § 30*. The liability imposed upon a railroad company who has not fenced

in its road by Rev. St. 1895, art. 4528, does not exclude other liabilities which may arise from its failure to fence it, or, if fenced, to keep the fence in repair. In *Quill v. H. & T. C. Ry.*, 46 S. W. 847, and *Houston & T. C. R. Co. v. Quill*, 55 S. W. 1128, this court said: "While it may not be the duty of a railroad company to servants operating its trains to inclose its roadbed, yet if the company, after having fenced it, negligently permits its fence to become so out of repair that stock can enter upon the track, and if the danger to its employes incident to operating its trains is by such negligence increased, and if, by reason of such increased risk, one of the employes is injured by the derailment of an engine caused by its collision with stock entering upon the track on account of such defective fence, the company would be liable for the injury thus occasioned its employé." If this be correct, a fortiori would the railroad, upon such facts, be liable for an injury to a passenger. But in such cases the liability of the company does not rest alone upon the authority of the decisions of this court. In *A. T. & S. F. Ry. Co. v. Reesman*, 23 L. R. A. 768, 60 Fed. 370, 9 C. C. A. 20, the plaintiff was a brakeman, and the burden of his case was that the railway company had negligently suffered the fences along its right of way to become and remain out of repair, and in consequence thereof a steer broke through, got upon the track, derailed the train, causing the injury to plaintiff. It is said by Mr. Justice Brewer: "The purpose of fence laws of this character is not solely the protection of proprietors of adjoining fields. That there should be no obstructions on the track is a matter of the utmost importance to those who are called upon to ride on railroad trains. Whether that obstruction be a log placed by some wrongdoer, or an animal straying on the track, the danger to the trains and those who are traveling thereon is the same." And, after reviewing many cases on the subject, quotes with approval from *Donnegan v. Erhardt*, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527, the following: "A railroad company, for the safety of its passengers, as well as its employes upon its engines and cars, is bound to use suitable care and skill in furnishing not only adequate engines and cars, but also a safe and proper track and roadbed. The track must be properly laid and the roadbed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be and come on the track, and a train is thereby derailed, and any person thereon injured, the railroad company, upon plain common-law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and, if they do, there is danger that the train may come in collision with them and be wrecked. Adequate

measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find, upon the facts of a case, that it was the duty of a railroad company to fence its track and guard against such danger." Where a passenger has been injured in a collision between his train and animals on the track, the failure to fence is sufficient evidence of negligence to take the case to the jury. *Sullivan v. Railway*, 30 Pa. 234, 72 Am. Dec. 698; *Lackawanna & B. R. Co. v. Chenewith*, 52 Pa. St. 382, 91 Am. Dec. 168. In *Fordyce v. Jackson* (Ark.) 20 S. W. 528, where plaintiff's testimony tended to show that the derailment of the train upon which he was riding was caused by a bull on the track, the court said: "It is no answer for the railway to prove simply that the animal came there without its knowledge. In this state it is the general custom to permit cattle to run at large. It is apparent to those who operate railroads that roaming cattle are a constant menace to the safety of an unguarded track. The railway's obligation to every one whom it undertakes to carry in the relation of a passenger is that it will take every reasonable precaution to avert injury to his person, whether from collision with cattle or from other danger which it has reason to apprehend. The omission of any reasonable caution to effect that end is negligence. The obligation required of the employes in charge of the trains faithful watchfulness to prevent accidents by collisions with cattle, and it requires the company to keep a clear right of way, to afford them the facility of performing this duty. If these and other precautions are insufficient to guard against the danger, and a fence will render the track safe from the intrusion of cattle, the company's obligation demands the more effective precaution." Again, it is said by Chief Justice Stayton in *G., C. & S. F. Ry. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345: "In view of the fact that a railway company has the right to fence its right of way, if this is not done the fact that a derailment is caused by contact with an animal is a fact which may be looked to in ascertaining whether or not the carrier has exercised due care." It cannot, therefore, in view of the authorities cited, be held as a matter of law that a common carrier by rail owes its passengers no duty to fence its track, or, if fenced, to keep the fence in such repair as will prevent cattle from entering thereon. This disposes of the question presented by the first 12 assignments of error adversely to appellant.

There was no error in the court's refusal to give an appellant's request the following special charge: "A railway company is not required, under the law of this state, to fence its track or provide cattle guards along its track, and in case it has fenced its track or provided cattle guards it is not required

to keep the same in repair; and even though you should find that the fence and cattle guards along defendant's right of way where the accident is alleged to have occurred were defective, or in bad condition, such facts of themselves would not constitute negligence upon the part of defendant"—as is demonstrated by what we have said in considering the preceding assignments.

It is clear that appellant was not prejudiced by the failure of the court to exclude the testimony complained of in the thirteenth assignment of error, for the undisputed testimony shows that when the calf was first seen by the engineer it was not more than 40 feet in front of the engine; that it would have been impossible, under any circumstances or conditions, to stop the train in time to avert the collision; that the collision with the calf knocked the front trucks of the engine off the rails, and they rode the ties for about 300 or 350 yards, when the engine turned over. The derailment of the trucks of the engine rendered the conditions entirely different from such conditions as the whole of Mr. Green's testimony, whether drawn out by appellant or appellee, was predicated upon, and made the derailment of the train inevitable. What difference, then, could it have made in what distance a train, with all equipments in first-class condition, could have been stopped, whether running on a down, level, or up grade? It could not, under any conditions, by the use of every means and effort, have been stopped before it struck the calf, and there is no testimony tending to show that its movement could have been controlled after the engine's trucks had been derailed by such collision.

The court did not err in refusing to give, at appellant's request, special charge No. 2, which is as follows: "In order for plaintiff to recover in this suit, he must prove by a preponderance of the evidence not only that defendant, at the time plaintiff received his alleged injuries, if any, was negligent in the operation of its train, but that such negligence, if any, was the proximate cause of plaintiff's injuries, if any. And although you should find that defendant was negligent in the operation of its train, still if you believe from the evidence that such negligence, if any, was not the proximate cause of said injury, but that said accident would have happened even though said train had been carefully operated, you will find for the defendant." When a passenger is injured in the derailment of a train a prima facie case of negligence is made out, which entitles him to recover unless it is rebutted. *Mex. Cent. Ry. v. Lauricella*, 87 Tex. 279, 28 S. W. 277, 47 Am. St. Rep. 103; *G., C. & S. F. Ry. v. Smith*, 74 Tex. 276, 11 S. W. 1104; *Elliott on Railroads*, § 1634; *Fetter on Carriers*, § 482; 3 *Thomp. on Neg.* §§ 2770-2773; *G., H. & S. A. Ry. v. Fales* (recently decided by this court) 77 S. W. 234, and authorities there cited. The same principle disposes of

appellant's other assignments which complain of the court's failure to give other special charges which are antagonistic to it.

The twenty-third assignment of error raises a question of fact, and is without a statement to support it. Therefore it will not be considered. Rule 31 (31 S. W. vii); *Railway v. Puente* (Tex. Civ. App.) 70 S. W. 362.

There is no error requiring a reversal of the judgment, and it is affirmed.

QUEBE v. GULF, C. & S. F. RY. CO.*

(Court of Civil Appeals of Texas. Oct. 24, 1903.)

PERSONAL INJURIES—RELEASE—CONSTRUCTION—CONSIDERATION—EXTENT.

1. In an action for personal injuries, in which defendant introduced in evidence a written release, the evidence as to which was contradicted, the construction of the release was for the court.

2. A release of a claim for personal injuries for a consideration of \$1, and an agreement by defendant to employ plaintiff for a definite time, under which plaintiff was re-employed for a considerable time, was supported by a valuable consideration.

3. Where a release of a claim for personal injuries was made at a time when the injured party only knew of injuries to his throat and breast, but the release recited that it was intended to fully determine any claim of the injured party, and that he released the other party from any action, suit, debt, claim, or demand whatsoever by reason of any matter, cause, or thing whatsoever, the release included injury to the eyesight, although such injury was not known to exist when the release was executed.

Appeal from District Court, Johnson County; W. Poindexter, Judge.

Action by W. S. Quebe against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

S. C. Padelford, for appellant. J. W. Terry, for appellee.

BOOKHOUT, J. Appellant instituted this suit in the district court of Johnson county on the 14th of April, 1902, to recover damages for personal injuries alleged to have been sustained by him while in the employ of defendant. A trial resulted in a verdict and judgment for defendant, and plaintiff appealed.

Conclusions of Fact.

W. S. Quebe was in the employ of the Gulf, Colorado & Santa Fé Railway Company as foreman in the carpenter shops at Cleburne. The railway company owns several machine shops located in Cleburne, and they are situated parallel to each other, with a space between the several buildings of about 200 feet. There are large doors in the north and south sides of these buildings, about

the center thereof; and there is located a railway track running north and south through these doors and buildings, and over the intervening space between the buildings. The most northerly building is called the coach shop, and the next building south of the intervening space is the boiler shop. From the south door of the coach shop, over the intervening space, and down through the boiler shop, is down grade. There is a passway along the eastern edge or side of this railway track, between the coach shop and the boiler shop, and the employes of the railway company use this passway in going from one shop to another. On the 3d day of May, 1901, W. S. Quebe, who was acting as foreman of the truck department, and had two or three gangs of men under him, wanted an extra pair of engine wheels moved from the coach shop. There was standing in the south door of the coach shop an engine tank, which had to be moved before the wheels could be taken out. Quebe ordered a gang of men to move the tank out of the door, and cautioned them to be careful, as it was very heavy, and not let it get away from them. The engine tank was to be moved out of the door far enough to not block the door, and so the door could be closed at night. At the time there were several men working on the track south of them, about the boiler shop, cutting iron on the rail. The men moved the engine tank down the track. Quebe, who was some distance away, looked around, and saw the engine tank running down the track, as he said, "helter skelter," and immediately ran outside, grabbed up a piece of plank about 6½ inches thick and 6 or 8 inches wide and 2 feet long, and ran down the track to catch the engine tank and block it. While so running, his foot came in contact with an iron pin driven in the ground, and sticking up about 8 or 10 inches, which caused him to fall. He threw the block of wood to catch himself, and one end struck the ground, and Quebe caught the other end in his throat. He failed to break the fall, and hit the ground hard, striking upon his head and left side, and injuring him. The iron peg was located about 18 inches from the east rail of the track, and about 20 feet from the north side of the boiler shop, and in said pathway. Quebe did not see the iron pin until he fell, and did not know it was there. By failing to block and wedge the engine tank, the men moving it did not use ordinary care. They did not obey the instructions of Quebe, their foreman, in that they were not careful in moving the tank. In this respect they were negligent, and their negligence should be imputed to the railway company. The jury, under the evidence, could have found the railway company negligent in permitting the iron peg to remain sticking up in the passway. Quebe was not guilty of contributory negligence, and there was danger of the engine tank running over the men who were working on the railroad

*Rehearing denied December 12, 1903.

¶ 2. See Release, vol. 42, Cent. Dig. § 24.

track near the boiler shop if the same was not stopped, and it was to prevent this danger that caused Quebe to act as he did in attempting to stop the engine tank. Quebe sustained injuries to his throat and breast, and, believing that the same were not serious, on the 8th of May, 1901, he signed the release set out in the opinion, and on the same day returned to work. He worked four months thereafter for defendant, when he became blind, and quit work. There was testimony from which the jury could have found that the injury to his eyes and eyesight was caused by the injuries received by Quebe in said fall. Other facts appear in the opinion.

Conclusions of Law.

Various questions are raised in this appeal, which, under our view of the case, it becomes unnecessary for us to decide. Five days after the injuries were sustained, the plaintiff, at the request of the railway company, signed a release which reads:

"Release: Contract of settlement: Know all men by these presents that whereas on the 3rd day of May, 1901, I, the undersigned, was in the employ of the Gulf, Colorado & Santa Fé Ry. Co. as carpenter, and while so employed received injuries as follows: Throat and breast injured by falling on peg.

"And whereas, said company will not employ or retain in its employment any one who has an unadjusted claim for damages against it, and will not promise employment to or consider any one as an applicant for employment who has an unadjusted claim against it.

"Now, therefore, for the purpose of fully ending and determining any claim that I may have against said company, and for and in consideration of the sum of one dollar to me in hand paid by the said company, the receipt whereof is hereby acknowledged (it being agreed that the execution hereof will be conclusive evidence of the receipt of same by me, and that I will never claim that the same was not paid to me by the said company), and in consideration of the promise of said company to employ me for one day as carpenter (as carpenter) at the usual rate of pay, the execution hereof being conclusive evidence that said company has made me said promise and for such further time and in such capacity as may be satisfactory to the said company and not longer, or otherwise, I do hereby remise and release, and forever discharge said company of and from any and all manner of actions, suits, debts and sums of money, dues, claims and demands whatsoever in law or equity I have ever had or now have against said company, by reason of any matter, cause or thing whatsoever, whether the same arose upon contract or upon tort, it being expressly agreed and understood that said company is not bound nor obligated by these presents or otherwise (except as to said one day) to

retain me in any particular kind of employment, nor for any definite time.

"In testimony whereof, I have hereunto set my hand this the 8th day of May, 1901.

"W. S. Quebe.

"Witness, J. Scott, T. K."

Appellant testifies: "I signed that release so that I could return to my old job. I knew I had to sign it in order to return to my work." He says he went to work after he signed the release, and on the same day. He did not know when he signed the release that there was any injury to his eyes, nor did the agents of the railway company know of any injury to plaintiff's eyes when they procured the release. The trial court left it to the jury to say whether, under all the evidence, the release covered the injuries to appellant's eyes and eyesight, or only injuries to his throat and breast.

It is contended by appellant that, the testimony in reference to the release and the manner of its procurement being uncontroverted, the release should have been construed by the court, and it was error to submit its construction to the jury. The appellee insists that there was no error in leaving its construction, in connection with the evidence surrounding its execution, to the jury, and, if there was error, it was harmless, because the jury properly construed the same. The evidence in connection with the release being uncontradicted, it would have been proper for the court to have instructed the jury as to its effect. *Hunnicut v. State*, 75 Tex. 233, 12 S. W. 106; *Denham v. T. C. L. Co.*, 73 Tex. 78, 11 S. W. 151; *Shepherd v. White*, 11 Tex. 346; *Ash v. Beck* (Tex. Civ. App.) 68 S. W. 53. It was shown that the release was executed for a valuable consideration, to wit, \$1, which was paid into hand, and the further agreement to re-employ appellant for a definite time. He was re-employed in accordance with the terms of the release, and worked four months for the railway company. He would not have been re-employed had he not executed the release. We have held that such a promise, and its performance, constitute a valuable consideration. *Carroll v. M., K. & T. Ry. Co.*, 69 S. W. 1004, 5 Tex. Ct. Rep. 700.

But it is insisted that the release, by its terms, only covered injuries to the throat and breast, and should be construed as embracing only these injuries, and that it does not cover injuries to the eyes and eyesight, for which alone this suit is instituted. The release expresses the purpose to be the "fully ending and determining any claim that I may have against said company." It further states: "I do hereby remise and release, and forever discharge said company of and from any and all manner of actions, suits, debts, and sums of money, dues, claims and demands whatsoever in law or equity I have ever had or now have against said company, by reason of any matter, cause or thing whatsoever, whether the same arose upon

contract or upon tort." The terms of the release, in connection with the oral testimony, in our opinion, are broad enough to include the injury to appellant's eyes and eyesight. Had a suit been instituted by appellant for the injuries to his throat and breast, and recovery had therefor, such judgment would have been a bar to a second suit for injuries to his eyes. This holding is supported by the opinion of the Supreme Court in *Ry. Co. v. McCarty*, 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854.

The facts in this case are quite similar to the facts passed upon by the Supreme Court in the *McCarty* Case, and, in view of the holding in that case, we think the court, under the uncontroverted evidence, should have instructed a verdict for defendant. We conclude that, under the uncontroverted facts, the proper judgment has been rendered herein, and the same is affirmed.

SPIVEY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

CRIMINAL LAW—INSANITY—DEFENSE—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS—REASONABLE DOUBT.

1. On a prosecution for murder the defense was that accused had been laboring under an insane delusion to the effect that his wife had been intimate with deceased, and the defense endeavored to show by a physician, who had examined accused as to his sanity, what accused had said to the physician as to the cause of the killing, for the purpose of producing the facts on which the physician had based his opinion that accused was insane, as tending to establish the insane delusion and the good faith of accused. *Held*, that the testimony should have been admitted.

2. Code Cr. Proc. 1895, art. 774, provides that no communication between a husband and wife shall be admissible on a criminal prosecution against either of them. Article 775 provides that neither a husband nor wife shall be a witness against the other save on prosecutions for a wrong committed by one against the other. On a prosecution for murder the defense was that accused had been laboring under an insane delusion that his wife had been intimate with deceased. The wife of accused testified that after accused was under arrest for the crime he told her that he wanted her to testify that deceased had made indecent proposals to her, and that it would go hard with him if she did not. *Held*, that the testimony should have been excluded.

3. An instruction on a trial for murder that if the jury believe that defendant unlawfully killed deceased not under the immediate influence of sudden anger or rage arising from an adequate cause he would be guilty of murder in the second degree, was erroneous, in that it required the jury to find affirmatively that defendant did not act on sudden passion before they could relieve him from punishment for murder in the second degree.

4. On trial for murder an instruction that if defendant unlawfully killed deceased not under the influence of sudden anger he would be guilty of murder in the second degree is erroneous, as, if the jury found he did not act under sudden passion, they could not convict him of murder in the second degree, but must convict him of murder in the first degree.

5. Where there was no question as to the killing, and the defense was insanity, an instruc-

tion that the instrument or means by which a homicide is committed are to be taken into consideration in judging the intent, and that, if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears, was erroneous.

6. A witness having denied a certain conversation with the wife of accused, an instruction that the jury should disregard the conversation, save for the purpose of affecting the credibility of the witness, was erroneous, as assuming the fact of such conversation.

Appeal from District Court, Falls County; Sam R. Scott, Judge.

John T. Spivey was convicted of murder in the first degree, and he appeals. Reversed.

Rice & Bartlett, J. W. Spivey, and Z. I. Harlan, for appellant. Howard Martin, Asst. Atty Gen., and Lewellyn & Connally, for the State.

DAVIDSON, P. J. This conviction resulted in a life sentence in the penitentiary for murder in the first degree. The killing was unquestionably proved; in fact, there was no issue on this phase of the case. Insanity was the defense. This issue was raised by a great mass of testimony from quite a number of witnesses to the effect that appellant a few months before the homicide had conceived the idea that deceased was intimate with his wife. Deceased had been boarding in the family, and was a young man about 23 years of age. The wife was 47 years old. It may be stated, without summing up the testimony, that there were no facts which to the rational mind would justify such conclusion. Appellant finally caused deceased to leave his house. From the time appellant conceived this idea of the relation of his wife and deceased his whole manner of life seemed to completely change. He continually talked about it. It seemed to be ever present with him when about home. His wife became frightened, and sent for her son, Don Spivey, who had been in the Indian Territory or Oklahoma, to return home. He did so, and acted rather in the assumed position of guardian for his father. He talked with him a great deal about his troubles, and tried to convince him that there was nothing in his statement. Appellant would admit this, and immediately began talking on the same subject again. This was continued until subsequent to the homicide. Among other witnesses summoned were Dr. Graves, superintendent of the lunatic asylum at San Antonio; Dr. Worsham, superintendent of the lunatic asylum at Austin; Dr. Wallace; Dr. Rice; Dr. Allen; and Dr. Sewell. They (except Dr. Wallace) came to Marlin in advance of the trial for the purpose of obtaining data relative to the mental and physical condition of appellant. They had defendant and witnesses before them, made a thorough examination of the antecedents of his family and all the cir-

cumstances which tended to throw light upon the subject. The evidence before them was from both sides, state and defense. The examination seemed to be very thorough, and the conclusion reached by these physicians was unanimous that he was insane. They examined appellant in person, talked with him, and heard his statements. Among other things, he proposed to prove by Dr. Graves what was said by appellant to him in regard to the cause of the killing of deceased, which would have been substantially that testified by the wife, son, and father of appellant. This was excluded by the court on the ground that it was irrelevant, immaterial, and self-serving. It was offered for the purpose of producing all the facts upon which Dr. Graves and Dr. Worsham based their opinion as to the insanity of defendant, and as tending to elicit and establish the insane delusion appellant was laboring under as to the infidelity of his wife, and the good faith of his belief as to the supposed adulterous intercourse of his wife at the time of the examination as well as at the time of the homicide. We believe this testimony should have been admitted. *Burt v. State*, 38 Tex. Cr. R. 397, 40 S. W. 1000, 43 S. W. 844, 39 L. R. A. 305, 330.

Mrs. Spivey was placed on the stand as a witness in behalf of her husband, and testified that about dark after the killing an officer placed her husband under arrest, spent the night at their residence, and left with appellant for the county site the following morning; they were permitted to occupy the same room that night; that they retired about 9 o'clock, but neither of them slept any during the night; that her husband wanted her to come to his trial and testify that deceased had made indecent proposals to her, and she told him she would not do so. He then wanted her to say that Hoffman (deceased) had made indecent proposals to her, and she told him she could not do so; that he further stated that it would go mighty hard with him if witness did not so testify. He did not say what they would likely do with him, and did not state further than that it would go mighty hard with him. He did not mention the punishment of hanging, or any punishment, but just stated that it would go mighty hard with him. He was then under arrest. Subsequently motion to exclude this testimony was made and overruled. The court explains as follows: "This conversation was a part of the same conversation, and took place during the time of the conversation, which defendant was permitted to show had occurred between himself and wife after the killing, though counsel for defendant had not asked witness any questions relative to what defendant stated he wanted her to swear to, nor as to whether he thought he would be punished." This testimony should have been excluded: First, appellant was under arrest; second, it was a confidential communication between appellant and

his wife. Articles 774, 775, Code Cr. Proc. 1895; *Brock v. State* (Tex. Cr. App.) 71 S. W. 21, 60 L. R. A. 465; *Bluman v. State*, 33 Tex. Cr. R. 64, 21 S. W. 1027, 26 S. W. 75; *Hoover v. State*, 35 Tex. Cr. R. 345, 33 S. W. 337; *Jones v. State*, 13 Tex. App. 1; *Gaines v. State*, 38 Tex. Cr. R. 218, 42 S. W. 383; *Penny v. State* (Tex. Cr. App.) 42 S. W. 297. See, also, *Barth v. State* (Tex. Cr. App.) 46 S. W. 228, 73 Am. St. Rep. 935; *Hurst v. State* (Tex. Cr. App.) 40 S. W. 264.

Exception was reserved to the following portion of the court's charge on murder in the second degree: "If, therefore, you believe from the evidence that defendant unlawfully killed deceased, and in doing so did not act under the immediate influence of sudden anger, rage, resentment, or terror arising from an adequate cause—that is, such cause as would commonly produce such passion in the degree that would in a person of ordinary temper render the mind incapable of cool reflection—the killing under such circumstances would be upon implied malice, and he would be guilty of murder in the second degree; and if you so find beyond a reasonable doubt you will find defendant guilty of murder in the second degree," etc. Various objections are urged to this charge, which we think are well taken. The jury were required here to find affirmatively that defendant did not act under the immediate influence of sudden passion before they could relieve him from punishment for murder in the second degree. This is a change of the doctrine of reasonable doubt. If there was a reasonable doubt upon this proposition, appellant was entitled to it. Again, if the jury found that he did not act under sudden passion, then, of course, they could not convict him of murder in the second degree, but left them to convict of murder in the first degree, which they promptly did. A charge upon manslaughter was not given, nor was a definition of adequate cause; and the failure to do so left but two degrees of culpable homicide for the investigation of the jury, to wit, murder in the first and second degrees. So, if they found he acted under sudden passion produced by an adequate cause, being guilty of some offense he was necessarily guilty of murder in the first degree, because, under the charge given, he could not be guilty of murder in the second degree, inasmuch as the jury are affirmatively charged that, if they found he did not act under immediate influence of sudden passion, he would be guilty of murder in the second degree. Therefore, if he acted under the immediate influence of sudden passion, and being guilty of some offense, it would necessarily follow he would be guilty of murder in the first degree. See *Neyland v. State*, 13 Tex. App. 546; *Pollard v. State* (Tex. Cr. App.) 73 S. W. 955; *Whitaker v. State*, 12 Tex. App. 443; *Brunet v. State*, Id. 535.

Complaint is made of this excerpt from the charge: "The instrument or means by

which a homicide is committed are to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears." While this, abstractly considered, is the law, yet in this character of case it should not be given. *Smith v. State*, 19 Tex. App. 110.

The charge with reference to the testimony of A. M. Spivey will not arise upon another trial, unless the testimony introduced would suggest it. It should not have been given on this trial. The issue was not raised by the record as we understand it. Spivey was asked with regard to a conversation with the wife of defendant, which he denied, and here the matter ended. The court charged the jury that they would not consider evidence of the conversation between A. M. Spivey, the father of defendant, and the wife of defendant, except for the purpose of affecting the credibility of A. M. Spivey, the father. This was an assumption by the charge of the conversation, when the proof showed that no such conversation occurred.

Exception was reserved to the argument of state's counsel, and the failure of the court to eliminate the same by a charge. This will not arise upon another trial, and its discussion is pretermitted.

For the errors discussed, the judgment is reversed, and the cause remanded.

MCCARDELL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 2, 1903.)

ASSAULT—SELF-DEFENSE—INSTRUCTIONS—EVIDENCE.

1. On a prosecution for aggravated assault with a deadly weapon, the facts showed that the assaulted party had thrown his open knife at defendant, who had requested him to desist, and that at the time of the assault defendant had thrown the knife of the assaulted party away some distance, and he was in the act of picking it up in a manner indicating that he intended to throw it again. *Held*, that defendant was entitled to an instruction on self-defense.

2. It was error to admit testimony on behalf of the state showing that the railroad hands of which the parties were a part were in the habit of hurrahing one another and pitching knives at one another.

Appeal from Polk County Court; A. B. Green, Judge.

Cal McCardell was convicted of aggravated assault, and he appeals. Reversed.

F. Campbell, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an aggravated assault by means of a

deadly weapon. There are but two questions we deem of importance:

First, the testimony, in our opinion, clearly presented the issue of self-defense. This was not charged upon, and the special requested charge by appellant was refused. The immediate facts show that the alleged assaulted party had thrown his open knife a time or two at appellant, who had requested him to desist. According to some of the witnesses, he had taken appellant's cap and cut it with his knife, filling it with sand and throwing it away; and, at the time of the alleged assault, appellant had thrown the knife of the injured party off some distance. The injured party was in the act of picking it up, and in such manner as indicated to appellant that he intended to further use it in throwing at him. This testimony was in the record, and it justified appellant in demanding a charge on self-defense, for, the assaulted party was picking up the knife at the time to continue throwing it, appellant had a right to strike.

Error is also assigned upon the admission in behalf of the state of the testimony showing that the railroad hands, of which the assaulted party and appellant were a part, were in the habit, and "it was the custom of this section crew, to hurrah one another and to pitch knives at one another." This was error. See *Hawkins v. State*, 17 Tex. App. 593, 50 Am. Rep. 129; 7 Crim. Law Mag. 277; *State v. Burnham*, 56 Vt. 445, 48 Am. Rep. 801.

For the errors indicated, this judgment is reversed, and the cause remanded.

ARMSTRONG v. STATE.

(Court of Criminal Appeals of Texas. Dec. 2, 1903.)

APPEAL—BOND—LANGUAGE OF BOND—STATUTORY REQUIREMENTS.

1. An appeal in a criminal case will be dismissed where the recognizance omits the concluding phrase, "in this case," as required by Code Cr. Proc. 1895, art. 887.

Appeal from Hopkins County Court; R. B. Keasler, Judge.

Clay Armstrong was convicted of crime, and he appeals. Appeal dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. The Assistant Attorney General has filed a motion to dismiss this appeal because of a defective recognizance. In that it omits the concluding phrase, "in this case," as required in article 887, Code Cr. Proc. 1895. An inspection of the recognizance shows that the motion is well taken. *Cryer v. State*, 36 Tex. Cr. R. 621, 37 S. W. 753, 38 S. W. 208. The appeal is accordingly dismissed.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1903.)

CRIMINAL LAW—APPEAL—REVIEW—INSTRUCTIONS.

1. On appeal from a conviction of assault with intent to murder, the propriety of an instruction on self-defense cannot be reviewed in the absence of the evidence.

Appeal from District Court, Walker County; J. M. Smither, Judge.

Sandy Williams was convicted of assault with intent to murder, and he appeals. Reversed, rehearing granted, and another rehearing refused.

McKinney & Hill, for appellant. Dean, Humphrey & Powell and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault with intent to murder, and his punishment assessed at five years' confinement in the penitentiary.

Exception was reserved to the following portion of the court's charge: "If, from the evidence, you are satisfied beyond a reasonable doubt that defendant, Sandy Williams, on or about the time charged in the indictment, and prior to the filing of the same, * * * with a deadly weapon, or instrument reasonably calculated or likely to produce death or serious bodily injury from the manner in which it was used, and with malice aforethought, did assault the said Tom Bukowski, and if you are further satisfied by the evidence, beyond a reasonable doubt, that said assault, if any, was not made under the immediate influence of sudden passion, produced by an adequate cause, * * * or not in defense of himself against an unlawful attack, producing a reasonable expectation or fear of death or serious bodily injury, then you will find defendant guilty of an assault with intent to murder, and so say by your verdict," etc. It will be noted that this charge omits to instruct the jury that an assault, in order to constitute an assault to murder, must be with the specific intent to kill. In order to constitute this offense, such assault must be made with the specific intent to kill, as well as upon malice aforethought. Gillespie v. State, 13 Tex. App. 415; White v. State, 13 Tex. App. 259; Davis v. State, 15 Tex. App. 475; Pruitt v. State, 20 Tex. App. 129; McCullough v. State, 24 Tex. App. 128, 5 S. W. 839; Moore et al. v. State, 26 Tex. App. 322, 9 S. W. 610; Trevenio v. State, 27 Tex. App. 372, 11 S. W. 447; Wood v. State, 27 Tex. App. 393, 11 S. W. 449. For other authorities, see White's Ann. Pen. Code, § 1036. The record does not contain a statement of facts, but this is a charge which cannot form the basis of a conviction for assault with intent to murder. There is no state of facts which would justify the con-

viction, under this charge, of assault to murder. The judgment is reversed, and the cause remanded.

On Rehearing.

(Nov. 25, 1903.)

At a former day of this term the judgment was reversed because of a fatal omission in the charge of the court, which is fully shown in the original opinion. Upon the state's motion for rehearing, it is made fully to appear that the charge was not defective in the respect discussed in the original opinion, but the clause "with intent then and there to kill and murder" was omitted from the paragraph of the charge by mistake in making up the transcript. This makes the charge of the court complete and in compliance with the law. The motion for rehearing is accordingly granted, and, no error being apparent in this record, the judgment is affirmed.

On Second Rehearing.

(Dec. 16, 1903.)

Appellant now files motion for rehearing, and insists that the judgment should be reversed because the court erred in charging on self-defense, in using the following language: " * * * But further believe that, at the time of so doing, said Bukowski had made an attack on him, which, from the manner and character of it, and the defendant's knowledge of the character and disposition of the said Bukowski, caused him to have reasonable expectation or fear of death or serious bodily harm. * * * " The facts are not in the record. It may be that the evidence fully justified this instruction. We cannot tell without the testimony. Hickey v. State, 76 S. W. 920, is not in point. Rehearing refused.

SPURLOCK v. STATE.*

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

CRIMINAL LAW—APPEAL—STATEMENT OF FACTS—TIME FOR FILING—ERRORS REVIEWABLE—EMBEZZLEMENT—INDICTMENT—SUFFICIENCY.

1. Under the law allowing 10 days after adjournment of term to file a statement of facts, a statement filed on the eleventh day cannot be considered on appeal, where no diligence on the part of appellant was shown on the preparation of the statement until the tenth day, when he presented his statement to the judge, who was holding court in a different county, and who had, just before, approved the statement prepared by the district attorney, and forwarded it to the county seat, which it did not reach, and so was not filed, until the eleventh day.

2. It is not necessary that an indictment for embezzlement from a private individual state that the party whose property was embezzled was a "private person."

3. On appeal from a conviction of embezzlement an assignment of error that under the evi-

*Rehearing denied December 16, 1903.

† See Criminal Law, vol. 15, Cent. Dig. § 2942.

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2941.

dence there should have been a charge on a misdemeanor embezzlement cannot be considered in the absence of a statement of facts.

Appeal from District Court, Throckmorton County; H. R. Jones, Judge.

Drue Spurlock was convicted of embezzlement, and appeals. Affirmed.

Cunningham & Oliver, for appellant.
Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of embezzlement, under article 938, Penal Code, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

The statement of facts, which was filed under the old law, allowing ten days after adjournment of the term under the order granting that time, appears to have been filed on the eleventh day, one day too late. Appellant has filed a motion setting up the diligence he used to procure and file said statement, and he asks that we consider the statement of facts, although not filed within the time authorized by law. In support of the motion appellant refers us to *Bigham v. State*, 36 Tex. Cr. R. 453, 37 S. W. 753, and *Cannon v. State*, 41 Tex. Cr. R. 467, 56 S. W. 351. In the former case there appears no lack of diligence on the part of counsel for appellant to prepare and file the statement of facts. In that case there was a 10-day order. We find that on the third day after adjournment of the term appellant presented the statement to the judge (who in the meantime had begun a term of court in another county in his district) with the statement that he and the district attorney had failed to agree, and then turned over to the judge the statement prepared by himself, with the request to prepare and file a statement, which, under the statute, the judge was required to do. In that case the judge did not prepare and file the statement until some days after the 10 days had elapsed. We held in that case that there was no laches on the part of appellant or his counsel. In the *Cannon Case* it is shown that it took about four days to try the case, and the statement of facts was lengthy, and the counsel proceeded at once to the preparation of a statement of facts, and got it prepared and forwarded by express to the judge where the trial occurred—counsel living in an adjoining county—and that, by a failure of the express messenger to transfer the package to a connecting company, the same was not delivered until the next day. But the delivery then was within time, though the judge declined to examine and approve the same on account of the shortness of time intervening before the lapse of the 10 days; and this, although he was asked to file the statement and make such corrections afterwards as he saw fit. Neither of said cases are applicable to the facts here shown. The judge certifies in his approval of the statement of

facts that on the ninth day after adjournment of court (he then being at Haskell, holding court, in another county) the defendant had failed up to that time to present his statement; that the district attorney had already submitted his statement; and that on the ninth day he approved the same, after examination. It is shown by appellant in his motion that such statement was forwarded by the judge by mail to Throckmorton, where the case was tried; but it reached there on the eleventh day after the adjournment of the district court of said county. In this connection it is further shown that, if the postmaster had sent the statement of facts by another route it might have reached its destination in time to have been filed on the tenth day after adjournment of court. It is also shown that on the tenth and last day appellant's counsel presented the district judge with a statement of facts at Haskell, and proposed that he should approve the same, and that he would himself carry that to Throckmorton, the county site of Throckmorton county, and file it; and, if his request had been complied with, he could and would have filed said statement on the tenth and last day. We would observe in this connection that the distance between Haskell and Throckmorton is not stated, nor is any effort made in this motion to explain why appellant did not use some effort to have said statement of facts approved before the tenth and last day. We know of no authority, under the circumstances here stated, that would authorize the judge to approve a second statement of facts. Besides this, as was stated above, no act of diligence was shown on the part of appellant in regard to the preparation and presentation of said statement until the very last day of the time allowed him. In both of the cases cited there was no lack of diligence on the part of counsel, as they appear to have proceeded at once on the adjournment of the term in the preparation of a statement of facts and presentation thereof to the judge. In the first case cited the failure to file the statement was directly attributable to the laches of the judge, and not of appellant or his counsel. Here it appears that the judge waited on appellant's counsel until the last day, and then forwarded the statement of facts approved by him by mail. If appellant himself, under the circumstances, had previously applied to the judge, and made some request of him in regard to the statement, to give it to him in time in order that he might have it filed in Throckmorton county, before the expiration of the 10 days, and the judge had failed to do so, but mailed the statement, then the fault might have been with the judge. We do not believe, under the authorities, that we can consider the statement of facts as a part of the record in this case. *Monk v. State*, 38 Tex. Cr. R. 602, 44 S. W. 158; *Crawford v. State* (Tex. Cr. App.) 44 S. W. 1088.

Appellant contends that the indictment is defective, in that it fails to charge that P. P. Powell, the party whose property is alleged to have been embezzled by appellant, is a "private person." It may be a correct proposition of law that, where the ownership in embezzlement is alleged to be in a name applicable alone to a corporation or a joint-stock company, that this should be alleged; but the same rule would not apply where the name in its usual acceptation refers to a person. *Nasets v. State* (Tex. Cr. App.) 32 S. W. 698; *Faulk v. State*, 38 Tex. Cr. R. 73, 41 S. W. 616. Of course, in such case, if it should be established that it was not the name of some person referred to, but that of a corporation, there would be a variance. We hold that the indictment was not defective.

Appellant's other contention is that the court should have charged on a misdemeanor embezzlement, on the ground that there is some proof tending to show that all of the money charged in the indictment could not have been embezzled at the same time, but, if any was embezzled, it consisted of various appropriations less than \$50 at a time. In the absence of a statement of facts, this assignment cannot be considered.

No error appearing in the record, the judgment is affirmed.

THOMPSON v. STATE.*

(Court of Criminal Appeals of Texas. Dec. 2, 1903.)

CRIMINAL LAW — CONTINUANCES — APPLICATIONS — JURY — DISCRIMINATION AGAINST NEGRO RACE — EXCEPTIONS — REVIEW.

1. Refusal of the court to grant a continuance because of the sickness of defendant's counsel was not ground for reversal where it was shown that he had other counsel, and there was nothing to show that he suffered any injury on account of the counsel's absence.

2. An application for a continuance of a criminal case because of the sickness of a witness who would testify that the statements of a state's witness were untrue, but which did not show what the statements were, was properly denied.

3. As a general rule, continuances are rarely granted for the purpose of procuring impeaching testimony.

4. An application for a continuance on account of the absence of a witness subpoenaed, who would testify that at the time of the alleged offense defendant was with witness at a place a considerable distance from the place of the commission of the offense, was properly denied for failing to specify the place.

5. An application for a continuance of a trial for rape on the ground of the absence of a witness who would testify that the family of the prosecuting witness telephoned an officer that the offense was committed by a third person was properly denied, where, from the evidence, it was immaterial, even if the prosecutrix had herself testified that she telephoned the officer that she suspected it was the third person who assaulted her.

6. On a motion to quash an indictment charging a negro with crime because in the forma-

tion of the grand jury no negro was drawn, it was shown that there were about 10,000 voters in the county, and that of these about 600 were negroes; that no negroes were drawn on the grand jury, and that within the knowledge of the witnesses none had ever been drawn. One of the commissioners selecting the jury testified that all the commissioners were white men; that they had the tax rolls and city directory when they selected the juries; that no negroes were drawn to serve as jurors; and that, if the name of a negro had been suggested, he would have been placed on the jury. Held insufficient to show that the negro race was discriminated against.

7. On a similar showing on a motion to quash a special venire based on the same ground, it was not error to refuse to quash the venire.

8. A witness who has measured the tracks at the scene of a crime, or is able to testify to some peculiarity between the tracks found at the scene of the crime and those shown otherwise to have been defendant's tracks, is competent to testify as to the similarity of the tracks.

9. An objection to the admissibility of evidence can only be raised by bill of exceptions.

10. The question of the disqualification of a juror in a criminal case because he had not paid his poll tax cannot be raised by motion for a new trial, but must be shown by exceptions.

Appeal from District Court, Bexar County; John H. Clark, Judge.

Ernest Thompson was convicted of rape, and appeals. Affirmed.

J. B. Butler and A. B. Cowen, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of rape, and his punishment assessed at death; hence this appeal.

Appellant moved for a continuance because of the absence of his leading counsel, J. M. Eckford, Esq., who is shown to have been sick at the time of the trial. It is shown that appellant had other counsel, and the record does not disclose that he suffered any injury on account of the absence of his leading attorney. In this connection appellant also asked for a continuance on account of the absence of said J. M. Eckford, Esq., who he alleged was a material witness for him, and who had been duly subpoenaed, and was unable to appear on account of sickness; that appellant expected to prove by said witness that Adolphus Thompson, a material witness for the state, told him that he had been frightened into making statements against defendant, and that said statements were untrue. What these statements were that Thompson disclosed to Eckford is not made to appear, and we are not authorized to supply this by intendment. Moreover, if it was intended here to insist on a continuance in order to impeach Thompson by Eckford, we would observe that, as a general rule, continuances are rarely granted for impeaching testimony.

*Rehearing denied December 12, 1903.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1049.

Appellant also claims that the case should be continued on account of the absence of Frank Morris, who had been subpoenaed, and from some cause unknown to defendant was not present. Defendant says he expected to prove by said witness that at the time the alleged offense was committed defendant was with him at a place a considerable distance from the place where the offense was committed, and remained with him during the afternoon. This statement should have been made with more regard to particulars. Certainly appellant could inform his counsel at what particular place he was during that afternoon with the witness Morris, and it should have been shown in the application. Besides, the diligence for this witness was not sufficient.

A continuance was also craved because of the absence of Andrew Strelsick. By this witness appellant expected to prove that the family of "Victoria Nickle telephoned the officer that the offense was committed by the boy Haywood—the boy who rides the jack." The record does not disclose that any effort was made to shift this offense upon the boy Haywood, and from the evidence it would be immaterial, even if the prosecutrix, Victoria Nickle, had herself testified that she telephoned the officers that she suspected it was Haywood who had assaulted her.

Melvin Pitman was another absent witness. The application shows that it was expected to be proved by him that he saw defendant in company with Frank Morris at the time the offense was alleged to have been committed. This statement is equally as indefinite as that heretofore treated relating to the witness Morris. We do not think the court erred in overruling the motion for continuance.

On the trial appellant made a motion to quash the indictment, because, he being a negro, in the formation and impanelment of the grand jury no negro was drawn; the negro race being discriminated against in the drawing, selection, and impanelment of said grand jury that returned the bill of indictment against defendant. The motion further alleged that within the limits of Bexar county there are 7,000 qualified jurors, of which at least 600 or 800 are negroes, qualified to sit upon juries. A similar motion was made to quash the special venire. The court appears to have heard evidence on this subject, and to have overruled these motions, to which appellant excepted. The witnesses show there were 10,000 or 11,000 voters in Bexar county; that of these 600 or 700 are negroes; that no negroes were drawn on the grand jury, and within their knowledge none had ever been drawn; that sometimes negroes sat on petit juries. But it is nowhere shown by any of the witnesses how many of the alleged 600 or 700 negro voters in Bexar county were qualified jurors. Besides being a voter, a person must be a freeholder or

householder, and able to read and write, and other qualifications not necessary to be mentioned. It may be that out of this population of 600 or 700 negroes (about one-twelfth of the voters in the entire county) but few possessed the necessary qualifications to serve as grand or petit jurors. One of the commissioners who selected the jury was examined, and he states that all of the jury commissioners were white men; and that they had the tax rolls and city directory before them when they selected the grand and petit juries for the May term, 1902; that no negroes were drawn to serve as grand or petit jurymen; that the name of no negro was presented or drawn as a grand jurymen for said term; if the name of a negro had been suggested, he would have been placed on the grand jury. It thus appears, so far as the commissioners are concerned, that there was no intentional effort on their part to discriminate against the colored race in the formation of either grand or petit juries; and under the meager proof here offered we are not enabled to say that there was any discrimination against the negro race. On the contrary, it simply occurs that the matter was not brought up to be acted on; and, if there were competent negro jurors in that county (which was not shown, although it may be presumed that out of such a number of voters there must have been some competent jurors), still, as the matter is presented, it does not appear that in the formation of either the grand or petit juries the negro race was discriminated against. The failure to select any negro was simply, at most, an oversight. The court did not err in refusing to quash the indictment or special venire.

During the trial appellant objected to the evidence of certain witnesses regarding tracks found at the scene of the alleged outrage that were similar to tracks made by appellant. The objection urged to this testimony is that said witnesses did not first qualify as experts or persons skilled or familiar with the subject testified about. We do not regard the evidence as to similarity of tracks a matter for expert testimony. A witness, in order to identify tracks found at the scene of a transaction with those of an accused, must, before he can testify as to such similarity, show some knowledge in regard to the tracks testified about. He must have measured them, or must be enabled to testify to some peculiarity between the tracks found at the scene and those shown otherwise to have been the tracks made by appellant. This bill does not disclose the conditions under which the opinions or statements of the witnesses were given as to the similarity of tracks found at the scene of the outrage with those made by defendant. In order that the witnesses should have been disqualified to speak upon this matter, the bill should have shown that they made no measurement of

the tracks, or that they were not familiar with any peculiarities in the tracks found upon the ground with those made by appellant. As presented by this record, the court did not err in admitting the testimony of the witnesses.

Appellant also complains that the court erred in failing to give an instruction to disregard the testimony of the state's witnesses Trainer and Mahula as to their opinion that the tracks made at the alleged place of the assault were made by the feet of defendant as measured by them at Atkins. When we recur to the testimony of these witnesses, as found in the statement of facts, we believe there was ample testimony to authorize the admission of the evidence of these witnesses as to the similarity of tracks found upon the ground with those of the appellant; and the court was not required to instruct the jury to disregard said tracks.

In motion for new trial appellant contends that the court erred in permitting to be introduced in evidence against appellant the record of the age of appellant, with other members of his father's family, found in a book at the home of appellant. In answer to this it is sufficient to say that no bill of exceptions was reserved to this character of testimony. We make the same observations in regard to the objection urged in appellant's motion for a new trial to three jurors who sat on the trial of the case. Appellant urges that said jurors were disqualified because they had not paid their poll tax. But this is neither shown by bill of exceptions nor otherwise, save as one of the alleged grounds of the motion for new trial; consequently it cannot be considered.

Appellant also craves a reversal because he says the verdict of the jury is not sustained by the evidence. The evidence that prosecutrix was outraged is of a positive character. The evidence as to the identity of appellant being the party who perpetrated the outrage is of a circumstantial character. However, we think it is ample, and fully complies with the rule regarding circumstantial evidence; and, in our opinion, shows to a moral certainty, to the exclusion of any other reasonable hypothesis beyond any reasonable doubt, that appellant beforehand formed the design to perpetrate an outrage upon prosecutrix. He lived in the same neighborhood with her, and knew the route she took in going to and returning from school. He lay in wait for her, stripped of his clothes, and wearing a disguise over his face. He rushed upon the little girl, violently seized her (she was evidently overcome with terror, and was thus rendered powerless to resist his purpose). He threw her to the ground, accomplished his object, and then fled. His defense was alibi. The jury evidently did not regard his testimony, but believed the theory of the state; and we see nothing to authorize us to reverse the case.

The judgment is accordingly affirmed.

DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

CRIMINAL LAW—WITNESSES—HUSBAND AND WIFE—PRIVILEGED COMMUNICATION—SUBSEQUENT DIVORCE—CORROBORATION OF WITNESSES.

1. Under Code Cr. Proc. 1895, art. 774, providing that neither husband nor wife shall testify to communications made by one to the other while married, nor shall they, after the marriage relation ceases, be made witnesses to any such communication made while the relation subsisted, except where one or the other is prosecuted for an offense which the communication goes to extenuate or justify, the testimony of a divorced wife to a threat made by her former husband against one with whose murder he was charged, in the course of a conversation with the witness prior to the divorce, is inadmissible.

2. A witness who has not been impeached cannot be corroborated by showing he has made the same statement testified to, at other times, to other parties.

Appeal from District Court, Jefferson County; A. T. Watts, Judge.

John Davis was convicted of murder in the second degree, and appeals. Reversed.

O'Brien, John & O'Brien, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary.

Upon the trial the state proved by Sibbie Robertson the following: "I am the daughter of Ed Gilder, deceased, and was prior to and at the time of the killing of Ed Gilder the wife of defendant, John Davis, but have since the death of Ed Gilder married a man by the name of Robertson. I was at the house of Ed Gilder at the time he was killed, down at Aunt Emily Ben's, and did not see the shooting. It was at Aunt Emily Ben's, on the little gallery of the little house used by her for the purpose of amusement and giving parties. He was lying on his side, and his entrails were out. He had his good mind. He was talking. Q. Did he say anything with reference to his condition? A. He said: 'Sweetheart, you begged me to stay at home, but I refused to do so. I am shot. John Davis did it. He slipped up and shot me. He did it with that old gun he had.' He said it snapped twice before it fired. He said he was a dead man. He was talking to my mother, Lizzie Gilder, at the time. Just before defendant went to Aunt Emily Ben's to live, he and I, as husband and wife, were living in a little house of ours. After our marriage we had lived about three months in the house with deceased, Ed Gilder, and his wife. It was about three weeks before the killing of Ed Gilder that John Davis had gone to Aunt Emily Ben's to live. Q. At the time you left your father's house, as the wife of John Davis, what was the conduct

of John Davis to your father? A. One night when father was sick, defendant told me to hang his overalls by the fire to dry. I did so, and about 2 o'clock in the night he wanted me to get up and go after his overalls. I told him I would not, because it was not time for him to go to work. He said: 'That is what I say about a lot of damn fools. I have a good notion to get my gun and kill the whole bunch.' Then papa, from the other room, said: 'Davis, don't make so much noise. I am sick as I can be.' Defendant kept fussing, and told deceased, if he did not like it, he could help himself. Defendant attempted to get his gun and get in the room. This is all he did." At the time this testimony was introduced, appellant reserved no exception, nor was any motion made after its introduction to exclude the same from the consideration of the jury, nor was any bill of exceptions reserved in any way to its introduction. It is urged for the first time in this court as a reason for the reversal of this case. Article 774, Code Cr. Proc. 1895, provides: "Neither husband nor wife shall in any case testify as to communications made by one to the other while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsisted, except in a case where one or the other is prosecuted for an offense, and a declaration or communication made by the wife to the husband, or by the husband to the wife, goes to extenuate or justify an offense for which either is on trial." In *Brock v. State*, 71 S. W. 20, 60 L. R. A. 465, construing article 775, Code Cr. Proc. 1895, this court held that the testimony of the husband or wife against the other would not be admissible, and its admission would constitute reversible error, whether excepted to or not; nor could one testify against the other, even if that one consented to the admission of the testimony. It will be noted from the above that appellant was talking to his wife at the time he made the threats against deceased, and hence her testimony is a communication made by the husband to the wife, which is inhibited by the letter and spirit of article 774, supra. We see no reason here, if the testimony and statement were held by this court to be reversible error in the *Brock Case*, supra, without bill of exception, why the evidence disclosed should not be equally so. While the record shows that the parties were divorced, yet the article under consideration precludes her testifying to any communication made to her by her husband, regardless of said divorce. Therefore it follows that the court erred in permitting this testimony to be introduced. For the reasons at length on this subject, see *Brock's Case*, supra.

Bill No. 3 complains that the state was permitted to ask witness Lizzie Gilder, wife of deceased, if she had ever told anybody that deceased had a pistol that night, and she

was permitted to answer that she had not. A witness that has not been impeached by the adverse party cannot be corroborated by showing that she has made the same statement testified to at other times, to other parties. This witness was not impeached, and the bill so shows. *Riojas v. State* (Tex. Cr. App.) 36 S. W. 268; *Doucette v. State* (Tex. Cr. App.) 45 S. W. 800; *Red v. State* (Tex. Cr. App.) 46 S. W. 409.

The charge of the court, when considered as a whole, does not present any reversible error—at least, such error as was injurious to appellant. Appellant insists that the court presented issues suggesting adequate cause not raised by the evidence. Without going into the details, we would suggest that, on another trial, adequate cause charged upon should be the cause brought out in the evidence.

For the errors discussed, the judgment is reversed, and the cause remanded.

FRANCE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 2, 1903.)

ROAD OVERSEER — REFUSAL TO SERVE — INABILITY TO READ AND WRITE.

1. In a prosecution under Pen. Code 1901, art. 486, for willfully refusing to serve as road overseer, defendant's inability to read and write is no defense.

Appeal from Hopkins County Court; R. B. Keasler, Judge.

L. G. France was convicted of willfully failing to serve as road overseer and appeals. Affirmed.

Wood & Guthrie, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of willfully failing to serve as road overseer. The prosecution was brought under article 486, Pen. Code 1901. Motion was made to quash the information, which was overruled. The court ruled correctly in regard to this. The contention of appellant seems to be that because he was unable to read and write he was therefore justified in refusing to discharge the duties as road overseer. There are no authorities cited in support of this proposition, and we have been unable to find any justification, legally speaking, for the position. The commission was issued to appellant as road overseer, retained by him for some days, and finally returned to the commissioner of that particular commissioner's precinct, accompanied by an old certificate from his physician, which indicated his inability to attend to the duties of such office. But upon investigation this certificate seemed to have had no bearing upon the condition of his present health, it having been given long prior to the time at issue, and the commission was again returned to appellant. The next theory advanced

by him was that, as he could not read and write, he was not called upon to act as road overseer. There is no merit in his contentions.

The judgment is affirmed.

SMITH v. STATE.

(Court of Criminal Appeals of Texas. Dec. 2, 1903.)

HOMICIDE—TRIAL—IMPANELMENT OF JURY—EQUAL PROTECTION OF THE LAW—EVIDENCE—CHANGE OF VENUE.

1. Where jury commissioners, appointed in a county where a fourth of the population were negroes, to impanel juries for the trial of a negro, were all white men, and of the grand and petit jury lists drawn only one name was that of a negro, and he was either dead or had left the county years before, there was a discrimination in violation of Const. Amend. 14, guarantying equal protection of the law, though it was through an error that the negro drawn was not a resident.

2. Where accused and his counsel made efforts to act in regard to the impanelment of a grand jury, but could get no information as to its action concerning him, in time, the failure to challenge the panel does not deprive accused of his right to raise the question of discrimination in its formation.

3. Where a negro has been tried three times in the same county for homicide, and the race question was prominent, a change of venue should be granted on another trial, though witnesses testify that in their opinion a fair and impartial jury can be secured in the county.

4. A witness' testimony that tracks near the place of a homicide were of a No. 8 or 9 shoe, broad at the ball of the foot, narrowing towards the toe, and with one side of the heel worn off, and that the shoe of the person accused of the homicide answered this description, is not definite enough to authorize the witness to give his opinion that the tracks found were similar to those of the accused.

Brooks, J., dissenting.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Robert Smith was convicted of murder in the first degree, and appeals. Reversed.

George Peter Brown and Sidney J. Wilson, for appellant. Chas. Batsell, Asst. Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death. This case has been before this court twice before, and on both occasions it was reversed, because in the formation and impanelment of the grand jury which found the indictments against appellant (a negro) he was discriminated against on the part of the court. *Smith v. State*, 42 Tex. Cr. R. 220, 58 S. W. 97; *Smith v. State*, 69 S. W. 151, 5 Tex. Ct. Rep. 434. Since the last reversal a new grand jury was impaneled, and appellant reindicted. He made a motion to quash the indictment on the same ground as heretofore, to wit: "That appellant was a negro, and was char-

ged with the murder of Aria Taylor, a white woman; that no negroes were placed on the grand jury which indicted him, and that there are from 2,000 to 3,000 negroes resident citizens of Grayson county, who are qualified jurors; and who were qualified to sit as grand jurors, being about one-fourth of the jury population of said county; that the jury commissioners appointed by the court were all white men; that in selecting the grand jury they drew no negroes on said grand jury, and in this connection they discriminated against him in the formation of said grand jury, and thus denied him the equal protection of the law, which is guaranteed him under the fourteenth amendment to the Constitution of the United States and the decisions thereunder." After hearing the evidence, the court overruled said motion to quash, and appellant reserved his bill of exceptions. We have carefully examined the record testimony contained in this bill of exceptions, and discover no material change from the conditions attending the impanelment of the two former grand juries, except here it is apparent that there was an endeavor, as was stated by the assistant county attorney of Grayson county in his argument, to avoid the effect of the decisions of the Supreme Court of the United States and of this court. In the former trials no person of African descent was drawn on the grand jury, but in the present instance it appears the commissioners managed to draw one person of African descent. On investigation, however, it was shown that he was either dead or had left the county a number of years before this offense was committed. While the commissioners, in their testimony, attribute this mistake to an accident, still it does not occur to us that it relieves the situation, even if they had drawn a negro juror who was a citizen of the county, and who was still alive. Of itself it would not show a lack of discrimination against the negro race. They testify that their purpose was to give the negroes representation on both the grand and petit juries, and that they decided to put one negro on each list. We do not understand that the law requires that negroes shall be drawn or serve on juries, but the law does require that in the selection of grand and petit juries the negro race be not discriminated against where a negro is to be indicted or tried. It is no answer to this proposition to say that, in order to meet the decisions of the Supreme Court of the United States, they discussed the question, and decided to place one negro on the grand jury, in order that the negro race be represented. An effort to comply with the fourteenth amendment and the decision thereunder, instead of endeavoring to avoid the same, in a colored population shown to exist in Grayson county, might have entitled the negro race to a greater representation on both the grand and petit juries than is here shown. And when we take in connection

with this the fact that the commissioners drew or selected a dead negro to serve on the grand jury, it makes it evident that they did not exercise that care in the selection of as important a body as the grand jury that would indicate their purpose was not to discriminate against the negroes. In this connection we refer to the testimony of Judge Bryant, the federal judge of that district, who states that he has negroes from Grayson county, both on the grand and petit juries, serving during his court, showing that there must be persons of African descent who can be found, and who are considered capable of performing duties devolving on grand juries. While we fully understand the sentiment that may have actuated the officers of the court below, and appreciate their disinclination to place the administration of the law, even in part, in the hands of a people assumed to be inferior to the white race, yet under the law and before the law all are equals, and in its administration no favors can be shown, nor can either the letter or spirit of the law be ignored.

It is said, however, that appellant should have exercised his right of challenge to the array, and, having failed to do so, he cannot now complain, although his race may have been discriminated against in the selection of a grand jury. In reply to this we would observe that there is some evidence that appellant made an effort to get into communication with the court in regard to the impanelment of the grand jury, and wrote a note, and gave it to one of the attendants at the jail; but it does not appear to have reached any officer of the court or the grand jury. Moreover, his lawyer, Mr. Cox, who had previously managed the case on appointment, but was on the eve of retiring from the defense of appellant, brought this matter to the attention of the court about the time the grand jury were impaneled, or as they were going to their room after impanelment, and requested that, if it was intended to reindict Bob Smith, he wanted an opportunity to challenge the array. The judge informed him that he knew nothing about it. It does occur to us, under the circumstances of this case, that it was the duty of the judge, when this matter was brought to his attention to have informed himself, through the county attorney, as to the purpose of reindicting appellant; and whether the grand jurors were then being impaneled, or about retiring, it would have been an easy matter to have recalled them, and thus have afforded appellant an opportunity to raise the question at that stage of the procedure. This was not done.

In reversing this case we cannot forbear mentioning the fact that certain members of the bar of Grayson county, under appointment of the court, and without compensation, have represented appellant both in the various trials in the lower court and this court. Their services have not been of a

perfunctory character; on the contrary, they have manifested both courage and ability. Appreciating fully the genius and spirit of our free institutions, they have left no stone unturned in order to afford defendant every defense guaranteed to him under the law. And it may not be improper here to observe that no state has a better system of procedure safeguarding every right of a defendant charged with a criminal offense than has our own commonwealth. If a person is charged with a capital felony, and is too poor to employ counsel, our statutes provide for the appointment of counsel, who are required to serve without fee or reward. Throughout the trial the presumption of innocence follows him as a shield for his protection, and every reasonable doubt is resolved in his favor; and, better still, and in this respect vastly superior to the federal procedure, no judge during the trial or in his charge dare intimate his opinion as to defendant's guilt. While high overhead, and pervading all, is that provision of our Bill of Rights which guarantees to a defendant a trial by a fair and an impartial jury; and in keeping with this provision every law in our statutes on this subject is in consonance with this constitutional guaranty. We do not hesitate to assert that under our system of procedure a defendant on trial for a criminal offense is not only vouchsafed a fair trial, but a liberal trial, with every intendment in his favor; and that, no matter what his race or color, he is afforded the equal protection of the laws, which, in our opinion, is best preserved to him by lodging the administration thereof in the hands of the most cultured and intelligent of our citizenship, without regard to other qualifications. However, the Supreme Court of the United States, in construing the fourteenth amendment to the Constitution, have added what they deem another guaranty of fair trial by jury where the rights of a member of the negro race is involved. *Carter v. State*, 39 Tex. Cr. R. 345, 46 S. W. 236, 48 S. W. 508, and authorities there cited. We are bound to recognize the fact that the federal Constitution and the laws of Congress enacted thereunder are the supreme law, so far as we are concerned. Although we may differ with that learned tribunal in the construction of said amendment, still their interpretation thereof is the paramount law, and it is our duty to follow it, and administer it fairly and impartially.

Reviewing the entire record, we believe it is manifest that under federal decisions on this subject the Supreme Court of the United States would not hesitate in holding that in the impanelment of the grand jury which found this bill of indictment appellant was discriminated against on account of his race and color, and, so believing, we are constrained to reverse and remand the case, with instructions to the lower court in the impanelment of a new grand jury to reindict

appellant to afford him the fullest latitude in the exercise of his rights in selecting a grand jury. By pursuing this course future expense and delay will be avoided, while at the same time every right appellant is entitled to under the law will be guaranteed.

We would further observe, in regard to the change of venue, that the record before us, while it shows perhaps on the part of every witness testifying that in his opinion appellant could get a fair and impartial jury in Grayson county, yet it is apparent even in the minds of a majority of these witnesses there is some question about it, that it would require an effort to secure such jury. This has been brought about by various causes, chiefly on account of the race question, and the notoriety of this homicide, occasioned by frequent trials, and in which this race question has been projected to such an extent as to incite prejudice against this appellant. As evidence of this feeling, on one occasion when a mob had failed to secure another victim for whom they were seeking, there was strong talk amongst them of going to the jail at Sherman and lynching Bob Smith. We believe, under the facts of this case, if the question should be presented again in this shape, after indictment found, it would be the duty of the court to change the venue, in order that there be no question as to the fairness and impartiality of a trial.

During the trial appellant reserved a bill of exceptions to the action of the court permitting a witness to testify as to the appearance of certain tracks found by him on the ground where the homicide was committed on the next morning, and that in the opinion of said witness they were similar to appellant's tracks and those of deceased. The objection here urged is that the witness was not sufficiently definite as to the character of the tracks to authorize him to give an opinion as to the similarity thereof; but stated, in substance, that the tracks he saw on the ground, which he took to be defendant's, were of a No. 8 or 9 shoe; that the impression of the heel of the right foot, as it appeared on the ground, was that it was made by a shoe worn off on one side of the heel, and that the shoes which he saw worn by appellant on that morning appeared to be a No. 8 or 9, and that the heel on his right shoe was worn off on one side; that the shoes also appeared to be broad across the ball, tapering towards the toe; that the impressions on the ground appeared to have been made by a shoe broad across the ball, narrowing towards the toe; that he did not take measurements of the impressions on the ground or of the shoes. In this connection it may be observed that other witnesses examined the locality, and stated that the ground was very hard there, and no tracks were apparent; and that a short time after the body was discovered a great number of people were there, and if there had been

tracks they would have been obliterated. However, looking to the witness' testimony alone, we do not believe that the facts detailed by him were sufficiently definite to authorize him to give an opinion as to the similarity of the impressions on the ground with those of the shoes worn by defendant. He was not even certain as to the number of the shoe worn by appellant, stating it was an 8 or 9, and the only peculiarity suggested by him is as to the heel of the shoe and the impression of the heel on the ground. It occurs to us that, before a witness is authorized to give an opinion upon so vital a question as the similarity of tracks as a circumstance tending to connect appellant with the offense charged, his testimony should be more certain than is manifested here. *Grant v. State*, 42 Tex. Cr. R. 274, 58 S. W. 1025; *Gill v. State*, 36 Tex. Cr. R. 594, 38 S. W. 190.

Appellant also complains because the court failed and refused to give a charge on accomplice testimony as to the witness Netherly. Without reciting the testimony here, we believe that, if the evidence in a future trial should be the same as is presented by this record, it would be the duty of the court to give a charge on accomplice testimony as to this witness.

There are other questions suggested, but they are such as are not likely to occur on another trial of the case, and we pretermitt any discussion thereof.

For the errors pointed out, the judgment is reversed, and the cause remanded.

BROOKS, J., dissents.

BOURLAND v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE.

1. A recognizance defective in not stating the amount of appellant's punishment, as required by Code Cr. Proc. 1895, art. 887, necessitates a dismissal.

Appeal from District Court, Blanco County; Clarence Martin, Judge.

V. F. Bourland was convicted of adultery, and appeals. Dismissed.

N. T. Stubbs and Will A. Morris, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of adultery. The Assistant Attorney General has filed a motion to dismiss the appeal; urging that the recognizance is defective, in not stating the amount of the punishment assessed against appellant, as required by article 887, Code Cr. Proc. 1895. An examination of the recognizance shows it is defective in this respect. The motion is sustained. *May v. State*, 40 Tex. Cr. R. 196, 49 S. W. 402. The appeal is accordingly dismissed.

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2711.

DYER v. STATE.*

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

CRIMINAL LAW — TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE—WITNESS—CREDIBILITY.

1. In a prosecution for burglary, an instruction that, if recently stolen property was found in the possession of defendant, and when he was first challenged concerning it he gave an explanation which was reasonable, probably true, and consistent with his innocence, then it devolves upon the state to show the falsity of the explanation, is objectionable as on the weight of the evidence.

2. In a prosecution for burglary, evidence that defendant had 20 years before been convicted of assault with intent to murder was too remote to be admissible as affecting his credibility as a witness.

Appeal from District Court, Harris County; J. K. P. Gillaspie, Judge.

Jake Dyer was convicted of burglary, and appeals. Reversed.

C. E. and A. E. Heldingsfelder, for appellant. Howard Martin, Asst. Atty. Gen., and J. V. Lea, Dist. Atty., for the State.

BROOKS, J. Appellant was convicted of burglary, the penalty assessed being two years' confinement in the penitentiary.

Exception was reserved to the following portion of the court's charge, to wit: "If you should find that the house mentioned in the indictment was broken, and certain chickens were taken therefrom, and the same had been recently stolen, and that they were found in the possession of the defendant, and that when he was first challenged concerning his possession he gave an explanation thereof which was reasonable and probably true and accounted for defendant's possession in a manner consistent with his innocence, then it devolves upon the state to show the falsity of said explanation; and, unless you so find from the evidence, then find the defendant not guilty." This charge is upon the weight of evidence, as insisted by appellant, and is almost a literal copy of the one condemned by this court in *Wheeler v. State*, 34 Tex. Cr. R. 350, 30 S. W. 913.

Appellant also insists that the court erred in charging the jury that they could consider the fact that appellant had been convicted 20 years ago of assault with intent to murder, for the purpose of affecting his credibility as a witness. There is no bill of exceptions reserved to the admission of such evidence. However, in view of another trial, we would suggest that this testimony, being so remote, should not be admitted. It is proper and germane to prove crimes recently committed by appellant for the purpose of affecting his credibility as a witness, but public policy demands that offense committed long years prior to the trial should not be admitted in evidence. However, we note that the record shows defendant himself introduced this tes-

timony, but we are at a loss to understand on what theory he did so. Be his reasons what they may, it is not proper for the court to charge the jury on such testimony. *Bowers v. State* (Tex. Cr. App.) 71 S. W. 285.

For the error discussed, the judgment is reversed, and the cause remanded.

SAPP v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

CATTLE THEFT—EVIDENCE—IMPEACHING WITNESSES—INSTRUCTION—FOR—MER JEOPARDY.

1. An acquittal under an indictment charging the accused with larceny of the property of T. is no bar to his prosecution for larceny of the same property alleged to belong to M.

2. On a prosecution for cattle theft an unrecorded brand may be used, in connection with other testimony, to identify the animal, but cannot be used as proof of ownership.

3. Where, on a prosecution for cattle theft, evidence of an unrecorded brand was admitted, it was the duty of the court to give an instruction limiting the effect of the testimony to the question of identity of the animal.

4. On a prosecution for cattle theft, evidence of the disposition of the animal after defendant's arrest and in his absence was inadmissible.

5. Where at the time of trial for cattle theft the alleged owner was dead, evidence that during his lifetime he attended several terms of court as a witness on behalf of the state was admissible as tending to show his want of consent.

6. Where, on a prosecution for cattle theft, the state called a witness who had made a statement to the district attorney to the effect that he and defendant got the cattle at the latter's house, but who testified that he was with defendant when the latter bought the cattle from a negro, and denied making the statements attributed to him, the state had the right to impeach him by showing that he made a different statement or that he misled the district attorney in failing to state to him a material fact in favor of defendant.

7. Where the state is permitted to introduce evidence to impeach its own witness by showing that he made a different statement elsewhere, the court must limit the impeaching testimony to the purpose for which it is introduced.

8. Evidence that a witness for the state on a trial for crime induced a third person to go off the bond of a witness for defendant for another offense because the witness was a witness for defendant was admissible as tending to show the prejudice of the state's witness.

9. Where, on a prosecution for cattle theft, defendant claimed that he purchased the cattle, an instruction that, if the proof merely connected the defendant with the property subsequent to the taking, and the jury so believed beyond a reasonable doubt, they should find him not guilty, is misleading and confusing.

10. Where, on a prosecution for cattle theft, there was no testimony that defendant was present when the animals were taken, but that his first contact with the animals was at the time of his alleged purchase, and the state relied on circumstantial evidence to overcome the defense of purchase, a charge on alibi should have been given, though there was no direct evidence of alibi.

11. Where, on a prosecution for cattle theft, a witness for the state testified that he assisted

*Rehearing denied December 16, 1903.

¶ 2. See *Animals*, vol. 2, Cent. Dig. § 9; *Larceny*, vol. 32, Cent. Dig. § 126.

defendant in getting and driving the cattle from a county where they were taken to a certain place where they were disposed of, a charge on the law of accomplice should have been given in reference to such testimony.

Henderson, J., dissenting in part.

Appeal from District Court, Brazoria County; Wells Thompson, Judge.

Bill Sapp was convicted of cattle theft, and appeals. Reversed.

Brockman & Kahn and E. T. Branch, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft of cattle, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

There was no error in the action of the court striking out appellant's plea of former jeopardy. The acquittal under the former indictment alleged possession and ownership of the property to be in one Turner, whereas the present indictment alleged the property to be in Moller. It is difficult to see how appellant could have been convicted under the former indictment for the theft of Moller's property. If, on the trial of the present case, the proof had shown that the property was not Moller's, but Turner's, appellant could not have been convicted under this indictment because of the variance. Hence there was no error in the action of the court striking out said plea, and there was no suggestion in the evidence here that the property alleged to have been stolen was Turner's, or any issue of that sort presented.

Bills Nos. 2, 3, and 4 are with reference to the admission in evidence of marks and brands on the alleged stolen animal. The mark was admissible in evidence without regard to its record. The unrecorded brand could not be used as proof of ownership, but could be used as any other flesh mark, in connection with other testimony, to identify the animal. *Turner v. State*, 39 Tex. Cr. R. 327, 45 S. W. 1020; *Welsh v. State*, 42 Tex. Cr. R. 338, 60 S. W. 46. In this case there was evidence of the witness who branded the animal that the mother had the same mark and brand, which he placed on the animal, and that said mother was claimed by and in the possession of Moller. Now, he branded the calf in the cow's brand, because it was the calf of its mother, and this testimony was admissible for the purpose of identifying the animal, and as a circumstance tending to show the ownership of it. However, it was the duty of the court to have distinctly instructed the jury on the subject of an unrecorded brand, which it failed to do.

It was not competent for the state to show the disposition of the animal after defendant's arrest, and in his absence. What other persons did as to sending it back and turning it loose in the range where Moller's cattle ran was not a transaction binding on defendant, but was calculated to impress the jury

against appellant on the question of ownership. It was incumbent on the state to make out the ownership of the animal as alleged, but this should be done by competent, and not by hearsay, evidence.

It was shown that Moller, the alleged owner, had died since the indictment was found in this case, and the state was permitted to show that he attended several terms of court while living. This was objected to on the ground that it was an indirect method of showing Moller's want of consent. The bill does not show by whom Moller was summoned—whether for the state or defendant. But where positive evidence cannot be had to show want of consent this can be proved by circumstances, and we think it could be shown that Moller, during his lifetime, attended court as a witness on behalf of the state, as a circumstance tending to show his want of consent.

The state placed C. H. Coleman on the stand as a witness. On his direct examination he testified that he was with appellant when the cattle were driven from Brazoria county into Houston, and helped drive them; that he did this at the instance of appellant; that he was with appellant when he bought the cattle from a negro named Jackson Harris on the prairie. At this juncture the state claimed surprise at his testimony, and then laid a predicate for his contradiction, both by his written statement made to the district attorney, and by the district attorney and Sheriff Weems; that is, he was asked if he did not make a written statement to the district attorney in which he swore that they got the cattle at appellant's house. Witness denied the statements attributed to him. The state was then permitted to contradict said witness by his sworn statement, and also by the district attorney and sheriff. This was objected to on the part of appellant on the ground that Coleman was a state's witness, and had delivered no testimony detrimental to the state of an affirmative character, but had merely failed to testify to facts for the state. We think this procedure was without error. The witness did testify to an affirmative fact very detrimental to the state. Evidently he had been placed on the stand for the purpose of proving a theft, whereas he proved a very material affirmative fact for the defendant, to wit, that of purchase. Under the authorities it was competent for the state then to show that he had made a different statement to the district attorney, or that he had misled the district attorney in failing to state to him a material fact in favor of defendant. However, while the testimony was admissible, it was the duty of the court to have limited this testimony to the very purpose for which it was introduced, to wit, that of impeaching the witness Coleman. Unlimited, the jury would be liable to use it as original testimony against appellant, especially as it was shown by the affidavit this wit-

ness made that he testified to the fact that appellant got the cattle at his house, or, according to the sheriff, in the little pasture near his house; that he did not state to any of the witnesses that appellant purchased them on the prairie from a negro.

We believe it was competent for appellant to have introduced evidence, if he could, to the effect that state's witness John Dagg induced Sweeney to go off the bond of defendant's witness Chapman, Sweeney being on said witness' bond for another offense; that Dagg did this because Chapman was a witness for defendant in this case. This character of testimony would tend to show the animus of the witness Dagg; that is, if he denied he had animus against appellant, this circumstance might be shown as a circumstance to show that he had such prejudice.

The court, in delivering his charge on appellant's defense, instructed them properly on appellant's alleged purchase of the animal in question. He then proceeded to tell the jury that, although they might believe said animal had been stolen, yet, in order to warrant a conviction in this case, it devolved on the state to show defendant's participation in the original taking; and then proceeded to instruct the jury, as follows: "If the proof merely connects this defendant with the property subsequent to the actual taking, and you so believe from the evidence beyond a reasonable doubt, you will find him not guilty." This charge is complained of because it shifted the burden of proof on the defendant, in that the jury were required to believe that he was connected with the stolen property after its theft beyond a reasonable doubt before they could acquit him. If this is not a charge on the weight of testimony, and shifted the burden of proof upon defendant as to a material matter, it is certainly misleading and confusing, and so was calculated to impair appellant's defense.

Bill of exceptions is reserved because the court failed to charge the jury on the law of accomplice testimony as to the witness C. H. Coleman, introduced by the state, and shown to be interested in the alleged theft. But this bill proceeds further, and would rather seem to be a bill of exceptions to the failure of the court to limit the testimony which was introduced by the state for the purpose of impeaching Coleman. However, the learned judge who tried the case states that he signed the bill with the explanation that the charge on accomplice testimony was omitted because Coleman gave no damaging testimony against defendant, and defendant's counsel in his argument made no such contention as set out in this bill. We have already stated that it was incumbent on the court to have limited the testimony in impeachment of the witness Coleman. But if it was intended by this bill to raise the question that the court should have charged on accomplice testimony as to the witness Coleman, we are inclined to agree with the ex-

planation of the judge—that is, that Coleman was a strong witness for appellant, and, although introduced by the state, he testified to no fact tending to show the guilt of appellant of the offense charged; and it was not incumbent on the court to give a charge on accomplice testimony as to this witness. He stood before the court just as though he had been introduced by appellant, and a charge to regard his testimony as that of an accomplice would have been calculated to injure appellant with the jury as to this witness.

Appellant also complains because the court failed to charge on alibi. While there is no direct evidence of alibi, still there is no testimony showing that appellant was present at the very time the animals were taken from the range. His first contact with the animal in question, as shown by positive testimony, was at the time of his alleged purchase. The state was compelled to rely on circumstances to overcome and break down the defense of purchase, and, inasmuch as the doctrine of alibi may be indirectly involved in the case, in view of another trial it would be well that the court should give a charge on alibi.

For the errors discussed, the judgment is reversed, and the cause remanded.

DAVIDSON, P. J., and BROOKS, J. We agree to the reversal of the judgment, but we are further of the opinion that the witness Coleman was an accomplice. The state used him as a witness against the accused, and the facts show that he assisted in getting and driving the alleged stolen cattle from Brazoria county, where they were taken, to the city of Houston, where disposition was made of them, and evidently with the knowledge of their theft, if in fact they were stolen. Upon another trial the charge on the law of accomplice should be given with reference to the testimony of witness Coleman.

RUNNELS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1908.)

STATUTES—COMPILATION—CRIMINAL LAW—POISONS—PROSECUTION—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.

1. Though the compilers of the Code failed to bring in certain provisions of a statute, the court in construing the statute in the Code may look to the original for aid in construction, but cannot bring forward any portion of the statute as it formerly existed.

2. Pen. Code 1895, art. 647, inflicting a punishment on any one who shall mingle "any other noxious potion or substance with any drug, food or medicine, with intent to kill or injure any person," defines an offense irrespective of whether the word "other" be rejected.

3. Pen. Code 1895, art. 647, imposes a punishment on any one who shall mingle "any other noxious potion or substance with any drug, food or medicine, with intent to kill or injure any person." As the statute formerly stood (Pasch. Dig. art. 2198; Pen. Code 1858, art. 537) it read: "Any poison or other noxious potion,"

etc. *Held*, that the phrase, "noxious potion or substance" in the Penal Code means some character of poison.

4. On a prosecution under Pen. Code 1895, art. 647, for mingling a noxious substance with a drink, with felonious intent, a witness was asked by the district attorney, "When you went to P. Bros. for syrup, did you find it necessary to prow around in their back room?" and on appeal it appeared from the bill of exceptions that the witness answered the question in the negative, after objection, but before the court could rule on the objection, and the court explained that there was no motion made to have the answer of the witness withdrawn from the jury. *Held*, that the question was sufficiently presented, and the court of its own motion should have excluded the question.

5. A witness for the state was permitted to testify that prior to the day the offense was alleged to have been committed he saw accused, in the nighttime, rise up back of the drug store, the place where the offense was committed, and that accused, after being spoken to by witness, came into the store, went toward the prescription case, and then out of the front door. On the trial accused was driven to an explanation as to the reason for his being at the back of the store that night, and there was evidence on behalf of the state that on the occasion when the offense was committed the state was watching accused. *Held*, that the admission of the evidence was erroneous, as it could not be otherwise than injurious to accused, it not having been shown that the offense was committed by any burglary, and it not being warranted on the theory that it afforded a basis for the evidence that accused was being watched.

6. On a prosecution for mixing a noxious substance with a drink it was error to permit the state to show that one of defendant's employers, prior to the offense, found a bottle of strychnine in his drug store out of its usual place, and that he found a bottle in the drawer of an old prescription case, no connection being shown between the bottle of strychnine and defendant.

7. Where, on a criminal prosecution, witnesses for the state had been attacked by defendant by showing that they had testified to material facts at the examining trial, different from their testimony on the trial, it was proper to permit the state to prove the good character of their witnesses for truth and veracity.

8. Under Pen. Code 1895, art. 647, imposing a punishment on any one mixing any noxious substance with any drink, food, or medicine, the offense is complete when the noxious potion is mingled, although there be in fact not enough of it mingled to injure or kill any one.

9. An instruction that, if accused mixed a noxious potion with a drink with intent to make it bitter, and with no intent to injure any one, he would not be guilty, was as liberal as accused was entitled to.

10. It was not error to submit to the jury that simple syrup was a drink, though the evidence showed that it was being prepared to be used with other ingredients as a drink.

11. The state's witnesses testified that they saw accused throw a substance toward a tub, and that subsequently they found a white granulated substance on the board on which the tub sat and on the handle of a wooden paddle in the tub, and one or two stated that they saw something on top of the syrup which looked like the substance on the plank and paddle. The substance on the plank and paddle was strychnine, but the contents of the tub was not analyzed. *Held*, that the question whether defendant had mingled the strychnine with the drink should be submitted to the jury on a charge of circumstantial evidence.

Appeal from District Court, Nacogdoches County; Tom C. Davis, Judge.

Robert Runnels was convicted of mingling a noxious potion with a certain drink, and he appeals. Reversed.

Brewer & Dial, Mims & King, and Young & Stinchcomb, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of mingling a noxious potion with a certain drink, with intent to kill or injure persons to the grand jurors unknown. His punishment was fixed at two years' confinement in the penitentiary.

Appellant contends there is no law sufficiently defining this offense. The prosecution was brought under article 647, Pen. Code 1895, which says: "If any person shall mingle or cause to be mingled any other noxious potion or substance with any drink, food or medicine, with intent to kill or injure any other person, or shall willfully poison any spring, * * * he shall be punished," etc. His contention is that there is something material omitted from the article, inasmuch as the phrase "any other noxious potion or substance" evidently refers to something preceding. And appellant shows in this connection that as the statute formerly stood—which was article 2198, Pasch. Dig., being article 537 of the Penal Code as enacted in 1858—it read, "If any person shall mingle any poison, or any other noxious potion or substance with any drink," etc.; that the omission of the preceding portion of said article by the codifiers of 1879 rendered the expression "any other noxious potion or substance" unintelligible, and the article as it now stands does not define any offense. In this connection he further contends that we cannot reject the word "other" in said article, so as to define an offense, as this would be judicial legislation, which is not authorized. In *Braun v. State*, 40 Tex. Cr. App. 286, 49 S. W. 620, it was held that, although the codifiers had failed to bring forward in the new Code certain provisions of an original act, yet the court, in considering an article brought forward, could look back to the original act to construe the same, and ascertain its meaning with reference to another provision of the Code in the same chapter. In that connection the court, quoting from *Black on Interpretation of Laws*, pp. 368, 369, said: "When the language of the Code or revision as it stands would lead to absurdity or highly improbable results, it may be compared with the language of the original statute to ascertain if the phraseology has not been changed by mistake or inadvertence." So, without holding that we can interpolate or bring forward a portion of an article that formerly existed as a part thereof after the same has been left off for so many years, so as to constitute it a part of the article in question, we hold, in accordance with the principle indorsed in *Braun's Case*, that we can look back to the original statute in order to determine whether the same was left off by mistake or inadvert-

tence, and to aid in construing and interpreting the present act. However, the present act must stand on its own language as defining an offense; and if, as it appears, it does not constitute an offense, then a prosecution thereunder cannot be maintained. Now, whether or not we reject the word "other," as it now appears in article 647, Pen. Code 1895, we hold that it does define an offense. However, it may become a question as to whether or not "noxious potion or substance" means or refers to any character of poison, inasmuch as we have no antecedent term in the statute; and so that, so far as an offense is concerned, we must depend wholly upon what is a noxious potion or substance. If "noxious potion or substance" embraces poisons, then it comes within the statute. And by way of interpreting what the article may mean in this respect, as stated before, we look back to see what was contained in the original act, to wit, "poison or other noxious potion or substance," thus treating "noxious potion or substance" as some character of poison. We make these remarks because, accurately speaking, there may be some distinction between a poison and a noxious potion or substance. That is, "poison" has been defined "as any substance which, when applied to the body externally, or in any way introduced into the system without acting mechanically, but by its own inherent qualities, is capable of destroying life." See 2 Beck's Med. Jur. Wharton & Stille define "poison" "as a substance having an inherent deleterious property, which renders it, when taken into the system, capable of destroying life." And in this connection they say, "Questions may arise as to the applicability of the term to substances which destroy life by mechanical means, such as powdered glass," etc. See section 493. While "noxious" means "hurtful, harmful, baneful, pernicious, destructive," etc. Webster's Dictionary. And "potion" means "draught, used as a liquid, medicine, or dose." See Webster. So we take it that "potion," as used in the statute, applies to some hurtful or baneful liquid; and "noxious substance" would mean some solid of a hurtful or baneful character. So that "noxious potion or substance" is a broader term than "poison." A poison would not include powdered glass or boiling water, while "noxious potion or substance" would not only embrace poisons, but the latter. See *People v. Van Deleer*, 53 Cal. 149. Accordingly we hold that the statute defines the offense charged against appellant.

Appellant assigns as error the action of the court permitting the district attorney to ask witness John Burrows, "When you went to Perkins Bros. for syrup and things, did you find it necessary to prowl around in their back room?" It appears from bill No. 2, presenting this matter, that the witness answered the question in the negative, after objection made, but before the court could rule upon the objection. The court explains this by stating that there was no motion made to have the

answer of the witness withdrawn from the jury. We think the question was sufficiently presented; and if, as stated in the bill, while the court was meditating as to his ruling the witness answered the question, the court, of his own motion, should have excluded it.

By the third bill he calls in question the action of the court permitting the witness Rafe Stripling to testify for the state that just prior to the day this offense was alleged to have been committed he saw appellant, in the nighttime, rise up back of the drug store (the place where the offense was alleged to have been subsequently committed), and some 25 or 30 feet from said store, and walk towards witness; that he asked witness how he was getting along; witness asked him how he felt, and appellant said he was "kinder" tired, and said he was up the night before with the Woodmen Circle, and took in about \$7.50; and appellant then asked witness if he stayed open, and he told him no. He then walked on up to the platform, came in the store, stayed a minute or two, then went on up toward the prescription case, and then went on to the front, and then on out at the front door. We fail to see any connection between this testimony and the alleged offense. Evidently it was intended to show that appellant for some cause was lurking around the back of the store at night for some purpose, and was calculated to cast suspicion on him that he was either intending a burglary of the store or some other offense. Indeed, if we look to the statement of facts, we find that appellant was driven to an explanation in his testimony as to the reason for his being at the back of the store on that occasion. If this incident was shown to be a part of the transaction, or if it had been shown that the offense was committed by means of burglary on that night, or soon thereafter, and the case was depending wholly on circumstantial evidence, it might be admissible. But, so far as we are advised, it is not connected with the offense in any wise, unless that incident afforded the reason for the state introducing testimony, as it did, that on the occasion when the alleged offense was committed they were watching appellant. But this would scarcely afford a reason for that. Still the jury would be prone to conclude that appellant had put himself under the ban of suspicion by being in the rear of the prosecutor's store that night, and consequently they were watching him. This character of testimony could not but prove hurtful to appellant. It might be resorted to by them, in case the evidence of guilt was doubtful, to assist them in determining that, because appellant had been previously caught in a suspicious place, he must have placed the poison in the tub.

What we have said as to the foregoing bill also applies to the next bill, where the state was permitted to show, over appellant's objections, that Perkins, who was one of appel-

lant's employers, some time prior to the 25th of July, or maybe since then, found a bottle of strychnine in his drug store out of its usual place; that he found a bottle in the drawer of the old prescription case, which sets in the back room. No connection was shown between appellant and this bottle of strychnine. There must be some testimony of a tangible character tending to connect appellant with an isolated circumstance before it is admissible against him.

Appellant reserved a number of exceptions to the evidence offered and introduced by the state to prove the good character of the state's witness Hazelwood, and also of Henry Millard, for truth and veracity in the community in which they lived. These bills, as explained by the court, show that this testimony was introduced after these witnesses had been attacked by appellant by showing they had testified to material facts at the examining trial different from their testimony on this trial. This was permissible. White's Ann. Code Cr. Proc. 1895, § 1119.

Appellant contends that the court erred in a number of charges. Among others, he insists that the court was in error in telling the jury that, if they found appellant mingled strychnine in simple syrup, and that the same was a drink, and that said strychnine was a noxious potion or substance, with intent to injure or kill persons whose names were to the grand jurors unknown, etc., to find him guilty, although in fact he did not mingle enough strychnine with the syrup to injure or kill any person; appellant's insistence being that it is necessary, under the statute, to mingle enough of the noxious potion to at least injure any person who might take a drink of the mixture. We do not so construe the statute. We think it depends on the intent, rather than on the means to accomplish the result. Of course, if some harmless drug should be mixed with some drink or substance, and such drug was absolutely harmless, the offense would not be made out; but if the drug was poisonous, or noxious, and it was mingled with intent to injure, although it may not accomplish the result, the offense is made out. As to the intent of appellant, we think this was amply guarded in a subsequent charge of the court, although this was excepted to by appellant. The court instructed the jury, if appellant mixed the noxious potion with the drink merely with the intent to make it bitter, and with no intent to injure any one, he would not be guilty of the offense. This, we think, is sufficient, if not more liberal than the law authorized.

Appellant further contends that the court was not authorized to submit to the jury that simple syrup was a drink, inasmuch as the evidence showed only that it was being prepared to be used with other ingredients as a drink. We think in such a state it was a drink, under the terms of our statute, and

appellant would be guilty of mingling a poisonous or noxious substance with the simple syrup to the same extent, just as if some one were preparing a toddy, and had placed the sugar and water in a glass intending subsequently to pour the whisky into it, and in the interim some one should mix a poison with the sugar and water.

Appellant also contends that the court should have given a charge on circumstantial evidence, urging that the case was not made out by positive testimony; that no one in fact saw appellant throw or place any strychnine in the tub of simple syrup; that the most the state's witnesses could say was that they observed appellant throw a substance towards the tub, and subsequently they found a white granulated substance on the board on which the tub sat, and some also on the handle of the wooden paddle in the tub; and one or two witnesses state that they saw something on top of the syrup which looked to them like it was the same substance they saw on the plank and paddle. The substance on the plank and paddle was analyzed, and found to be strychnine. The contents of the tub was not analyzed. While the testimony here shows positively that appellant threw something toward the tub of simple syrup, and it may be conceded that this substance which was found on the board on analysis was shown to be strychnine, yet no witness testified that the substance was thrown into the tub. The most that can be said is that one or two witnesses saw something on the surface of the simple syrup that appeared to be similar to the substance found on the board and paddle. The statute requires that the offender "shall mingle" the noxious potion with a drink, etc., before he can be found guilty. If he attempted to mingle the strychnine with the simple syrup, and failed to put or throw any of the poison into the tub, he could not be found guilty of mingling poison with drink in the tub. Of course, this could be proved by circumstantial evidence; and it occurs to us that the state here relied on circumstances to show that the strychnine was thrown or put into the tub. We believe that this question should have been submitted to the jury by a charge on circumstantial evidence.

For the errors discussed, the judgment is reversed, and the cause remanded.

BROOKS, J. I agree to disposition of case.

FUGETT v. STATE.

(Court of Criminal Appeals of Texas. Dec. 2, 1903.)

MURDER—JURIES—SELECTION—RACE DISCRIMINATION—EVIDENCE—ADMISSIBILITY—SUFFICIENCY.

1. Where there is testimony of men of unusual intelligence and high standing, including

a negro physician, tending to show that there are no negroes in the county, in which one of that race is prosecuted for homicide, qualified to sit on juries, objections based on race discrimination in the selection of grand and petit juries are without merit.

2. Where defendant in a prosecution for homicide, testifying in his own behalf, denied trying to buy a knife shortly before the murder, testimony of a witness that defendant did, shortly before the murder, try to buy a knife from witness, is admissible as rebuttal evidence, and, under the statute, could have been introduced at any time before the closing of the argument.

3. Remarks by the county attorney in his argument that "the defendant's counsel could have asked defendant about his wife cutting him in former difficulties, but he failed to do so," are not prejudicial to defendant, in a prosecution for murder, where the court at the time orally instructed the jury to disregard the remarks, and then gave a written instruction to the same effect.

4. Evidence considered, and held sufficient to sustain a conviction of murder in the first degree.

Appeal from District Court, Johnson County; Wm. Poindexter, Judge.

Henry Fugett was convicted of murder, and from a judgment assessing the death penalty he appeals. Affirmed.

Keith & Rice, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a case in which a negro man was assessed the death penalty for killing his wife. A careful review of this testimony shows there has been no race discrimination in the selection of grand and petit juries in Johnson county. Therefore there was no error in overruling appellant's contentions along these lines. The witnesses introduced were men, in the main, of unusual intelligence and high standing. Among other witnesses was Dr. Barnes, a negro physician, whose testimony was rather incisively to the effect that there were no negroes in Johnson county qualified to sit upon juries. He states that he was acquainted with practically all of his race in the county. Without going into the details, we hold the evidence fails entirely to show race discrimination in the matters about which complaint is made. This case, perhaps, is not as strong as either of the following: *Hubbard v. State*, 67 S. W. 413, 4 Tex. Ct. Rep. 660; *Parker v. State*, 65 S. W. 1066, 3 Tex. Ct. Rep. 637; *Martin v. State*, 72 S. W. 386, 6 Tex. Ct. Rep. 909.

While Barnes was testifying in behalf of appellant's motions to quash indictment and venire, he was asked if he "thought there were among the colored voters of Johnson county any number who could read and interpret the charge of the court, and as to his opinion as to the general qualification of the colored voters of Johnson county for jury service." The bill fails to set out the answer of the witness, or state what his testimony would have been. The error seems to be predicated entirely, so far as the bill is concerned, upon the question asked.

Witness Boyd was permitted to testify that he resided but was not in Cleburne at the time of the killing. Was in Waxahachie. Knew defendant. A few days before the killing, appellant came to his place of business, and wanted to buy a butcher knife. He first called for Mr. Cyrus. "I showed defendant some knives, but he did not buy. His objection being that they were not good steel; that he wanted a knife that would not bend or break. He said he wanted it for a bread knife." That witness went to Waxahachie that night, and heard of the killing while at Waxahachie, perhaps next day. That, to the best of his recollection, appellant was in his place of business, looking at the knives, two days before the killing. This was objected to because not in rebuttal, irrelevant, immaterial, and could only have the effect of prejudicing the jury against appellant. The court qualifies the bill by stating that while appellant was on the stand, testifying in his own behalf, he denied trying to buy the knife from witness Boyd, and Boyd's testimony was introduced in rebuttal of that statement of appellant. This testimony is clearly admissible in rebuttal of defendant's testimony, and as original evidence to prove the fact that defendant was endeavoring to purchase a knife shortly before the homicide. The testimony adduced on the trial is of that character which would have permitted its introduction from either standpoint. The facts show that, subsequent to investigating the knives at Boyd's, appellant bought a butcher knife, and, the day of and preceding the homicide, ground it very sharp, and shortly afterwards went to where his wife was, and cut her in a fearful manner, inflicting as many as a half dozen fatal stabs or wounds. If the fact that he was seeking to purchase this knife a day or two before the killing was of material character, it could be introduced at any time before the closing of the argument, for such is the provision of our statute.

The county attorney remarked to the jury, in his argument: "The defendant's counsel could have asked defendant about his wife cutting him in former difficulties, but he failed to do so." One of the grounds of objection to this is that it was prejudicial, in view of the fact that while defendant was testifying in his own behalf his attorneys were not permitted to prove by him facts and circumstances of former altercations, if any, between himself and his deceased wife. The court, in his qualification, says he did allow "defendant to testify to the cause of all difficulties between himself and deceased; but, as defendant testified he cut and stabbed her because she said she could get another man to give her all she wanted, the particulars of injuries inflicted by one upon the other months and years before became wholly immaterial. There was nothing introduced making evidence of stabs inflicted by deceased upon defendant months and years

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1693.

before the homicide material." As the record is, the use of this language did not prejudice, because the court instructed the jury at the time to disregard the remarks of the county attorney, and then gave a written instruction to the same effect.

The evidence is ample, showing that appellant and his wife had had previous difficulties, and that perhaps she may have been the cause, and produced the occasion, and was the aggressor in some of these former difficulties, and had finally left him. The evidence is sufficient to support the judgment. It was a most brutal, savage killing. If there is any extenuating fact in the case, it is founded in his asserted love for and jealousy of his wife. It seems from the evidence that her reputation was not above suspicion, in regard to chastity—in fact, the evidence on this line was damaging to the character of deceased—all of which appellant seems to have been aware, and was the occasion of some, perhaps all, of their troubles. She had finally separated from him, and refused to be reconciled. He undertook to buy a knife from Boyd a day or two before the killing. He failed to find one to suit his purpose. The day of the killing he found one, and ground it until it was very sharp. Having done this, he repaired to the place where his wife was living, and butchered her in a most outrageous manner; cutting out her bowels, cutting her throat, and stabbing her in some 16 places. Either of a half dozen of these wounds, the physicians say, was fatal.

As we find the record, there is no error, and the judgment is affirmed.

STATE v. BONNER.

(Supreme Court of Missouri, Division No. 2.
Dec. 9, 1903.)

CRIMINAL LAW—FELONIES—PROSECUTION BY INFORMATION—VERIFICATION—NECESSITY—INSTRUCTIONS—EVIDENCE—ASSUMPTION OF FACTS.

1. The Missouri constitutional amendment of November 8, 1900, provided that indictments and informations should thereafter become concurrent methods for the prosecution of felonies, after which Rev. St. 1890, § 2476, was amended so as to provide that all felonies should be "prosecuted by indictment or information, except," etc.; and section 2477 was amended by Act March 13, 1901, so as to require that informations should be verified by the oath of the prosecuting attorney, or of some person competent to testify, or be supported by affidavit of such person, filed with the information. *Held*, that where, after the passage of such amendment, an information for a felony was filed by the prosecuting attorney of the county against defendant, not verified by his oath, or the oath of any other person competent to testify, or supported by affidavit, and defendant moved to quash the information for such defect before verdict, a denial of such motion was error.

2. Where, in a prosecution for embezzlement, there was no evidence tending to show that defendant hired the horse alleged to have been embezzled, an instruction that a bailee in the

present case is a person who hires a horse, etc., was erroneous.

3. Where, in a prosecution of an alleged bailee for the embezzlement of a horse, the ownership of the horse was sharply contested throughout the trial, an instruction assuming that prosecutor owned the horse, and by which the jury was practically advised that the horse was prosecutor's property, was erroneous.

Appeal from Circuit Court, Cole County; James E. Hazel, Judge.

William Bonner was convicted of embezzlement, and he appeals. Reversed.

J. G. Slate and Edmund Burke, for appellant. E. C. Crow, Atty. Gen., and C. D. Corum, for the State.

GANTT, J. This is an appeal from a judgment of conviction in the circuit court of Cole county. The defendant was prosecuted by information filed by the prosecuting attorney of said county, charging him with embezzlement and larceny, in three separate counts. The said information is in the words following (omitting caption):

"Robert P. Stone, prosecuting attorney, within and for the county of Cole and state of Missouri, upon his oath of office informs the court that William Bonner on or about the 10th day of December, A. D. 1900, at the county of Cole and state aforesaid, became and was the bailee of a certain horse, of the value of forty dollars, and one wagon, of the value of fifteen dollars, all of the value of fifty-five dollars, the personal property of George Porth, then and there being, which said horse and wagon was let and delivered to the said William Bonner as said bailee, and, being so the bailee thereof, the said William Bonner the said horse and wagon did then and there fraudulently and feloniously embezzle and convert to his own use. And so the said William Bonner the said horse and wagon in the manner and form aforesaid feloniously did steal, take, and carry away, against the peace and dignity of the state.

"And Robert P. Stone, prosecuting attorney aforesaid, within and for the county of Cole and state of Missouri, upon his oath of office aforesaid further informs the court that William Bonner on or about the 10th day of December, A. D. 1900, at the county of Cole and state of Missouri, being then and there the agent of a certain private person, to wit, one George Porth, and the said William Bonner then and there, by virtue of his said employment as agent of the said George Porth, had received and taken into his possession and under his care one horse, of the value of forty dollars, and one wagon, of the value of fifteen dollars, all of the value of the fifty-five dollars, of the personal property belonging to the said George Porth, and the said horse and wagon then and there feloniously did embezzle and fraudulently convert to his own use without the assent of his employer, the said George Porth, the owner of said property, and the said William Bonner

the said horse and wagon in manner and form aforesaid feloniously did steal, take, and carry away, against the peace and dignity of the state.

"And Robert P. Stone, prosecuting attorney aforesaid, upon his oath of office aforesaid further informs the court that William Bonner on or about the 10th day of December, A. D. 1900, at the county of Cole and state of Missouri, one horse, of the value of forty dollars, and one wagon, of the value of fifteen dollars, all of the value of fifty-five dollars, of the goods, chattels, and personal property of one George Porth, then and there being, feloniously did steal, take and carry away, against the peace and dignity of the state."

It will be noted there was no verification by the prosecuting attorney or any competent witness appended to the information.

On the 24th of November, 1902, the defendant filed his motion to quash the said several counts, which was by the court overruled, and he duly excepted. At the same term, defendant was tried before a jury, and convicted. The verdict was general, and made no reference to a particular count.

The evidence was conflicting. On the part of the state, it tended to prove that the defendant was selling sewing machines for George Porth, a merchant of Jefferson City. In order to further his business, it was necessary for defendant to have a horse and wagon adapted to the purpose. All parties testified that the wagon was purchased from Walther. Porth testified he paid for the wagon, and that it was his property. Walther and defendant testified that Walther sold it to defendant for \$9 or \$10, and Walther was to take, and did get, a watch valued at \$4 or \$5 in part payment, and Porth was to stand good for the balance. Porth testified the watch was his property, and defendant testified that he bought the watch in Davenport, Iowa, and it belonged to him. As to the horse, the evidence discloses that defendant traded a sewing machine, variously estimated at \$11.60 and \$14, which belonged to Porth, and which defendant had in his possession to sell, for a horse belonging to one Stokes. Defendant testified that he reported the sale to Porth, and, while the latter disapproved the trade at first, he finally consented to it. Porth testified that Bonner reported the trade; that he took the horse at \$40, and paid Bonner \$10 commission on the sale, and took the horse as his own, permitting Bonner to use it. Bonner in the fall or winter of 1900 sold the horse and wagon to Grider for \$30, and went to Arkansas for his wife's health. In 1902 he returned to Callaway county, and this prosecution was commenced.

1. The defendant moved to quash the indictment because the same was not verified either by the oath of the prosecuting attorney, or by some person competent to testify as a witness in the case, nor is it based upon the affidavit of some private person, filed with the clerk, as required by sections 2477,

2478, Rev. St. 1899, as amended by Acts 1901 (Laws 1901, pp. 138, 139). The information is not verified in either mode, and the question presented is important. By the amendment to the Constitution of Missouri adopted by the people November 8, 1900, indictments and informations became concurrent methods for the prosecution of felonies. Prior to that, felonies could only be prosecuted by indictment. Soon after the adoption of the amendment, a question arose as to the time it went into effect, and whether it was self-enforcing without the aid of legislation. In *State v. Kyle*, 166 Mo. 287, 65 S. W. 763, the court in banc held that the amendment took effect from the time of the canvass of the vote on the amendment by the Secretary of State, and that it was self-enforcing and operative from the date it took effect, to wit, December 19, 1900. In January, 1901, and prior to any legislation regulating the mode of proceeding by information in felony cases, the prosecuting attorney of Moniteau county filed his information against Kyle, charging him with robbery. The information in that case was assailed because it was not verified by the prosecuting attorney, and not sworn to by any private person competent to testify in the case; but it was held that in the absence of a statute prescribing the mode of procedure by information in the prosecution of felonies, and as "information" was used in the amendment in its common-law sense, resort must be had to the common law to determine its sufficiency, and it was held sufficient without verification or a supporting affidavit. At the regular session of the General Assembly in 1901, and on the 13th of March, 1901, the Legislature proceeded to adjust the statutes on the subject of prosecutions by information to the new order of things, and accordingly article 3 of chapter 16, Rev. St. 1899, was amended by inserting in section 2476, after the word "indictment," the words "or information," so as to make that section read, "All felonies shall be prosecuted by indictment or information except," etc. Section 2478 was also amended by striking out the word "misdemeanor" therein, and inserting in lieu thereof the word "crime." Thus amended, it is obvious that the Revised Statutes of 1899 (article 3 of chapter 16) provided a statutory method of prosecuting felonies by information, and directing when and where they should be filed, and in section 2477 specifically requiring that informations should be verified by the oath of the prosecuting attorney, or by the oath of some person competent to testify, or be supported by affidavit of such person filed with the information. So that, while there was no statutory method of procedure provided when the *Kyle* Case arose, and for that reason the common-law form of information was adjudged sufficient when this prosecution was commenced, there was a specific statutory provision governing this

method of prosecution, and one which no one will question the right of the Legislature to prescribe. When our General Assembly took this subject in hand, and directed the form of prosecutions by information, the common law on this subject no longer obtained. It was the obvious purpose of the Legislature, in view of the amendment to the Constitution, to revise the whole subject-matter of prosecutions by information, and to make article 3, c. 18, Rev. St. 1890, uniform in its operation as to all grades of crime; and it must be held that the acts of March 13, 1901 (Laws 1901, pp. 138, 139), operated to supersede the common law on the subject, and that they were intended to prescribe the only rules of procedure which should govern such prosecutions. It then being plain that the information fails to conform to either of the three alternatives prescribed by the statute as to verification, the circuit court erred in not sustaining the motions to quash and in arrest of judgment because the information was not verified as required by law. The offense charged is one involving the liberty of the citizen, and the courts are not at liberty to disregard the safeguards which the Legislature have deemed essential prerequisites to a prosecution for crime.

2. The defendant also urges error in the giving of the third instruction, in these words: "The jury are instructed that a bailee in the present case is a person who hires a horse, and either at the time of hiring or afterwards conceives a design of stealing him, and actually converts him to his own use, with the intent to convert to his own use, and the bailee in the present case is a person who is intrusted with the possession of a certain wagon and the horse mentioned in the testimony for the purpose of driving over the country selling sewing machines, and which personal property is to be returned to the owner when the agency for the sale of the sewing machine shall cease, if they shall believe from the evidence that the property was delivered to the defendant for that purpose, and that he was the agent of George Porth, the owner thereof, and that the property belonged to and was owned by the said George Porth, then the defendant is a bailee of said property." The objection that there was not a scintilla of evidence tending to show a hiring of the horse alleged to have been embezzled is well taken. We have gone carefully through the entire record, and there is no testimony of a hiring in it. This instruction is also obnoxious to the charge that it virtually assumed that Porth was the owner of the horse and wagon, whereas his ownership was contested throughout the trial; and there was much evidence tending to show that the horse and wagon belonged to Bonner, though he was indebted to Porth for aiding him in purchasing them. It was error to assume a controverted fact so vital to the interest of defendant. Moreover, while

probably not so intended, there is room for the contention that it practically advised the jury that the horse and wagon were Porth's property. The court properly instructed the jury to acquit of the larceny charged in the third count.

The other assignments need not be discussed. For the errors already indicated, the judgment must be, and is, reversed, and the cause remanded.

BURGESS and FOX, JJ., concur.

CITY OF CHILLICOTHE v. BRYAN et al.
(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

NUISANCE—ABATEMENT BY PARTY INJURED—
ESTOPPEL—EASEMENT—PRESCRIPTION
—PERMISSIVE USE.

1. A person injured by a nuisance has the right to abate it, but in so doing must not be guilty of any excess.

2. A person who permitted a city to construct the outlet of a sewer on his land could not obstruct the outlet and inflict damage on the persons connecting their residences with the sewer, on his and the city's representations that they had the right so to do, though the sewer constituted a nuisance and was constructed under the promise that it would not be a nuisance.

3. A person who permitted a city to construct the outlet of a sewer on his land, and who represented to the purchasers of his lots in the vicinity of the sewer that they would have the benefit of connection with the sewer, was estopped from obstructing the outlet.

4. A city did not acquire by prescription the right to maintain a sewer on a person's land because it had maintained it for a period of over 10 years, where such maintenance was by permission alone, and not adverse.

Appeal from Circuit Court, Livingston County; J. W. Alexander, Judge.

Action by the city of Chillicothe against Lydia A. Bryan and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Lewis A. Chapman, for appellants. J. M. Davis & Sons and Paul D. Kitt, for respondent.

BROADBUSH, J. The plaintiff, a municipal corporation of this state, by injunction seeks to restrain the defendants from obstructing a certain city sewer.

In the year 1889 plaintiff, in pursuance of a certain ordinance, constructed a sewer located as follows: Commencing in Polk street opposite to the alley passing through block 14, King's Addition to the city of Chillicothe, thence north through said alley to the channel of natural drainage north of block 16, also in King's Addition. The plaintiff has maintained and used the same for sewerage purposes from that time to the beginning of the suit, except for several short periods during which the defendants obstructed the same at its outlet. This sewer empties upon the land of defendant Lydia A. Bryan.

¶ 1. See Nuisance, vol. 37, Cent. Dig. §§ 51, 52.

It appears that in each instance when defendants obstructed the sewer plaintiff caused it to be opened. But it is alleged that defendants threaten to obstruct it again, and will do so unless restrained. It is admitted that there was no condemnation of the land for sewer purposes, and no money paid to Mrs. Bryan therefor. It is admitted, however, that she consented to its location and construction on her land. A number of persons who own dwellings in the vicinity of the sewer have made connection with it for general drainage purposes, and the said obstructions cause the contents of the sewer to flow back into the basements of these dwellings. On the other hand, while it is admitted that the sewer was constructed with the consent of Mrs. Bryan, it was understood at the time she so gave her consent that the sewer was to be used for drainage of cellars only, or was to be taken up if it proved a nuisance, or that plaintiff would take such precaution as would prevent it from becoming a nuisance. The sewer empties into a natural drain or small stream of water on Mrs. Bryan's land where her cattle and hogs obtained drinking water. The preponderance of the evidence was that the contents passing through the sewer and emptying on the Bryan land were foul and noxious; but there was also evidence that such was not the case except to a limited extent, and that proper flushing would practically keep it free from bad odors. At the time Mrs. Bryan gave permission to the city to lay the sewer through her land she owned certain lots of ground in block 1, fronting said block 16; and it was in evidence that for the purpose of inducing persons to purchase her said lots she represented to them that they would have, if they bought her said lots, the advantage of drainage by connecting with said sewer; that she constructed a sewer from the cellar of her own dwelling to connect with one constructed by two other persons for general purposes of drainage from their dwellings that did connect with the sewer in question; and that she allowed another person to connect a sewer from his dwelling with her own. Finally, many dwellings in the neighborhood made sewer connections with the sewer in question. There was some evidence on defendants' part tending to show that, when Mrs. Bryan gave permission to the city to lay the sewer on her land, it was understood that it was to be used to drain cellars only, and the preponderance of the evidence was to the effect, as already stated, that the city would take such action as would prevent it becoming a nuisance, either by taking it up or extending it further. Defendants had at different times before complained to the city authorities of the unwholesome condition of the sewer. And it was in proof that the sewer as maintained depreciated the value of the Bryan land, and that the sewerage mixed with and contaminated the running water in said stream to

such an extent as made it unhealthy for defendants' cattle and hogs, it making them sick. The court found for plaintiff, and made the temporary injunction theretofore issued permanent, and defendants appealed.

The evidence was conflicting, but the preponderance was that it was agreed at the time Mrs. Bryan gave her permission to the city to lay the sewer that the city would prevent it from becoming a nuisance, and if necessary would construct it further on. The city was put to some expense necessarily in the construction of the sewer, and its utility is clearly established. Having consented to the location of the sewer on her land, the question arises: Was Mrs. Bryan justified, under the circumstances, in obstructing it?

There is no doubt about any person injured by a nuisance having the right to abate the same, but in so doing he must not be guilty of any excess. Wood on Nuisances, vol. 2, § 844. The defendants in this case, by obstructing the outlet of the sewer, went further than the circumstances justified them. The evidence disclosed the fact that the obstruction of the sewer caused the water and filth therein to flow into the cellars of persons who had sewer connections, which damaged their property and rendered them unhealthy. As has been seen, the city constructed the sewer for the benefit, in part at least, of the persons living in that vicinity, and they were led to believe that they had the right to connect with it for sewerage purposes, not only by the city, but by Mrs. Bryan as well. It may be that she understood when she gave the license in question that the sewer was only to be used for drainage of cellars, but she must have known that to obstruct the outlet was to inflict damage upon the persons so connecting their residences with said sewer, including those with whom she had connected her own drain or sewer. We do not think there is any authority that justifies the action of the defendants in obstructing said sewer, and thereby creating in every dwelling connected with the same by sewer a separate nuisance. And the acts of Mrs. Bryan in representing to the purchasers of her said lots that they would have the benefit of sewerage connection with the one in question, and connecting her own dwelling with it, are acts wholly at variance with the idea that she would have the right to obstruct the sewer. She was estopped by her own acts, whatever may have been the original understanding. And it is equally clear that, whatever may have been such understanding, the plaintiff has no right to maintain a nuisance upon her land without her consent, as we think the evidence conclusively shows. Notwithstanding there is some evidence that the sewer is not a nuisance, the preponderance is to the contrary, and it is not conceivable how it could be otherwise. And, further, we hold that the city has not acquired by prescription the right to maintain the nuisance in question

because it has maintained the sewer for a period of over 10 years. The law is that prescription does not exist where the use is by permission alone and not adverse. Jones on Easements, p. 179; Pitzman v. Boyce, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 538. There can be no reasonable doubt but what defendants have mistaken their remedy. The courts afford them ample redress.

The judgment of the court was right under the facts, and it is therefore affirmed. All concur.

CLOPTON v. SIMONDS.

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

GUARDIAN AND WARD—FINAL SETTLEMENT—ATTORNEY'S FEES—APPEAL—MATTERS REVIEWABLE.

1. A curator was properly allowed an attorney's fee of \$25 for defending his final settlement against the ward's exceptions.

2. An item not included in exceptions filed by the ward in the probate court to her curator's final account cannot be considered on appeal.

3. On an appeal from a judgment of the circuit court denying a ward's exceptions to her curator's settlement, only such matters as were complained of in the motion for a new trial before the circuit court can be considered.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

In the matter of the final settlement of John R. Clopton, guardian of Nora Simonds, in which the ward filed exceptions. From a judgment of the circuit court, on appeal from the probate court, approving the settlement, the ward appeals. Affirmed.

C. C. Lawson and J. D. Bohling, for appellant. Barnett & Barnett, for respondent.

SMITH, P. J. This is a proceeding that originated in the probate court. Clopton was guardian and curator of Nora Simonds, a minor. Exceptions were filed to his final settlement. On the trial anew in the circuit court the exceptions were denied and the settlement approved. The ward appealed here.

The appellant complains that the trial court erred in allowing the curator an attorney's fee of \$25 for defending his final settlement. This was a proper allowance. In re Estate of Meeker, 45 Mo. App. 186; State ex rel. Tygard v. Elliott, 82 Mo. App. 458.

It is next insisted that the court erred in charging up to appellant's estate the expenses that Stella Courtney's estate should have borne in the two lawsuits. As we do not find that this complaint was included in the exceptions filed in the probate court and on which the case was tried, we cannot notice it here.

The contention is further made that the curator was negligent in accepting a note of Gallie and Houx for \$300 from Sneed,

and in not enforcing his judgments against Sneed in his final settlements of the two estates of the Simonds and Courtney heirs, and that but for this negligence it would not have been necessary for him to have gone to the expense he did in enforcing the vendor's lien, etc. It is a sufficient answer to this contention to say that we are unable to discover that the motion for the new trial suggested any such ground of objection to the finding of the trial court. In a case like this we are required to confine our review to such errors as are bottomed on the objections assigned in the motion for the new trial. No error alleged to have been committed during the progress of the trial can be noticed here, unless the attention of the court was called to it in the motion for the new trial.

As far as we can understand, the case was fairly tried. Our attention has been called to no prejudicial error requiring a reversal of the judgment, which accordingly must be affirmed. All concur.

MOREY v. CLOPTON.

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

CONTRACTS — CONSTRUCTION — EVIDENCE — MEETINGS OF TEMPORARY BODY — PAROL PROOF — SECONDARY EVIDENCE — VENDOR AND PURCHASER—SELECTION OF PARCEL BY VENDEE— POWER OF MAJORITY.

1. The loss of a memorandum kept by the secretary of a meeting is sufficient to authorize secondary evidence of its transactions.

2. The proceedings of meetings of the subscribers to lots in an addition, who, under their contracts of purchase, were to select their individual lots in such manner as the majority of them should decide, may be proved by parol evidence, irrespective of whether any memorandum of the proceedings was kept or not.

3. The several contracts entered into between the vendees of lots and the vendor, which were identical in their provisions, related to the same subject-matter, and were entered into as a whole for the accomplishment of a single purpose, and which provided that the individual lots of each vendee were to be selected in such manner as the majority of the vendees should prescribe, must be construed as one contract.

4. Under contracts subscribing for lots in an addition, which provided that each lot should be about 45x120 feet, and appraised so that the average price should be \$200, and that the lots should be assigned among the subscribers in such manner as the majority should decide, the majority was constituted the agent of all the subscribers, and its action in parceling the lots so as to be equal value, though of different areas, and selling at public auction preferential choices, the fund raised thereby to be applied in grading streets, procuring plats, abstracts, etc., was within the power conferred on it, and was binding on every subscriber, whether belonging to the majority or not.

5. The action of the majority was equally binding on a subscriber, though he was out of the state at the time of the adoption of the scheme, or was not present at the bidding, or had nothing more than constructive notice that the meetings would be held, as the majority was not bound to give him notice of the time of their action.

¶ 1. See Guardian and Ward, vol. 26, Cent. Dig. § 539.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

Action by A. P. Morey, trustee, against John R. Clopton. From a judgment for plaintiff, defendant appeals. Reversed.

Barnett & Barnett and John Cashman, for appellant. Montgomery & Montgomery, Chas. E. Yeater, and Geo. P. B. Jackson, for respondent.

SMITH, P. J. A correct understanding of the nature of this case and the questions raised by the appeal therein may be best had by a reference to the pleadings, which are as follows:

"Plaintiff states that in the year 1897 he, together with his associates, Ira Hinsdale, W. P. Haley, and the Porter Real Estate Company, were the owners of a large tract of land in and adjacent to the southwestern part of the city of Sedalia. That during the said year the plaintiff and his associates and this defendant, with other citizens of the city of Sedalia, were desirous of inaugurating a public enterprise which would increase the general business and population of the said city of Sedalia, and otherwise benefit the same, and the respective citizens and property owners thereof, and for that purpose and to that end a movement was set on foot to secure the location in said city of the car shops of the Missouri, Kansas & Texas Railway Company, and, after various preliminary negotiations, it was proposed and agreed that the plaintiff and his said associates should donate a portion of the above-mentioned tract of land owned by them to the said railway company as a site for the location of the coach and car shops of the said railroad company, and also donate one hundred thousand dollars to secure the erection, location, and maintenance of said shops, and, to provide a means of raising the said sum of money for the above purpose, the plaintiff and his associates also proposed to donate another portion of said tract of land, to be divided into lots, to be sold to the property owners and other citizens of the city of Sedalia, the proceeds of such sales to be used for the purpose of securing the location and construction of said shops. Plaintiff further states that, after it became practically assured that such plan would succeed, he and his associates set apart for the purpose of being divided into lots and sold as aforesaid a portion of said land, described as follows: The east 50 acres of the south half of the southwest quarter of section 4, and the east 50 acres of the north half of the northwest quarter of section 9, all in township 45, of range 21, in Pettis county, Missouri. Thereupon the Sedalia Board of Trade, an association of business men and other citizens of the city of Sedalia, undertook to secure contracts for the purchase of lots by different persons in Sedalia in order to raise the said sum of one hundred thousand dollars, upon

the proposal and understanding that the portion of said land set apart for said purpose would be divided into five hundred lots, of an average value of two hundred dollars each, and the said Sedalia Board of Trade did secure contracts between various parties and this plaintiff for the sale of said lots. That, among others, this defendant did on the 28th day of January, 1897, enter into a contract with this plaintiff for the purchase of two lots, at the average price of \$200 each, agreeing to pay therefor the total sum of \$400, which said contract is in words and figures as follows: " * * * The party of the first part agrees to purchase of said A. P. Morey, trustee, lots to the amount of \$400, at an average price of \$200 per lot, in an addition to be platted in the city of Sedalia, located on land bounded on the east by Grand avenue, on the north by 12th street, if extended west from Grand avenue, and extending west to Sneed avenue, or such a distance as is necessary to plat 500 lots; said lots to be about 45x120 feet, with streets and alleys; said lots to be appraised at prices so that the average price of the lots platted on said land shall be \$200 per lot; and they shall be assigned among and between the subscribers thereto in such manner as the majority of said subscribers shall decide. This contract is made on condition that said A. P. Morey, trustee, and his associates, shall make an arrangement with the officers of the M., K. & T. Railway Company to locate their coach and car shops on land adjoining this land on the south or southwest, and extending along the M., K. & T. Railway right of way. If it be found by the said A. P. Morey, trustee, and his associates, that they can make a satisfactory contract with the said railway company, then upon notice of that fact, and upon demand, the party of the first part agrees to pay 25 per cent. of the purchase price of said lot or lots into Third National Bank in the city of Sedalia, to be held in trust by said bank until the same shall be needed to carry out said contract with the railway company by said A. P. Morey, trustee, and his associates, at which time the said bank shall pay the same to A. P. Morey, trustee, and his associates; and when said contract is formally entered into between said A. P. Morey, trustee, and his associates, and said railway company, a further payment of 25 per cent. of the purchase price shall be due and payable to the said A. P. Morey, trustee, and his associates. Upon the payment of this second 25 per cent. said A. P. Morey, trustee, shall execute a warranty deed to the party of the first part for lots purchased by him, and the remaining one-half of the purchase money shall be secured by deed of trust upon the property conveyed, payable one-half in six months, and the balance on or before one year from date of deed, with interest at the rate of six per cent. per annum. Said A. P. Morey, trustee, and his associates, agree to use the

proceeds received from this sale of said lots for the purpose above mentioned; and in case said contract is not entered into by said A. P. Morey, trustee, and his associates, with the said railway company, within 90 days from this date this contract shall be null and void. John R. Clopton. A. P. Morey, Trustee.' Plaintiff further states that the land set apart for said 500 lots was duly platted as an addition to the city of Sedalia known as 'West View,' and bounded as described in said contract. Plaintiff further states that, in accordance with the condition of said contract, he, as trustee for the joint interest of himself and his associates, as aforesaid, together with the said Sedalia Board of Trade, did on the 13th day of April, 1897, enter into a contract with the Mo., Kansas & Texas Railway Company for the permanent location and maintenance of said coach and car shops of said railway company on the tract of land adjoining the said addition on the south or southwest thereof, and extending along the Mo., Kansas & Texas Railway right of way, and said land upon which said shops were to be erected was conveyed by this plaintiff to said railway company for that purpose. Plaintiff further states that, when it was ascertained that a satisfactory contract for the purpose aforesaid could be made with the railway company, 25 per cent. or \$100 of the amount which the defendant by said contract agreed to pay became due, and the same was paid by the defendant. And thereafter, when the said contract was entered into between the plaintiff and said railway company, another 25 per cent., or \$100, of the amount which the defendant by said contract agreed to pay became due and the same remains unpaid by the defendant. Plaintiff further states that thereupon, in accordance with the terms of the contract between the board of trade and plaintiff, and the said railway company on the other part, the latter commenced the erection of the shops on the land conveyed to it for that purpose, and continued in the work of erecting said shops as provided in said contract, and has now completed the same. Plaintiff further states that it was provided and stipulated in the contract between plaintiff and defendant, as it was in the contracts between the plaintiff and other purchasers of lots in said addition, that the lots should be assigned among the subscribers thereto, being the parties entering into said contracts, in such manner as the majority of said subscribers should decide. And thereafter the parties who entered into contracts for the purchase of the said 500 lots, designated in said several contracts as subscribers to said lots, held one or more meetings for the purpose of considering and determining upon some plan for the assignment of said lots among the various purchasers thereof, and a plan was agreed upon among and by a majority of said subscribers. That in pursuance of said plan so agreed upon a

large number of said lots have been assigned to the various purchasers thereof, and most of the purchasers of said lots have fully paid the price and sum which they agreed to pay therefor, but plaintiff says that this defendant has neglected and refused to make any selection of the two lots which he contracted to buy, and has refused and neglected to pay the balance, to wit, three hundred dollars, of the purchase price so promised to be paid by his contract aforesaid. Plaintiff says that by the terms of the contract between the plaintiff and defendant plaintiff agreed to execute a warranty deed to the defendant for the lots purchased by him upon payment of the second 25 per cent. of the purchase money as aforesaid, and the defendant agreed to pay the balance of the purchase money as follows: That is, one-half thereof, or one hundred dollars, in six months from the date that said deed should be executed, or the date of the maturity of the said second 25 per cent., and the other half of said balance, to wit, \$100, in one year from said date, said deferred payments to be secured by a deed of trust upon the lots purchased by defendant. Plaintiff states that he was ready and willing to execute and deliver to defendant a warranty deed for the said lots upon payment of the said second 25 per cent. as aforesaid, and so offered to do, and called upon and requested the defendant to make selection of his two lots in accordance with the plan agreed upon by the subscribers or purchasers of lots, but, although requested, the defendant has failed and refused to make any selection or to pay the balance of the purchase money as aforesaid, although plaintiff has at all times been ready to deliver a proper deed to the defendant for said lots, as provided in said contract. Wherefore plaintiff says that the defendant now owes on account of the purchase of said two lots, by virtue of the terms of the aforesaid contract between plaintiff and defendant, the sum of three hundred dollars, with six per cent. interest thereon from April 13, 1897. Plaintiff further states that certain others of the purchasers of or subscribers for lots in said addition have failed to make selections of the lots which they contracted to buy, and that, together with the said lots contracted for by the defendant, there remain unassigned in the said addition the following lots: [Describing them.] In and to which the defendant is entitled to an interest equal to — of said lots of the average value of two hundred dollars each, which interest remains undivided and unsegregated from the rest of said unassigned lots because of the refusal of the defendant to make his selection. Wherefore plaintiff says that he is entitled to a lien upon an undivided interest in the aforesaid unassigned lots equal to two lots, of the average value of two hundred dollars each, as aforesaid, and upon the defendant's right to select two of the said unassigned lots, as security for the balance of

the purchase money and interest as aforesaid remaining unpaid. Plaintiff therefore prays that he have and recover judgment against the defendant for the said sum of three hundred dollars, with interest at six per cent. per annum thereon from April 13, 1897, and that the said sum of principal and interest, together with the costs of this suit, be declared a lien upon the defendant's interest as aforesaid in and the right to select two of said unassigned lots in said West View addition to the city of Sedalla, and that special execution issue for the sale of said interest and right in said addition to satisfy said judgment and costs, and that for the balance of said judgment, if any, the plaintiff have general execution against the defendant, and plaintiff prays for all other proper relief."

The answer to the plaintiff's petition admits that defendant signed the contract sued on, but denies each and every other allegation in said petition contained. Further answering, the defendant says that it is not true that he was ever offered an opportunity to take one of the average lots in said addition at the sum of \$200, or was ever offered or afforded an opportunity of taking two lots, as agreed, at the sum of \$400, as alleged in plaintiff's petition, and denies that any fair, reasonable, or valid plan for the allotment of said pieces of ground among the various subscribers was ever adopted, or that any legal, valid, or binding method was adopted, and denies that any method of the allotment of said lots or pieces of land among the various subscribers was ever adopted by a majority of such subscribers, etc.

There was a trial before the court. As no declarations of law were requested or given, we cannot know upon what theory the case was considered and disposed of. It results that if the judgment, which was for plaintiff, was justified by the evidence on any theory, it must stand.

The defendant contends that the court erred in its action allowing the plaintiff to prove by parol evidence what took place at the several meetings of the vendees. The majority, executing the powers conferred upon them as a body by the contract, was not a board of directors of a business or other corporation, nor was it an official body required by law to keep a record of its proceedings. It was but a temporary association, acting together for the purpose specified in the contract, and when that purpose was accomplished it became *functus officio*. One of the principal things which was enjoined upon it by the contract was to divide the 500 lots which the vendees had jointly purchased. The division was to be effected in such manner as the majority of the vendees should decide. Whether or not that majority did meet and adopt a plan or scheme was a question of fact, like any other fact, to be proved by the best evidence the nature of the case would admit. Its action was certainly not

to be proved by a record only, when it was not required to keep one.

It seems that the secretary of the meeting, on his own motion and for his own use, kept some sort of a memorandum of the proceedings of the meeting; but that had been lost or mislaid, and so could not be produced at the trial. If it had been, as it was not, the only primary evidence in the case, its loss was sufficient to justify the admission of parol evidence of its contents. But we are unable to discover any reason why the acts and proceedings of the meeting could not be proved by parol evidence, without reference to whether the secretary kept any memorandum of the proceedings of the meeting or not.

The further contention is made by the defendant that there is no evidence to be found in the record tending to prove that a majority of the vendees ever met, appraised, and divided the 500 lots comprised within said West View addition, so that the average value of the lots as parceled was \$200, as contemplated by the contract, but cannot be upheld. The uncontradicted evidence proves that there was several meetings of the vendees, and that at such meetings it was ascertained that a majority of said vendees was not only present, but voted for each proposition that was declared passed and adopted.

The defendant, with much earnestness, further insists that the scheme, even if adopted, for the assignment of the lots, in so far as it provided for selling the right of preference at auction to the highest bidder, was not within the authority conferred by the contract. It must be, of course, conceded that if the majority exceeded the limitations of the authority vested in it by the contract the defendant, who was not present at the meeting, and did not by his vote consent to the adoption of the scheme, was in no way bound by the action of such majority. Whether or not the defendant is bound by the action of the majority is a question which for its solution is dependent upon the construction that shall be given to that provision of the contract which is to the effect that the lots should be about 45x120 feet, with streets and alleys, and be appraised at prices so that the average price should be \$200 per lot, and that they—the lots—"should be assigned among and between the subscribers [vendees] thereto in such manner as the majority of them should decide." The several vendees entered into separate contracts with the trustee vendor, but each contract was, except as to amount of the subscription, exactly like the others. As these several contracts related to the same subject-matter, and were entered into as a general whole, to accomplish the single purpose therein clearly expressed, they must be considered as one contract. *MacDonald v. Wolff*, 40 Mo. App. 302; *Houck v. Frisbee*, 66 Mo. App. 16. All of the vendees entered into a contract with the trustee embracing the provision just referred to. They each and all agreed as between the

trustee and themselves and between themselves the said 500 lots should be assigned among them in such manner as the majority of them should decide. Under this provision plenary power was granted by defendant to the majority of his associate vendees to assign the lots, in which all had an equitable interest, among them in such manner as that majority should decide. Under the contract it—the majority—was constituted the agent of each one of the vendees, subject to the limitations therein prescribed, to divide and partition the 500 lots in such manner as such majority should decide, to the end that each might receive the lot or lots to which he was entitled. But there was necessarily a difference in their relative values resulting from location, topography, etc. In order to preserve the average and at the same time establish an equality in value among the lots, it became necessary to reduce the area of some and increase that of others. This was effected by the scheme. The lots were parceled out, and so appraised that each parcel was made the equal in value of every other one or of the value of \$200. None of the 500 lots as parceled out were of a less value than \$200. No odds which one of the parcels was selected by a vendee, it was equal in value to any other one in the addition. The last parcel which remained unselected was equal in value to the first or any other that had been selected.

After the lots had been parceled, and the value of each fixed by the appraisalment at \$200, it would, of course, result that, though the parcels were of equal value, for many reasons some of the vendees would prefer one lot to another, and so the scheme provided that the majority should sell the right of preference at auction to the vendee offering the greatest amount of premium therefor. The fund to be raised in that way was to be applied to the opening of streets through the addition, procuring plats, abstracts of title, recording, etc., which was for their common benefit and advantage.

If a vendee did not attend the meetings, or did not bid for a preference, he still had the right to make a selection from the remaining unselected parcels, any one of which was equal in value to any one of those that had been selected. He could suffer no substantial detriment as long as a single parcel remained which he could have assigned to him. There were as many parcels of equal value as had been subscribed for. There was no inequality nor injustice in the scheme. And even if defendant's right of selection is narrowed down to two parcels, still he cannot complain of this, because it inevitably results from the scheme that some one of the vendees must take such parcels; and why not defendant as well as any other? We have no doubt that the scheme for the division, as devised by the majority, was within the limitations of the power conferred by the contract, to which the defendant was a party, and he can-

not now be heard to question it. It was conclusive as to him. The scheme having been devised by the majority, it is as binding on the defendant and others of the minority as on those composing the majority. And it could make no difference if the defendant was not in the state at the time of the adoption of the scheme, or was not present at the bidding, or only had at most constructive notice that the meetings would be held, and of this he cannot complain, since his agent, the majority, was not required to give him notice of the time it would meet and transact the business which he had intrusted to it as such. He was as much bound as if present. His presence was not necessary to validate the act of his agent in the premises. There is no pretense that the scheme was a fraudulent concoction of the majority. The scheme was authorized by the contract, and consequently its requirements constituted no modification or departure from such contract. As we discover no merit in the defense interposed, the judgment must be affirmed. All concur.

DOYLE v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. Dec. 1. 1903.)

ABSENT WITNESS—CONTINUANCE—REFUSAL—ERROR—MISJOINDER—DEMURRER.

1. The question of misjoinder of parties, not raised by demurrer, is not available.

2. Where an action is pending against two defendants, who occupy a hostile attitude in the case towards each other, it is error to deny a motion for a continuance on the part of one defendant because of an admission on the part of plaintiff as to what an absent witness would testify without calling on the other defendant to say whether he will consent to the contents of the application being taken as testimony as between the defendants.

Appeal from St. Louis Circuit Court; J. R. Kinealy, Judge.

Action by Patrick Doyle against the St. Louis Transit Company and another. From a judgment for plaintiff against the St. Louis Transit Company, it appeals. Reversed.

Boyle, Priest & Lehman, for appellant.
A. R. Taylor, for respondent.

Opinion.

GOODE, J. Plaintiff received a head wound by the collision of one of the defendant's electric cars with a carriage in which he was riding. This action for damages was instituted against the transit company and Harrigan & Sheahan, who were undertakers and liverymen, as joint defendants. Plaintiff hired a carriage from said firm to attend a funeral in the outskirts of the city of St. Louis. His sister, mother-in-law, and a child were in the carriage with him, he being seated on the front seat, with his back to the horses. On the return from the ceme-

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1185; Parties, vol. 37, Cent. Dig. §§ 151, 174.

tery, as they were driving along Florissant avenue, and nearly opposite a roadhouse, the collision occurred. The carriage had been driven along the south or inbound track, and was in no danger on that track from a front-end collision, as all cars thereon moved in the direction the carriage was going. According to the testimony for the plaintiff, it was forced to leave that part of the avenue west of the roadhouse on account of the street being closed for certain improvements to be made. The carriage then drove along on the north side of the avenue, and when near the roadhouse entered the north street car track to get around some carriages which were standing at the roadhouse. While proceeding on the north track a short distance, and just as the driver was turning out of it, a street car struck the front of the carriage near the right wheel, smashed it, and broke the plaintiff's skull, he and his physician swore, though there is testimony for the defense that he received merely a scalp wound. The negligence of which the transit company is accused is that the car crew ran the car in question at a reckless and excessive speed, gave no warning of its approach, failed to keep watch for vehicles in the street, used no effort to stop the car, and caused it to collide with the carriage. Violations of the vigilant watch and the speed ordinances of the city of St. Louis were pleaded. As to the defendants Harrigan & Sheahan, the charge of negligence is that their servant, the driver of the carriage, caused and suffered it to be collided with by the car, his negligence concurring directly with the negligence of the transit company in causing plaintiff's injury. The transit company filed a general denial and a plea that plaintiff himself was to blame for the accident because he remained on the street car track without looking or listening to see or hear the approach of the car, which he could have seen or heard by observing those precautions. At the inception of the trial the transit company's counsel objected to any evidence, assigning as one reason for the objection that the petition showed on its face that the defendants were not jointly liable. The transit company filed an application for a continuance on account of the absence of a witness named Watkins, setting out facts said witness would swear to which tended strongly to show the collision was entirely the fault of the driver. Plaintiff agreed to admit the witness would so swear, and the transit company was forced to go to trial. The court instructed that the affidavit of what Watkins' testimony would be should not be considered in determining whether Harrigan & Sheahan were guilty of negligence proximately contributing to the accident. The jury returned a verdict in favor of the plaintiff against the transit company for \$3,000, and in favor of the other defendants, Harrigan & Sheahan.

The evidence, far from showing a common

tort participated in by both the motorman and the driver of the carriage, proved that the casualty might have occurred from the sole negligence of the motorman, the sole negligence of the driver, or the concurring negligence of both; in other words, the case presented aspects in which the interests of the transit company and of Harrigan & Sheahan were directly antagonistic, and their positions were hostile during the trial. It was the effort of the transit company to show the driver was exclusively to blame; of Harrigan & Sheahan to show the motorman was exclusively to blame; while the plaintiff stood indifferent, as he had a case against one or both the defendants in any event. *Waller v. R. R.*, 59 Mo. App. 410. Whether there was a misjoinder of parties defendant cannot be considered, for the point was not raised by demurrer, as was requisite to make it available. *Bensieck v. Cook*, 110 Mo. 173, 19 S. W. 642, 83 Am. St. Rep. 422; *Franke v. St. Louis*, 110 Mo. 516, 19 S. W. 938. Nevertheless we think the plaintiff took the risk of such a contingency arising as was presented by the absence of the witness Watkins. Ordinarily, the plaintiff would have been entitled to admit the witness would testify, if present, as the application for a continuance stated he would, and thus avoid a continuance. In that event the application would have been read to the jury as testimony, and have had the force and effect of his testimony, so far as the law could make it. But, as has been said, such evidence is a feeble substitute for the presence of a witness on the stand, and the statute permitting it to be used in lieu of his testimony should be so construed as to put the party who finds himself in this situation at as little disadvantage as possible. *Elsner v. Sup. Lodge*, 98 Mo. 640, 11 S. W. 991. The matter in the application for a continuance which was substituted for Watkins' testimony went to show that nobody but the driver of the carriage was to blame, thereby tending to completely exonerate the transit company, and throw liability for the accident on Harrigan & Sheahan. But the court instructed the jury that in determining whether Harrigan & Sheahan were guilty of negligence proximately and directly contributing to the collision they should not consider the testimony of Watkins that had been read to the jury by the attorney of the transit company. This was equivalent to telling the jury they could consider said testimony to determine that the transit company was not negligent, but could not consider it to determine that Harrigan & Sheahan were. But the collision was caused by the negligence of the transit company, or Harrigan & Sheahan, or both, and this instruction went far toward neutralizing the force of the testimony, and depriving the transit company of the benefit of it. When the application for a continuance was presented, as the transit company and Harrigan & Sheahan were prac-

tically adversaries, the latter should have been called on to say whether they would consent to the contents of the application being taken as the testimony of Watkins as against them. If they refused to do so, the case should have been continued; otherwise the transit company was bound to be forced into trial without using the testimony of one of its main witnesses on a vital issue.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

STATE v. GASSARD et al.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1908.)

CRIMINAL LAW—FAILURE TO COUNT BALLOTS—INDICTMENT—SUFFICIENCY.

1. In all prosecutions for felonies everything constituting the offense must be pleaded with certainty and clearness, and nothing must be left to be implied.

2. An indictment of election judges, charging neglect of duty in failing to properly count ballots for and against constitutional amendments, which does not aver that the failure was in itself willful, or how committed, or whether the count was falsified for or against the amendments, or whether the count was exaggerated or reduced from the correct returns of the ballots cast at the election, is fatally defective.

Appeal from St. Louis Court of Criminal Correction; L. A. Steber, Special Judge.

Indictment charging Samuel Gassard and others with crime. Quashed, and the state appeals. Affirmed.

C. P. Williams, for the State. J. A. Gerens and Harry A. Walsh, for respondents.

REYBURN, J. The state has appealed from the judgment of the St. Louis court of criminal correction sustaining a demurrer and motion to quash, assigning as reasons that there was a misjoinder of parties, as the offense charged was of such a character that two parties could not be charged jointly as guilty thereof; that the indictment was indefinite, vague, and uncertain, and failed to sufficiently inform defendants of the offense with which they were charged; the indictment being in the following language:

"The Grand Jurors of the State of Missouri, within and for the body of the city of St. Louis, now here in court, duly impeached, sworn and charged, upon their oath present: that on the 4th day of November, one thousand nine hundred and two, at the city of St. Louis aforesaid, the same being the Tuesday after the first Monday in November of said year, at the city of St. Louis aforesaid, and in each ward and election precinct of the said city, a general election was held pursuant to the constitution and laws of the state of Missouri, and that at said election there

was submitted to the people of the city of St. Louis for their choice and election, certain proposed amendments to the constitution of said state, and that at said city of St. Louis and on said day, Samuel Gassard, John J. Shea and W. W. Wilkinson were the duly appointed and qualified judges of election for said election in the second precinct of the 22d ward of said city, and that it was their duty then and there, upon the close of the balloting at said election to make a careful count and canvas of all votes cast at said election precinct, both for and against the said proposed constitutional amendments, and duly certify to the Board of Election Commissioners a true count of such votes cast, but that the said Samuel Gassard, John J. Shea and W. W. Wilkinson were then and there wilfully guilty of neglect of their aforesaid duty, and did then and there neglect to truly and properly count the ballots cast at the said election in said precinct for and against the said constitutional amendments.

"Contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

There appears to be scarcely a principle in criminal pleading more inflexibly and generally established and upheld than that in an indictment nothing material shall be taken by intendment or implication; that in all prosecutions for felonies everything constituting the offense must be pleaded with certainty and clearness; nothing must be left to be implied. *State v. Thierauf*, 167 Mo. 429, 67 S. W. 292; *State v. Hagan*, 164 Mo. 654, 65 S. W. 249; *State v. Phelan*, 159 Mo. 122, 60 S. W. 71; *State v. Patterson*, 159 Mo. 98, 59 S. W. 1104; *State v. Evans*, 128 Mo. 406, 31 S. W. 34; *State v. Rector*, 126 Mo. 328, 23 S. W. 1074; *State v. McGinnis*, 126 Mo. 564, 29 S. W. 842. This indictment conspicuously fails to set forth the allegations wherein consisted the offense, and is too vague and indefinite to meet the constitutional requirement and the right of defendant to be informed of the nature and character of the offense for which he is arraigned. It is not averred that the failure to truly and properly count the ballots was in itself willful; nor does it appear how the criminal violation of official duty was committed, or in what direction such breach tended; whether the count was falsified for or against the constitutional amendment; whether the count was exaggerated or reduced from the correct returns of the ballots cast at the election. As a criminal pleading obligated to advise the defendants of the violations of law with which they were accused it is signally and fatally defective, and the ruling of the presiding special judge was fully authorized and correct in sustaining the demurrer and motion to quash.

The judgment is therefore affirmed.

BLAND, P. J., and GOODE, J., concur.

¹ See Indictment and Information, vol. 27, Cent. Dig. §§ 122, 124, 123, 124.

**KOELLING v. AUGUST GAST BANK
NOTE & LITHOGRAPHING
CO. et al.**

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

REPLEVIN—JUDGMENT FOR DEFENDANT—EXECUTION—RETURN OF PROPERTY.

1. Plaintiff sued in replevin and acquired possession of the property. Thereafter judgment was rendered for defendant, reciting that it was entitled to possession, and an execution was issued describing the property, and requiring the sheriff to obtain the same from the plaintiff, and on failure to do so to recover a certain sum, being the value of the property replevied. Rev. St. 1899, § 4478, provides that on issuance of execution in replevin, if the property be not delivered within 10 days, the officer shall make the assessed value thereof, with damages and costs. *Held* not to give the party against whom the judgment was rendered an option to keep the property or pay its value.

2. Where, in replevin, plaintiff obtained possession of the property, and judgment was rendered for defendants, and the execution provided that if defendants elected to take the property, and plaintiff did not deliver it within 10 days, the sheriff should take it and deliver it to defendants, or if he failed so to do its value should be made out of the goods of plaintiff and his surety, as plaintiff had no right to retain the property by paying the value, there was no error in the execution prejudicial to plaintiff.

Appeal from St. Louis Circuit Court; D. G. Taylor, Judge.

Action by Theodore H. Koelling against the August Gast Bank Note & Lithographing Company and others. Judgment for defendants affirmed (71 S. W. 728), and from an order overruling a motion to quash an execution plaintiff appeals. Affirmed.

David Murphy, for appellant. Wm. E. Fisse, for respondents.

Opinion.

GOODE, J. This is an appeal from an order of the circuit court overruling a motion filed by the plaintiff to quash an execution issued on a judgment in favor of the defendants for the possession of certain specific articles of personal property. The case was in this court on the main issues heretofore, and will be found reported in 97 Mo. App. 664, 71 S. W. 728. The action was one of replevin, and the plaintiff had obtained possession of the property in controversy when the suit was instituted. The defendants finally prevailed, as will be seen by referring to the decision of the former appeal, and the judgment in their favor, reciting that it was entitled to possession of the property, which judgment runs as follows: "It is therefore now considered by the court that the defendants do have and recover of the plaintiff, and of Chauncey I. Filley, the surety on the replevin bond, the possession of the property in controversy and herein above described, or the value thereof, as agreed by said parties, to wit, said sum of four hundred dollars, at their election, and also costs of suit,

and that execution issue herein in conformity with this judgment."

An execution was issued on that judgment reciting the recovery of it against the plaintiff and his surety on the replevin bond, and describing the property. The execution then proceeds as follows: "These are, therefore, to command you to require and demand of the above-named plaintiff, Theodore H. Koelling, and Chauncey I. Filley, surety on the replevin bond aforesaid, that they return to the above-named defendants the property aforesaid, or pay the value thereof as assessed by the court, if the said defendants shall elect to receive the value thereof as aforesaid. If the said defendants shall elect to take the aforesaid property, and the said Theodore H. Koelling and Chauncey I. Filley shall not deliver the same to you or to said defendants, pursuant to your demand therefor, within ten days after the date hereof, that then you take the said property and all thereof out of the possession of the said Theodore H. Koelling and Chauncey I. Filley, and deliver the same to the said August Gast Bank Note and Lithographing Co., Louis J. W. Wall, and Joseph Ambbs; or, failing to receive or to take said property as aforesaid, you shall, out of the goods and chattels and real estate of the said Theodore H. Koelling and Chauncey I. Filley, make the assessed value of the property aforesaid, to wit, the said sum of four hundred dollars (\$400), with costs. * * * You are further commanded that you have this writ before the judges of said court on the first Monday of June next, and that you certify how you have executed this writ. Witness: Wm. H. Hauschulte, clerk of our said court, with the seal thereof hereunto affixed, at office in the city of St. Louis, this 2d day of April, A. D. 1903."

The motion to quash alleges that the execution is not statutory in form, but an extraordinary process, directing the sheriff to do an act beyond his power. The plaintiff's real contention is that no execution could issue commanding the sheriff to take the property from the plaintiff and deliver it to the defendants. To our minds, such a rule would nullify and set at naught our statutes for the recovery of specific personal property, whose principal purpose is to take property from the possession of a person who is not entitled to it and turn it over to the person who is. The contention of the plaintiff would result in giving the party who does not own the property, or is not entitled to possession, an election to say whether he will keep it or pay its value to the other party, whereas the statutes by plain words vest this election in the owner or the party entitled, as ought to be done.

Plaintiff's counsel seems to rely on section 4478, Rev. St. 1899, which reads as follows: "If such property be not delivered to the officer within ten days after process issued, he shall levy and make the assessed value there-

of, the damages and costs, of the property of the party against whom the process issued."

The election to be made by the party who owns the property or is adjudged entitled to its possession regularly occurs after the property has been delivered to the sheriff (Rev. St. 1899, § 4477), although it may occur before judgment (*White v. Graves*, 68 Mo. 218; *Wooldridge v. Quinn*, 70 Mo. 370). But the statutes presuppose that the party entitled shall make his election after the defeated party to the replevin action has delivered the disputed property to the sheriff, and it is his duty to deliver it within 10 days after process issues. Rev. St. 1899, § 4478. If he does not deliver it in that time, the sheriff may proceed to levy to make its assessed value, damages and costs, out of the party in default. Section 4478. Such action of the sheriff, however, does not divest the successful party of the right to the property, because he need not exercise his choice in the matter until the sheriff gets the property. That it does not divest the title is specially provided in section 4479. The previous section (4478) is designed to coerce the losing party into turning the property over to the sheriff, and is not designed to give said party an option to keep it or pay its value. *Hanlon v. O'Keefe*, 55 Mo. App. 528. The successful party loses the right to possession of the property only when he has elected to take its value (section 4479); which election, as stated, need not be made by him until his defeated adversary has complied with the law by delivering the property to the sheriff. Another section of the statute gives the right to an execution for the delivery of personal property, and requires the sheriff to take the property under the execution, and deliver it to the one entitled to it. Rev. St. 1899, § 4486.

The execution which was issued in this case simply provided that if the defendants elected to take the property, and Koelling and his surety did not deliver it within 10 days after process issued, the sheriff should take it from Koelling and Filley, and deliver it to the defendants; or, if the sheriff failed to either receive or take the property, that its value should be made out of the goods of Koelling and Filley. If, as was decided in *White v. Graves* and *Wooldridge v. Quinn*, supra, the party entitled may make his election before judgment, when no injustice will be done thereby, he may certainly make it after judgment, but before the sheriff has obtained the property, if no injustice will result; and none will in the present case. As the plaintiff had no right to retain the property by paying its value, this execution in the form it bears could work no prejudice to him, and the judgment of the court below refusing to quash it is affirmed.

BLAND, P. J., and REYBURN, J., concur.

AMERICAN BRASS MFG. CO. v. PHILIPPI.*
(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

UNLAWFUL DETAINER—APPEALS—NOTICE—
CONSTRUCTION OF STATUTES—DISMISSAL
—DILIGENCE OF APPELLANT.

1. Rev. St. 1899, § 3366, providing that the same notice of appeals in unlawful detainer cases shall be given as of appeals from justices' courts, imports into the unlawful detainer act section 4074, which requires notice 10 days before the first day of the term at which the cause is to be determined.

2. Rev. St. 1899, § 3370, providing that unlawful detainer appeals shall be returnable, if the judgment is rendered in vacation of the circuit court, to the first day of the next term thereof, but, if rendered during term, within "six" days after rendition, is not incompatible with section 4074, providing for "ten" days' notice of appeal from justice's judgment; since section 3364 provides that, if the transcript is filed in term time, the cause shall be set for some day during the term, and thus the cause may be set ahead for trial, so as to allow 10 days' notice, if appellee demands it.

3. The ten-days notice of appeal required by Rev. St. 1899, §§ 3366, 4074, to be given in unlawful detainer cases, should be speedily given after the perfection of the appeal.

4. The unlawful detainer act, being a penal statute, is not to be construed by implication to contain section 4076, chapter 43, Rev. St. 1899, on justices' courts, which is not expressly incorporated therein, and which provides for the dismissal of an appeal from such courts, when notice is not given at least 10 days before the second term of the appellate court after the appeal is taken.

5. Under the unlawful detainer act, the spirit of which is opposed to delays, and section 3387, Rev. St. 1899, which expressly provides that, if appellant shall not prosecute his appeal, it may be dismissed, the appellant must prosecute his appeal with diligence to final determination, and, if he fails to do so, the court, in its discretion, may dismiss it, on motion of the appellee, at the first time at which it is returnable as well as at any subsequent term.

6. An appeal from a justice's judgment in an unlawful detainer suit, which, after perfection, was allowed to rest from April to the following February, was properly dismissed for delay in prosecution.

Appeal from St. Louis Circuit Court; Franklin Ferriess, Judge.

Action by the American Brass Manufacturing Company against Theodore F. Philippi. From a judgment of the circuit court dismissing defendant's appeal from a justice's judgment for plaintiff, defendant appeals. Affirmed.

Kurt Von Peppert, for appellant. Ras-sieur & Buder, for respondent.

BLAND, P. J. On April 15, 1902, a judgment in a suit of unlawful detainer was rendered by Justice R. B. Haughton, in the city of St. Louis, in favor of plaintiff and against defendant. Two days thereafter the defendant appealed the cause to the St. Louis circuit court, and the transcript of the justice was filed in the circuit court on April 21, 1902. The circuit court was in session

*For separate opinion, see 77 S. W. 765.

¶ 1. See *Forcible Entry and Detainer*, vol. 28, Cent. Dig. § 174.

during the whole of the month of April. No notice of the appeal was given by defendant to plaintiff. The cause was not called up until February term, 1903, of the circuit court, when, on motion of plaintiff to dismiss the appeal, the defendant was required to give a good and sufficient appeal bond (the one filed before the justice being deemed insufficient), which he did. After the new bond was filed, the plaintiff filed its motion to affirm the judgment of the justice or dismiss the appeal on the ground that two terms of the court had elapsed, and no notice of the appeal had been given. The motion was sustained, and the appeal dismissed at the cost of defendant. From this order defendant appealed to this court.

Section 3370, art. 2, c. 29, Rev. St. 1899, a part of the forcible entry and detainer acts, provides that appeals from the justice's court to the circuit court shall be returnable, if the judgment is rendered in vacation of the circuit court, to the first day of the next term thereof; but, if the judgment of the justice be rendered during the term of the circuit court, the appeal shall be returnable within six days after the rendition of the judgment. Section 3384 of the act provides that, if the transcript from the justice is filed in term time; the cause shall be set for trial on some day during such term, unless for good cause shown the court shall otherwise direct. Section 3366 of the act provides that, when a cause shall be taken to the circuit court under the provisions of this article, notice thereof shall be given as of appeals from justices' courts. Prior to the revision of 1889 no notice of an appeal from the judgment of a justice in an unlawful detainer suit or for forcible entry and detainer was required. The effect of section 3366, supra, is to import into the unlawful detainer act section 4074, art. 10, c. 43, Rev. St. 1899, and to require the appellant to give at least 10 days' notice of his appeal if the appeal be taken upon any day other than the day on which the judgment was rendered. No notice of the appeal was given in this case. The appellant contends that, inasmuch as section 3370, supra, required him to have the transcript filed in the circuit court within 6 days after the rendition of the judgment, the cause was returnable within 6 days to the April term, 1902, of the circuit court, and that it was a physical impossibility for him to give 10 days' notice of the appeal before the return term thereof, and that sections 3370 and 4074, supra, are irreconcilable.

If it is possible to harmonize these sections, and to give effect to the legislative intent as expressed in them, without doing violence to the language of either section, it is the duty of the court to enforce them both. *State v. Heman*, 70 Mo. 441; *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491; *Kane v. Railway*, 112 Mo. 34, 20 S. W. 532. We think this may be done. The appeal, when taken in vacation of the circuit court, is returnable to

the first day of the succeeding term. An appeal taken during the session of the circuit court is made returnable to the term, not to a particular day of the term; and the cause cannot be entered on the docket of the term except by an order of the court, and when so docketed it cannot be set for trial on any day of the term unless ordered to be so set by the court. Section 3384, supra, does not say on what day of the term the cause shall be set for trial, but only that it shall be returnable at that term, thus leaving it to the discretion of the court to name the day the cause shall be set for a hearing and when the appellee shall be required to appear and answer to the suit. In other words, it is left to the court to name the particular day of the term to which the cause is in fact returnable. The practice is, when the attention of the court is called to the matter by the appellant by asking leave to have the cause docketed (which he is bound to do if he prosecutes his appeal with due diligence), for the court to name a day for the trial of the cause. It is therefore an easy matter to set the cause ahead so as to allow 10 days' notice of the appeal if the appellee demands it. In this view of the procedure there is no practical difficulty in complying with the statute requiring 10 days' notice of the appeal, whether taken in term time or in vacation of the circuit court. The spirit of the forcible entry and detainer act requires prompt action and a speedy trial, and we think the statute requiring notice of appeal should be construed in harmony with the spirit of the act, and that notice should be speedily given after the appeal is perfected.

2. The penalty prescribed by section 4076, art. 10, c. 43, to the effect that the judgment may be affirmed or the appeal dismissed for failure of the appellant to give notice of the appeal at least 10 days before the second term after the appeal is taken, is not expressly carried into the forcible entry and detainer act by section 3366, supra, nor by any other section found in that act. Being a penal statute, it cannot be imported into the chapter by implication. *State v. Bryant*, 90 Mo. 534, 2 S. W. 836; *State v. Gritzner*, 134 Mo. 512, 36 S. W. 39; *State v. Murlin*, 137 Mo. 297, 38 S. W. 923. The spirit of the unlawful entry and detainer act seems to us to be opposed to so long a delay before the court may, in the exercise of a sound discretion, dismiss the appeal for want of prosecution, and that the appellee is not bound to wait that length of time before he may successfully move to have the appeal dismissed for want of prosecution. Section 3387 of the act, among other things, provides that, if the appellant shall not prosecute his appeal, it may be dismissed. This section can have no other meaning than that the appellant shall prosecute his appeal with diligence from the day he takes it to a final termination, and, if he fails to do so, the court, in

the exercise of its judicial discretion, may dismiss it on the motion of the appellee at the first term at which it is returnable as well as at any subsequent term.

3. The appeal slept in the office of the clerk of the circuit court from April, 1902, until February, 1903, and would perhaps have slept on until doomsday had it not been called up by the appellee's motion to dismiss. Appellant took no steps whatever, after perfecting his appeal, to prosecute it in the circuit court. He clearly violated the law which permitted him to take the appeal in failing to prosecute it, and has no ground to complain because his appeal was dismissed.

The judgment is for the right party, and is affirmed.

GOODE and REYBURN, JJ., concur.

MORITZ v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

STREET RAILWAYS—NEGLIGENCE—COLLISION WITH TEAM—DISCOVERED RISK—QUESTION FOR JURY.

1. Where a wagon which was being driven parallel to street car tracks was turned towards the tracks to cross them when an approaching car was 500 feet away, and was struck by the car as it reached the second track, the question of whether the motorman could have avoided the collision after he saw the wagon was for the jury.

Appeal from St. Louis Circuit Court; J. A. McDonald, Judge.

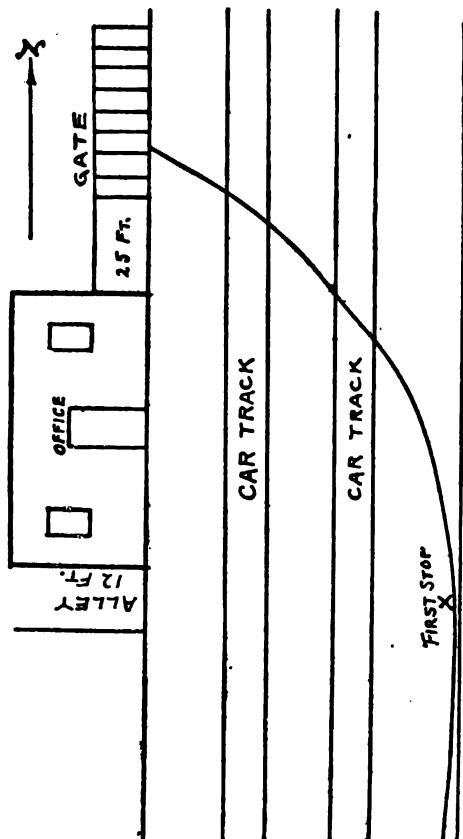
Action by Frank Moritz against St. Louis Transit Company. From a judgment for defendant, plaintiff appeals. Reversed.

M. Hartman and Walther & Muench, for appellant. Boyle, Priest & Lehman, for respondent.

Opinion.

GOODE, J. Action to recover for injuries to a team of horses, harness, and wagon due to colliding with an electric car belonging to the defendant, and operated by its servants. The accident happened on Twelfth street, in the city of St. Louis, between Chouteau avenue and Gratiot street. The distance between those two streets is stated in the testimony to be about 1,500 feet. This block was at one time bisected by Papin street, but that street had been closed, and no longer crossed Twelfth when the accident happened. The Shickle & Harrison Foundry Company's yards and office building are situated on the west side of Twelfth street, about midway of the block. John E. Luley was driving the team when the collision occurred. He had loaded a boiler on a float wagon at Third and Clark streets to take it to the Shickle & Harrison Foundry. The load and wagon were heavy, and were mov-

ed slowly. At Chouteau avenue Luley entered Twelfth street, and drove north on the east side near the curbing until he came to an alley just south of the office building of the foundry company, when he paused to turn diagonally across the street to the yard. A north-bound car running on the east track, and also a south-bound car on the west track, had just passed the wagon. Immediately after they passed, Luley started across the tracks on a northwest curve toward the gate of the foundry yard. This diagram shows the situation:



As he turned to the west, the car which hit the team was coming down the bridge approach near Gratiot street, 500 feet or more away. The team crossed the east track, and had just stepped on the west one when the car struck the wagon pole and the off horse, doing damage. No gong was sounded or warning given by the motorman. The car ran nearly to Chouteau avenue after striking the wagon. The collision occurred directly in front of the gate of the foundry yards. All the evidence tends to show the car was running at the high speed of 18 or 20 miles an hour.

The foregoing statement of the case is made up from the testimony given by the plaintiff and corroborative witnesses, there being no material discrepancy which has attracted our attention in the several narra-

*Rehearing denied December 1, 1903.

tives of the occurrence related by the persons who saw it.

One act of negligence counted on in the petition is a violation of the ordinance of the city of St. Louis which requires street car crews to keep vigilant watch for vehicles or persons on foot on the car track, or moving toward it, and to stop their car in the shortest time and space possible on the first appearance of danger to a vehicle or person. It is averred that the motorman in charge of the car which hit the wagon failed to keep vigilant watch and stop the car in the shortest time and space possible on the first appearance of danger to the plaintiff's vehicle. Another act of negligence pleaded is that the defendant was bound, by the ordinance under which it occupied the street, to keep the speed of its cars within 10 miles an hour; but that, in disregard of the ordinance, this car was running in excess of that rate. Still another specification is that the motorman failed to give warning of the approach of the car by sounding the bell or otherwise.

At the conclusion of the testimony on behalf of the plaintiff, the court granted an instruction in the nature of a demurrer to it, forcing plaintiff to take a nonsuit, from which, after vainly moving to have it set aside, he appealed.

1. The sufficiency of plaintiff's abstract of the record is attacked on the ground that it nowhere shows a bill of exceptions was filed in the court below, or the filing of a motion to set aside the nonsuit and for a new trial, or the overruling of such motion, and an exception by the plaintiff. The abstract recites the filing of a motion of that kind on the 19th day of June, 1903, and within 4 days after the nonsuit was taken. Said motion is printed in full, and following it appears a recital that on the 22d day of July, at the same term of court, it was overruled, and the plaintiff then and there excepted to that action of the trial court. The abstract further recites that on the 23d day of July plaintiff filed an affidavit for appeal, which was granted, and 30 days given for filing bill of exceptions. The last date, to wit, July 23d, is a misprint, for, by turning to the transcript, we found the appeal was taken and time allowed to file bill of exceptions on July 28th, instead of the 23d. The abstract further recites that on August 27th and within 30 days, an order was made and entered of record granting plaintiff 30 days' additional to file his bill of exceptions. As the previous order was entered on the 28th, instead of the 23d, the extension was made within its currency, and was effective. The abstract further recites that, in order to carry the rulings and exceptions previously recited into the record, plaintiff tendered his bill of exceptions to the court; that it was signed and sealed September 24, 1903, during said June term of the circuit court, by the judge of said court, was filed on said last-named

date, marked filed by the clerk of the court, and duly entered of record. We can detect no flaw or imperfection in the foregoing statement of the contents of the abstract which would deprive this court of the right to review the plaintiff's exceptions. In truth, it appears from the recitals that the bill of exceptions was filed during the term at which the cause was tried and judgment rendered. The cases cited by the defendant support the rule that the filing of a bill of exceptions cannot be proven by the bill itself, but must appear from the record dehors the bill. *Reno v. Fitz Jarrell*, 163 Mo. 411, 63 S. W. 808. But this rule is not violated in the present case, since the abstract of record recites an entry of the filing of the bill. *McDonald v. Hoover*, 142 Mo. 484, 44 S. W. 334; *Jordan v. Railway Co.*, 92 Mo. App. 81. We find, too, apt recitals of entries of the filing and overruling of the motion for new trial and of plaintiff's exception. The abstract is further criticised for setting out fragments of the evidence, instead of the whole of it, thereby precluding this court from reviewing the action of the trial court in sustaining the demurrer to the evidence; but it appears to present the testimony of the witnesses in full; hence, is proof against this criticism.

2. The witnesses agree that the motorman made no effort to stop the car until the instant of the collision, although, according to their testimony, he must have observed the approach of the team toward the track on which the car was running when he was more than 500 feet away, and that the driver intended to cross that track. This was certainly evidence to go to the jury in support of plaintiff's case. Granting that the driver was negligent in proceeding when he saw or might have seen the car, which, however, was an issue of fact, according to the reasoning in the *Schafstette* Case, *infra*, it was for the jury to say whether, by prompt and active measures, the motorman could have checked the car in time to prevent a collision. The distance between the car and the wagon was great enough to support the inference that the former could have been stopped, by proper effort, before harm was done; but the testimony is uniform that no effort was made to stop it. The case of *Schafstette v. Railway Co.* (Mo. Sup.) 74 S. W. 826, is in point. In that case the distance between the colliding car and the vehicle, when the latter drove on the track and started along it, was 500 feet. Commenting on that fact, the Supreme Court, by Judge Marshall, said: "It is not true as a matter of law, and *prima facie* cannot be true as a matter of fact, that it is negligence for a citizen to cross or drive upon and along a street car track when a street car is five hundred feet away, although it may be coming in the same direction, and running at a speed of five, ten, or even more, miles an hour, when the track is straight, and the operative of the car can easily and plainly

see that such person is in such position. In such case, particularly where the citizen turns onto the track and drives upon or close to it, with his back to the approaching car, it is the duty of the operative to check the car and avoid the accident; and, if a collision occurs, it is prima facie, if not altogether, owing to the negligence of the operative of the car." That reasoning applies to the present case, in which the team and wagon must have been within the motorman's gaze, if he was looking, and the intention of the driver to cross the track apparent. A driver or pedestrian can hardly find a better chance to cross car tracks in safety than when the nearest car is 500 feet from him. On some streets of St. Louis there is nearly always a car that close during some hours of the day. The evidence is that the driver tried to turn his team back to the east as soon as he noticed the car, but was unable to turn soon enough to escape a collision. He did all he could to avoid an accident, so far as appears, after he saw the car. The facts before us are very like those in *Cooney v. Railway Co.*, 80 Mo. App. 226, in which the plaintiff was hurt by a car while driving diagonally across a car track; his movements having been under the observation of the motorman for quite a distance. The ordinance in question, as well as the common law made it the duty of the motorman to begin to acquire control of his car as soon as he saw there was danger of an accident; and the testimony was compatible with the conclusion that such danger was visible when he was 500 feet away, for at that time the team was already crossing the east track, and headed toward the west one. In *Aldrich v. Transit Co.* (Mo. App.) 74 S. W. 141, we said: "The behavior of a person may clearly signify before he goes on the track that he will go on it in unconsciousness of impending danger, and it then becomes the duty of a motorman or engineer to obtain control of his car or engine before it is too late to avoid striking the person, if possible." If the statements of the witnesses who testified were true—and we must accept them in reviewing the ruling on the demurrer—no step was taken to check the car until just as it struck the wagon, which argues either inattention on the part of the motorman or indifference. Of course, if the team obtruded into his view too late for him to stop before hitting it, the case is different. But no witness made that inference necessary, since they all swore the car was distant 500 feet, or further, when the wagon started across the track, and that there was nothing between the two vehicles to obstruct the gaze. There was testimony, also, that some distance from the point of collision the grade begins to rise from a point to which it previously descends. On the evidence, we must hold that an issue arose for the determination of the jury as to whether the defendant was guilty of negli-

gence which proximately caused the accident.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

TURNERY v. BAKER.

(Court of Appeals at Kansas City, Mo. Dec. 7, 1908.)

CONTRACTS—QUANTUM MERUIT—EVIDENCE—INSTRUCTIONS—PLEADINGS—COUNTERCLAIM.

1. An answer setting up a counterclaim does not substantially differ from a petition, and the reply thereto performs the office of the answer to the petition; and, if both parties establish their claims, the judgment must be rendered for the party whose demand is found to be in excess.

2. An instruction submitting a case on the theory of plaintiff's petition is not erroneous because it ignores the defense set up as a counterclaim.

3. A requested instruction which is broader than the pleadings, or which omits references to facts therein alleged, and embraces others not included, is properly refused.

4. Where an issue is sufficiently submitted by instructions given, the refusal to give a requested charge containing a correct statement of the law applicable to the facts is not prejudicial.

5. Where one is prevented from performing his contract by reason of acts of the other party to the contract, the failure to perform is not a defense in an action on a quantum meruit.

6. Where an architect employed to assist in making a suitable selection of real estate on which to erect improvements, and to superintend the construction of the buildings, with the express approval of the landowner placed a subordinate in charge in his stead as supervising architect, in an action by the architect for his services conversations between defendant's contractor and such subordinate were admissible to the same extent as if had with the architect.

7. Hypothetical questions put to experts may assume facts tended to be established by the evidence.

8. The objection that a verdict is excessive cannot be considered on appeal unless it is made a ground for a new trial.

Appeal from Circuit Court, Jackson County; E. P. Gates, Judge.

Action by Albert Turnery against Andrew J. Baker. From a judgment for plaintiff, defendant appeals. Affirmed on rehearing.

Harkless, O'Grady & Chrysler, for appellant. Brown, Harding & Brown, for respondent.

SMITH, P. J. The plaintiff in his petition alleged: That he was an architect engaged in the practice of his profession, and that "defendant employed him to assist in making a suitable selection and purchase of real estate in Kansas City on which to erect improvements, and to inspect and examine buildings in said city and elsewhere, to determine the character of the proposed buildings, and to pay his expenses in so doing; to devise and prepare plans and specifications

¶ 1. See Set-Off and Counterclaim, vol. 43, Cent. Dig. § 130.

for such contemplated buildings; and to superintend the construction thereof. That, in pursuance of his employment by defendant as aforesaid, plaintiff inspected, in company with defendant, various tracts of land suitable for building sites in Kansas City and elsewhere, and finally, by the advice and suggestion of plaintiff, defendant purchased a certain tract of ground at Sixteenth and Broadway in Kansas City, and that thereupon plaintiff, in pursuance of his employment as aforesaid, and at the express direction of defendant, devised and prepared plans and specifications for the grading of the tract of ground so purchased, and the construction of a stone wall around the same, and let the contracts therefor, and plaintiff superintended, at the instance of said defendant, and as a part of the employment as aforesaid, the work of grading said lot and the construction of said retaining wall. Plaintiff further states that, at the special instance and request of defendant, and as part of the employment aforesaid, plaintiff devised and prepared preliminary plans for the erection and construction of two buildings upon said described tract of ground, and that plaintiff gave defendant various and frequent consultations regarding the improvement of said land as aforesaid, and that plaintiff has ever since been ready and willing to complete said plans and specifications therefor, and to superintend the construction of said buildings, but that defendant, in violation of the terms of his employment of plaintiff as aforesaid, and in disregard of plaintiff's rights, has terminated said employment, and has refused to permit plaintiff to finish and complete said plans and specifications, and to superintend the erection and construction of the buildings thereunder. Plaintiff says that, in the inspection and examination of buildings at the instance of defendant as aforesaid, he expended the sum of about \$175. Plaintiff states that a reasonable value of the services performed by him as aforesaid for defendant, together with the money expended, is twenty-five hundred dollars," etc. The answer contained a general denial, which was followed by an allegation to the effect that "defendant admits that he employed the plaintiff to draw plans for and superintend the construction of a stone retaining wall mentioned in plaintiff's petition; that plaintiff undertook to do so, but so negligently and carelessly constructed said retaining wall, or caused the same to be constructed, as that the retaining wall aforesaid was so constructed as to project over onto the property of adjoining property owners, and other portions of said wall were so constructed as not to come out to the edge of defendant's line of property; that, by reason of such negligence and carelessness on the part of the plaintiff, defendant has been damaged in the sum of two thousand one hundred and sixty-eight dollars, for which, with his costs, he asks judgment over against the plaintiff." The replication of plaintiff denied

that he was guilty of any negligence or carelessness in the construction of said retaining wall, and denied that any portion of said wall was or is constructed so as to project over defendant's lot onto other property, "but plaintiff says that said wall was constructed out of rough face stone, and some points of which extended out further than others. Plaintiff admits that the base of a certain post erected at the southwest corner of said wall projects over the line of defendant's lot some one to five inches, but says that said projections are largely occasioned by the projecting points of said rough stone. Plaintiff alleges that defendant knew of the position and projection of said stone while said stone was being erected, and that he consented and ordered the said post erected as it now stands, and that he has sustained no damage thereby." We have thus set forth the pleadings in extenso, so that one of the grounds upon which defendant seeks a reversal of the judgment may be fully understood.

The defendant objects that the plaintiff's fourth instruction, which submitted the case upon the theory of the petition, was erroneous, because it wholly ignored his defense. The only defense pleaded to plaintiff's claim was that of a general denial. There was, however, a counterclaim pleaded. The case, on the pleadings, was one where the parties thereto alleged cross-demands. In effect, there were two causes of action in the same action. Both parties were, to a certain extent, plaintiffs, and both defendants. An answer in such case does not substantially differ from a petition, and the reply to the answer performs the same office as the answer to the petition. Each party claims affirmative relief from the other. If both parties establish their claims, the judgment is rendered for the one or the other accordingly as his demand may be found to be in excess. *Kinney v. Miller*, 25 Mo. 576. And so, it has been said, a counterclaim must have a tendency to show an independent cause of action—a claim existing in favor of the defendant against plaintiff arising either out of the contract or transaction sued on, or some other. *Holzbauer v. Heine*, 37 Mo. 443. It is thus seen that a defense is to be distinguished from a counterclaim. The defendant pleaded no special defense. The plaintiff was entitled to a submission of the case on the facts hypothesized in his petition, since he adduced evidence tending to support that hypothesis. There was no defense pleaded or proved to which a reference, if required (*Hughes v. Railroad Co.*, 127 Mo. 447, 30 S. W. 127), could have been made in the plaintiff's instruction. There was nothing in the case requiring the submission of a qualification to it. Nor was it required that defendant's cause of action against plaintiff be referred to in it. The claim of plaintiff and the counterclaim of defendant were distinct and independent. The plaintiff's instruction was

not subject to defendant's criticism. The rule requiring that an instruction for plaintiff which undertakes to submit the whole case must include a reference to the defendant's defense has no application in a case like this, where the defendant seeks to recover on a counterclaim or cross-demand.

The plaintiff's fifth, sixth, and seventh instructions, in substance, told the jury that if it was satisfied from the preponderance of the evidence that plaintiff negligently constructed said retaining wall, or caused the same to be constructed, so as to project over the lot of an adjoining proprietor, and that other portions of it were so constructed as not to come to the edge of defendant's property, defendant would be entitled to recover on his counterclaim. These instructions fairly submitted the defendant's counterclaim. They might have gone further, and submitted the defense to the counterclaim pleaded by the replication. This was not done, but the omission was more prejudicial to the plaintiff than to the defendant.

The defendant's fourth instruction, which was refused, included in its hypothesis facts not pleaded by that part of the answer setting up a counterclaim. It was broader than the counterclaim alleged in that pleading. It omits any reference to the facts therein alleged, and embraces others not embraced in the statement of the counterclaim. But had it been an accurate expression of the law as applicable to the counterclaim pleaded, its refusal would not have been prejudicial, since it (the counterclaim), as already stated, was sufficiently submitted by the plaintiff's instructions.

The defendant further objects to the ninth instruction given for plaintiff, which declared that, even though plaintiff did not fully carry out his contract with defendant, this was no defense to the former's claim, if the jury found that it was through no fault of such former that he was prevented, etc. The action was not on the contract, but on a quantum meruit. It ought to be an indisputable proposition that if the plaintiff, for no fault of his, was prevented by defendant from completing performance, his failure, under such circumstances, was not an available defense against the plaintiff's claim; and this was all that was asserted by said instruction. The defendant's contention that the plaintiff was allowed to prove the value of his services, as though he had carried out the contract, cannot be sustained. The evidence, so far as we can understand it, tended to prove no more than the reasonable value of the services performed by the plaintiff under the contract. Any purpose to prove its value on the theory of a complete performance was expressly disavowed by the plaintiff at the trial.

It appears from the evidence that, before plaintiff started on his tour of inspection, as required by the contract, with the express approval of defendant he placed his two sub-

ordinates, Bolloit and Hall, in charge in his stead as supervising architects; and, when the question arose whether the pilaster was properly located, the contractor, Turner, came to Hall, and he (Hall) gave him (Turner) instructions in respect to the location of the pilaster. The plaintiff was allowed to prove the conversation between Hall and Turner touching this matter, and the action of the court in that regard was not erroneous. It was not different than if the plaintiff himself had directed the defendant's contractor in respect to the proper location, etc., of the pilaster.

The defendant complains that the court erred in permitting the plaintiff to put to the expert witnesses Rose and Markgraf certain hypothetical questions. The rule to be observed in putting hypothetical questions is that facts may be assumed where there is evidence tending to establish them relevant to the theories which the parties are attempting to uphold. *Neudeck v. Grand Lodge*, 61 Mo. App., loc. cit. 106 et seq.; *Benjamin v. Ry. Co.*, 50 Mo. App. 609. After a careful consideration of the questions propounded, we have concluded that they did not trench upon the rule just stated. Some of them were needlessly long and involved, but, in the main, they were based upon facts which had some support in the evidence. There was no such error in this respect as would justify a reversal of the judgment.

Lastly, the defendant complains that the verdict was unconscionable and excessive, and for that reason it should not be allowed to stand. On turning to the motion for a new trial, we do not find that it contained any such ground of objection, and for that reason we cannot consider it here.

The judgment must be affirmed. All concur.

HANLON v. GOODYEAR et al.

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

REPLEVIN—DECREE IN FORMER SUIT—ADMISSIBILITY—INSTRUCTIONS—DAMAGES—DOUBLE RECOVERY.

1. In replevin for corn, defendant offered in evidence the record in a former suit for an injunction, showing that defendant had recovered judgment in forcible entry and detainer for the possession of the lands upon which the corn was grown, and had been put into possession, whereupon the defendant in the forcible entry and detainer action threatened to retake possession, and to do personal violence to any person whom the defendant in the present case should put in possession. In view of this, the injunction suit was commenced, and defendant in the forcible entry and detainer suit was enjoined from interfering with the possession of defendant in the present case. It further appeared from the evidence that the defendant in the injunction suit disobeyed the injunction, and was arrested for contempt of court, and that the plaintiff in the present case, just before the arrest, had plowed and planted a part of the land for the defendant in the injunction case, and was in possession under this person of a portion of the

tract to which the injunction did not extend, and undertook to cultivate the entire tract. *Held*, that the record in the injunction suit was admissible as against the plaintiff in the present case, though he was not a party to the injunction suit.

2. In replevin for certain corn, it appeared that it was raised upon land the possession of which had been recovered by defendant in forcible entry and detainer against the person under whom plaintiff claimed, and that thereafter this person had disobeyed an injunction restraining him from interfering with the defendant's possession of the east half of the tract, and the plaintiff, acting under and for this person, had raised a crop on the west half. *Held*, that an instruction should have been given to the effect that, though plaintiff planted the corn in question, yet if, at the time the person under whom he claimed was in possession of the east half of the land on which the corn was raised, defendant was one of the owners of the land, and the portion planted on the east half was intended for the person under whom plaintiff claimed, and planted for him, and possession was continued by this person and plaintiff up to the time when they were dispossessed of the land, and defendant entered upon and took possession of the east half, and harvested the corn, then the plaintiff could not recover for any of it, even though he was prevented from cultivating and harvesting the corn by force used by the defendants.

3. In replevin, in which it appeared that the property was delivered to the plaintiff, and that there was no redelivery of it to defendants, an instruction that if the jury found that the property was not in possession of either plaintiff or defendants, but had been disposed of by defendants, it might, if it found for the plaintiff, assess a reasonable market value, and damages covering injuries to the property, was error.

4. In replevin, in which it appeared that the property was delivered to plaintiff, and never redelivered to defendant, the alleged fact that defendants had, in a subsequent action, recovered possession of the property, could not be considered in determining the question of damages.

Appeal from Circuit Court, Platte County; Alonzo D. Burnes, Judge.

Action by James D. Hanlon against Louis P. Goodyear and others. From a judgment for plaintiff, defendants appeal. Reversed.

Wilson & Wilson and Geo. W. Day, for appellants. Noyes, Heath & Walls and Sidney Berry, for respondent.

SMITH, P. J. This is an action of replevin, which was brought to recover the possession of 250 bushels of corn. There was a trial in the circuit court, into which the cause was removed by appeal, which resulted in judgment for plaintiff, and defendants appealed.

During the progress of the trial the defendants offered in evidence the record of a decree of the circuit court which recited and showed a certain suit in equity, wherein one John Sills was plaintiff, and Goodyear, one of the defendants in the present action, was defendant, which was to the effect that whereas the said Goodyear had, in an action of forcible entry and detainer, recovered judgment against said Sills for the possession of the lands upon which the corn was grown which is the subject of the present action of replevin, and whereas, further, the

said Sills, under the writ issued on that judgment, had been put out, and the said Goodyear put in, the possession of said lands, and whereas, also, further, the said Sills, after he was so put out of possession, had reentered and taken possession of a small portion of said tract, and threatened to extend his possession to the entire tract, and was threatening to do personal violence to any person whom Goodyear should put in possession, and was intimidating the latter and those whom he sought to put in possession from continuing the possession given such latter under the said writ, etc., therefore an injunction be awarded against the said the former (Sills), enjoining and inhibiting him from entering upon the said land, or any part thereof, and from in any wise interfering or intermeddling with the possession and enjoyment thereof by the former (Goodyear), his tenants and servants, etc. *Sills v. Goodyear*, 80 Mo. App. 128. The undisputed evidence shows that, notwithstanding the foregoing decree, Sills interfered and intermeddled with the possession of Goodyear, one of the defendants herein, and thus brought himself into contempt of the said decree, and for which he was, under an order of the court, arrested and confined in the county jail. The plaintiff adduced evidence tending to prove that just before the arrest of Sills the plaintiff, for Sills, plowed and planted in corn the part of the land to which the inhibition of the injunctive process extended. There was further evidence tending to prove that, as soon as Sills was arrested and removed from the land, the defendant Goodyear again entered, and put the other defendants in possession. Plaintiff was in possession of the west half of the land under Sills, but the decree extended only to the east half, to which Sills had made some claim, and from which he had been ejected under the writ in the forcible entry and detainer case, and from which, later on, he had been removed, when arrested for his contempt. The plaintiff undertook to plant and cultivate not only the west half, but the east half as well. It may be fairly inferred from his attempts to cultivate the east half that he was acting for and in behalf of Sills. The conduct of both plaintiff and Sills in interfering with the possession given Goodyear under the writ was such as to show the existence of a relation between them justifying the admission of the decree in evidence in the present case. By the decree it appears that the defendant was in the possession of the east half, and that both Sills and plaintiff, acting in concert, interfered with that possession. It was as admissible in this action as if Sills had been a party to it.

In this connection it may be stated that we think the tenth instruction requested by the defendants should have been, as it was not, given. It, in substance, told the jury that, even if plaintiff planted the corn in question, yet if they further "find and believe that, at

the time of so doing, John Sills was in possession of the east half of the land on which said corn was raised, and plaintiff was in possession of the west half of it; that the defendant Goodyear was one of the owners of said land; that the portion planted on said east half was intended for said John Sills, and plaintiff planted it for him; that the possession aforesaid was continued by Sills and plaintiff up to the time when said Sills was taken off of said land; that defendant Goodyear entered upon and took possession of said east half as soon as said Sills was taken away, and tended the corn, and cut and shocked it, and that all or some portion of the corn sued for in this action was raised on said east half—then the plaintiff cannot recover for any corn which you may believe was raised on said east half; and in such case it will make no difference that you may believe that Hanlon, the plaintiff, was prevented from cultivating and harvesting the corn on said east half by force used by defendants." No other instruction was given that submitted the case on a like theory. Defendants were clearly entitled to a submission of the case on the theory of this instruction.

The evidence presented by the abstracts discloses the fact that the corn replevied by the constable under the writ was delivered to the plaintiff, and that there was no redelivery of it to defendants. On this evidence, the plaintiff was not entitled to the fifth instruction given at his request, which told the jury that if it found the property sued for was not in possession of either plaintiff or defendants, but had been disposed of by the defendants, then, if it found for plaintiff for the possession of the property, to assess a reasonable market value of the corn and fodder at such sum as it should believe the same to be reasonably worth, not to exceed \$150, and also such damages as would cover all injuries to the property, not to exceed \$100. The verdict of the jury was that the plaintiff was entitled to possession, that the value of the property was \$150, and that the damages occasioned by the injury to it, and for the taking and detention, were \$30.50. This instruction told the jury, if it found for plaintiff for the possession of the corn, to assess a reasonable market value of it, at such sum as it should be reasonably worth. The submission of the question of market price was erroneous, for the reason that the plaintiff was given the possession of the corn under the writ. It was not redelivered to the defendants. It is therefore obvious that the value of the corn was not an element of damage to be considered by the jury. Rev. St. 1899, § 4476; *Baird v. Taylor*, 30 Mo. App. 580. The jury should have been restricted by the instruction to such damages, if any, as the plaintiff had sustained in consequence of the taking and detention of the corn. But to allow him to recover possession of the corn, and the market value of it,

together with damages for the taking and detention, was glaringly erroneous.

There is some inference afforded by the evidence that the defendants, in another action brought against plaintiff, recovered possession of the corn from the plaintiff, but this was not sufficiently shown to authorize the submission of the case upon the theory that the defendants had obtained possession and disposed of it. In determining the question of damages in this case, the court should not have been in any way influenced by the proceedings had in any other subsequent suit between the said parties touching the same subject-matter. If the defendants brought a subsequent suit against the plaintiff for the recovery of the corn, it is difficult to see from anything contained in the record in this case how that action, or the proceedings therein, could have anything to do with this. If the corn was taken out of the present plaintiff's possession by that action, it was for the court to determine the rights of the parties according to the facts as it found them there to exist. But the proceedings in that case should not have been used to influence or dominate the decision of this.

As far as we can discover, the case in other respects was well enough tried. No other error prejudicial to the defendants is seen. It follows that, on account of the errors hereinbefore pointed out, the judgment must be reversed, and cause remanded. All concur.

COOPER v. HUNT et al.*

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

INTOXICATING LIQUORS—LICENSES—PROCEEDINGS—REVIEW—CERTIORARI—MATTERS OF RECORD—EXCISE COMMISSIONER—JURISDICTION—FINDINGS—CONCLUSIVENESS—INJUNCTION—GROUNDS OF RELIEF.

1. Under Rev. St. 1899, § 2997, requiring an application for a dramshop license to be supported by a majority of the taxpayers owning property in the block in which the dramshop is to be kept, which application is, by Sess. Acts 1901, p. 142, to be kept on file in the office of the clerk of the county court (in St. Louis, in the office of the excise commissioners), for public inspection, not less than 10 days before the license is issued, a license granted December 8th on a petition filed December 2d was void.

2. Certiorari is the proper method for determining the validity of dramshop licenses, when the facts necessary to such a determination appear of record.

3. Since, under Rev. St. 1899, § 3022, the excise commissioner is required to keep a record of petitions for dramshop licenses and remonstrances, which are to be open for public inspection, whether a petition was on file for 10 days before the license was issued, as required by Sess. Acts 1901, p. 142, is a matter of record, which may be determined by certiorari.

4. Whether petitioners for a liquor license withdrew their names from the petition, and subscribed them to a remonstrance, would also appear of record.

5. An alleged false statement made by petitioners for a dramshop license, to the effect that

*Rehearing denied December 15, 1903.

¶ 2. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 80.

some other person intended to sign the petition, is no ground for equitable relief against the action of the excise commissioners in granting the license.

6. That an applicant for a liquor license promised plaintiff to withdraw the same is no ground for equitable relief against the action of the excise commissioners in granting the license, where there was no averment that plaintiff was thereby led to neglect to take any proceedings against it.

7. In granting dramshop licenses, the excise commissioner, having acquired jurisdiction, acts judicially; and his findings of fact on which the right to issue a license depends, including the fact whether the petition was in truth signed by a majority of the eligible citizens, are conclusive.

8. The excise commissioner acquires jurisdiction to grant a dramshop license on the presentation of a petition reciting that the subscribers were a majority of the assessed, taxpaying citizens and guardians of minors owning property in the block.

9. A finding of the excise commissioner that the requisite number of persons signed a petition for the issuance of a dramshop license cannot be reviewed in proceeding for injunction, except on the ground of fraud.

10. It must be presumed, in proceedings for injunction, that the excise commissioner acted on a conviction based on knowledge of the eligibility of subscribers to a petition for a dramshop license, whether he made any investigation thereof or not.

11. No ground is presented for an injunction against the maintenance of a dramshop when the circumstances relied on for such relief are either matters of record before the excise commissioner, which may be reviewed on certiorari, or are such that the commissioner's finding precludes further review.

Appeal from St. Louis Circuit Court; D. G. Taylor, Judge.

Action by F. K. Cooper against Charles M. Hunt and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Myron Westover, for appellant. Kehr & Tittman, for respondents.

Opinion.

GOODE, J. Plaintiff avers that she is the owner of two parcels of ground in city block 1038 in St. Louis—one fronting on the north line of Lucas avenue, and the other on the south line of Morgan street. One of plaintiff's parcels adjoins premises known as No. 3201 Lucas avenue, owned by the defendant Ella Pechmann. Plaintiff's property in the block is occupied by 16 dwelling houses, rented to tenants. The defendant Charles M. Hunt was granted a license by the excise commissioner of the city of St. Louis December 8, 1902, to conduct a saloon at No. 3201 Lucas avenue, which premises are averred to have been leased to him by Ella Pechmann on condition that Hunt secure a valid license to keep a dramshop therein; the lease not to be binding if the license should be revoked or declared invalid. The object of this suit is to have the dramshop license granted to Hunt declared void and canceled, to restrain him from conducting a saloon on the premises No. 3201 Lucas avenue, and to restrain Ella Pechmann from renting said premises for use as a saloon. Plaintiff avers

that she will suffer special damage from the existence of a saloon in the block, on account of her large property interests therein, and the purpose for which her property is rented, to wit, as residences. The allegation on which relief is prayed against the license are these: Hunt's first petition for license, filed with the excise commissioner November 15, 1902, was not signed by a majority of the assessed, taxpaying citizens and guardians of minors owning property in city block 1038, but only by 7 persons. After filing said petition, to wit, November 23d, Hunt declared to the plaintiff that he had withdrawn his application for a license, on account of the opposition in the neighborhood—a false statement, as Hunt never withdrew his application, but, on the contrary, filed another petition December 2d, purporting to be signed by 7 other persons as petitioners. The excise commissioner on the same day (December 2d) determined that there were 22 persons eligible under the law to sign a petition for license to keep a dramshop in the block, and that 12 of said eligible persons had signed Hunt's petition. Thereupon, on December 2d, the excise commissioner issued a statement that on the payment of a license tax, and the presentation of the proper receipts, he would grant a license to Hunt, and did grant one to him December 8, 1902. It is further alleged that, of the 7 names appearing on the petition filed November 15th, those of W. O. and Emma E. Thomas were signed to a remonstrance against granting the license, in the same handwriting as the signatures of those names to the petition, and that the remonstrance was filed with the excise commissioner November 21, 1902; that the name of Mrs. M. Reckinger, on the petition of November 15th, was not the name of any person owning property in city block 1038; and that the names of Sarah L. Rodomsky and M. Reckinger were not signed by any person having authority to sign the petition. The meaning of this averment, as shown by the general tenor of the petition, is not that the names of those parties were forged, but that the parties were ineligible to sign. Moreover, as there were 14 petitioners in all, there could have been a majority of the 22 persons eligible to sign after rejecting said two names. In regard to the signatures of W. O. and E. E. Thomas, the averment is that they first signed Hunt's petition on a representation made by him that he had an appointment with J. Rodomsky, who would sign it on presentation, which statement turned out to be false, and, on discovery that it was false, the Thomases signed the remonstrance.

The case went to trial, but the court excluded most of the evidence offered by the plaintiff. In addition to proffering proof of the above averments, plaintiff offered to prove that not only were the names of M. Reckinger and Sarah Rodomsky signed to the petition of December 2d by persons without

authority to sign said names, but that the remaining 5 names signed to it were those of persons who did not own property located in block 1088, and had not paid any taxes on property located therein, and that the excise commissioner made no effort to ascertain the facts.

The statutes of the state require an application for dramshop license to be supported by the petition of a majority of the assessed, taxpaying citizens and guardians of minors owning property in the block in which the dramshop is to be kept. Rev. St. 1899, § 2997. The statute governs applications for license not only to county courts, but, as well, applications in the city of St. Louis to the excise commissioner. That officer is required to keep a record, among other things, of petitions for dramshop licenses, and remonstrances against granting them, all of which are to be open to the inspection of any person who desires to inspect them. Id. § 3022. It is further provided that a petition for license shall be on file in the office of the clerk of the county court, and, by reasonable construction, in this city in the office of the excise commissioner, not less than 10 days before the license is issued for public inspection. *Sess. Acts 1901*, p. 142. In *State ex rel. Waggoner v. Seibert*, 71 S. W. 95, 97 Mo. App. 212, we decided that the excise commissioner has no jurisdiction to issue a dramshop license unless a petition has been on file for 10 days. If the license in this case was granted on the petition of December 2d, the act was done without jurisdiction, and the license is void. But the accepted mode of testing the validity of a dramshop license, when the facts necessary to determine its validity appear of record, is by certiorari. *State ex rel. v. Heege*, 37 Mo. App. 338; *State ex rel. v. Higgins*, 71 Mo. App. 180; *State ex rel. v. Seibert*, supra. As petitions and remonstrances are to be kept as public records by the excise commissioner, the particular point under advisement can be ascertained in a certiorari proceeding; and we think the other points raised by plaintiff can, too. If the Thomases withdrew their names from the petition, and subscribed them to a remonstrance, that fact would appear of record. It is to be observed that the alleged false statement made to them by Hunt that one Rodomsky intended to sign Hunt's petition is certainly no such statement as would authorize equitable relief, for Rodomsky's action would be no good reason for theirs, and, besides, the representation related to a future event. *Estes v. Desnoyers Shoe Co.*, 155 Mo. 577, 56 S. W. 316.

As to the allegation that Hunt promised plaintiff to withdraw his application for license, it is enough to say there is no averment that plaintiff relied on the promise, or was deceived by it, and lulled into inactivity. We do not decide that in any event plaintiff could proceed to annul the license on such a

misrepresentation; a ruling on that point not being compelled, to dispose of the case.

In granting dramshop licenses, the excise commissioner acts judicially, and his finding of facts we understand to be conclusive. He must have jurisdiction before he can proceed; but he acquired jurisdiction in the present case on the presentation of a petition reciting that the subscribers were a majority of the assessed, taxpaying citizens and guardians of minors owning property in the block. *State ex rel. v. Heege*, supra; *State ex rel. v. Cauthorn*, 40 Mo. App. 94; *State ex rel. v. Moniteau Co. Ct.*, 45 Mo. App. 387; *State ex rel. v. Higgins*, supra. The excise commissioner unquestionably had jurisdiction to proceed with the matter, and it became his function to determine whether or not the petition was in truth signed by the majority of the eligible citizens, as well as the other facts on which the right to issue a license depended. We think his decision cannot be reviewed or revised in this proceeding, but are not prepared to say that, if he was imposed on by forged signatures or other fraudulent measures, there could be no relief in favor of a property owner in the block, specially injured by the presence of a saloon. Relief by injunction against a fraudulently procured license for selling pools on a race track was granted to the state in an action instituted by the Attorney General. *State ex rel. v. Zachritz*, 186 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711. The point most insisted on in that controversy was that the state had no interest in canceling a license surreptitiously procured, but the opinion suggested that the state had a sufficient interest, because of the duty incumbent on it to see that its laws are enforced for the protection of citizens—pro bono publico. We think it unnecessary to decide whether or not the action of a county court or excise commissioner in granting a license, when that action is induced by the covinous practices of the party licensed, can be annulled, and the opening of a dramshop thereunder restrained, at the instance of a specially injured property owner. If the petition of December 2d was taken as a basis for the license before it had been on file 10 days, the license could be set aside in the usual mode; and so, if the excise commissioner found twenty-two persons had the right to petition, while fewer than a majority of that number in fact petitioned, this flaw is of record. There is nothing to prove the excise commissioner was overreached, or fraudulently deceived into believing the signatures were genuine, when they were forged, or as to any other material fact. He had all the papers before him, and it was his duty to determine whether a majority of eligible signatures were subscribed to the petition. Whether he decided correctly or not, there is no averment or proof that he acted corruptly, or that he was overreached, and his decision controlled by fraudulent artifices of either of the defendants. He had power

to grant the license on the petition of November 15th, and may have done so, though we cannot reconcile such a decision with the finding that there were 22 persons eligible to sign. But as it was his duty to decide the matter, his ruling cannot be reviewed in this proceeding except on allegations of fraud, if at all. There is an allegation that the commissioner made no investigation as to the eligibility of any of the subscribers, except Early; but we must presume he was satisfied about the matter, and acted from a conviction based on knowledge of the facts, whether he investigated or not.

On the whole, it appears that whatever circumstances are relied on by the plaintiff for annulling the license, and restraining one of the defendants from carrying on, and the other from permitting, a saloon, are either matters of record before the excise commissioner, which could be reached by certiorari—the procedure commonly adopted in such instances—or are such that the commissioner's finding concerning them precludes further review. Therefore no equity is presented for injunctive relief. As a general proposition, equity does not interfere to annul or restrain action under proceedings that are void on their face. *Holland v. Johnson*, 80 Mo. 34; *Clark v. Ins. Co.*, 52 Mo. 272.

Judgment affirmed.

BLAND, P. J., and REYBURN, J., concur.

ANDERSON v. FORRESTER-NACE BOX CO.

(Court of Appeals at Kansas City, Mo. Dec. 7, 1908.)

MASTER AND SERVANT — INJURIES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE — SAFE PLACE TO WORK — DEFECTIVE APPLIANCES.

1. In an action for injuries sustained by a servant owing to a nail springing from its place as he struck it in attempting to drive it, causing an injury to his eye, the fact that the place where he was at work was poorly lighted did not render the master liable, it appearing that he struck the nail a square blow.

2. The want of sufficient light was owing to the servant's own negligence, it appearing that he had been furnished with a lantern which he failed to use.

3. Where a servant employed as a carpenter was injured by a nail flying out when he struck it in attempting to drive it, causing an injury to his eye, the mere fact that the nail was of a character more difficult to start into the wood than others, and that it was more inclined to fly out, did not render the master liable, the servant being an experienced carpenter and having used a great many nails of that character.

Appeal from Circuit Court, Jackson County; Wm. B. Teasdale, Judge.

Action by John Anderson against the Forrester-Nace Box Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed on original hearing, and reversed on rehearing.

Harkless, O'Grady & Crysler, for appellant. Jno. G. Park, for respondent.

ELLISON, J. This is an action for injury to one of plaintiff's eyes. He prevailed in the trial court.

The cause of complaint as charged in the petition is that plaintiff was in the employ of defendant as a carpenter in and around its box factory, and at the time of the accident was laying plank flooring in the basement of defendant's building, and in attempting to drive a nail into a stake which he had set by the side of a stringer it glanced or sprung from its place and struck and broke his eyeglass, so that the broken fragments entered the eye itself, inflicting a painful injury. The negligence charged was that the basement was so dark that he could not see clearly the hatchet and nail so as to accurately aim his strokes, and that the nails (which were furnished by defendant) were a new kind covered with cement, and were slender and springy, so that they had a tendency to spring from their place while being driven; that the cement was liable to cover the face of his hatchet and render it liable to glance from the head of the nail. It is further charged that defendant knew, or might have known, of the darkness of the basement in time to have provided lights.

The evidence as given by plaintiff in his own behalf shows that he has no cause of action. He was a carpenter of many years' experience. He had been working for defendant several months prior to the injury and for some time afterwards. The charge that the place where he was at work was too dark, and known to be by defendant in time to have provided light, is eliminated from the case in two vital particulars by his testimony. He stated that the windows did not give good light in the basement, that it was only about half light there, and that he could barely see the face of the hatchet and the nail. But he said that he held the nail while he struck the first blow to set it, and that it was at the second blow that it flew out and injured him, and that at that stroke he "struck a square blow." From this it is apparent that the question of light had no connection with the accident, since the stroke he made was a proper one, and one that the darkness did not affect and that light could not have bettered. Again, on the question of the place being too dark, he testified that lanterns had been provided, and that he had used them at other times when it was dark. He then stated, in response to a question by his attorney, that he could not have used a lantern to any advantage in laying the floor, and that he "intended to go ahead as best he could without a lantern, and that he was afraid to use it—may be upset." He then stated on recross-examination as follows: "Q. What would have been the matter with your setting the lantern down somewhere? A. Well, I had to move the lantern every 10 or

15 minutes, you see, to give me light to the place where I was working. Q. Well, then, you just concluded to take the risk of it; you wouldn't get a lantern? A. I would not get a lantern because I like to get along without." It is thus apparent that, even if the darkness had been the cause of a misstroke at the nail, it was the result of his own negligence in not doing as he had at other times in the same place—"used a lantern in dark places."

The only other charge of negligence is that the nail was an unsafe instrument furnished by defendant. We regard it as without merit. It does not appear that any different nail was demanded, or that any complaint was made of this particular kind. Plaintiff stated that he was not under the immediate supervision of any one. He had simply been directed to lay the floor. That the nail was a steel wire nail (as distinguished from a cut iron nail) covered with cement, and was considered an improved nail; that he had used them many times before the accident in working around the factory—had driven "about a thousand" of them. That he worked there, after being off five days on account of the accident, for a month, and used the same nails at various places where he had need of them. That he had been at work on this floor with the same nails for about 15 days before he was hurt. That he was in sole charge of the work. That there was a carload of these nails in the basement, and that those he used he got himself from the general lot, and that he used his own hatchet. It is true he stated the nails were a "little slimmer, and are to be used only in the machine." But he candidly stated that he had used these nails for any purpose needed, and at any place, both before and after the accident. The evidence not only showed the nail was an improved nail, but that it had much to recommend it over other nails; and though it be conceded that it was some more inclined to fly out while being driven than others, that fact by no means fixes a liability on defendant, when considered with the evidence that plaintiff was fully cognizant of all its qualities and its uses. This court, in an opinion by Judge Hall (*Muirhead v. Ry. Co.*, 19 Mo. App. 634), said that an employer is not bound to have the safest appliances which can be obtained. And that is the rule recognized and applied by the Supreme Court. *Huhn v. Ry. Co.*, 92 Mo. 440, 4 S. W. 937.

But aside from the view just expressed, we do not consider the nails used by defendant to have been shown to be a defective appliance in the sense meant by the law. They were said to be somewhat more difficult to start into the wood than others. But it cannot be that such trifling difference, considering the nature of so common an appliance as

a nail, could render the employer liable to an action in a case where he would not have been if some other nail had been used. The misstroke on a nail, the failure of a nail to take proper hold and glancing out of its place when being driven, is too common an occurrence in the life of a carpenter to make a mishap arising therefrom the cause of an employer's liability. A large nail is harder to drive than a small one; and either is harder to drive in, and is more apt to glance out of, seasoned hard wood than soft wood. Is it to be expected that the employer is to stand in constant attendance on a carpenter to tell him these things?

This case is not like that where a sliver may fly off from a defective sledge or other appliance. It is an ordinary glancing of a nail, which happens to every carpenter, perhaps, every day in the year. The incident is so common, and an accident therefrom so rare, that it is not just to assert a claim when it unexpectedly happens. "A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then; to whose ideal behavior we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct on a basis of bare chances a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure of what appears likely in the usual course of things." *Ray's Negligence of Imposed Duties*, 133. *Webb's Pollock on Torts*, 45, says that: "A reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible; human affairs could not be carried on at all." *Hysell v. Swift & Co.*, 78 Mo. App., loc. cit. 50. "When an injury cannot reasonably be anticipated, and would not have happened except under exceptionable circumstances, it is not negligence to fail to take precautionary measures to prevent it, although if taken the injury would not have resulted." *Am. Brew. Ass'n v. Talbot*, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538.

The view which we have taken of this case finds general support in the cases of *Lee v. Gas Co.*, 91 Mo. App. 612; *Watson v. Coal Co.*, 52 Mo. App. 366; and *Shea v. Ry. Co.*, 76 Mo. App. 29.

In view of the record, as made up from the testimony of plaintiff himself, we have no hesitation in holding that he has no cause to complain of the defendant, and the judgment will accordingly be reversed. All concur.

CITY OF CENTRALIA v. SMITH.

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

CRIMINAL LAW—EXPLODING FIRECRACKERS—CITY ORDINANCE—INFORMATION—DEFENSES—APPEAL.

1. The statement made by defendant in his motion for a new trial, that he excepted to the overruling of a motion to quash the information charging him with crime, is not sufficient to enable the court, on appeal, to consider such ruling, in the absence of an exception having been saved.

2. A city ordinance prohibiting the explosion of firecrackers without the written consent of the mayor is within the police power of the city.

3. A city ordinance prohibiting the explosion of firecrackers without the written consent of the mayor is not void as a delegation of legislative power to the mayor.

4. It is no defense to a prosecution for violating a city ordinance, prohibiting the explosion of firecrackers, that previous violators of the ordinance had not been prosecuted.

5. It is no defense to a prosecution for violating a city ordinance, prohibiting the explosion of firecrackers, that defendant had participated with most all the citizens in violating the ordinance on previous occasions, when the ordinance was ignored, and the mayor of the city generally had charge of the fireworks on such occasions.

6. It is no defense to a prosecution for violating a city ordinance, prohibiting the explosion of firecrackers, that defendant did not know of the ordinance.

7. It is no defense to a prosecution for violating a city ordinance, prohibiting the explosion of firecrackers, that, when defendant heard the marshal say he had been ordered by the mayor to arrest persons found shooting firecrackers in the street, defendant did not know the order meant to embrace the backyard of defendant's home.

8. It is no defense to a prosecution for violating a city ordinance, prohibiting the explosion of firecrackers, that the citizens advertised and had a Fourth of July celebration on the occasion of defendant's violation of the ordinance, and defendant thought that shooting firecrackers was in keeping with the occasion.

Appeal from Circuit Court, Boone County; John A. Hockaday, Judge.

G. W. Smith was convicted of crime, and appeals. Affirmed.

J. L. Stephens, for appellant. H. S. Booth and J. H. Cupp, for respondent.

ELLISON, J. Defendant was convicted in the police court of the city of Centralia for exploding firecrackers within the limits of the city on the 4th of July, 1901. He appealed to the circuit court of Boone county, where he was again convicted. He now comes here asking that the judgment be reversed.

There was a motion made by defendant to quash the information or complaint, which was overruled. As no exception was saved, we need not notice it further. The statement made by defendant in his motion for new trial that he excepted is not sufficient.

The ordinance of said city which defendant is charged with violating prohibits the explosion of "firecrackers, Roman candles,

squibs, pin wheels, throwing turpentine balls, or other combustible device, without the written consent of the mayor specifying the time and place where," etc. We regard it as within the police power of the city to enact the ordinance. The notorious fact that fires, frightening of horses, and serious accidents to both actors and spectators commonly follow such amusement, is ample and reasonable ground justifying the exercise of the supervisory restraining power of the municipality.

The defendant claims the ordinance to be invalid as delegating a legislative power to the mayor. The rule is correctly stated by defendant, as shown by authorities in his brief, that legislative power cannot be delegated, but we do not consider that any such power is delegated by the ordinance in question. It prohibits the explosion of firecrackers, etc., "without the written consent of the mayor specifying the time and place." This was not a delegation of legislative power. It was a mere cautionary clause, to the end that such matters might be supervised by the executive officers of the city. It was no more a delegation of legislative power than is the common municipal mode of restraining the carrying of firearms except by written permission of the mayor.

The trial court properly sustained the objection of the attorneys for the city to evidence offered to show that the ordinance had not been theretofore enforced when violated on legal holidays. Its dormant state theretofore may have demonstrated its wisdom, and have been ample cause for its present enforcement.

Finally, the defendant makes the following statement as bearing on the legality of the act charged against him: "That he had during his citizenship in Centralia participated with most all the citizens in shooting off firecrackers on the Fourth day of July, and other legal holidays. That on these occasions the ordinance of said city had always been ignored, and by tacit understanding suspended, and the mayor of said city generally had charge and management of the fireworks. That defendant did not know it was a violation of any of the ordinances of said city to shoot firecrackers on the Fourth day of July, having known of its universal participation by the citizens of said city on such days, and on this same day, the Fourth day of July, 1901. That, when defendant heard the marshal say he had been ordered by the mayor to arrest parties found shooting firecrackers in the street, he did not know that the order meant to embrace the backyard of one's home. That the citizens advertised and had a Fourth of July celebration on this occasion, and defendant, of course, thought that the shooting of firecrackers was in keeping with the occasion." We are of the opinion that the trial court properly rejected such theory as a justification of the offense charged.

The judgment is affirmed. All concur.

¶ 4. See Municipal Corporations, vol. 36, Cent. Dig. § 1389.

MANLEY v. CRESCENT NOVELTY MFG. CO.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1908.)

SALES—RESCISSION BY VENDEE—TIME—WHAT IS REASONABLE—QUESTION FOR COURT OR JURY—JUSTICES OF THE PEACE—PLEADINGS—SUFFICIENCY.

1. Under Rev. St. 1890, § 3852, dispensing with formal pleadings in justices' courts, and providing that plaintiff shall file the instrument sued on, or a statement of account, or of the facts on which the suit is founded, a statement "By amount paid * * * account 75 cutters, charged at \$2.25 apiece, which cutters were not according to contract * * * \$168.75," was sufficient.

2. While the vendee in a sale of personalty by express warranty, or on sample, has a right to rescind for noncompliance with the warranty or sample, such right must be exercised, and the chattels be returned to the vendor, within a reasonable time from their delivery to the vendee.

3. The question as to what is a reasonable time for the vendee in a sale of chattels to rescind the sale for noncompliance with warranty or sample is, when fair-minded men may differ, one of fact for the jury; but when the time elapsed between delivery of the chattels and rescission is so long that no such question can arise, the court should declare the delay unreasonable as a matter of law.

4. Where a vendee in a sale of chattels gave notice of their rejection and defective character on October 28th, but made no tender of their return or demand for repayment of the money paid therefor until the following March, such delay, in the absence of any explanation or excuse therefor, was unreasonable as a matter of law, and barred such vendee's right to a rescission.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by J. S. Manley against the Crescent Novelty Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed.

George W. Lubke, Jr., for appellant. Abbott & Edwards, for respondent.

REYBURN, J. This action was begun before a justice of the peace of the city of St. Louis by filing the following statement:

"Crescent Novelty Mfg. Co., to J. S. Manley, Dr.

By amount paid by J. S. Manley to Crescent Novelty Mfg. Co., account 75 Cutters, charged at \$2.25 apiece, which cutters were not according to contract	\$168 75
Damages because of the failure of the Crescent Novelty Mfg. Co. to manufacture and deliver cutters according to contract.....	350 00
	<hr/> \$518 75

To Credit:	
1 Ret'd Stamp	\$ 3 00
48 Discs at 35c.....	16 80
	<hr/> 19 80
	<hr/> \$498 95"

A counterclaim was filed by defendant, consisting of an account composed of sundry items, showing a balance of \$58.05 claimed;

¶ 1. See Sales, vol. 48, Cent. Dig. §§ 294, 812, 818.

but as the verdict of the jury was in favor of plaintiff for \$155.85, and for defendant on its cause of action against plaintiff for \$19.80 (obviously the credit voluntarily given), no further consideration need be given thereto.

At the opening of the trial, before any evidence had been introduced, defendant moved the court to exclude all evidence on plaintiff's first item on the ground that it stated no cause of action against defendant, in that it contained no allegation that plaintiff offered to deliver back the articles sold, the price whereof plaintiff sought to recover, which motion was overruled, and the trial proceeded. At the completion of plaintiff's testimony the defendant moved the court to require plaintiff to elect upon which of the causes of action stated he would go to the jury, and, the motion being sustained, plaintiff elected to stand upon the first item, based on the claim that the contract had been rescinded.

The testimony established a contract by correspondence between the parties, written from Anniston, Ala., and St. Louis, Mo., by which defendant undertook to manufacture, and deliver on board cars at city of St. Louis, 100 cotton bale tie cutters, at price of \$2.25 each, the arms of which should be made of cast steel, the discs to be constructed of best tool steel, and to be finished and manufactured in conformity to a sample implement made and submitted by defendant to plaintiff, to be first-class work in every respect, with wooden handles and arms above them japanned, all portions of the cutters to be of standard size and made so as to be interchangeable. Defendant undertook the execution of the contract, and delivered in part performance 75 of the tools. Testimony, oral and epistolary, was introduced by plaintiff establishing the contract, and tending to prove that the cutters delivered were not manufactured in compliance therewith, and the defendant offered evidence to the contrary.

1. The statement of his cause of action filed in magistrate's court by plaintiff at inception of the proceeding was sufficient. Formal pleadings on part of either plaintiff or defendant are expressly dispensed with by statute in a justice's court, and a statement sufficiently specific to inform the opposite party of the basis and character of the demand asserted, and to bar a subsequent action founded upon the same facts, is a full compliance with the statutory requirement. Rev. St. 1890, § 3852; Johnson v. Kahn, 97 Mo. App. 628, 71 S. W. 725. While the recitals of plaintiff's complaint do not contain all the allegations sufficient to constitute the cause of action sought to be upheld by the proof introduced, the statute's liberal provisions are met and satisfied.

2. The delivery of the cutters from time to time as manufactured seems to have proceeded till September 27, 1901, when final

shipment was made, completing the total number delivered as stated. By letter of October 20th, plaintiff made a series of objections to the tools received, enumerating various defects and imperfections, and concluding with declaration that he wanted no more like them, and could not accept any of them as a fulfillment of the contract, and inquiring what defendant proposed to do. About the middle of March following, defendant was advised by attorneys of St. Louis that plaintiff had placed his claim in their hands for immediate attention, and this proceeding was begun soon after.

In a sale of personalty upon express warranty by the vendor, or in sale on sample, the right of rescission by the vendee is firmly established in this state, although the rule in many other states is otherwise. 2 Mechem, Sales, § 1805; Johnson v. Whitman Agricultural Co., 20 Mo. App. 100. The enforcement of this remedy, however, is conditioned upon its exercise seasonably, and the restoration of the opposite party to statu quo by surrender of all obtained by the vendee under the contract. The vendee has of right a reasonable time, after arrival of the chattels sold, to satisfy himself whether they complied with the warranty, or, if sold by sample, with the latter; but, in determining to refuse the property and rescind the sale by tendering it back to the vendor, he is required to act within a reasonable period. The established rule deduced from the many decisions upon the subject is that what will be a reasonable time is usually a question of fact for the jury, and not a question of law for the court. Where fair-minded men may reasonably differ in opinion upon the question whether the vendee had exercised his right of rescission and made return of the personalty sold with reasonable promptness, the issue is one of fact for the jury; but, where the period of time suffered to elapse between the delivery and the effort to rescind is so long that no such question can arise, the issue is not one of fact for the determination of the jury, but it becomes the duty of the court to pronounce the delay unreasonable as a matter of law. In other words, the time may be so short that the court may declare it reasonable, or so long that the court may declare it unreasonable. Tower v. Pauly, 51 Mo. App. 75; Steam Heating Co. v. Gas, Etc., Co., 60 Mo. App. 148; Skeen v. Springfield, Etc., Co., 34 Mo. App. 485; Rubber Co. v. Rubber Co., 74 Mo. App. 286; Branson v. Turner, 77 Mo. App. 489; Johnson v. Whitman, Etc., Co., 20 Mo. App. 100.

The tender of the return of the cutters, and demand for payment of the money paid therefor, was made on behalf of plaintiff subsequent to the 18th of March, 1902; no explanation or excuse was made or attempted why the rescission of the contract had been so long deferred after notice given in letter of October 28, 1901, of the defective

character of the cutters, and that they would not be accepted under the contract; and, without hesitation or doubt, so long an interval should have been declared an unreasonable time, and the plaintiff barred from the relief sought in this action.

The instruction asked by appellant at the termination of plaintiff's testimony, and again, in substance, requested at the close of the whole case, to the effect that upon the pleadings and all the evidence the plaintiff was not entitled to recover on his cause of action against it, and that the verdict of the jury upon the plaintiff's cause of action must be in favor of defendant, should have been given. The judgment is accordingly reversed, and the cause remanded.

BLAND, P. J., and GOODE, J., concur.

In re WOGAN.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

DEPOSITION—BAD FAITH—NOTICE—CONFLICT OF LAWS.

1. The sufficiency of a notice to take depositions, as to time of service, is determined by the laws of the state where an action is pending, and not of the state where the depositions are to be taken.

2. That parties to a suit gave the adverse party notice of the taking of depositions so short as to render it impossible for his attorney to be present is not conclusive evidence of bad faith on the part of those taking the depositions, so as to invalidate the proceedings.

3. A notice to take depositions to be used in an action pending in Oklahoma, without notice to the attorney of record of the party whose deposition is to be taken, and who resided in Oklahoma, so short that it was impossible for the attorney to reach the place where the depositions were to be taken in time for such taking, justifies the notary before whom the deposition is to be taken to continue the case for a sufficient number of days to allow the attorney to be present.

Petition by M. A. Wogan for writ of habeas corpus. Writ denied.

J. D. Barnett, for petitioner. James Ball, for respondent.

BLAND, P. J. M. A. Wogan, the petitioner herein, brought his civil suit in the district court of Pottawatomie county, territory of Oklahoma, against Annie and W. F. Callahan, to recover certain real estate described in the complaint. Prior to October 17th it was agreed by and between the attorneys of the respective parties to the suit that the cause should be set down for hearing on some day, to be designated by the court, during the month of December, 1903. It is shown that Wogan intended to be present at the trial, and that his presence is necessary to enable his attorney to properly prosecute his suit. Wogan resides about eight miles from the city of Montgomery, in the county of Montgomery, in the state of Missouri. The attorney of the Callahans came from

Oklahoma to Missouri, and had served on Wogan, at his home in Montgomery county, a notice that the Callahans would, on the 19th day of November, at the city of Montgomery, county of Montgomery, state of Missouri, take depositions before W. C. Hughes, a notary public, to be used as evidence in the case of M. A. Wogan against Annie and W. F. Callahan, in the district court of Pottawatomie county, territory of Oklahoma. The notice was served on Wogan on the 17th day of October, and on the same day a subpoena was served on him to appear before the notary public as a witness in said cause. Wogan communicated by wire with his attorney, who resides in Enid, Okl., and was advised by him not to testify before the notary, as the proceeding was not lawful. He appeared, however, before the notary, and was sworn as a witness. In answer to preliminary questions propounded by a local attorney whom he procured (Judge Barnett), he stated he intended to be present at the trial in Pottawatomie county in December, 1908, and had made his arrangements to go there, and would be present at the trial to testify, and that his presence was necessary to enable his attorney to properly try the case. After so stating, he refused to further depose for the following reasons: First. That no notice of the taking of the depositions had been served on his attorney. Second. The notice served on him is insufficient in time under the laws of Oklahoma and under the laws of the state of Missouri; that he is plaintiff in the case and that his deposition could not lawfully be taken in Missouri in a cause pending in Oklahoma; that no commission had issued authorizing a deposition by a court having jurisdiction. Third. That the deposition was not attempted to be taken in good faith, but merely to "fish" out in advance what the testimony would be. And, fourth, that his attorney had advised him not to testify before the notary. These objections were deemed insufficient by the notary, and Wogan was required to answer interrogatories propounded to him as a witness by the attorney of the Callahans. He refused to answer these interrogatories, and was thereupon duly committed to jail by the notary for contempt in refusing to testify as a witness. To regain his liberty he has petitioned this court for a writ of habeas corpus. The writ was duly issued and served on the sheriff and ex officio jailer of Montgomery county, in whose custody Wogan is. The sheriff has made a return to the writ showing that Wogan is held in custody by virtue of the commitment issued by the notary public, and by a recommitment ordered by the judge of the circuit court of Montgomery county on a hearing before him of a writ of habeas corpus sued out by Wogan. The laws of the territory of Oklahoma provide that depositions of witnesses may be taken "when the witness does not reside in

the county where the action or proceeding is pending" (section 358, St. 1893, p. 821); "that depositions may be taken out of the territory by a judge, * * * notary public," etc. (section 361, St. 1893, p. 822); "that prior to the taking of any deposition, unless taken under special commission, a written notice specifying * * * shall be served upon the adverse party, his agent or attorney of record, or left at his usual place of abode. The notice shall be served so as to allow the adverse party sufficient time by the usual route of travel to attend and one day for preparation, exclusive of Sunday" (section 364, St. 1893, p. 822). By section 372, St. 1893, p. 823, it is provided that when a deposition is offered to be read in evidence it must appear to the satisfaction of the court that for any cause specified in section 358 the attendance of the witness cannot be procured. By section 331 of said Statutes it is provided that "no person shall be disqualified as a witness by any civil action or proceeding or by reason of his interest or his being a party or otherwise," etc. From the foregoing excerpts from the sections of the Statutes of Oklahoma, it will be seen that Wogan is a competent witness; that the notice to take depositions was properly served upon him, he being the plaintiff in the case, and was sufficient in time to authorize the notary to take depositions under the laws of Oklahoma.

1. It is contended by the petitioner that the law of Missouri in respect to the time of notice should be followed and complied with, as the depositions were to be taken in this state, and that the notice was one day short under the Missouri law. The deposition was not to be used in any court in Missouri, but in a district court in the territory of Oklahoma, and would be available as evidence if taken in pursuance of the laws of that territory; and they, not the laws of Missouri, control in respect to the taking of depositions and all proceedings before or after their taking, for the laws of Missouri have no extraterritorial force, and have no application whatever to the manner of taking depositions to be used in evidence in a foreign jurisdiction. The laws of Oklahoma authorize notaries public of this state and other states to take depositions to be used in the courts of that territory. It is a universal practice, which grew out of the civil law, to take depositions in a foreign jurisdiction on a *dedimus* or commission, issued by the court where the suit is pending, authorizing some officer or designated person in the foreign jurisdiction to take depositions of witnesses residing in the foreign jurisdiction, to be used as evidence in the jurisdiction from which the *dedimus* issued. This procedure has been simplified by statutory enactments in most of the states and territories, so as to allow the taking of depositions of witnesses in a sister state or territory before some officer

empowered by the statutes of the state where the suit is pending to take depositions by merely giving a written notice of the time and place, etc., of taking such depositions, thus dispensing with the commission and interrogatories usually attached thereto.

2. The attorney of the Callahans, without giving notice to Wogan's attorney of record in Oklahoma, came to Montgomery City, Mo., and there served notice on Wogan to take depositions, and made the notice so short that it was impossible for his attorney to reach Montgomery City to be present at the taking of the depositions. This conduct has the appearance of a desire on the part of the attorney of the Callahans to gain an undue advantage by taking the deposition of Wogan in the absence of his attorney, but it is not conclusive that the attorney of the Callahans was acting in bad faith. He declared before the notary that his object in taking the deposition was to secure Wogan's evidence to use at the trial, and the notary found that the effort to take the deposition was in good faith. If it was in good faith, then there was no abuse of judicial process, and the remarks of Judge Macfarlane in *Matthews v. Railroad*, 142 Mo., loc. cit. 669, 44 S. W. 802, and the cases of *In re Davis*, 38 Kan. 408, 16 Pac. 790, and *In re Oubberly*, 39 Kan. 291, 18 Pac. 173, cited and relied on by the petitioner, are not in point. It was competent, under the laws of the territory of Oklahoma, for the Callahans to take the deposition of Wogan, the adverse party, he being a resident of the state of Missouri, and it may be that their defense to the action pending in the district court of Oklahoma rests principally upon his evidence; hence the court ought not to interfere to prevent the taking of his deposition, unless it is manifest that judicial process is being abused. It is not so manifested in this case, and the notary and the judge of the circuit court both found that the effort to take the deposition of Wogan was made in good faith. We think, however, if Wogan desires the presence of his attorney of record at the taking of his deposition, the notary should continue the taking of the same for a sufficient number of days to enable his attorney to come from Oklahoma to Montgomery City.

The petitioner is remanded to the custody of the sheriff and ex officio jailer of Montgomery County, Mo.

REYBURN and GOODE, JJ., concur.

ATKINSON v. ELMORE et al.

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

BANKRUPTCY — DISCHARGE — NOTICE OF PROCEEDINGS — ACTUAL NOTICE — NOTICE TO AGENT — EVIDENCE.

1. Bankrupt Law 1898, § 17 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), provides that a discharge in bankruptcy

releases the debts of the bankrupt, except such as have not been duly scheduled, unless the creditor has notice or actual knowledge of the proceedings in bankruptcy. In an action on notes against an indorser who had been discharged in bankruptcy, evidence considered, and held sufficient to show that a certain person had acted as agent for the owner of the notes at the time of and prior to the bankruptcy proceedings, and that he had actual knowledge thereof, so as to bar the debt, notwithstanding that the notes had not been properly scheduled.

2. Notice to an agent or actual knowledge on his part of proceedings in bankruptcy constitutes notice or knowledge of the principal.

Appeal from Circuit Court, Buchanan County; W. K. James, Judge.

Action by Frank M. Atkinson against William Elmore and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

C. F. Strop and K. B. Randolph, for appellant. Beardsley, Gregory & Kirshner, for respondents Elmore and Cooper.

ELLISON, J. This is an action whereby plaintiff seeks to recover from defendants Elmore and Cooper the balances due on three promissory notes. The defendants pleaded a discharge in bankruptcy by the federal court for the Western District of Missouri. The trial was without a jury, and judgment rendered for defendants on a special finding of facts.

It appears from the findings of the trial court that defendants were the payees in a note given them by one Gillette for \$2,586.98, secured by chattel mortgage on cattle. They sold the note to the German-American Bank of St. Joseph, Mo., and the bank, in turn, sold it to William and Henry Krug of the same city, who were brothers, one being a director and the other president of the bank. J. G. Schneider was vice president and active manager of the bank. Defendants became much embarrassed financially, and in 1899 their creditors, including the Krugs, gave them an extension by taking new notes payable in one, two, and three years. The notes were executed to S. Hegner, which was the maiden name of the daughter-in-law of one of the Krugs, her husband being connected in the bank with his father as an active director and vice president thereof. Defendants, however, entered these new notes in their register as payable to the bank, to whom they had sold the original note. In 1900 the defendants filed voluntary petitions in bankruptcy, and scheduled the notes as payable to the bank. They were afterwards discharged.

Plaintiff is assignee of the notes in suit (though, it appears, merely to collect), and seeks to avoid the discharge of defendants on the ground that the Krugs had no notice of the bankruptcy proceedings. By section 17 of chapter 3 of the bankrupt law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), a discharge releases the debts of the bankrupt "from all his

provable debts, * * * except such as have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." In this case the defendants, as just stated, scheduled the bank as the creditor holding the notes in question. They were therefore not "duly scheduled" as required by the statute cited, and the only question for decision is, did the Krugs, or either of them, have notice or actual knowledge of the proceeding in bankruptcy? Whatever notice or knowledge they had was such notice and knowledge as was brought home to Schneider, the manager of the bank, and who defendants claim was the authorized agent of the Krugs. The trial court found that Schneider was their agent, and plaintiff contends that such finding was not justified. It therefore becomes necessary to look into the connection which existed between Schneider and the Krugs.

After the note was purchased by the bank, and before it was sold to the Krugs, Schneider made arrangements for the pasturage and care of the mortgaged cattle securing the note, and advanced several hundred dollars of his individual money for that purpose. He thereby became interested in the mortgage. After the bank sold the note to the Krugs by indorsing it over to the daughter-in-law, Schneider wrote to defendants reminding them as he had told them "several times before" that the note was not owned by the bank, "but by Mr. S. Hegner, one of our friends who has asked me to look after it for him," and that "I have just succeeded in seeing him and showed him your letter. He states that if possible he will attend the [creditors'] meeting." He then asks that letters be addressed in his care, or "you may simply write me direct." No one representing the Krugs attended the creditors' meeting, but in a few days afterwards Schneider went down to Kansas City, and accepted the same terms of extension granted by other creditors. The Krugs ratified this act, and accepted the three notes now in suit. These notes were made to include not only the amount of the original note, but the sum which Schneider advanced for care of the cattle. When the mortgaged cattle were sold, the proceeds were sent to Schneider, and he, as stated in his letter, turned over the check to S. Hegner. Thereafter, when the first of the extension notes became due, one of the Krugs gave it to Schneider to collect, and he wrote to one of defendants asking that it be paid. Afterwards, Schneider returned it, with the statement that it could not be collected, and advised that no action be taken until the other two became due. When all became due, Krug gave them all to Schneider, with directions to employ attorneys and bring suit. Thereafter these defendants filed their petition in bankruptcy, as already stated. The bank was notified of

the proceeding by the referee. The notice was received by Schneider, and filed by him with the papers of the bank. Schneider then wrote to defendants' attorneys to be informed of the particulars concerning such petition, and for their opinion of what per cent. of indebtedness would be paid.

The trial court found, as stated in the special finding of facts, that "Schneider, in all efforts towards the collection of the indebtedness represented by the notes, was the real and substantial manager and agent for and on behalf of the owners" of the notes.

After full consideration of the statement at length of evidence and facts found therefrom, we are of the opinion that the court was amply justified in finding that Schneider was the agent of the Krugs, and that he had notice of the proceedings in bankruptcy. The law is that notice to the agent or actual knowledge of the agent of proceedings in bankruptcy is notice or knowledge of the principal. In *re Beerman* (D. C.) 112 Fed. 862.

We have not overlooked the argument in behalf of plaintiff that there was no proof of Schneider being the agent of the Krugs at the time he received the notice of the proceedings in bankruptcy. And so we have considered what has been said on the subject of distinction between notice and actual knowledge. But we reject the argument so advanced by plaintiff. Taking the whole finding of facts together, it is clear that the court has found the agency existed as quoted above, and, as already stated, there was ample room to make the finding. Proof of agency may be made much in the same way any other disputed matter is ascertained. *Mosby v. Com. Co.*, 91 Mo. App. 504; *Sharp v. Knox*, 48 Mo. App. 169.

In our opinion counsel place too much stress on some expressions used by the trial court in stating the findings of facts. The court does not at any part of it state anything inconsistent with his final finding that Schneider was agent for the Krugs in all matters connected with the management and collection of the notes in controversy.

From the foregoing view of the case it will not be necessary to consider whether the fact that Schneider had a joint interest in the note (though not named therein) would render notice to him notice to his co-obligees, regardless of the question of special agency.

The judgment should be affirmed. All concur.

ROBINSON v. ST. LOUIS & S. RY. CO.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

CARRIERS—INJURY TO PASSENGERS—INSTRUCTIONS—BURDEN OF PROOF—DAMAGES—LOSS OF EARNINGS—QUANTUM—WITNESSES—EXPERT TESTIMONY—CROSS-EXAMINATION—PREJUDICIAL ERROR.

1. In an action for personal injuries it was competent for physicians, both of whom attended plaintiff while the injuries were fresh, to

testify that the curvature of plaintiff's spine was due to the injury, and that it would increase rather than decrease on account of the weak condition of his leg, where plaintiff testified that prior to the injuries he was straight and had no curvature.

2. Defendant in a personal injury action was not prejudiced by cross-examination of his expert medical witness, which elicited a statement that a physician who attended plaintiff was in a better position to form an opinion of the nature and character of the injuries than one who must form his opinion on a mere hypothetical question.

3. In an action for injuries to a passenger, an instruction that defendant was liable if plaintiff was injured in consequence of a head-end collision of its cars, if defendant's servants in charge of the car could have prevented such collision by the exercise of that high degree of care which would have been exercised by careful, skillful, railroad employes under similar circumstances, was a correct statement of the law.

4. The collision of street cars running in opposite directions on the same track is prima facie evidence of negligence in an action for passenger's injuries, which, when shown, shifts the burden on defendant to show by a preponderance of evidence that the collision was not due to its fault.

5. Evidence that plaintiff in a personal injury action was in the race-horse business, that prior to the injury he did his own training, but that after the injury he had to employ a trainer all the time, and that his earnings had been \$10,000 per annum over and above bets, was sufficient to authorize the submission of loss of earnings as an element of damages.

6. In an action for injuries to a passenger, when there was evidence that plaintiff was badly injured, suffered great pain, turned gray, was partially paralyzed in his left leg, which was reduced in size, causing him to limp, that his spine had a curvature which would tend to increase, and that he paid out large sums for physicians and nurses' services, and for room rent in a hospital, a verdict for \$2,500 was not excessive.

Appeal from St. Louis Circuit Court; J. A. Blevins, Judge.

Action by Harry Robinson against the St. Louis & Suburban Railway Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

Dawson & Garvin, for appellant. James M. Sutherland, for respondent.

BLAND, P. J. Plaintiff, on August 28, 1901, was a passenger on one of defendant's street cars, which he had boarded for the purpose of being carried to the Kinloch race course, in the county of St. Louis. On the way there, there was a head-end collision of the car on which plaintiff was a passenger and another one of defendant's cars, occasioned by the negligence of the defendant's motorman in charge of the car on which plaintiff was a passenger, in failing to turn in on a switch to enable the other car to pass, as required by the rules of the defendant company. The motorman testified that the mistake was made on account of a lapse of his memory as to the switch he should take. When the cars collided the plaintiff was thrown violently and with great

force across the back of the seat in front of the one occupied by him, and was struck on the back by some object in the car. The evidence is all one way that plaintiff was badly injured, and that he suffered great pain, and paid out a considerable sum to physicians and nurses and for room rent in a hospital while being treated for the injury. But there is a controversy as to the permanency of the injuries. On the part of plaintiff the evidence shows that the injury caused him to turn gray; caused partial paralysis to his left leg, and that it is reduced in size, is weak, and causes him to walk with a halting and limping gait; that his spine has a curvature resulting from the injury, and that the curvature will increase rather than diminish on account of the manner in which plaintiff is compelled to walk, caused from the defect in his left leg. On the part of the defendant the evidence tends to show that the plaintiff had entirely recovered from the injury, and that at the trial he was simulating the curvature of his spine and the limp in his walk. The jury found for plaintiff, and assessed his damages at \$2,500. After saving its exceptions in the usual way, defendant appealed.

Drs. J. W. and W. W. Vaughn, witnesses for the plaintiff, were permitted, over the objection of defendant, to testify that the curvature of plaintiff's spine was due to the injury, and that it would increase rather than decrease on account of the weak condition of plaintiff's left leg. Dr. J. W. Vaughn attended plaintiff, and treated him for the injury. Dr. W. W. Vaughn examined him while he was still confined to his bed, and assisted Dr. J. W. Vaughn to place him in a plaster of paris cast. They acquired an opinion of the nature and character of the injury from personal examinations of the injuries when they were fresh, and from such examinations were qualified to give an intelligent opinion as to the effects already produced and that would probably ensue from the nature and character of the injuries. On the assumption that the plaintiff, prior to the injury, was straight and had no curvature, as he testified he was, we think it was competent for those physicians to testify that the stooped condition of plaintiff was caused by the injury.

Dr. Thompson testified as an expert for defendant. He was asked on cross-examination if the physician who attended plaintiff was not in a better position to form an opinion of the nature and character of the injuries than one who must form his opinion on a mere hypothetical question. This question was objected to by defendant. The objection was overruled, and defendant excepted. The ruling is assigned as error. It seems to us that the question answers itself; for it is self-evident that a physician who has seen, examined, and treated a physical injury, if he is equally skilled, is better qualified, by reason of his superior informa-

tion, to judge of the character and extent of the injury, than one who must form his opinion from a mere verbal description of the injury, and we cannot see how the defendant was prejudiced by the answer of Dr. Thompson to the question; for the same answer would naturally spring up in the mind of every juror, and a jury would so conclude without the question being asked.

Instructions numbered 1, 3, and 4, given for plaintiff, are contended by defendant to be erroneous. They are as follows:

"(1) If the jury find from the evidence in this case that the defendant, on the 28th of August, 1901, was operating the cars mentioned in the evidence for the purpose of carrying passengers for hire as a street railway; and if the jury further find from the evidence that the defendant, by its servant in charge of one of said cars, received plaintiff as a passenger thereon at or near Wells Station, to be carried as such passenger upon said car to a point on defendant's railroad at or near Kinloch race track in St. Louis county, Mo., and that the plaintiff paid his fare as such passenger; and if the jury further find from the evidence in this case that whilst the plaintiff was such a passenger on said car, being so carried to his point of destination aforesaid, and before he reached his said point of destination, the car in which he was such passenger was collided with by another of defendant's cars going the opposite direction on the same track, and that thereby plaintiff was injured—then the defendant is liable in this case, if the defendant's servants in charge of its said car could have prevented said collision by the exercise of a high degree of care, such as would have been exercised by careful, skillful railroad employes under the same and similar circumstances."

"(3) The jury are instructed by the court that if the jury believe from the evidence that plaintiff was a passenger lawfully on board of the defendant's street car at the time of the collision appearing in evidence, and received injuries therein, then the burden of proof is shifted upon the defendant to show to the satisfaction of the jury that said collision was caused through no negligence or carelessness of defendant's agents, and unless it is so shown the jury should find a verdict for plaintiff."

"(4) If the jury find for the plaintiff they should assess his damage at such sum as they believe from the evidence will be a fair compensation to him, subject to the limitations of the other instructions given herein: First. For any pain of body or mind which the plaintiff has suffered or will suffer by reason of his injuries, and directly caused thereby. Second. For any loss of earnings from his business, directly caused by his disability to attend to his business, which the plaintiff has or will hereafter have sustained, directly caused by his injuries. Third. For any expenses for medicine, nursing, med-

ical or surgical attention which the plaintiff has necessarily incurred, or will hereafter necessarily incur, directly caused by the said injuries, in seeking relief therefrom."

In what particular Nos. 1 and 3 are erroneous is not specifically pointed out by defendant. That they properly declared the law of the case we have no doubt. The collision of the cars running in opposite directions on the same track was *prima facie* evidence of defendant's negligence. When shown, the burden was shifted on defendant to show by a preponderance of the evidence that the collision was not due to its fault. *Malloy v. Railway* (Mo. Sup.) 73 S. W. 159; *Clark v. Railroad*, 127 Mo. 197, 29 S. W. 1013.

The objection to the fourth instruction is that it authorized damages for loss of earnings in business. The contention is that there is no evidence of such loss. We think the defendant misapprehends the evidence. Plaintiff testified he was in the race-horse business, buying and selling race horses, training them and putting them on race tracks; that before the injury he did his own training, but after the injury he was not able to train his horses, and had to hire and keep in his employ a trainer all the time; that his earnings had been \$10,000 per annum over and above any money he had made by bets on races. Hence there was evidence of profits in his business and loss in those profits by being compelled to increase the expense of his business to the extent of hiring a special trainer.

It appears to us from all the evidence in the record that the plaintiff had a very meritorious case, and that it was tried without prejudicial error. The verdict is a moderate one, in view of the severity and extent of the injury. The judgment is manifestly for the right party, and is affirmed.

GOODE and REYBURN, JJ., concur.

HEDRIX v. CHICAGO, R. I. & P. RY. CO.
(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

GARNISHMENT—JURISDICTION—SERVICE ON DEFENDANT OUTSIDE THE STATE—STATUTE—AFFIDAVIT—SUFFICIENCY—DIVORCE—PERSONAL JUDGMENT.

1. A garnishee must make the defense that the judgment upon which the writ of garnishment is based is void for want of jurisdiction.

2. Under Rev. St. 1899, § 582, providing for actual service of process on a defendant outside the state in divorce and other proceedings, and requiring affidavit in conformity to one set out in section 575, stating, among other things, that the ordinary process of law cannot be served "in this state" in the manner prescribed by law, an affidavit otherwise sufficient, but omitting the phrase "in this state," is void.

3. Process issued under Rev. St. 1899, § 582, providing for actual service of process on a defendant outside the state in divorce and other proceedings, on an affidavit required thereby,

¶ 1. See Garnishment, vol. 24, Cent. Dig. § 348.

not in conformity with one set out in section 575, as required therein, confers no jurisdiction on the trial court over the defendant.

4. Rev. St. 1899, § 582, providing for actual service of process on a defendant outside the state in divorce and other proceedings, does not contemplate, nor attempt to authorize, a personal judgment based on such service, so that a judgment for alimony rendered thereon is void.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Maggie F. Hedrix against William P. Hedrix and the Chicago, Rock Island & Pacific Railway Company, garnishee. From a judgment quashing the writ of garnishment, plaintiff appeals. Affirmed.

Jas. J. O. Donohoe, for appellant. Sale & Sale, for respondent.

REYBURN, J. In a statutory proceeding for divorce brought in the circuit court of the city of St. Louis by appellant, defendant therein, William P. Hedrix, was served by delivery to him, June 1, 1902, in the county of Colfax, territory of New Mexico, by the sheriff of that county, of a copy of the petition and summons. At the October term, 1902, the return term, defendant failed to appear in the cause, and a default was granted October 16, 1902, and November 5th following, upon a hearing, final judgment was rendered—additional to awarding plaintiff a divorce and other relief asked—ordering defendant to pay to plaintiff the sum of \$20 per month alimony, the first payment to be made on the 15th day of November, 1902, and a like sum on the 15th day of each month thereafter. An execution was issued upon this judgment March 12, 1903, and a writ of garnishment thereunder served upon respondent on the same day, returnable to the April term of the court. Appellant filed interrogatories at the return term, and the garnishee filed a motion to quash the writ of garnishment, assigning a series of reasons why the judgment for alimony against the defendant in the cause for divorce, upon which the writ of garnishment was issued, was void, and the latter writ should be quashed. The court overruled plaintiff's motion for judgment against the garnishee for failure to make answer to the interrogatories submitted, and sustained the garnishee's motion to quash the writ of garnishment; and, after proper preliminaries, plaintiff has appealed.

1. It devolved upon the garnishee, not merely as the exercise of a right, but also as a duty, and in self-protection, to make the defense that the judgment upon which the writ of garnishment was based was void for want of jurisdiction. If the court rendering the original judgment had attempted to exercise jurisdiction without any legal foundation, the whole proceeding was void, and no property or credits of defendant could be divested through it; and a garnishee voluntarily submitting to judgment for any amount in his

hands belonging to the defendant, without interposing the defense of absence of jurisdiction, would neither be protected in the subsequent payment of such judgment, nor discharged from the indebtedness as against defendant, who could be deprived of his property only by due process of law. *Mercantile Co. v. Bettles*, 58 Mo. App. 384. In the words of an eminent commentator: "It follows, hence, that a garnishee must, for his own protection, inquire, first, whether the court has jurisdiction of the defendant; and next, whether it has jurisdiction of himself. If the jurisdiction exists as to both, he has no concern as to the eventual protection which the judgment of the court will afford him; it will be complete." *Drake, Attachment*, § 695.

2. It is urged that the garnishee could not collaterally inquire into the validity of the judgment, but, where the interests of a stranger to the record are about to be affected by the enforcement of the judgment, the latter may show that it was rendered without jurisdiction. *Russell v. Grant*, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563. And the rule in this state has been declared to be that "the question of jurisdiction must be tried by the whole record. Where it appears from the whole record that the court had no jurisdiction, either over the person or subject-matter, the judgment is void, and will be so treated in a collateral proceeding." *Adams v. Cowles*, 95 Mo. 507, 8 S. W. 711, 6 Am. St. Rep. 74; *Hiles v. Rule*, 121 Mo. 248, 25 S. W. 954.

3. The numerous grounds assigned by the garnishee for quashing the garnishment writ, condensed, are founded, first, upon an attack on the affidavit of plaintiff to the petition for divorce, as not conforming to the statute; next, upon the proposition that the trial court had no jurisdiction of the person of defendant, and the judgment, if enforced, would deprive him of his property without due process of law; and, again, that the judgment as rendered was violative of the thirtieth section of the Constitution of the state of Missouri, and of the fourteenth amendment of the Constitution of the United States, in substance, providing that no person should be deprived of life, liberty, or property without due process of law, and, if enforced, would deprive defendant of his property without due process of law. The concluding reasons enumerated for the quashing of the writ impugn the constitutionality of section 582 of the Revised Statutes of 1899, as contravening alike the provisions of the above section of the state Constitution and of the fourteenth amendment of the federal Constitution, and this court is precluded from their consideration, and they are not essential to the proper determination of the controlling proposition presented. A proceeding for divorce is a proceeding in rem, only affecting the marital status of the parties to the marriage relationship; and a judg-

ment rendered upon constructive service, and in conformity to, and valid under, the law of the state where the petitioner, bona fide, is a domiciled citizen, is valid in other states, as well as where the judgment is awarded. *Hamill v. Talbott*, 72 Mo. App. 22; *Gould v. Crow*, 57 Mo. 200; 2 Black, Judgments (2d Ed.) §§ 925, 928, 929, 931, 932. The method of actual service of process upon defendant beyond the territorial limits of the state, authorized by the statute, takes the place of the constructive service by publication provided by a preceding section. Sections 575, 582, Rev. St. 1899. But to legalize and render effective the issuance of process, and to secure the jurisdiction of the court by service upon the defendant, the statutory requirements should be observed with scrupulous accuracy. *Murdock v. Hillyer*, 45 Mo. App. 287; *Russell v. Grant*, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563. The statute, under the authority of which this process was intended to be obtained, provides that if the plaintiff, in any of the causes mentioned in section 575, of which divorce is one, shall make the affidavit required by such section, and file in the cause proof of service of process on any defendant, in conformity with the provisions of the section, thereafter provided, the order of publication provided in section 575, and proof of its publication under section 581, shall be dispensed with. The form of the affidavit under section 575 shall state that part or all of the defendants are nonresidents of the state, and cannot be served in this state in the manner prescribed in this chapter. The affidavit accompanying the petition for divorce, omitting the statutory language peculiar to the divorce proceeding, continues, "and that the said defendant is a non-resident of the city of St. Louis and state of Missouri, and that the ordinary process of law cannot be served upon him." The important and significant words, "in this state," are not found therein, and their absence renders the affidavit neither literally nor substantially in accord with the statute; and the process, therefore, was issued without warrant of law, and was void, and conferred no jurisdiction over defendant upon the trial court.

4. In the opinion of this court, a true and correct interpretation of section 582 of the statute does not contemplate, nor attempt to authorize, nor does it purpose, a personal judgment based upon service of process on defendant beyond the boundaries of the state of Missouri. Whatever views at times may have prevailed in other states (2 Freeman, Judgments [4th Ed.] § 567), the courts of Missouri early recognized the principle that the authority of a judicial tribunal was confined to the territorial limits of the state establishing it, and the line of decisions in this state recognizing that involuntary jurisdiction could be acquired of the person of defendant only by service of process upon him within the limits of the state is unbroken.

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Smith v. McCutchen, 38 Mo. 415; *Wilson v. Railway*, 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624; *Latimer v. Railway*, 48 Mo. 105, 97 Am. Dec. 378; *Ellison v. Martin*, 53 Mo. 575. The case of *Ellison v. Martin*, 53 Mo. 575, differed from the case at bar only in the respect that service was had upon the defendant by publication, in lieu of the method of personal service now substituted by statute, and resorted to herein. The judgment for alimony therein was held void, as was the title obtained by execution sale thereunder; and the court, in turn, holds that the Legislature never contemplated that general judgments might be rendered merely on publication of notice, without appearance of the defendant.

Alike on principle and authority the judgment for alimony in the divorce proceeding was void, the garnishment writ rightly quashed, and the judgment of the lower court is affirmed.

BLAND, P. J., and GOODE, J., concur.

STATE v. LAWRENCE.

(Supreme Court of Missouri, Division No. 2.
Dec. 9, 1903.)

FALSE REPRESENTATIONS—REASONABLENESS—INFORMATION—REPUGNANCY—INSTRUCTIONS—SUFFICIENCY—COMPATIBILITY—SCHOOL DISTRICTS—POWERS OF DIRECTORS—ISSUANCE OF WARRANTS—VALIDITY—SUPERINTENDENT OF SCHOOLS—LIMITATION OF POWERS—PRESUMPTIONS—KNOWLEDGE OF LAW.

1. Under Rev. St. 1899, § 9761, relative to the meetings of school directors and the appointment of a clerk, and providing that each director shall have due notice of the time, place, and purpose of meeting, and that the clerk shall keep a correct record of their proceedings, in order to issue a binding warrant for the purchase of books the directors must meet as a board, with a clerk to record the proceedings, and, as a body, make the purchase, and order the warrant drawn in conformity to statute.

2. A conviction of attempting to procure a school warrant by false pretenses cannot be sustained if the warrant procured by defendant was a legal obligation against the district.

3. There can be no offense of procuring or attempting to procure by false pretenses a legal school warrant from school directors, when such directors had no power or authority to issue such a warrant.

4. In a prosecution for attempting to procure a legal school warrant by false pretenses, the procurement of which failed because the warrant obtained was issued by the directors when not at a legal meeting, an instruction that defendant would be guilty, if the only thing which prevented the warrant from being a legal obligation was the lack of power of the directors to issue a legal warrant, was erroneous in failing to inform the jury as to the proper course to be pursued by the directors in order to issue a legal warrant, and direct them in the application of the false statement to the directors under such circumstances.

5. An information for attempting to procure a legal school warrant by false representations, inducing the purchase of books by a school district, alleging that defendant represented (1) that he was the agent of the State Board of

¶ 1. See False Pretenses, vol. 23, Cent. Dig. § 17.

Education, (2) that the Board of Education had approved the books, (3) that such Board had made a contract with the book company to supply the books, (4) that the State School Superintendent had made a contract with defendant to introduce the books in the school district, and to sell the same and collect therefor, was bad for repugnancy and inconsistency.

6. School directors are presumed to know that the law (Rev. St. 1899, § 9859) prohibits the State Superintendent of Public Schools from acting as agent for any author, publisher, or bookseller.

7. False representations made to school directors to the effect that the person making them was agent of the State Board of Education, and of the School Superintendent, who had approved of, and had made contracts with a supply house to furnish the school districts, certain books, which the law obliged such districts to purchase, were so absurd as not to be calculated to deceive a reasonable man, and were insufficient to form the basis of a criminal prosecution.

8. In a prosecution for the attempted procurement of a school warrant by false representations, inducing the purchase of books by school directors, an instruction to find defendant guilty if he represented that he was agent of the State Board of Education, and of the School Superintendent, who had approved of, and made a contract with a supply house to furnish school districts, certain books, which the law obliged such districts to purchase, was erroneous in that it conflicted with instructions for defendant that he had the right to sell books approved by the superintendent, and represent them as having been so approved, and that he could not be convicted for representations as to the law or the legal duties of school districts.

9. In a prosecution for attempting to procure a legal school warrant, by false pretenses, inducing school directors to purchase books, evidence examined, and *held* insufficient to sustain a conviction.

Appeal from Circuit Court, Grundy County; Paris C. Stepp, Judge.

W. B. Lawrence was convicted of attempting to procure a school warrant by false representations, and appeals. Reversed.

F. B. Ellis and C. A. Loomis, for appellant. Edward C. Crow, Atty. Gen., and Bruce Barnett, for the State.

FOX, J. The defendant was tried at the November term, 1902, in the Grundy county circuit court, upon an information in four counts. The conviction was upon the first count, which charged the defendant with an attempt to obtain by false representations and pretenses a school warrant of the value of \$37.50 from incorporated School District No. eight (8); township sixty-one (61), range twenty-three (23), in Marion township, Grundy county, Mo., and from C. D. Axtell, C. E. Banta, and Ed Urton, the directors thereof. In another count of the information defendant was charged with obtaining such school warrant by such false pretense.

The first count in the information upon which defendant was convicted, omitting caption, is as follows: "Comes now Hugh C. Smith, prosecuting attorney, within and for Grundy county, Missouri, and on his oath of office informs the circuit court of Grundy

county, Missouri, by this, his first amended information, that on or about the 26th day of January, A. D. 1901, at Grundy county, Missouri, one W. B. Lawrence, then and there being, then and there with the intent then and there unlawfully and feloniously to cheat and defraud, then and there unlawfully, knowingly, designedly, and feloniously, did falsely, fraudulently, designedly, and feloniously represent, state, and pretend to C. D. Axtell, C. E. Banta, and Ed Urton, then and there being and constituting the duly elected, qualified, and acting board of directors of School District Number Eight (8), township sixty-one (61) and sixty-two (62), range twenty-three (23), in Marion township, Grundy county, Missouri, a corporation organized and existing under the laws of the state of Missouri, of which said board of directors C. D. Axtell was president and C. E. Banta clerk, that the said W. B. Lawrence was then and there the duly authorized agent of the educational department of the state of Missouri to introduce, sell, deliver, and receive payment therefor, a certain set of books known and designated as 'Supplementary Reading and Reference Books,' and being fifty (50) volumes in number, to the various school districts of the state of Missouri, and that he was sent out by the educational department of the state of Missouri for the purpose of introducing and placing a set of said books in each of the school districts of the state of Missouri. That the fifty volumes of books that he was selling and introducing as aforesaid had been selected by W. T. Carrington, State Superintendent of Public Schools for the state of Missouri, and approved by the State Board of Education for the state of Missouri. That the said W. T. Carrington, State Superintendent of Public Schools of the state of Missouri, had recommended and urged the school districts all over the state of Missouri to buy said books. That the State Board of Education had made a contract with the Missouri Supplementary Book Company to furnish to the various school districts of the state of Missouri said fifty volumes of books at very low prices, for the purpose of introducing them in said school districts. That the sum of thirty-seven and $\frac{50}{100}$ dollars was said introductory price which had been agreed upon as aforesaid. That W. T. Carrington, State Superintendent of Public Schools for the state of Missouri, had made a contract with him, the said W. B. Lawrence, to introduce these books in the various school districts of the state of Missouri, and to sell said books to said school districts, and to receive and collect the purchase price therefor. That the laws of the state of Missouri compelled each and every school board in the state of Missouri to purchase said books. And the said W. B. Lawrence, by means and by use of the said false and fraudulent representations, statements, and pretenses so made as aforesaid to the said C. D. Axtell,

C. E. Banta, and Ed Urton, then and there constituting the board of directors of said school district, then and there unlawfully, knowingly, willfully, designedly, and feloniously did attempt to obtain from said C. D. Axtell, C. E. Banta, and Ed Urton, constituting the board of directors of said school district, a school warrant or order on the township treasurer of Marion township, in Grundy county, Missouri, the township in which said school district was at said time and now is situated, in the sum of thirty-seven and $\frac{50}{100}$ dollars, of the value of thirty-seven and $\frac{50}{100}$ dollars of the property of the school district aforesaid, then and there being, with intent then and there unlawfully, knowingly, designedly, and feloniously to cheat and defraud; whereas, in truth and in fact, the said W. B. Lawrence was not then and there the duly authorized agent of the educational department of the state of Missouri to introduce, sell, and deliver and receive payment therefor a certain set of books, known and designated as 'Supplementary Reading and Reference Books,' as aforesaid, to the various school districts of the state of Missouri, and said W. B. Lawrence was not sent out by the educational department of the state of Missouri for the purpose of introducing and placing said books in each of the school districts of the state of Missouri, the said books had not been selected by said W. T. Carrington, State Superintendent of Public Schools of Missouri, said books had not been approved by the State Board of Education for the state of Missouri; the said W. T. Carrington, State Superintendent of Public Schools of Missouri, had not recommended and urged that the school districts all over the state of Missouri purchase said books; the Missouri State Board of Education had not made a contract with the Missouri Supplementary Book Company, with the said W. B. Lawrence, or any other person to furnish said books to the various school districts of the state of Missouri, and had made no contract whatever with the said Missouri Supplementary Book Company nor with the said W. B. Lawrence; W. T. Carrington, State Superintendent of Public Schools of Missouri, had made no contract with said W. B. Lawrence to introduce said books into the various school districts of the state of Missouri, nor to sell said books to said school districts, nor to receive and collect the purchase price therefor; the said W. T. Carrington, State Superintendent of Public Schools of Missouri, had made no contract whatever with the said W. B. Lawrence; the laws of the state of Missouri did not compel said board of directors to purchase said books; there was no Missouri Supplementary Book Company; all of which the said W. B. Lawrence then and there well knew; against the peace and dignity of the state."

The evidence relied upon to support this conviction is that detailed by the school di-

rectors, Axtell, Urton, and Banta, which, so far as pertinent to the offense charged, was substantially as follows:

C. D. Axtell testified, on the part of the state, as follows: "I am 40 years old; am a farmer; live at Dunlap, Grundy county, Missouri, in District No. 8, township 61, range 23. I was president of the school board at that time; Charley Banta was the secretary. I have been a member of the board for the last 15 years. Ed Urton was the other director. I know the defendant; he is the large, fleshy man. The first time I ever saw him I was at my farm; he was with George Hubell at that time; that was about the 26th day of February, 1901; this was the same day of the transaction he is charged with here. He said his business was to introduce some books—library books—for the various school districts. Mr. Banta stopped there a short time after they came. Mr. Urton was at home, so far as I know. Well, his business was, he said, to introduce a set of library books for the various school districts, and he said he would like to show me the books; that he had what he called a 'prospectus' or 'sample'—whatever you may call it. He said he had been sent out by the educational department of Missouri to introduce these books. Well, the books he had with him we examined. The books, he said, Mr. Carrington, the State Superintendent, had recommended these books to the various districts. The price of the books was thirty-seven dollars and a half. Well, he said the books was put out by the Missouri Supplementary Book Company, and Mr. Carrington approved of these books, and urged each and every school district should buy these books. He also said it was a finable offense if the district did not buy these books. Q. By the Prosecuting Attorney: Is there any record of what was done, Mr. Axtell? A. No, sir. Q. Tell the jury, if you can, whose signatures are attached to this instrument? A. Chas. Banta and myself."

Plaintiff introduced the following school warrant, marked "Exhibit A":

"Incidental Fund.

"\$37.50.

No. ———.

"Treasurer of Marion township, Grundy county, Missouri: Pay to W. B. Lawrence, Jan. 1st, 1902, or order, the sum of thirty-seven and $\frac{50}{100}$ dollars, for 50 Vol. Supplementary Books furnished District No. 8, Townships 61 and 62, Range 23, out any funds in your hands for the payment of incidental expenses, belonging to said District.

"Done by order of the Board, this 26th day of Jan. 1901.

"C. D. Axtell, President.

"C. E. Banta, Clerk.

"Trenton Nat. Bank, Trenton, Mo., No. 2,988." Indorsed on back as follows: "W. B. Lawrence." "Trenton Nat'l Bank, Trenton, Mo. Paid Feb. 10, 1902."

"Q. Mr. Axtell, tell the jury what you and Mr. Banta did there in reference to purchasing these supplementary library books, if anything. A. Well, he proposed to sell those books, and we looked over them, and we thought they were a good set of books, and he wanted us to buy them, and we told him we could not buy them, as there was only two of us together, and he said that would make no difference, that there was a quorum. I then told him that I wouldn't do that. He said he would go over and see Mr. Urton. I was pretty busy at this time. He was a member of the board. He went over and saw him, and brought a written statement from Urton to us. Well, after receiving this written statement from Urton, we bought the books, and gave him this warrant, which is heretofore marked 'Exhibit A.' Well, we bought the books of him, gave him a warrant for \$37.50 for these books. The district never received any books, never got anything in return. (Witness here identified warrant marked 'Exhibit A.' It was obtained in Grundy county, Missouri, 1901.) Q. Tell the jury on what you relied? A. We relied on Mr. Lawrence's statements. I signed it because I was president of the board; signed it for the payment of the books, and by the recommendations that he made in regard to the books. The district never received the books. No, sir; we never received them. I saw C. E. Banta sign the warrant; I delivered the warrant to him. Q. Upon what did you rely, Mr. Axtell, when you delivered this warrant? A. We relied upon the facts; we would get the books; we took him to be an honest man. I think this is the paper which is marked 'Exhibit B.' Mr. Banta, my daughter, Mr. Banta's daughter was present, and probably some of the rest of the family were there; there was only two members of the board. I handed Mr. Lawrence the warrant; we had no money belonging to the incidental fund when we signed this warrant. At the time he gave us this paper he told us that he was the agent of the company. We expected Mr. Lawrence to ship the books; we had nothing to do with the book company; he said he was their agent; he said he was the authorized agent for the book company to sell and collect for them."

Defendant here offers in evidence the following contract, marked "Exhibit B." Same admitted in evidence as follows:

"Dunlap, Mo., Jan. 26, 1901.

"Received of District No. 8, Township 61 and 62, Range 23, this 26th day of Jan. 1901, one school warrant for the sum of Thirty-seven and fifty One Hundredths Dollars (\$37.50), payable to J. C. Tracy, Manager, in payment for one set of Fifty Volumes of Supplementary Reading and Reference Books, to be delivered by the Missouri Supplementary Book Company on or before the 20th day of Feb. 1901, at the freight depot at Dunlap, Missouri.

"[In fine print:] The Company shall not

be bound by any verbal contracts made by traveling salesmen or agents.

"J. C. Tracey,

"Manager the Missouri Supplementary Co.

"Countersigned by W. B. Lawrence, Agent.

"[Signed]

C. E. Banta."

Written across the face of the above receipt in ink the word "Sent." Written in lower left-hand corner of receipt, "No Dictionary," in pencil. Written on back of receipt, "Written to about shipment May 26, 1901."

C. E. Banta testified as follows, on the part of the state: "I live in District No. 8, townships 61 and 62, range 23. I am clerk of the board. I met Lawrence first at Dunlap, Missouri. Mr. Lawrence said that he was introducing a school library, and which he understood we wanted to place in our school, and he had something there he was introducing, which had been selected by the State Superintendent, Carrington, and also indorsed by the State Board of Education of the state of Missouri, and that they and this state board had made arrangements with the Supplemental Book Company of the State of Missouri, or the Missouri Supplemental Book Company, or something of that nature, I believe, to introduce the libraries in the various school districts of the state, and by having arrangements with this State Board of Education they could put these libraries down to the nominal sum of \$37.50; that they would be in reach of most of the districts of the state. That is about all I remember that he said. There at that time we went into Mr. Urton's store, and he undone his list of books, and showed us the copies, you know, and then he drove down to Mr. Axtell's. He went down; well, I went down also; he went down, and I went down afterwards, to Mr. Axtell's; then we went to Mr. Axtell's house, and about the same conversation took place there that we had had. When the first conversation took place I think I was alone; that is, at the store. He had quite a talk with me, and Mr. Urton was there part of the time, and he was busy, and said he couldn't see him at the present, for him to go down and see the other member of the board. They drove down there, and I started home. I live on beyond Mr. Axtell's, and I just stepped in, and we had the same conversation there; he made about the same assertions that he did at the store. My daughter and Mrs. Eva Banta were present when this statement was made. Well, we looked at the books that he was showing, but we told him we couldn't do anything alone; we was only just part of the board; you know that we would have to get together before we could come to any definite conclusion. So they drove over to Mr. Urton's, and I went home. In the meantime, Mr. Lawrence and Hubell were together. He came to my house with a statement, with Mr. Urton's signature to it; Mr. Lawrence stated that the other two directors were in favor of buying the books, and I told him I didn't want to sign the war-

rant on account of not being a witness; he said it would not make any difference, that he was in a hurry, and had to leave that evening for some other place, and it would be just the same as if we had a legal meeting. When we bought the books I relied on what he said about its being the State Board of Education having made arrangements with him to supply these districts with these books, and in signing the warrant for \$37.50, and that he alone had the power to collect the warrant. He gave us a receipt, for we both required of him a receipt showing that the warrant had been issued. That is my signature preceding the word 'Clerk' there. When I signed it I relied on the truth of the salesman, Mr. Lawrence, had made; he made such a plain and gentlemanly plea about this company being connected with the state. We never received the books. (Defendant objects to the foregoing testimony of C. E. Banta, for the reason that it shows that the testimony tends to show that the goods were to be delivered in the future; that it is not a crime to sell goods and not deliver them, or agree to deliver and not deliver; and for the reason that the warrant issued defendant did not bind the district, and created no legal liability, that it was void on its face, it being payable one year after date, and could deceive no one; and for the further reason that the board of directors, acting separate and apart of one another, cannot bind the district. Objection overruled, to which action of the court the defendant then and there excepted at the time.) Mr. Lawrence gave us a receipt, which is marked 'Exhibit D.' We bought the books in good faith, and I suppose, if they had come as represented, I would have been willing to receive them without any complaint, because they were a good line of books that he showed us. They were a good line of books, and I don't see any reason why we would not have received them if they had come according to contract."

Ed Urton, on behalf of plaintiff, testifies as follows: "I was one of the board of directors of School District No. 8 on January 26, 1901. The defendant came to my store on the 26th day of January, 1901, and was selling library books. Mr. Lawrence came there, and he told me that he was selling library books. He said that by reason of the Missouri Supplemental Book Company he could place these books in the school districts at a very low price, and that the books had been recommended by Professor Carrington and the State Board of Education, and that Professor Carrington had recommended that the libraries be placed in the rural districts of the state. So I told Mr. Lawrence that I was busy and did not have time to talk to him, and I says, 'Mr. Axtell and Mr. Banta, one is president and the other is clerk of the district, and you go and see them; if they think the books are worth the money, I am agreed, we'll buy them;' in fact, I rather gave him consent there to buy the books, if it was

agreeable to them. So he went away, came back in an hour or such a matter, and stated that Mr. Banta or Mr. Axtell wouldn't buy the books without a written agreement from me. So he wrote a little piece on a little piece of paper. I sent a written statement that it was agreeable to me. The district never got the books. I relied on the statement that Professor Carrington had recommended these books; I thought he ought to know. Q. This conversation between you and Mr. Lawrence? A. Yes, sir. Q. Mr. Banta and Axtell were not present? A. No, sir. Q. You never was present, personally, with them, nor had any notice of a meeting of the school board at that time, did you? A. No, sir; there was no meeting, as far as I know."

Mrs. Dot Axtell testifies, on part of the plaintiff, as follows: "He said that he was representing the Missouri Supplementary Book Company, that he was working to sell these books to the various school districts, and that they had been recommended by W. T. Carrington, the State Superintendent of Public Schools of Missouri, and that he was working for the State Board of Education, and that the books had been approved by them or Mr. Carrington; thought they were needed in every school district, and should be purchased."

Miss Eva Banta testifies as follows: "I was at my father's house about January 26, 1901, when the defendant came there. He said he was the authorized agent of the Supplemental Book Company to sell those books, which had been approved by W. T. Carrington, State Superintendent. He said he was selling these books for the Supplementary Book Company, and was their agent. He named some of the books, some of them were Plutarch's Lives, Life of Washington, Poems of Bryant, and some histories."

George H. Hubell testified: "I introduced Mr. Lawrence to Mr. Urton. Said, 'I am here in the interest of the State Board of Education and the Missouri Supplementary School Book Supply Company, reading and reference school book company.' He said—that is, as best as I can remember—that it had always been the desire of W. T. Carrington and the State Board of Education to furnish the several school districts of the state with proper reference reading books. He said Mr. Carrington and the State Board of Education had got together and had the proper books; that Mr. Carrington had selected this 50 volumes of books as the necessary books; that Mr. Carrington had selected this number of books because he thought the number of books and the price at which they were now quoted would be in the reach of the several districts of the state. He said he was the authorized agent of the Missouri Supplemental Book Company, and the State Board of Education, of which W. T. Carrington was a member, to place these books and sell them in the several counties of the state. Mr. Urton said he was only

one of the directors, and the books suited him, and to go and see the other directors. Mr. Lawrence and myself got in the buggy and went down to the home of Mr. Axtell; went and saw Mr. Axtell, where the rest of the family was. Mr. Lawrence made the representations he did to Mr. Urton. At that time, before Mr. Lawrence started in with these representations, Mr. Charles Banta, another one of the directors, came in, and the price suited them, and the books suited them, and they were in favor of buying them. Mr. Banta and Mr. Axtell said they were not together as a board; they could not buy them, and, besides, they did not want to transact any business unless Mr. Urton was present, and Mr. Lawrence said, 'I'll go up and get Mr. Urton's written contract;' I believe he said 'written contract.' He says, 'It is my last day here in this county, and I've got to go, and I can't wait for the board to meet,' and so we went back to Dunlap, Mo., a mile north, and Mr. Lawrence wrote out a written statement; Mr. Urton signed it; then we went back to the house of Cleverance Axtell, and showed him the statement of Mr. Urton, and we went to the house of Charles Banta, and he said it was all right. Mr. Lawrence wrote out an order payable to himself; he wrote out same on piece of paper, and Mr. Banta signed it."

Mr. Axtell, the president of the board, further testified as follows: "Q. Upon what did you rely, Mr. Axtell, in delivering this warrant to the defendant? A. I relied upon his good faith that we would get the books. Well, it was for payment of the books. We relied upon the fact that we thought we would get the books. We took him to be an honest man, and that we would get them."

Mr. Banta, another member of the board of directors, testified as follows: "Q. Now, if these books had have come according to this contract here, you would have received them all right, would you, Mr. Banta? A. Why, if they had come in good shape, why, I suppose that is all we could have done. Q. Now, the books that he proposed to sell you, if they had been shipped to you, you would have accepted them? A. Why, I suppose so. Q. And the reason why this prosecution has been instituted is because he did not ship you the books? A. Why, we bought the books in good faith, and I suppose if they had come as represented we would have been willing to receive them without any complaint, because they was a good line of books that he showed us. Q. If the Missouri Supplementary Book Company had shipped these books that you purchased, why, you would have made no objections or complaint about it? A. Yes, sir. They was a good line of books, and I don't see any reason why we would not have taken them if they had come according to agreement. Q. And there would have been no complaint whatever—nothing said about it? A. Well, I could not say whether they would not have been. Q. So

far as you know? A. Yes, so far as I know."

Mr. Urton also gave further testimony as follows: "Q. Now, if the books had been shipped that you purchased, why, that would have been the end of it, so far as you are concerned, wouldn't it, Mr. Urton? A. Yes, sir. Q. Now, Mr. Lawrence told you, Mr. Urton— That is your name, I believe, 'Urton'? A. Yes, sir. Q.—that the Missouri Supplementary Book Company would ship the books, that he was their agent? That is what he told you? A. I don't remember that he told me that he would ship the books. I don't remember who he said would ship the books. Q. He said that he was agent for that company? A. He said that by reason of the contract with this company that he was able to place the books with the rural districts of the state. Q. By reason of a contract with the Missouri Supplementary Book Company? A. Yes, sir."

Mr. Axtell, president of the board, further testified as follows: "Q. Well, go ahead and tell what this defendant told you there about these books, if there was anything more, Mr. Axtell. A. Well, he said that these books was put out by the Missouri Supplementary Book Company, and Mr. Carrington approved of these books, and urged that each and every school district should buy these books. Q. Now, by this paper which was executed you knew that Lawrence was not to ship the books? A. Well, he represented himself to be the agent. Q. Yes, and you relied upon this book company here? A. We relied on Mr. Lawrence. Q. Didn't rely on this paper? A. Well, at the time he gave us this paper he told us he was the duly authorized agent. Q. You expected this book company would ship the books? A. We expected that Mr. Lawrence would ship them. Q. Well, this does not state that he agreed to ship them, does it? A. He said that he was their agent. Q. You looked to the book company to ship the books, didn't you? A. I looked to Mr. Lawrence to ship them books. Q. And didn't look to the book company? A. We didn't have anything to do with the book company. He said he was their agent. Q. Agent of the book company? A. Yes, sir. Q. Now, as the agent— He purported to be the agent of this company, didn't he? A. Yes, sir. Q. Now, you didn't understand that Lawrence had any books? A. We understood that he was the agent. Q. For this book company? Isn't that the fact, Mr. Axtell? A. I say that he said that he was their agent, their authorized agent for them to sell and collect for them. Q. Authorized agent to sell and collect for them? A. Yes, sir."

Mr. Urton, another of the school directors, testified as follows: "Q. Well, just the best of your impression, knowledge, and belief? A. He said, by reason of a contract with the Missouri Supplementary Book Company he had, he could place these books in the rural districts at a very low price, etc. Q. He told you, etc., that the Missouri Supplemen-

tary Book Company would ship the books? That he was their agent? That is what he told you? A. Now, I don't remember that he told me that they would ship the books. I don't remember that he said he would ship the books. Q. He said that he was agent for that company? A. He said that by reason of a contract with that company he was able to place the books in the rural districts of the state. Q. By reason of a contract with the Missouri Supplementary Book Company? A. Yes, sir. Q. Then you knew that the Missouri Supplementary Book Company was the company that was to ship the books? A. Why, I presume so."

At the close of the evidence the court instructed the jury upon all four counts. The instructions applicable to the first count, upon which the defendant was convicted, were as follows:

"The first count charges the defendant with attempting by false, fraudulent representations, statements, and pretenses to obtain a school warrant for thirty-seven dollars and fifty cents (\$37.50) from C. D. Axtell, C. E. Banta, and Ed Urton, constituting the board of directors of School District Number 8, townships 61 and 62, range 23, in Marion township, Grundy county, Missouri, by false representations to the said board of directors.

"(8) You are instructed that in this cause there are for your consideration four counts of the information, which was filed on the 10th day of November, 1902. The defendant has pleaded not guilty to the allegations of the informations, and it becomes your duty to determine as to his guilt or innocence under the first four counts of the information. While the information contains four counts, you are instructed that, if you find the defendant guilty, you should indicate upon which count you find him guilty. And in this connection, and in connection with the other instructions given you, you are instructed that the defendant in each count of the information is charged with having made the following false and fraudulent representations, statements, and pretenses, with the felonious intent to cheat and defraud, to wit: That the said W. B. Lawrence was then and there the duly authorized agent of the Education Department of the state of Missouri to introduce, sell, and deliver and receive payment therefor, a certain set of books, known and designated as 'Supplementary Reading and Reference Books,' and fifty (50) volumes in number, to the various school districts of the state of Missouri. That he was so sent out by the Educational Department of the state of Missouri for the purpose of introducing and placing a set of said books in each of the school districts of the state of Missouri. That the said fifty volumes of books which he, the said W. B. Lawrence, was selling, introducing aforesaid, had been selected by W. T. Carrington, State Superintendent of Public Schools for the state of Missouri, and

approved by the State Board of Education of the state of Missouri. That the said W. T. Carrington, State Superintendent of Public Schools for the state of Missouri, had requested and urged the school districts all over the state of Missouri to buy the books. That the State Board of Education had made a contract with the Missouri Supplementary Book Company to furnish to the various school districts of the state of Missouri said fifty volumes of books at a very low price, for the purpose of introducing them in said school districts. That the sum of thirty-seven and $\frac{50}{100}$ dollars was the said introductory price which had been so agreed upon as aforesaid. That W. T. Carrington, State Superintendent of Public Schools for Missouri, had made a contract with him, the said W. B. Lawrence, to introduce these books into the various school districts of the state of Missouri, and to sell said books to said school districts, and to receive and collect the purchase price therefor. That the laws of the state of Missouri compel each and every school board in the state of Missouri to purchase books.

"(9) You are instructed that if you believe and find from the evidence in this case, beyond a reasonable doubt, that at any time within three years next before the 10th day of November, 1902, the date of the filing of the information in this case, the defendant, W. B. Lawrence, at the county of Grundy, in the state of Missouri, intended to cheat and defraud, by means of false and fraudulent representations, statements, and pretenses, feloniously and designedly attempted to obtain a school warrant for thirty dollars (\$30) or more of the property of said district hereinafter named of C. D. Axtell, C. E. Banta, and Ed Urton, and that they constituted the board of school directors of the School District Number 8, townships 61 and 62, range 23, in Marion township, Grundy county, Missouri, then you will find the defendant guilty, as charged in the first count of the information, and assess his punishment at imprisonment in the State Penitentiary for a term of not less than two (2) years and not more than seven (7).

"(10) You are instructed that if you believe and find from the evidence that the defendant, by the means set out in the information in this case, attempted to get and procure witnesses Axtell, Banta, and Urton, school directors of School District Number 8, townships 61 and 62, range 23, Grundy county, Missouri, if you find they were directors of said school district, to issue to him, defendant, a legal warrant of said school district, in the sum of \$37.50, and in such an attempt to do so, if you will find he made such attempt, the defendant did all things in his power looking to the accomplishment of his purpose to secure said warrant, and made the representations, statements, and pretenses, alleged in the information, with the felonious intent to cheat and defraud, and that the only thing that prevented the warrant from being a le-

gal obligation was the failure or lack of authority upon the part of the said Axtell, Banta, and Urton to issue a legal warrant, over which defendant had no control, then you should find the defendant guilty, as charged in the first count of the information."

Upon this cause being submitted to the jury, they returned a verdict of guilty upon the first count in the information, and assessed defendant's punishment at two years in the penitentiary. After unsuccessful motions for new trial and in arrest of judgment, he prosecutes his appeal to this court.

It will be observed that the defendant in this cause was convicted upon the first count of the information, which charged him with an attempt to procure a school warrant or order, by false representations to the directors of the school district, with intent to cheat and defraud. The acts with which defendant is charged, as constituting a criminal offense, relate to a sale of certain books to a school district. Hence it is well, at the very inception of this investigation, to ascertain the relationship of the directors to the district, and their powers in respect to the transaction of the business concerning the same.

The lawmaking power of this state has made every school district, organized in pursuance of the provisions respecting their organization, a body corporate. Thus it is provided in section 9739, Rev. St. 1899: "All sub-districts, as organized and bounded, shall hereafter be known as school districts and thus denominated and numbered by the county court for the general purposes of education; and every such district, as well as those hereafter organized under the provisions of this chapter, shall be a body corporate, and possess the usual powers of a corporation for public purposes, under the name and style of 'District No. —, township —, range — of — county'; and in that name shall be capable of suing and being sued." Directors of these corporations are selected in pursuance of the provisions of law, which designate the number, the time, and manner of their selection. The directors are chosen to transact the business of the school district. In other words, they are the officers of the corporation, with authority to exercise the powers usually exercised by corporations. Section 9761, Rev. St. 1899, provides as follows for the organization of the board and the transaction of business: "The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. A majority of the board shall constitute a quorum for the transaction of business: provided, each member

shall have due notice of the time, place and purpose of such meeting; and in case of the absence of the clerk, one of the directors may act temporarily in his place. The clerk shall keep a correct record of the proceedings of all meetings of the board."

It will thus be seen that the officials of the school district—a body corporate—must conduct the business of the district in an official way, as indicated by the statute. To have issued a school warrant, binding upon the district mentioned in this cause, for the purchase of the books sought to be purchased by it, the directors in such transaction would be required to meet as a board, with one of their number as clerk, who is required to keep a correct record of the business of such meeting; then, as a body, make the purchase, order the warrant drawn, in conformity to the requirements of the statute, all of which must be evidenced by the record of the meeting.

The Kansas City Court of Appeals, in *Kane & Co. v. School District of Calhoun*, 48 Mo. App., loc. cit. 414, in treating of the legal methods of conducting the business of these school corporations, said: "We are of the opinion that the only proper evidence of the acts of the corporation was the record required to be, and which was, kept by the board. It seems that the secretary did keep a record of such proceedings, as the statute imperatively demanded, but nowhere was there found any authority from the board for the contract here alleged and relied on. The rule seems to be that, if the statute creating the corporation and providing for its proceedings shall require such proceedings to be preserved in a record kept for that purpose, then such record is the only proper evidence of such proceedings."

This court, in *Johnson v. School District*, 67 Mo. 319, in speaking on this subject, under the statute substantially the same as the present one, said: "It is clear that the members of the board, in transacting business for the district, were to do so in meetings of the board. In purchasing maps and globes, they could only act when assembled together in a meeting as the board of directors, and neither two nor all of the directors, acting separately and apart from each other, could bind the district by any contract they might make. The directors were not authorized to draw orders on the township clerk or treasurer to pay for globes or maps, or any other expenses incurred for the district. The law expressly provides that the clerk of the sub-district shall sign such orders, and that they shall be drawn on the township clerk, and unless so drawn and signed the township clerk could not pay them."

In that same case, what was announced by the Supreme Court of Iowa upon this subject, in *Taylor v. District*, 25 Iowa, 451, was approvingly quoted. It was said by that court: "The township district is a body corporate. Certain powers are reserved by or

conferred upon the electors, others are given by law to the district board, and others again to subdirectors. The electors composing the corporate body act by and through specific agencies, and in the mode prescribed by law. They cannot, as individuals, when not convened at the times and places contemplated by law, vote to raise a tax, authorize the making of a contract, delegate their powers, nor exercise any of the powers conferred upon them, as electors, by law. The law contemplates action by them, in their aggregate capacity, when duly and properly assembled, and not the action of each elector by himself, on the streets, at his store or shop, in the church or schoolhouse."

From the testimony disclosed by the record in this case, it is not pretended that the directors of the district alleged in the information upon which this prosecution is based acted as a board or as a body, or that there was any pretense of keeping a record of their proceedings. To maintain this conviction, it must be conceded that the warrant or order secured was not a legal obligation against the district, for this conviction is for an attempt to procure a legal school warrant, and if the warrant secured was a legal one, then there could be no such thing as an attempt to secure it.

Our attention is first attracted to the views of the trial court upon the law, as applicable to the count, in the information upon which defendant was convicted. As before stated, the conviction in this case was for an attempt to commit an offense. The concluding part of instruction No. 10 tells the jury: "If you will find he made such attempt, the defendant did in all things in his power looking to the accomplishment of his purpose to secure said warrant, and made the representations, statements, and pretenses alleged in the information, with the felonious intent to cheat and defraud, and that the only thing that prevented the warrant from being a legal obligation was the failure or lack of authority upon the part of the said Axtell, Banta, and Urton to issue a legal warrant, over which defendant had no control, then you should find the defendant guilty, as charged in the first count of the information." If that instruction is to be interpreted according to the terms used, then it is clearly erroneous. It says, substantially, if the defendant made the representations with intent to cheat and defraud, and the "only thing which prevented the warrant from being a legal obligation was the failure or lack of authority of the directors to issue a legal warrant over which the defendant had no control, you will find him guilty." If the directors had no authority to issue a legal warrant, then there could not possibly be any offense for obtaining one from them; hence there could be no attempt to obtain a legal warrant, when no power or authority existed to issue it. It may be that the learned trial judge applied these terms to the time and circumstances

when the illegal warrant was issued. If so, he was correct in the use of the terms as applicable to that transaction. Still, this would leave the jury groping in the dark as to the proper course to be pursued by the directors in order to issue a legal school warrant, and in no way directs them in the application of the alleged false statements to the directors, at a time and under circumstances that they were authorized to issue a legal warrant. This instruction did not properly declare the law, even though it was based upon a valid information and evidence sufficient to warrant a conviction.

The record further discloses that the defendant challenged, by demurrer duly filed, the correctness of the count in the information upon which the defendant was convicted. The reasons assigned in the demurrer are, first, that it charged no offense against the defendant; second, that it attempted to charge several independent and contradictory charges in the same information. The allegations in the first count of the information as to the false and fraudulent representations are as follows: (1) That the said W. B. Lawrence was then and there the duly authorized agent of the education department of the state of Missouri to introduce, sell, deliver, and receive payment therefor, a certain set of books known and designated as "supplementary reading and reference books," and being fifty (50) volumes in number, to the various school districts of the state of Missouri, and that he was sent out by the educational department of the state of Missouri for the purpose of introducing and placing a set of said books in each of the school districts of the state of Missouri. (2) That the 50 volumes of books that he was selling and introducing, as aforesaid, had been selected by W. T. Carrington, State Superintendent of Public Schools for the state of Missouri, and approved by the State Board of Education for the state of Missouri. (3) That the said W. T. Carrington, State Superintendent of Public Schools for the state of Missouri, had recommended and urged the school districts all over the state of Missouri to buy said books. (4) That the State Board of Education had made a contract with the Missouri Supplementary Book Company to furnish the various school districts of the state of Missouri said 50 volumes of books at very low prices, for the purpose of introducing them in said school districts. That the sum of thirty-seven and $\frac{50}{100}$ dollars was said introductory price which had been agreed upon as aforesaid. (5) That W. T. Carrington, State Superintendent of Public Schools for the state of Missouri, had made a contract with him, the said W. B. Lawrence, to introduce these books in the various school districts of the state of Missouri, and to sell said books to said school districts, and to receive and collect the purchase price therefor. (6) That the laws of the state of Missouri compelled

each and every school board in the state of Missouri to purchase said books. No one can read the allegations as herein quoted, all contained in one count, and escape the conclusion that they are repugnant and inconsistent with each other. First, it alleged that defendant was the agent of the Board of Education; secondly, that the Board of Education approved the books; third, that the State Board of Education had made a contract with the book company to supply the books; fourth, that W. T. Carrington, State Superintendent of Public Schools, had made a contract with defendant to introduce these books in the various school districts, and to sell said books to the districts, and to receive and collect the purchase price therefor. It is difficult to understand how defendant could have a contract with the State Board of Education, consisting of a body of men, to sell, deliver, and receive pay for the books, and also a contract with the Superintendent of Public Schools to do the same thing. It is glaringly inconsistent to say that he was the agent of the State Board of Education, and at the same time the agent of W. T. Carrington, in the performance of the same service. To emphasize this inconsistency and absurdity of the alleged false statements, it is averred that "the laws of the state of Missouri compelled each and every school board in the state to purchase these books." If that was true, then the board was compelled to buy the books, and it was only a question as to whom they would buy them of, and the defendant gave the directors an opportunity of determining their choice, whether they would buy from him as agent of the State Board of Education, for whom, it is alleged, he represented he was authorized to sell the books, or from him under the contract he had with Mr. Carrington to sell the books, or from him as agent of the Missouri Supplementary Book Company. The law prohibited the State Superintendent of Public Schools from making the contract with defendant that it is alleged he represented was made. Section 9859, Rev. St. 1899. The directors were presumed to know this was the law. If the representations were made by the defendant, as charged in the first count of the information, the fact of making such representations furnishes the reason why they were not calculated to deceive a reasonably prudent man. Not only are they inconsistent, but extremely absurd. If the directors did not want to purchase the books, we are unwilling to reflect upon their intelligence by concluding that the representations, as recited, induced them to make the purchase. The demurrer to the first count in this information should have been sustained, for the reason that the allegations as to false representations were repugnant and inconsistent, and, if made as stated, were not calculated to deceive and thereby accomplish the purpose sought.

The instructions given in this cause were

erroneous. Instruction No. 8 recites all the representations heretofore referred to, and that is followed by instructions numbered 9 and 10, which told the jury that if they believed from the evidence that the defendant made the representations, as recited and set out in the information, they will find the defendant guilty as charged in the first count of the information. These declarations were absolutely in conflict with instructions numbered 4 and 5, given on the part of the defendant, which told the jury: "(4) The court instructs you that the defendant had the lawful right to sell and solicit for sale of all books named and recommended in the pamphlet read in evidence, published by or under the authority of W. T. Carrington, Superintendent of Schools in the state of Missouri and president of the Missouri State Board of Education, and that he had the legal right to state and represent that said books had been so recommended and indorsed by the State Superintendent of Public Schools, and by the educational department of the state of Missouri, and to do so was no crime under the law, and for the doing of which alone you cannot convict him in this case. (5) The court instructs you that no representations or statements made by the defendant with reference to what the law was or is, or what was the legal duties of the school board or school district or board of directors thereof, if you find he made any, will constitute any offense, and you cannot convict him in this case for making them, nor for obtaining or receiving anything, or attempting to do so, solely on account thereof." The very representations that the court declares in those instructions could not constitute the basis of a criminal offense were made a part of the foundation in instructions numbered 7, 8, 9, and 10, upon which the jury were authorized to convict the defendant as charged in the first count of the information. The burden should not have been cast upon the jury to determine which declarations were to be followed.

Numerous other errors are apparent in the instructions, as applicable to other counts in the information. We will not discuss them, as they have no application to the count upon which the defendant was convicted. We have read, with great care, the entire evidence in this case as disclosed by the record, and we dare say that no one can read it and escape the conclusion that the conviction in this cause resulted, not from the offense charged, but from a failure of the district to get the books purchased from the defendant. It may be that defendant ought to be sent to the penitentiary. We by no means commend his conduct to the public, but before this can be done, if we are longer to respect the well-settled principle of law, there should be a clear legal charge supported by competent, as well as sufficient, evidence to authorize his conviction. This defendant was convicted for an attempt to procure, from certain school

directors, a school warrant, by false and fraudulent representations. The evidence in this cause is clearly insufficient to support the verdict. It will not justify this verdict to say that the district did not get the books. The defendant is not on trial for failure to comply with his contract and deliver the books purchased from him. It is equally unsatisfactory to say that the school directors relied upon his representations. The unquestioned, written testimony, the contract or receipt given by the defendant, shows beyond question that they were negotiating for books from this defendant, not as the agent of the Board of Education or Mr. Carrington, but as the agent of the Supplementary Book Company. The directors, or some of them, testify that they were satisfied with the line of books, and, had they been delivered, no complaint would have been made. They further say, "We were relying upon the fact that the books would be delivered." There is an entire absence of any testimony that they did not want the books, or that, if the representations had not been made, they would not have purchased them. The old, common expression that "there are two bad paymasters, one who never pays and one who pays in advance," is very appropriate to this case. That was the whole trouble in this transaction—the effort to pay for these books in advance. Can any intelligent man believe that these school directors bought the books simply because defendant represented that he was the agent of the Board of Education or Mr. Carrington, regardless of the fact whether the district wanted or needed the books? In supplying the wants and needs of a district, its taxable wealth must pay for it, and is it not indulging a very violent presumption of official misconduct that the directors of a corporation would incur a debt simply to gratify the wishes of any one in the introduction of an article which, applying the theory of this case, was not desired or needed in the proper conduct of the business of the corporation? The testimony simply shows that the directors of this school district permitted the defendant to persuade them to make a contract for certain books. The fact that he stated that the Board of Education or Mr. Carrington approved the books, or that he was representing them in selling them, furnished no reason why they had to buy them. Aside from that, the contract for the delivery of the books indicate in unmistakable terms that he was not representing the Board of Education or Mr. Carrington, but was acting for a book company. It may be urged that, the conviction being simply for an attempt to commit an offense, only such testimony as applies to that offense will be considered. Will say, as to that proposition, if we are to consider only the representations as made, the defendant having been convicted of only an attempt to commit an offense, being a concession that the directors did not act upon the statements of the defendant, it but adds additional force to the

views of this court that the statements were not calculated to deceive, for the reason that the directors were not deceived by them. On the other hand, in passing upon the question of an attempt to commit an offense, if we are to consider the testimony upon the entire transaction, not only that which is applicable to the attempt, but as well that applicable to the completed acts of both the defendant and the directors, then it includes the issuing of what is termed the "illegal" or "void" warrant, and the contract of purchase which resulted in the issuance of such warrant. Considering the entire transaction, the contract or receipt showing the purchase of the books, the issuing of the warrant, and the testimony of the directors, it will certainly not be contended that the directors issued the warrant upon the representations alleged. They all say that they looked to him to ship the books; that the warrant was issued in payment for the books promised. This is denominated an attempt to commit an offense. Is it not clearly apparent, from all the testimony in this cause, that if the defendant had not obtained the money on this warrant from the bank, and the district had not paid the bank for the warrant, this case would never have been heard of?

This conviction cannot be sanctioned because the defendant obtained the money for books which he promised to deliver, or for failure to deliver them. That is not the charge upon which this prosecution is based. There is an absence of any testimony indicating that the defendant attempted to get the directors to meet officially and order the warrant drawn; but the reverse appears. He did just what he attempted to do. He discussed the sale of the books with the directors individually, filled out the warrant himself, executed the receipt or contract for it, and obtained the money from the bank on the warrant as drawn. He accomplished, doubtless, what he intended; that was, to obtain the money for the promise of the delivery of the books. To constitute an attempt to commit an offense, the person making the attempt must have in mind the offense itself. The defendant, in this cause, filled out the warrant. The presumption is that he intended the result of his act, and it seems in this case that the illegal warrant answered the same purpose as one in due form. It is apparent that this transaction was just simply an ill-considered matter. The directors expected to get the books in consideration for the warrant, and we are unwilling to reflect upon the intelligence of the directors by concluding that they did not want the books, or did not need them, and simply made the purchase, at the expense of the taxpayers of the district, to gratify the State Board of Education and the State Superintendent of Public Schools. The expression of this court in *State v. Cameron*, 117 Mo., loc. cit. 648, 23 S. W. 769, may be very appropriately applied to the facts of this case. Gantt, J., speaking for the court, said: "It is

not the policy of the law to punish as a crime the making of every foolish or ill-considered agreement. If it is, the jails and prisons must be greatly enlarged. 'Where the pretense is absurd, or irrational, or such as the party injured had, at the very time, the means of detecting at hand, it is not within the act.' To the same effect is the case of *State v. Barbee*, 136 Mo., loc. cit. 445, 37 S. W. 1120. It was said in that case by Sherwood, J.: "It is well-settled law, both in this state and elsewhere, that it is not every false pretense which can be made the basis of a criminal prosecution. It must be such an one as is calculated to deceive."

We have given every phase of this case our most careful attention, and while the conduct of the defendant does not meet with our approval, still we are unable to reach any other conclusion than that this judgment is unsupported by the facts surrounding this transaction.

The judgment will be reversed, and the defendant discharged. All concur.

Ex parte LOVING.

(Supreme Court of Missouri. Dec. 9, 1903.)

STATUTES—TITLE—LOCAL OR SPECIAL LAWS— CONSTITUTIONAL LAW—CITY CHARTER—TAXATION.

1. Any reasonable doubt as to the constitutionality of an act must be resolved in favor of its validity.

2. Act March 23, 1903 (Sess. Acts 1903, p. 213), entitled "An act to regulate the treatment and control of neglected and delinquent children in counties having a population of 150,000 inhabitants," is not in violation of Const. art. 4, § 23, providing that no bill shall contain more than one subject, which shall be expressed in its title; "neglected and delinquent children" constituting only one subject.

3. That Act March 23, 1903 (Sess. Acts 1903, p. 213), regulating the treatment of neglected and delinquent children in counties of 150,000 inhabitants and over, applies at the time of its enactment to only two counties, does not render it in violation of Const. art. 4, § 53, prohibiting local laws, since it will include other counties which may hereafter come within the class described.

4. That Act March 23, 1903 (Sess. Acts 1903, p. 213), applies a rule of punishment to a class of children in counties of over 150,000 inhabitants that is not applied to the same class in other counties, does not render it in violation of Const. art. 4, § 53, prohibiting a special law where a general law can be made applicable; the conditions reasonably justifying the distinction made.

5. Act March 23, 1903 (Sess. Acts 1903, p. 213), relating to the treatment of neglected and delinquent children, is not invalidated by its failure to provide for the separation of neglected from delinquent children.

6. The provisions of a city charter are subject to, and must be in harmony with, the general laws of the state.

7. Act March 23, 1903 (Sess. Acts 1903, p. 213), relating to the treatment of neglected and delinquent children, and providing that the localities for whose benefit the law is enacted shall be required to pay the expenses of carrying out its provisions, is not violative of Const.

art. 10, §§ 1, 10, prohibiting the General Assembly from levying taxes for municipal purposes.

In Banc. Petition by James Loving for writ of habeas corpus against John P. Gilday, sheriff of Jackson county. Petitioner remanded to the custody of the sheriff.

Frank Gordon and John A. Sea, for petitioner. Seddon & Blair, J. Henry, Altschu, Roland Hughes, Gardiner Lathrop, Jas. P. Gilmore, J. V. C. Karnes, and Alfred Gregory, for respondent.

FOX, J. The facts in the case at bar are practically admitted. The defendant, James Loving, was arrested and charged with petit larceny, committed in Jackson county. The petitioner is a boy eight years of age, and brought before the juvenile court of Jackson county. The case was heard by the judge of the juvenile court, and, having heard the facts, he found the defendant guilty, and thereupon the following judgment was made and entered of record in the records of said county: "The State of Missouri v. James Loving. (No. 63.) Now on this day comes the prosecuting attorney of Jackson county, Missouri, and files information charging said James Loving with petit larceny, upon which information a warrant was issued, and said defendant was brought into court; and Frank Gordon, Esq., appears in court as attorney for said defendant, and, in his behalf, pleads 'Not guilty.' And the court, after hearing all of the evidence adduced, and being fully advised in the premises, finds that the defendant is guilty of a misdemeanor, that he is a delinquent child, and that he is eight (8) years of age. The court further finds that the parents of said defendant have not exercised the needed care and control over said defendant, and that he be committed to the State Reform School for Boys, and that his said parents are indigent, and that neither they nor the said defendant have any property or estate out of which the expenses of conveying said defendant to and his detention in said school can be paid. It is therefore ordered and adjudged by the court that the said James Loving be, and is hereby, committed to the guardianship of said State Reform School for Boys, at Boonville, Cooper County, Missouri, there to remain for the full period of two (2) years. It is further ordered and adjudged that the said James Loving be, and is hereby, committed to the custody of the sheriff of Jackson county, Missouri, and that said sheriff deliver said James Loving into the custody of the proper officer in charge of said State Reform School. It is further ordered and adjudged by the court that the county court of Jackson county, Missouri, pay the necessary expenses incurred by said sheriff in conveying said James Loving to, and of his detention in, said reform school." A writ of habeas corpus was sued out by the mother of the petitioner, and against the sheriff, who had the custody of James Loving, made

¶ See Constitutional Law, vol. 10, Cent. Dig. § 46.

returnable to this court. The legal service of the writ was waived, as was also the production of the body of the person, who, it was charged, was illegally restrained of his liberty. To this writ, in proper form, the sheriff filed his return, which is partly as follows: "John P. Gilday, sheriff of Jackson county, Missouri, for his return to the writ of habeas corpus directed to him from the Supreme Court of Missouri, the formal issue of which writ has been waived, states that James Loving was placed in his custody on the 17th day of June, 1903, by an order of commitment issued by Honorable James Gibson, judge of Division No. 1 of the circuit court of Jackson county, Missouri, and acting as judge of the juvenile court of said county. He says that, acting under the authority of an act of the General Assembly of the state of Missouri approved March 23, 1903, and found in the Session Acts of 1903, at page 213, said James Loving was brought before the Honorable James Gibson, judge as aforesaid, and that, upon due information and process and full hearing, the said judge committed said James Loving to the Missouri Reform School for Boys." Accompanying this return is a copy of the entire proceeding, including the judgment and commitment. To this return there is a demurrer filed, which is as follows: "Comes now the petitioner, by his attorney of record, and demurs to the return of John P. Gilday, sheriff of Jackson county, for the reason that said return does not state sufficient facts to authorize the detention of said petitioner. Petitioner further states that the act of March 23, 1903, under which the sheriff of Jackson county claims said petitioner is held, is invalid, for the reason that said act is in violation of section 53, art. 4, of the Constitution of Missouri; that said act is in violation of sections 1, 10, art. 10, of the Constitution." This statement indicates clearly the controverted questions, and it is unnecessary to say more.

This proceeding presents but one question for our consideration. That is the validity of the act of March 23, 1903, commonly known as the "Juvenile Court Act." We have examined with a marked degree of care, and read with deep interest, all of the provisions of the act of the Legislature involved in this controversy. We confess, at the outset, that the wise and beneficent purposes sought to be accomplished by this act—the prevention of crime, and the upbuilding of a good and useful citizenship—tends, at least, to the creation of a desire to uphold it. However, in the determination of so grave and important a question as the one with which we are confronted, inclinations and desires should not be consulted; and, in approaching the consideration of the questions presented, we hope to do so with that high conception of duty so appropriately expressed by Chief Justice Ryan in the Wisconsin Industrial School Case, 40 Wis. 333, 22 Am. Rep. 702: "Notwithstanding this prepossession in favor of

the statute before us, it is our duty to test all its provisions involved in this case by the letter and spirit of the Constitution, and to hold the restraints and principles of that instrument sacred, as against any provision of any act of the Legislature, however humane or benevolent." It must be conceded that this act reaches out into a new field of legislation, and, in a sense, may be said to be a new departure from the ordinary paths, in the exercise of the functions of that, the co-ordinate branch of the state government; but, in the language of what has been appropriately said elsewhere, "we live in a time of inquiry and innovation, when many things having the sanction of time are questioned, and many novelties jarring with long-accepted theories are proposed." This act is assailed on the ground that it is offensive to, and in violation of, the organic law—the Constitution of this state. In the solution of the proposition before us, we must keep in view that familiar principle that, if there is a reasonable doubt existing as to the constitutionality of the act, such doubt must be resolved in favor of its validity. This principle is so well recognized that the mere statement of it is sufficient. In *State ex rel. v. Aloe*, 152 Mo. 477, 54 S. W. 496, it was very clearly and tersely stated: "When the validity of a statute is drawn in question, the court approaches the subject as one involving the gravest responsibility, and to be considered with the greatest caution. The General Assembly is presumed to have been as careful to observe the requirements of the Constitution in enacting the statute as the court in applying it. Every presumption is to be indulged in favor of the validity of the act, and that presumption is to continue until its invalidity is made to appear beyond a doubt." To the same effect is *State ex rel. v. Pike County*, 144 Mo. 277, 45 S. W. 1098, where it is said: "It is the duty of the courts to uphold a legislative act unless it plainly and clearly violates the Constitution, and, if its language is susceptible of a meaning that will remove the objections to its validity, such interpretation should be adopted. 'A legislative intent to violate the Constitution is never to be assumed if the language of the statute can be satisfied by a contrary construction.' Endlich on the Interpretation of Statutes, § 179. It is our duty to uphold the act unless it plainly and clearly violates the fundamental law of the state, and, if its language is susceptible of a meaning that will remove the objections to its validity, such interpretation should be adopted."

First, it is urged that this act is in violation of section 28 of article 4 of the Missouri Constitution. The section referred to is as follows: "Bills must Contain but One Subject-Title. No bill * * * shall contain more than one subject, which shall be clearly expressed in its title." The title to this act is as follows: "An act to regulate the treatment and control of neglected and delinquent

children in counties having a population of 150,000 inhabitants and over, with an emergency clause." It is earnestly urged by counsel for petitioner that the title to this act contains more than one subject. This contention is predicated upon the theory that "neglected and delinquent children" constitute two classes of subjects. A fair and impartial analysis of the terms of the title demonstrates that they are not subject to this criticism. The terms "neglected and delinquent children" undisputably refer to two classes, but not to classes of different subjects. The subject of the title to this act is "children," and the terms "neglected and delinquent" refer solely to the classes or character of children which are treated of in the body of the act. If there is but one subject, as in the title to this act ("children" being the subject), the use of terms which refer to classes of the one subject is not obnoxious to the provisions of the Constitution. It may be said, as is argued in this cause, that "neglected and delinquent children" are entirely distinct classes, but it does not follow that they are separate and distinct subjects. The evident purpose of the provisions of the Constitution relating to the title of the act was "to prevent surprise upon the lawmakers by the passage of bills, the object of which is not indicated by their titles, and also to prevent the combination of two or more distinct and unconnected matters in the same bill." There is nothing in the title to this act which is calculated to surprise or mislead any one who may read it. The body of the act treats of the subject indicated by the title, and, whether the children are designated as "neglected" or "delinquent," both classes are germane to the subject of the title, "children." This court has spoken on this subject in *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774. Burgess, J., speaking for the court, very clearly announced the rule. He said: "The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intentment can be considered as having a necessary or proper connection. The Legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title defining it." *Marshall, J.*, in *State v. Firemen's Fund*, 152 Mo. 45, 52 S. W. 608, very tersely stated the law upon this subject. He said: "When all the provisions of a statute fairly relate to the subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and, if it is sufficiently expressed in the title, the statute is valid." *Mr. Justice Harlan*, in *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431, in treating of a constitutional provision of New Jersey similar to ours, says: "The purpose of this constitutional provision was declared by the Su-

preme Court of New Jersey, in *State v. Town of Union*, 33 N. J. Law, 350, to be to prevent surprise upon legislators by the passage of bills, the object of which is not indicated by their titles, and also to prevent the combination of two or more distinct and unconnected matters in the same bill. It is not intended to prohibit the uniting in one bill of any number of provisions having one general object, fairly indicated by its title. The unity of the object must be sought in the end which the legislative act proposes to accomplish. The degree of particularity which must be used in the title of an act rests in legislative discretion, and is not defined by the Constitution. * * * It is not intended by the Constitution of New Jersey that the title to an act should embody a detailed statement, nor be an index or abstract of its contents. The creation of an independent municipality being expressed in the title, the act in question properly embraced all the means or instrumentalities to be employed in accomplishing that object. As the state Constitution has not indicated the degree of particularity necessary to express in its title the one object of an act, the courts should not embarrass legislation by technical interpretation based upon mere form or phraseology. The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or, if but one object, that it was not sufficiently expressed by the title." *The North Dakota Supreme Court*, in *Re Kol*, 10 N. D. 493, 88 N. W. 273, very clearly settles this question. It said: "The Constitution only requires that the act shall contain a single subject of legislation, and that such subject or object shall be expressed in the title. It is not intended, neither is it required, that the separate means or instrumentalities necessary to accomplish the object of legislation shall be embodied in separate acts. Such a requirement would be absurd, rendering legislative acts fragmentary, and they would often fail of their intended effect, from the inherent difficulties of expressing the legislative will when restricted to such narrow bounds. The section of the Constitution under consideration is found in the Constitutions of a majority of the states, and it is universally held, and we think necessarily, that an act which has but a single purpose, and that purpose is expressed in its title, may embrace all matters which are naturally and reasonably included in it, and all measures which will or may facilitate the accomplishment of the purpose of the legislation."

This leads us to the consideration of the most vital proposition involved in this proceeding. It overshadows all other questions presented; that is, that the "juvenile court bill" is "in conflict with and offends the organic law of this state, in this: it is both a

local and a special law." The constitutional provision upon which this contention is predicated is as follows:

"Article 4, section 53. Special and Local Laws Prohibited. The General Assembly shall not pass any local or special law. * * * In all other cases where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined, without regard to any legislative assertion on that subject. Nor shall the General Assembly indirectly enact such special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed."

Sections 1, 2, and 3 of this act provide:

"Section 1. This act shall apply only to children under the age of sixteen years, not now or hereafter inmates of any state institution, or any training school for boys, or industrial school for girls, or any institution incorporated under the laws of this state: provided, that when jurisdiction has been acquired under the provisions hereof over the person of a child, such jurisdiction shall continue for the purposes of this act until the child shall have attained its majority. For the purpose of this act the words 'neglected child' shall mean any child under the age of sixteen years who is destitute or homeless, or abandoned, or dependent upon the public for support, or who habitually begs or receives alms, is found in any house of ill-fame, or with any vicious or disreputable person, or who is suffering from the cruelty or depravity of its parents, or other person in whose care it may be. The words 'delinquent child' shall include any child under the age of sixteen who violates any law of this state, or any city ordinance. The word 'child' or 'children' may mean one or more children, and the word 'parent' or 'parents' may be held to mean one or both parents, when consistent with the intent of this act. The word 'association' shall include any corporation which includes in its purposes the care or discipline of children coming within the meaning of this act.

"Sec. 2. The circuit courts exercising jurisdiction in counties having a population of 150,000 inhabitants and over in this state, shall have original jurisdiction of all cases coming within the terms of this act. The city of St. Louis shall be deemed to be a county within the meaning of this act.

"Sec. 3. In said counties the judges of the circuit court, shall, from time to time, designate one of their number, whose duty it shall be to hear and determine for such time as such judges shall designate, all cases coming under this act. A court room to be designated the 'Juvenile Court Room' shall be provided or assigned for the hearing of such cases, and the proceedings of the court in such cases shall be entered in a book or

books to be kept for that purpose, and known as the Juvenile Record, and the court may for convenience be called the Juvenile Court. The practice and procedure prescribed by law for the conduct of criminal cases so far as same may be applicable and when not herein otherwise provided, shall govern all proceedings under this act. In all trials under this act, any person interested therein may demand a trial by jury."

It is conceded that this act at present is applicable alone to the city of St. Louis and Jackson county, as no other county in the state at present has a population as great as 150,000. It is also clear that this act has application only to the class of children treated of in the territory designated, and not to all the children of the state who may be neglected or delinquent. There can be no dispute that this act does distinguish a class of children to whom the remedies provided for in the body of the act are made applicable, and the most vital and most difficult question presented in this proceeding is not the right to distinguish the class upon which the law is to be operative, but it is in respect to the conditions which would authorize or justify the distinguishing of the class. If the conditions reasonably justified the distinguishing of the class, and the provisions of the act affect equally all who come within that class, then we think it is clear that the act does not fall within the constitutional inhibition, because of its operation on one class only. This rule was clearly announced in the recent case of *State ex inf. v. Washburn*, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430. Valliant, J., speaking for the court, in treating of the provision of the Constitution now under discussion, said: "The clause of our Constitution above quoted does not prohibit the General Assembly passing a statute to affect particularly one class. Since there are classes of individuals and corporations so essentially different from other classes as that a law designed to apply to all would apply to some in one way and to others in another, or to some in one degree and to others in a larger degree, it becomes absolutely necessary that laws should be made to affect particular classes, else the very inequality sought to be avoided would be produced. A law might be uniform in theory, yet in its operation produce unjust discrimination, discriminating in effect by failing to discriminate in form; that is, by failing in shape to fit the unequal conditions to which it must apply. Therefore a law is not within the constitutional inhibition because it is designed to operate on one class only, provided the conditions reasonably justify the distinguishing of the class, and provided it affects equally all who come within that class. *Hamman v. Central Coal & Coke Co.*, 156 Mo. 232, 58 S. W. 1091. But if the attempted classification be arbitrary, or if the statute essays to confer a 'right, privilege, or immunity' upon one or some in the class, and not upon all, the

act is invalid." The terms of this act, in section 2, restricting the application of its provisions to counties "having a population of 150,000," are not sufficient to stamp it a local or special law. This proposition has frequently had the attention of this court, and it has uniformly held that such a provision, reasonably interpreted, has application to counties which may in the future acquire the population designated in the statute. This question was sharply presented in the cases of *State ex rel. v. Marion County*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23, and *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774. It was said by Barclay, J., in the former case: "The fact that the proviso applies only to counties of a certain population is not of itself enough to stamp it as special [local], in view of the rulings that have been made on that subject in the early years of the present Constitution. *State v. Tolle*, 71 Mo. 645; *State v. Herrmann*, 75 Mo. 340; *State v. Miller*, 100 Mo. 439 [13 S. W. 677]. Whatever the present members of the court might hold on that proposition, were it an original one, is needless to state. We feel ourselves in duty bound to follow the construction that has been made by our predecessors in respect of the proper forms of legislation, and upon which construction the legislative department has ever since been acting. It certainly is a point calling for a firm application of the doctrine of stare decisis. We think a fair reading of the proviso permits the interpretation that it is designed to apply to counties that may have the stated population at any time after the statute takes effect. That idea is not expressed in so many words; but, as the law is of continuing operation, and employs the present tense—'having' such a population—and a prospective effect is to be given to a statute where its language does not exclude that construction, we consider that the interpretation above indicated is reasonable, and should be accepted to sustain the action of the lawmaking department. Where a statute is fairly susceptible of a construction in harmony with the Constitution, that construction should be adopted, in obedience to several canons for the guidance of courts in dealing with this subject." *Burgess, J.*, in treating of the same act involved in the *Marion Case*, supra, said: "It may be true, and doubtless there are counties in the state which have no dramshops, or that have no township indebtedness, and to which, for that reason, the act does not apply; but it is nevertheless general in its application, because it does apply to all road districts and townships, including those which have compromised their indebtedness. It could not be more general in its application." In *State ex rel. v. Tolle*, 71 Mo. 645, the constitutionality of section 320, Rev. St. 1879, which made its provisions applicable in all cities having a population of more than 100,000 inhabitants, was involved. This court, interpreting the terms of that statute, which is similar,

in respect to having the required population, to the one before us, held it was not a special law, within the meaning of the Constitution. *State ex rel. v. Herrmann*, 75 Mo. 340-354, relied upon by counsel for petitioner, fully recognizes the distinction between the terms of the statute involved in that case and the terms employed in statutes similar to the one in this act. It was there said by the court: "But the statute under discussion in *Tolle's Case* differs very widely from the one we are discussing. The section passed upon in that case was section 320, Rev. St. 1879, which made provision that, 'in all cities having a population of more than 100,000 inhabitants, a board consisting of the judges of the circuit court of such cities, or a majority of the same, shall on or before the 1st day of November, 1879, and every two years thereafter, cause to be published,' etc. That section related to 'persons or things as a class,' and therefore filled the definition of a general law. It did not single out and relate to 'particular persons or things of a class.' And more than that, it would only operate, and was only intended to operate, in the future, and its general rule would operate as fast as cities having a population of 100,000 inhabitants should give occasion to apply the law." In *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218, the interpretation of the provisions applicable in the *Herrmann Case*, supra, and *State ex rel. v. Jackson Co.*, 89 Mo. 237, 1 S. W. 307, is very clearly distinguished. In the *Lucas Case* the statute regulating the practicing the occupation of barber was in judgment. *Marshall, J.*, in a full and careful review of those cases, makes the distinction adverted to very clear. He said: "Section 1 of the act [Laws 1899, p. 44], however, closes with this additional proviso: 'Provided that the provisions of this law shall not apply to barbers in any city, town or village containing less than 50,000 inhabitants.' And it is asserted that, because it does not cover cities that may hereafter attain a population of 50,000 inhabitants, it is obnoxious to the charge of being a special law, as defined in *State ex rel. Harris v. Herrmann*, 75 Mo. 340, and *State ex rel. v. County Court of Jackson County*, 89 Mo. 237 [1 S. W. 307]. In *Herrmann's Case* the act was held to be special because it applied only to cities of 100,000 inhabitants [Sess. Acts 1881, p. 172], and St. Louis was the only city that at that time filled this description, and only to such notaries as held commissions bearing date prior to the passage of the act. In the *Jackson County Case*, the act [Laws 1885, p. 222] was held special because it attempted to establish reform schools for juvenile offenders 'in all counties in this state, in which there is located a city of over fifty thousand inhabitants,' and Kansas City was then the only city in the state that filled this designation; and therefore, as the act was intended to act only presently, and not prospectively, it could never apply to any county except Jackson. But neither of

the acts construed in those cases are like the act involved in this case. Here the act, on its face, by its terms, and under the machinery it provides, treats not only of the present, but deals with the future. It creates a permanent board of examiners. It permits barbers who are practicing their vocations at the date of the act to continue to do so, simply requiring them to apply for a certificate each year thereafter." The terms "in counties having a population of 150,000 inhabitants and over," as provided in section 2 of this act, do not limit or restrict the operation of the provision to counties having the required population at the time of the passage of the act, but are applicable to all counties that might in the future attain the designated number of inhabitants. This conclusion is not only supported by the numerous cases heretofore cited and discussed, but is fully sanctioned by the uniform expression of this court upon similar provisions in the cases of *State v. Hayes*, 88 Mo. 344; *Ewing v. Hoblitzelle*, 85 Mo. 64; *State ex rel. v. Wofford*, 121 Mo. 61, 25 S. W. 851; and numerous other cases.

It is urged that this act is a special or local law, for the reason that it applies a rule of procedure and punishment to a class of children in certain counties that is not applied to the same class in the other counties of the state. That is true, and that presents the difficult question for solution in this proceeding. That there are in nearly every county of this state "neglected and delinquent children," as contemplated by this act, must be conceded. The class of children treated of in the act being in existence in all the counties leads us to the examination of the reasons justifying the lawmaking power to distinguish between the classes, and make the law applicable to that class within certain counties of a designated population. It has long been recognized that the Legislature could distinguish classes of subjects to which it would make its legislative provisions applicable, but there should always be conditions which reasonably justify this distinction. This distinction is clearly drawn in the *Lucas Case* in respect to barbers. Barbers practice their occupation in every county of the state; they belong to the same class of subjects as those barbers who reside in cities of 50,000 inhabitants; yet the lawmaking power distinguished between the same class, and enacted a law which was applicable alone to that class who practiced their occupation in certain cities. This law was correctly held valid, on account of the conditions surrounding the class to which it was made applicable. It might with equal propriety be said as to that law that it imposes a burden or punishment upon a barber in one locality that a barber, for doing the same thing in another community, is exempted from such punishment. Judge Marshall, in the *Lucas Case*, makes it clear why the Legislature should distinguish be-

tween the same class. He says: "The whole scheme of the act is to protect the health of the people in large cities. The Legislature must be presumed to have known that there is more disease where large numbers of people are congregated, and more probability of the spread of disease in large and closely settled cities, than there is in the country or in a small town. History shows that there is greater need of stringent police regulations of all kinds in large than in small cities. It is not unreasonable to believe that the wisdom and experience of the lawmakers may have taught them the greater necessity for regulations to prevent the spread of contagious diseases through barber shops in large cities than exists for such regulations in smaller places. The line must be drawn somewhere. Here it was drawn at cities containing 50,000 people. The same reason which would apply such regulations to cities that now contain 50,000 people would make it necessary to apply them to a city that one, five, or ten years hereafter attains that population. The act, by its terms is continuing, and intended to be a permanent regulation." It is apparent that the Legislature, in enacting the law applicable to barbers in large cities, deemed it unnecessary and impracticable to cover the entire state by its provisions, for the reason that the dangers sought to be avoided in the cities did not exist, or, if they did, it was to a very limited extent. The same principle announced in the *Lucas Case*, and the reasons underlying the application of it, are very clearly stated by this court in *State v. Ebert*, 40 Mo. 186. The principles announced in that case are particularly appropriate to the one before us, for the reason that the Legislature, by an act, organized a new court, and modified the remedy and the form of procedure in that class of cases coming within its jurisdiction. It was said by Wagner, J., speaking for the court: "There is another point which arises on the record which presents more difficulty, and that is whether the act does not violate that clause in our Constitution which says, 'the General Assembly shall pass no special law for any case for which provision can be made by a general law, but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable.' The section in which this provision is found enumerates and places a prohibition on many acts which were theretofore subjects of special legislation. The law in question does not fall within the specific acts prohibited in the enumeration, but, if obnoxious to objection, it must be on account of the words 'all other cases where a general law can be made applicable.' The law establishes and organizes a new court, and confers special jurisdiction. This is within the undoubted province of legislative power. To promote the ends which led to the creation of the

new court, it was necessary to change and modify the remedy and forms of procedure in that class of cases coming within its jurisdiction. The court itself would not be necessary throughout the state, nor would a general law with like or similar provisions be applicable to the whole state. In a large city like St. Louis, where vice and crime spring up and multiply, it may be not only necessary, but even indispensable, for the public good, and to protect the public morals, to institute in case of misdemeanors a more summary mode and manner of proceeding than by the slow, expensive, and cumbersome process of indictment. It is in the nature of a police or municipal regulation, and, although highly necessary in one community, it may be wholly inapplicable to another." It is clear that the court regards it no longer an open question that the Legislature has the power to reach out and furnish to densely populated cities such legislation as conditions require, which would be totally impracticable to the rural districts of the state. Doubtless the Legislature, in the enactment of this law, deemed it wise, as well as just, to furnish to a class of children living in densely populated cities an opportunity for reform which was not necessary to extend to all the counties of the state, and the reasons for the limitations of the application of this law cannot be more appropriately stated than is done by counsel for respondent: "It seems hardly necessary to explain why the application of this law was so limited, for it is self-evident that there would be practically no necessity for such a provision in purely agricultural communities, where families live miles apart, and where parental authority is ever present. In such states of society there is little or no corruption or contamination to affect delinquent or neglected ones. In the Lucas Case this court clearly recognizes the danger of infection from bodily disease in communities with congested populations. In this act the danger of moral infection is recognized as equally imminent. The practical side of the question is the one upon which the legislators must of necessity base their action, and one which the courts of this state have never failed to see, appreciate, and uphold. The many localities in this state where it would be useless, burdensome, and absolutely unjust to impose upon the citizens the expense necessitated by this act, where the evil to be remedied exists little, if at all, and where the benefit to be derived would be reduced to a minimum, show clearly that the limitation is based on a rational and practical basis. The threatening evil and imminent danger to society due to the congregation of dense populations, and the resulting vice and lawlessness in the large centers of population throughout this country, are only too well known to all who are in any way conversant with the trend of modern sociological development. As the evils to which this act

is aimed are due in a large measure to these conditions, so the remedy, to be coextensive with the evil, must be based upon a classification recognizing these conditions. This view has been frequently stated and upheld by this court."

It is next urged that this act "is in conflict with the fundamental idea on which such legislation is based, in this: it does not provide for the separation of the neglected child from the delinquent child." A similar insistence was made in the case of *Milwaukee Industrial School v. Supervisors of the County*, 40 Wis. 328, 22 Am. Rep. 702. This objection is fully met by the court in its clear and logical discussion of it. The court said: "It was strongly objected to the statute that it authorizes the same disposition of children destitute by misfortune and of children convicted of crime; committing them alike to these schools during minority, there to associate together. It must be remembered, however, that this evil, if evil it be, is subject to judicial discretion, and that, in sentencing criminal children, courts will not overlook the discretion to confine them in ordinary prisons or in these schools, or the degree of depravity of convicted children, or the liability of destitute children in these schools to be demoralized by association. Children guilty of crime are not always, perhaps not often, so depraved as to make their presence in such schools dangerous to their associates. The state, providing for children dependent upon it, whether from indigence or crime, has an essential discretion in the manner of doing so. And it appears to have been in the mind of the Legislature that children guilty of accidental offenses might be more sure to gain than children destitute by misfortune would be to lose by the association, under the careful discipline provided by the act, subject to the supervision of the State Board of Charities and Reform. But if the objection were as grave as represented, it would be a defect of detail only, not of power—a blemish not surprising in the infancy of so benign a reform, and readily to be obviated in time by amendment of the statute." This act is in perfect harmony with the important duty of the public in the promotion of good citizenship. It is not only a duty that the lawmaking power owes the public to provide for the application of certain remedies which will tend to reform, and at the same time protect, the neglected and delinquent children, but it is a clear right which that branch of the government can and should exercise. As to the exercise of the right there can be no question. It is very aptly and most forcibly expressed in *Ex parte Crouse*, 4 Whart., loc. cit. 11: "It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. That parents are ordinarily intrusted with it is because it can seldom be put into better hands; but, where they are incompetent or corrupt, what is there

to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an unalienable, one. It is not excepted by the Declaration of Rights out of the subjects of ordinary legislation, and it consequently remains subject to the ordinary legislative power, which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government is constituted, cannot be doubted. As to the abridgment of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school; and we know of no natural right to exemption from restraints which conduce to an infant's welfare. Nor is there a doubt of the propriety of their application in the particular instance. The infant has been snatched from a course that must have ended in confirmed depravity, and not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it."

It is also insisted that the provisions of this act are in conflict with certain provisions of the charter of Kansas City in respect to the exercise of jurisdiction by the police judge in pursuance of certain ordinances covering some of the matters that are included in this act. Will say upon that proposition that this being a general law, as applicable to the class of subjects treated of, the charter provisions would be inoperative. The provisions of the charter must be in harmony, not only with the Constitution of the state, but, as well, its general laws. This is clearly settled in the discussion of the cases of *Kansas City v. Oil Co.*, 140 Mo., loc. cit. 469, 41 S. W. 943, and *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860.

The provisions of this act were made for the benefit of the densely populated cities and counties attaining the population designated by the act itself, and it is not violative of sections 1 and 10 of article 10 of the Constitution, that the localities for whose benefit the law was enacted should be required to pay the cost and expense of carrying out its provisions. *State ex rel. v. Mason*, 153 Mo. 23, 54 S. W. 524; *State ex rel. v. Board of Education*, 141 Mo. 45, 41 S. W. 924; *State v. Owsley*, 122 Mo. 68, 26 S. W. 659; *Young v. Kansas City*, 152 Mo. 661, 54 S. W. 535.

This is a new law, going out into a comparatively new field of legislation, and it cannot and must not be expected that it would be complete in all the minor details, for its enforcement, but these imperfections cannot be made the basis of attack on its constitutionality. The Legislature doubtless felt that the conditions surrounding the children in large cities, the temptations that daily beset them, the increased danger of such surroundings, justified the distinction made, in the application of this act; and, being a co-ordinate branch of the government, due respect should be given the judgment of this branch of the

state government, as to whether or not such conditions surrounded the subject of legislation as to authorize and justify the distinguishing features of the act before us.

We are dealing not only with a delicate and tender subject, but also an important one. Every good citizen feels a deep interest in the betterment of the condition of the children of this state. We cannot be unmindful that the perpetuity of good government must depend upon the care and attention given those into whose hands it must eventually fall. Hence it is not only our duty, but in perfect accord with the instincts of a good heart, to imitate the example of our Divine Saviour, in manifesting on all occasions our interest in this subject, as he did, in the announcement to his disciples, "Suffer little children to come unto me, and forbid them not, for of such is the kingdom of God."

We have thus given expression to our views upon the questions involved in this proceeding. We have reached the conclusion that the act before us is a valid exercise of the legislative power, under the Constitution of this state. While this conclusion is reached, the question as to the constitutionality of this act is not without doubt, but, following the well-settled doctrine upon this subject, all reasonable doubts must be resolved in favor of the validity of the act. This we have done in this case.

We highly commend the spirit manifested by members of the bar in the presentation of the questions involved. It was simply a legal proposition, discussed upon a high plane, and for the sole and unselfish purpose of obtaining a judicial expression upon the validity of an act in which the public has a deep interest.

We have declared the act valid. Its proper and successful enforcement depends largely upon the people, and upon the conduct of the legal profession of the cities and counties to which it applies. If its provisions are enforced with the same spirit that has prevailed in the submission and discussion of the question involved, then there is no longer any doubt as to the benefits to be derived from this act by the children, their parents, and the public.

With these views, James Loving will be remanded to the custody of the sheriff. All concur.

EVANS v. WABASH R. CO.*

(Supreme Court of Missouri, Division No. 2.
June 30, 1903.)

MASTER AND SERVANT—SECTIONMAN—INJURY BY APPROACHING TRAIN—CONTRIBUTORY NEGLIGENCE—DOCTRINE OF DISCOVERED PERIL—APPLICABILITY.

1. An experienced sectionman, 45 years old, and with good eyesight and hearing, was working by the side of the track at a point of safety, while a train running 30 or 40 miles an hour

*Rehearing denied December 9, 1903.

was approaching from the rear. He had an unobstructed view of the track, had he looked, for at least $1\frac{1}{2}$ miles. The wind was blowing from about the direction the train was coming, and when about 300 yards away the train whistled, and an automatic bell ringer was started. A station whistle, and then a short whistle, were afterwards given, and lastly, when about 300 or 400 feet from decedent, a danger signal of four short, quick blasts. Apparently oblivious of the train, decedent crossed the track immediately in front of it and was killed. He knew that the train was due at that hour. *Held*, that decedent was guilty of contributory negligence.

2. The doctrine of discovered peril does not apply in the case of sectionmen discovered on a railroad track by the engineer of an approaching locomotive, until he has good reason to believe that they will not get out of the way.

Appeal from Circuit Court, Jackson County; E. P. Gates, Judge.

Action by Alice Evans against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. S. Grover, for appellant. Meservy, Pierce & German, for respondent.

BURGESS, J. This is an action under the damage act in which plaintiff recovered judgment against the defendant for \$5,000 damages for negligently running its train of cars over and killing her husband, James Evans. Defendant appeals.

The accident occurred in the town of Randolph, Clay county, on the 15th day of October, 1898. During the last four or five years prior to the death of deceased he had worked several times as a laborer for defendant on its road in said county. He was an active man, 45 years of age, at the time of his death, with good eyesight and hearing. On the day he was killed he was engaged in cutting weeds along the railroad track at a point on or near a road crossing about 100 to 125 yards east of the Wabash depot, in said town. He was struck by a locomotive, to which was attached a meat train, running at the rate of about 30 or 40 miles an hour. Evans was one of a force of sectionmen composed of Charles McCain, foreman, Jeff Prewett, John Tyler, Jesse Endicott, and himself. At the point where Evans was killed the railroad track runs almost due east and west, and the sectionmen were employed in cutting the weeds on it and a few feet on each side of it. The track of the railroad is parallel with and about six or eight feet north of the north rail of the Wabash track. Jeff Prewett was ahead, and was a short distance east of the crossing; Evans, the deceased, came next. Both Prewett and Evans were on the north side of the track. Deceased was working toward the east, with his back to the west, and at the time he was struck was just north of the rail—between the north end of the ties and the rail—at a point either on or very close to a road crossing. McCain, Tyler, and Endicott were all on the south side of the track. The train was running east, and the track was nearly

level and straight for about a mile west, so that the men at work were in full view of the engineer and fireman for a distance more than a mile west of the Randolph station. At that time a regular fast freight train, east bound, which was not scheduled to stop at Randolph station, passed that place at 2:12 in the afternoon. This train had been running on that time card for a long time prior to October 15, 1898, and was well known to the people of Randolph and vicinity as the "meat train." The train was exactly on time on October 15, 1898. The train whistled at the whistling post, a quarter of a mile west of Randolph station, and the bell-ringer on the engine, an automatic contrivance, was started at the time the whistle was blown, so that the bell rang from the whistling post until the train passed Randolph station. It was a clear day, with the wind blowing from the southwest. The train contained 28 loaded cars, and was running about 30 miles an hour, and its speed was not slackened as it approached Randolph station, as it was not scheduled to stop there. At that point the track of the Hannibal & St. Joseph Railroad is about 10 feet west of the defendant's track. The defendant's track, between its rails, is 4 feet $8\frac{1}{2}$ inches wide. The front end of the engine in use that day was 9 feet and 2 inches wide, so that the engine projected outside each rail $1\frac{1}{2}$ to 2 feet. After whistling at the post the engineer then in charge of defendant's engine whistled one long blast as a station signal, and then gave a short whistle, in answer to a signal from the conductor, not to stop at the station. Seeing a group of men working close to the track near the crossing just west of Randolph station, the engineer, when about 300 or 400 feet west of the crossing, whistled again—a danger or warning signal—four short, quick blasts. The men, as the engineer saw them, separated then, some on one side of the track and some on the other. Both the engineer and the fireman were in their proper places on the engine all the way from the whistling post up to and past Randolph station. After coming within 60 feet of the men, the engineer's view of them was shut off by the front part of his engine. Evans was never seen by either the engineer or the fireman, in a position of either danger or peril, prior to the accident. In fact, they did not know that any one had been struck by the engine until after they had reached Lexington Junction, some distance east of Randolph station. Even after receiving a danger signal, if one had been given, as it was not, it would not have been possible to have stopped the train in less than a quarter of a mile after receiving and understanding such signal. All the eyewitnesses to the accident agree that Evans never paid the slightest attention to the approach of the train, though it was in plain view for at least a mile west of Randolph station. Some of them, including Endicott, say that he was stooping over

cutting weeds with a shovel, within two feet of defendant's track, looking east, all the time the train was in sight, and until it struck him, and that he never changed his position or looked up during that time, and that he was struck and instantly killed by the front part of the engine. Prewett, however, who was about 28 feet from Evans, on the same side of the track with him, says that he (Prewett) both saw and heard the approaching train, and kept out of its way, while Evans walked east on the ends of the ties on the Hannibal track, until the train was within 60 or 75 feet from him, and then started across directly in front of it. The foreman, McCain, and Prewett each shouted a warning to Evans in a loud voice. Evans paid no attention to these warning cries, but stepped on the defendant's track, and was almost instantly thereafter struck and killed by the engine. Tyler, who was about 50 feet from Evans, heard the whistle at the whistling post, and saw the approaching train a mile away, but did not hear either the bell ringing or the warning cries of Prewett and McCain, and did not see Evans struck and killed. McCain, the foreman, was on the same side of the track with Tyler, but nearer to Endicott and Evans. He saw the train when it was two miles away, and afterwards, at intervals, as it approached the station, and heard the noise of the train, as well as the various whistles described by the engineer. He was standing on the opposite side of the track from Evans, and about 20 feet from him. Evans started towards the defendant's track from the Hannibal track when the rapidly moving train was about 60 feet away from him. McCain shouted to Evans, "Look out for ninety!" (the schedule number of the "meat train"), but Evans paid no attention to the warning, and immediately thereafter stepped in front of the rapidly moving train, and was almost instantly thereafter struck and killed by it. There was no rule in force as to signals or warnings to sectionmen, as each man was supposed to look out for himself.

The court gave a number of instructions on both sides of the case, and refused several asked by defendant, among which was one in the nature of a demurrer to the evidence, which reads as follows: "The court instructs the jury that under the pleadings and all the evidence in this case the plaintiff is not entitled to recover." From our view of the case, this is the only instruction necessary for us to pass upon. It is asserted by defendant that upon the undisputed facts in evidence in this case the plaintiff was not entitled to recover, and that the court should have so instructed the jury. In passing upon this question we proceed to do so with due appreciation of the familiar rule announced by this court in *Donohue v. Railroad*, 91 Mo. 364, 2 S. W. 424, 3 S. W. 848; *Barry v. Railroad*, 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610; *Dixon v. Railroad*, 109 Mo. 413, 19 S. W.

412, 18 L. R. A. 792; *O'Mellia v. Railroad*, 115 Mo. 221, 21 S. W. 508; and *Weller v. Railroad*, 164 Mo. 199, 64 S. W. 141, 86 Am. St. Rep. 592—to the effect that when reasonable minds may fairly differ upon the question as to whether or not the deceased was guilty of negligence contributing directly to his injury the case is one for the consideration of the jury. The question then is, does the evidence conclusively show that deceased was guilty of negligence in stepping upon the track in front of and in proximity to the approaching train? That he voluntarily put himself in a dangerous position at a time and place when and where he had no occasion to so do, and when, if he had thought, looked, or listened, he would not have done so, is, we think, clear. It is held in *Loeffler v. The Mo. Pac. Ry. Co.*, 96 Mo. 267, 9 S. W. 580, that where a person voluntarily put himself in a dangerous position at a time and place when and where he had no right to be, and when he must have known that the defendant railroad company did not require or anticipate his presence, the injuries received by him were the result of his own want of common prudence.

The deceased was an experienced railroad man, having worked for defendant as a section hand on different occasions, and must have known the exact time, or at least approximately, when the meat train would pass along, and therefore his duty to be on the alert, in order that he might keep out of its way. His co-laborers, including the foreman, were all engaged in removing weeds, with a long stretch of straight and unobstructed track upon which they could have seen a train approaching, had they been mindful of their own preservation, for the distance of at least $1\frac{1}{2}$ miles. It was not the duty of the section foreman to warn the section hands that a train was coming, even if he saw it. While the meat train did not stop at Randolph, it sounded the station signal within easy hearing and within plain view of the sectionmen. Deceased was not at that time on the track or in a place of danger, but, without looking or listening for danger, stepped in front of the approaching train, was struck thereby, and killed.

In *Loring v. R. R.*, 128 Mo. 359, 31 S. W. 6, Gantt, J., speaking for the court, says: "Loring was not a trespasser in the yards, but this in no wise absolved him from the duty of looking for a train before stepping upon the track. If the law exacts of a traveler upon a highway the duty of looking and listening, a fortiori it demands of an employé, familiar with the usages and dangers of a switch yard, that he look before he steps upon a track upon which his daily experience teaches him a train or an engine may pass at any moment. *Aerkfetr v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758. *Elliott v. R. R.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068. It was simply impossible for Loring to have looked west for an approach-

ing train and not have seen the cars being shoved by the switch engine. The track was wholly unobstructed. It was daylight. The cars were in plain view and close at hand, and in such a case, when he stepped upon the track and was struck by the train, he would be conclusively presumed to have disregarded his duty to look and listen, if the positive and unequivocal evidence of all the witnesses had not affirmatively established that he did not look, and his negligence precludes his right to recover. The only way this conclusion can be avoided is by showing that the engineer was negligent in not stopping the train after he knew Loring was down and under the cars. * * * Upon the whole case, our conclusion is that the evidence wholly fails to sustain the theory of the petition that there was no evidence of negligence by those in charge of the switch engine and cars attached thereto, but that Loring came to his untimely death by reason of his thoughtlessness in stepping immediately in front of the train which killed him, and the trainmen did not discover his peril in time to save him, and, as these facts appeared from the uncontradicted evidence, the trial court should have declared as a matter of law that plaintiff could not recover."

In *Davies v. People's Railway Company*, 159 Mo. 1, 59 S. W. 982, under permission from the city authorities the contractors for a building had deposited in the street, just in front thereof, large quantities of building materials, so that only enough space for a wagon remained between the street railway tracks and the materials deposited. Plaintiff, with his back to an approaching car, was assisting in unloading some heavy iron beams, and in order to do this he was compelled to use a lever, and to stand in the rear of the wagon, and slightly within the range of the cars, which were constantly passing. He was so engaged at the time of his injury; did not see the approaching car; it was not checked; no bell was rung; no warning given of its approach; there was a full and unobstructed view of the track for some distance; and while plaintiff was unloading this wagon two other cars had passed, and, being warned of their approach, he merely had to step aside or turn halfway around to escape injury. Plaintiff had been employed for some time at this point, knew that cars were continually passing, and admitted that he was aware of the danger. There was no allegation that the injury was wantonly or willfully done. Held that, under these facts shown by plaintiff's pleading and evidence, it was not incumbent on defendant to show plaintiff's contributory negligence, but that the court should have decided as a matter of law that upon plaintiff's own showing he could not recover, and it was error to submit the case to the jury. See, also, *Sharp v. Mo. Pac. Ry. Co.*, 161 Mo. 214, 61 S. W. 829.

But plaintiff claims that, even if deceased was guilty of negligence, yet if defendant's

employés in charge of the train became aware of his peril, or might, by the exercise of ordinary care, have become aware of it, in time to have enabled them, by the exercise of ordinary care, to have averted the injury, and they failed to exercise such care, plaintiff was entitled to recover. It will not do to apply this rule in all of its strictness to sectionmen whose business it is to work upon and keep in repair railroad tracks, for they are supposed to look after their own personal safety, and to know of the time at which trains pass, to look for them, and see them, and to move out of the way. It is of common knowledge that these men often voluntarily wait until trains get dangerously close to them, and then step out of danger, and let them pass by, and to require trains to stop upon all such occasions, when sectionmen are discovered at work on the track, would not only be imposing upon railroads unjust burdens, but would greatly interfere with traffic and travel. Those in charge of trains have the right to presume, in the first place, that such persons will keep out of danger, and not until they have good reason to believe they will not do so, and then fail to use all proper means at their command to prevent injuring them, in consequence of which they are injured, or are injured by reason of the willful negligence of those in charge of the train, should the defendant be held liable; and there was nothing of this kind in this case. Our conclusion is that the demurrer to the evidence interposed by defendant should have been sustained.

The judgment is reversed. All concur.

STATE v. PEEBLES et al.

(Supreme Court of Missouri, Division No. 2.
Dec. 9, 1903.)

BURGLARY—BREAKING—PRINCIPALS—INFORMATION—INSTRUCTIONS—VARIANCE.

1. In a prosecution for burglary, or burglary and larceny, the breaking and entry, like other facts, may be shown by circumstantial evidence.

2. In a prosecution of two persons for burglary and larceny it was not necessary, to support a conviction, to prove that both defendants entered the building, but if one of them entered, and was aided by the other in so doing and in stealing and carrying away the property, both were guilty of burglary and larceny.

3. Unlocking the door of a house with intent to steal personal property contained therein is burglary.

4. In a prosecution for burglary, proof of breaking, entry, and taking away the property against the will of the owner, justifies an inference that the opening of a door to the house was with criminal intent to steal.

5. In a prosecution for burglary the information charged that the crime was committed by unlocking and entering the front door of part of a building occupied by a certain firm, and it appeared that the property stolen was from another part of the building occupied by another person. The building was all under the same roof and inclosed as one, and the partition between the two parts did not extend the entire length of the building nor to the ceiling, so

¶ 2 See Criminal Law, vol. 14, Cent. Dig. §§ 81, 82.

that a person could have climbed over it without any breaking. The court charged that, if the defendants burglarized the building of the person in possession of that portion of the building from which the goods were taken, the jury should find them guilty. *Held*, that entering the portion of the building charged in the information to have been broken was burglary as to the entire building, so that the variance between the information and the charge was not fatal.

Appeal from Circuit Court, Atchison County; Cyrus A. Anthony, Judge.

Wilber Peebles and Oliver York were convicted of burglary, and appeal. Affirmed.

Hunt & Bailey and T. S. Stevens, for appellants. The Attorney General and Bruce Barnett, for the State.

BURGESS, J. At the May term, 1903, of the Atchison county circuit court, the prosecuting attorney of said county filed in said court an information charging the defendants, Peebles and York, jointly, with having feloniously and burglariously broken into and entered a certain warehouse situate in said county and belonging to one James E. Hall and Aggie Rickards and Eliza Rickards, in which there were divers goods, wares, and merchandise and valuable things then and there kept for sale, with the felonious intent to burglariously steal, and did steal, take, and carry away, 15 sacks of flour of the value of sixteen and fifty one-hundredths of a dollar, of the goods belonging to said James E. Hall in said warehouse then being found, and did then and there feloniously and burglariously steal, take, and carry away, against the peace and dignity of the state. They were thereafter put upon trial in said court, and found guilty of both burglary and larceny, and their punishments respectively assessed at three years' imprisonment in the penitentiary for the burglary, and two years for the larceny. They thereafter in due time filed motion for new trial and in arrest, which being overruled, they saved their exceptions, and prosecute this appeal.

At the time of the alleged commission of the offenses with which defendants are charged, one Sylvester Hall owned a frame warehouse in the village of Watson, Atchison county. It fronted east, and had a board partition in the center running the entire length of the building from a point about six to eight feet west of the front. It only extended upward to about as high as the lower ends of the rafters, and was only about eight feet high, leaving it entirely open above the partition end between that and the roof. In the space at the east end between the end of the partition and the wall was where the flour was. It was stacked up to within three feet, or something like that, of the top of the partition. One J. E. Hall occupied, as tenant of Sylvester Hall, that part of the building north of the partition as a warehouse for the purpose of storing flour and other commodities, and at the same time there was a

large number of sacks of flour therein, some 12 to 15 of which were stolen and carried away. Aggie Rickards and Eliza Rickards, as partners under the firm name of A. L. Rickards & Co., at the same time occupied the south side of the partition as a warehouse, in which they kept barreled salt and other articles of merchandise. Each of the rooms had a door in front, locked with different kinds of locks, and the evidence tended to show that the entrance was made through the door on the south side of the partition by unlocking it, and the flour passed over the partition from its north side to its south side, then out through the door. The offenses were committed on the night of the 4th or 5th of March, 1903. None of the stolen flour was found in the possession of defendants, and the evidence with respect to their connection with the offenses was altogether circumstantial. Defendant Peebles hauled a portion of the flour to the warehouse. It was the property of J. E. Hall, and that taken was worth about \$16.

Elmer Cassey, a witness for the state, testified that early in March, 1903, he had been around the livery stable of the defendant Peebles, and that defendant York also spent considerable time there, he being Peebles' uncle; that these defendants entered jointly into a conversation with witness, told him that they had a key to the warehouse, and asked witness to go with them that night to get out some flour; they said that they would go into the building and hand out the flour; witness refused to take any part in such an expedition, and the defendants said that they could get along without him and would do it themselves. After this conversation the defendants at about 9 o'clock went off, and witness went to bed. The defendants did not say what warehouse they expected to get the flour from, but they did speak of getting it over the partitions, and there is evidence that there was no other warehouse in the town where flour was kept. After the information had been filed against the defendants and they were put under arrest, they asked Cassey not "to give them away." There was evidence tending to show that the character of Cassey, witness for the state, among his neighbors, for truth and veracity, was not good.

Over the objection and exception of defendants, the court instructed the jury as follows: "(1) The court instructs the jury that the defendants are presumed to be innocent of the offense charged; that before you can convict them, or either of them, the state must overcome that presumption by proving such defendant or defendants to be guilty beyond a reasonable doubt. If the jury have a reasonable doubt as to the guilt of either of the defendants, they should acquit such defendant; but a doubt, to authorize an acquittal, must be a substantial doubt, and not a mere possibility of innocence. (2) The jury are instructed that, if they believe from the evi-

dence, beyond a reasonable doubt, that the defendants, Wilber Peebles and Oliver York, did, on or about the 1st day of March, 1903, or at any time within three years next before the 5th day of May, 1903, at the county of Atchison and state of Missouri, feloniously and burglariously break and enter the warehouse of James E. Hall, in which at the time were stored flour and other goods, wares, and merchandise, with the intent then and there to feloniously take, steal, and carry away any of the goods, wares, or merchandise therein situated, with the intent to deprive the owner permanently thereof and to convert the same to their own use, then in that case you will find the defendants guilty of burglary, and assess their punishment at imprisonment in the penitentiary for not less than three years. (3) If the jury find the defendants guilty of burglary, and if the jury further believe that, at the time of the commission of said burglary, the defendant did take, steal, and carry away from the premises aforesaid any flour, the same being the property of James E. Hall, you should find the defendants guilty of larceny, and assess their punishment at imprisonment in the penitentiary for a term not less than two years nor more than five years, in addition to the punishment assessed for the burglary. (4) The court instructs the jury that the word 'feloniously,' as used in these instructions, means wickedly and against the admonitions of the law—that is, unlawfully. (5) The jury are instructed that if they believe from the evidence that the warehouse of James E. Hall was a room of the same building in which the warehouse of Rickards & Co. was situate, and that said rooms were separated by a board partition, and if you further believe that the outer doors of said building were closed and locked, and if you further believe that the defendants entered said building by means of opening either outside door of said building, with the intent to take, steal, and carry away any of the goods, wares, and merchandise in said building stored, such entrance would constitute burglary, whether it was directly in or to that part occupied by Hall, or whether the entrance was first made through the part occupied by Rickards & Co. (6) The jury are further instructed that where the doors of a building are closed, and are opened by means of unlocking the same, or if said doors are closed, and the party removes a fastening—whatever it may be—and opens the door, such entrance will constitute a breaking, however small the force applied thereto. (7) The jury are further instructed that if you find from the evidence, beyond a reasonable doubt, that the defendants, at the county of Atchison and state of Missouri, at any time within one year next before the 5th day of May, 1903, did take, steal, and carry away from the warehouse of James E. Hall any flour of any value less than thirty dollars, the same being the property of the said James E. Hall, with

the intention to convert the same to their own use and permanently deprive the owner thereof, and you do not find that the defendants burglariously entered the said warehouse, you will find the defendants guilty of petit larceny, and assess their punishment at imprisonment in the county jail not exceeding one year, or at a fine not exceeding one hundred dollars, or at both such fine and imprisonment. (8) The jury are instructed that although defendants are jointly informed against and tried, yet as to each you should make a separate finding, and, if you should find both or either guilty, you should state in your verdict the finding and punishment as to each separately. (9) The court instructs the jury that while the offense of burglary and that of larceny are charged in the same count of the information, yet they are each separate and distinct offenses, and the jury are at liberty to acquit as to one and find defendants guilty of the other, or find defendants guilty of both or acquit of both, as they believe from all the facts and circumstances in proof; but to find the defendants guilty of either offense, they must so find, from all the facts and circumstances in proof, beyond a reasonable doubt. And, in this connection, the court further instructs you that you may find either one of the defendants guilty and acquit the other of either or both offenses, as you believe the evidence in this case may warrant. (10) The jury are further instructed that it is not necessary to prove the defendants guilty by testimony of witnesses who have seen the offense committed, but such guilt may be established by proof of facts and circumstances from which it may be reasonably and satisfactorily inferred." Thereupon, at the request and in the behalf of the defendants, the court gave the following instructions, to wit: "(11) The court instructs the jury that, in order to convict the defendants or either of them upon circumstantial evidence alone, the circumstances tending to show their guilt should be established beyond a rational doubt by the evidence in the case; and, when so established, should point so strongly to the guilt of the defendants as to exclude any other reasonable hypothesis than that of guilt. (12) In law, a person accused of crime is presumed to be innocent. This presumption entitles him to an acquittal, unless it is overcome by evidence of his guilt beyond a reasonable doubt. A juror is understood to entertain a reasonable doubt when he has not an abiding conviction to a moral certainty that the party accused is guilty as charged, and in this case the jury should acquit the defendants if you entertain a reasonable doubt of their guilt; and you should also acquit if it is as reasonable, considering all the facts and circumstances proven, to conclude that they are innocent as to conclude that they are guilty, or if all the facts and circumstances can be reasonably reconciled with any theory other than guilt. (13) The jury are the sole judges

of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight, you should take into consideration the character of the witness, his or her manner on the witness stand, his or her interest, if any, in the result of the trial, his or her relation to or feelings toward the defendant, the motives, if any, prompting his or her testimony, the probability or improbability of his or her statements, as well as all the facts and circumstances given in evidence. And, if the jury believe from all the facts and circumstances in proof that any witness has willfully sworn falsely as to any material fact in the case, you are at liberty to disregard the whole of the testimony of any such witness. (14) The court instructs the jury that the testimony of an accomplice in crime—that is, a person who aids, abets, or conceals the crime—is admissible; but the jury are instructed that the testimony of such an one aiding, abetting, or concealing a crime, when not corroborated by some person or persons not implicated in the crime, as to matters material to the issue—that is, matters connecting the defendants, or either one of them, with the commission of the crime charged against them or him, and identifying them or him as the perpetrators or perpetrator thereof—ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth before they should convict the defendants, or either of them, on such testimony."

While in burglary, or in burglary and larceny, there must be a breaking, and an actual entry with intent to steal, these facts, like the facts in any other criminal prosecution, may be shown by facts and circumstances, if sufficient. There could not, of course, under the evidence in this case, have been a larceny of the flour without an entry of the building; but we think the evidence conclusively shows that the flour was stolen, and that the warehouse was entered by unlocking the front door on the side occupied by Rickards & Co. It was not necessary that both of the defendants should have entered the building, but if one of them entered, and was aided by the other in so doing and in stealing and carrying away the flour, they are equally guilty both of burglary and larceny. The unlocking the door to the house with a criminal intent to steal some of the personal property therein contained was burglary, and such intent may be inferred from the breaking, entry, and taking away the property against the will of the owner, with intent to deprive him thereof.

It is said that the state's instruction numbered 2 is erroneous in that it tells the jury that, if they find that the Hall building was burglarized, they must find the defendant guilty, when there was no evidence tending to show that it was in fact burglarized. The information alleges, and the evidence tends to show, that the burglary was committed by

unlocking and entering the front door of the part of the building in the possession of Rickards & Co., and that the flour was stolen from that part of the building in the occupancy of J. E. Hall. If the warehouse was in fact burglarized, the evidence tends to show that it was done by unlocking and entering through the door on the side occupied by Rickards & Co., which is in accord with the allegations in the information, and the question is whether or not the variance was fatal. That the building was one and the same is undisputable, although occupied by different persons. It was under the same roof, and inclosed as one. The partition did not extend the entire length of the building by six to eight feet at the east end, and this space was blocked by piling up sacks of flour in it. Nor did the partition extend up to the ceiling, so that any person so inclined could have climbed over it from one side to the other without any breaking, or being guilty of burglary. This being the case, it would seem that the felonious breaking into the warehouse at any place was burglary as to the entire house, regardless of the fact that parts of it were occupied by different persons; otherwise breaking into a house on the side occupied by one person would not be burglary of the other, although the purpose may have been to steal, as was done in this case, personal property from that part of the building not occupied by the owner of it. "Proof of ownership is now not * * * very strictly required." Note 6, 3 Greenleaf on Evidence, § 81. The gist of the offense consisted in breaking and entering the house with intent to steal, and we think there was no material variance between the information and proof and the instruction as to the occupancy of the building. In *State v. La Croix*, 8 S. D. 369, 66 N. W. 944, the information charged that the defendant broke and entered the store building of William J. Hughes and Henry Slechta, partners doing business in the firm name and style of Hughes & Slechta, while in fact the firm was composed of said William J. Hughes and Christiana Slechta, the wife of Henry Slechta, and that the store building in question, occupied by said firm of Hughes & Slechta for the purpose of trade, was owned by George Backus. The court said: "Upon the ground of a variance between the information and the proof as to the ownership of the building and the stock of merchandise therein contained, counsel for the accused moved the court to direct the jury to return a verdict of not guilty, and the denial of said motion is assigned as error. This motion was properly overruled. There is no material variance between the information and the proof as to the occupancy of the building, and it appears from the undisputed evidence that said building contained a stock of merchandise belonging to the firm of Hughes & Slechta at the time the offense was committed. The fact that the title to said building was shown to be in another, and that Slechta's name was Christiana, instead of

Henry, is not a material variance. No pretense is made that the accused was, by the variance, misled or prejudiced in making his defense, and surely he is not exposed to the danger of being put twice in jeopardy for the offense described in the information. The variance was therefore properly disregarded." Citing *Coates v. State*, 31 Tex. Cr. R. 257, 20 S. W. 585; *State v. Emmons*, 72 Iowa, 265, 83 N. W. 672; *Smith v. State*, 34 Tex. Cr. R. 124, 29 S. W. 775; *Leslie v. State*, 35 Fla. 171, 17 South. 555; *Winslow v. State*, 26 Neb. 308, 41 N. W. 1116. If we are correct, as before intimated, with respect to the foregoing proposition, it is clear that there is no conflict between instructions numbered 2 and 5 given for the state.

It is insisted that there was no evidence to authorize the verdict. We are unable to concur in this view. If the principal witness for the state was worthy of belief, there was some evidence tending to show the guilt of defendants, otherwise there was no evidence tending to so show. The credibility of the witnesses and the weight of the testimony are always questions for the consideration of the jury, and this court will not interfere unless there is no substantial evidence to support the verdict. The verdict of the jury was approved by the trial court, who heard the witnesses and observed their demeanor on the witness stand, and under the circumstances we do not feel that we would be justified in interfering with it. We can but affirm the judgment. It is so ordered. All concur.

STATE v. MOORE.

(Supreme Court of Missouri, Division No. 2
Dec. 9, 1903.)

ASSAULT—INSTRUCTIONS—CONFORMITY TO INFORMATION.

1. Where an information charged an assault on A., it was error to charge that defendant would be guilty if he unlawfully committed an assault on A., B., or C.

Appeal from Circuit Court, Christian County; Asbury Burkhead, Judge.

James W. Moore was convicted of assault with a deadly weapon, and appeals. Reversed.

G. Purd Hayes, for appellant. Edward C. Crow and C. D. Corum, for the State.

BURGESS, J. On the 12th day of February, 1902, the prosecuting attorney of Christian county filed in the office of the clerk of the circuit court of said county an information against defendant, in two counts. The first count charges defendant with a felonious assault upon one Nancy Lewis with a deadly weapon, to wit, a certain gun, and with a certain pistol. The second count charges an assault in and upon

the body of said Nancy Lewis, with a deadly weapon, to wit, a large stone, on purpose and with malice aforethought. The defendant was found guilty, and his punishment fixed at two years' imprisonment in the penitentiary. After unavailing motion for a new trial, defendant appeals.

Over the objection and exception of defendant, the court, in instruction No. 1, authorized the jury to find the defendant guilty if he unlawfully committed an assault upon Nancy M. Lewis, Troy Lewis, or Roy Lewis, or either of them, while the information charges him with committing an assault upon Nancy M. Lewis only. The second instruction is open to the same objection. These instructions are admitted to be erroneous by the Attorney General.

The judgment is reversed, and the cause remanded. All concur.

STATE v. KENTNER.

(Supreme Court of Missouri, Division No. 2
Dec. 9, 1903.)

BUCKET SHOP—KEEPING PLACE—INFORMATION—SUFFICIENCY—PLACE OF PRETENDED PURCHASES—EVIDENCE.

1. An information charging defendant with keeping a place wherein he conducted, and there permitted persons named, and others unknown, to engage in, the pretended buying and selling of shares of stock of unknown corporations, and certain agricultural provisions, on margins, not intending to receive the same if purchased, or to deliver the same if sold, was sufficient, within Rev. St. 1899, § 2339, making it unlawful to keep a place wherein is conducted the buying or selling of stocks, grains, or other products, on margins or otherwise, without any intention of receiving and paying for the property bought, or delivering the property sold.

2. An information in the language of the statute creating a statutory offense, and which sets forth all the facts constituting the offense, is sufficient.

3. An information charging defendant with a violation of Rev. St. 1899, § 2339, making it unlawful to keep a place for the buying or selling of property on margins, is not defective for failing to allege that defendant intended to commit an offense.

4. Defendant was prosecuted for keeping a bucket shop in Mound City, while he resided and was in business in another city. The bucket shop was managed through an agent. A person desiring to buy would go to the office and employ defendant's agent to buy some article, at the same time depositing with him the margin. The agent received the market price from the defendant over the telephone. The buyer would ask what corn was worth, and the agent would then inquire of defendant, who would tell him, and then he would inform the buyer, when he would say what he wanted, and the agent would tell defendant to buy whatever amount the buyer said. Margins were put up in all deals, and where money was paid, it was deposited in the Mound City Bank to defendant's credit. Held, that the pretended purchases were made at defendant's place of business in Mound City.

Appeal from Circuit Court, Holt County; Gallatin Craig, Judge.

¶ 1. See *Assault and Battery*, vol. 4, Cent. Dig. § 126.

¶ 2. See *Indictment and Information*, vol. 27, Cent. Dig. §§ 292, 293, 294.

O. A. Kentner was convicted of keeping a bucket shop, and appeals. Affirmed.

See 74 S. W. 9.

Crandall & Strop and John Kennish, for appellant. Ivan Blair, for the State.

BURGESS, J. On the 11th day of April, 1902, the prosecuting attorney of Holt county filed with the clerk of the circuit court of said county an information against the defendant, Kentner, which is as follows: "Ivan Blair, prosecuting attorney in and for the county of Holt and state of Missouri, upon his oath of office informs that the defendant, O. A. Kentner, on or about the 1st day of May, 1901, and on divers other days before and since said 1st day of May, at and in the county of Holt and state of Missouri, did then and there unlawfully keep and caused to be kept a certain office room and place, wherein he, the said O. A. Kentner, conducted, and then and there permitted Steven T. Lucas, William S. Cannon, John Jourdan, John Trice, C. O. McIntyre, and divers other persons unknown, to engage in, the pretended buying and selling of the shares of stock and bonds of certain corporations, the names of which, where organized, and by virtue of what laws, are unknown, and cannot be given, and certain quantities of petroleum and provisions, to wit, pork and lard, cotton, grain, and agricultural products, to wit, wheat, corn, and oats, on margins, so called. The said persons so pretending to sell the said commodities, and pretending to offer the same for sale, not intending then and there to have the full amount of said property so sold or offered to be sold, or any part thereof, on hand or under their control, to deliver upon such sale, and the said parties so to buy said commodities, and pretending to offer to buy the same, not intending then and there to actually receive the same if purchased, or to deliver the same if sold, against the peace and dignity of the state. Ivan Blair, Prosecuting Attorney." Thereafter, at the April term, 1902, defendant filed a motion to quash said information, which is as follows: "Comes now defendant, and prays the court to quash the information in this case, for the reason that the information filed does not state facts sufficient to charge the defendant with a crime under the laws of the state of Missouri. Second. Because the act of the Legislature and laws upon which this prosecution is based is unconstitutional and void, for the reason that it gives to the informer or prosecuting attorney one-fourth (¼) of the amount of fine imposed for this violation, and for that reason is in conflict with that provision of the Constitution of the state of Missouri which grants exclusive power to the Governor of the state to grant pardon and remit offense, etc. Third. Because said information is so indefinite and uncertain that it does not inform the defendant of what offense he has to be tried, nor al-

lege that he intended to commit any offense." This motion was overruled, and defendant saved exceptions. The defendant was then put upon his trial, found guilty, and his punishment fixed at a fine of \$500. He appeals.

The facts, briefly stated, are that the place for keeping which defendant was convicted was in the town of Mound City, in Holt county. It was not contended that such place was kept or conducted by the defendant in person, nor that he was ever in Holt county, or made any agreement therein, in connection with the keeping of such place. As shown by the evidence, defendant was a resident of St. Joseph, Buchanan county, Mo., and was engaged in business in said city of St. Joseph. The theory of the prosecution is that the defendant was keeping the office or place charged in the information through his agent, one W. Eben Smith, who was in the actual charge of such office or place. A written agreement offered in evidence by the state was entered into by defendant and said Smith at St. Joseph, Buchanan county, Mo., setting forth the terms and the purpose for which Smith was employed by the defendant. According to this agreement and the evidence for the state, the defendant employed witness Smith, paying him \$70 per month, and furnished him the markets by telephone, free, at said Mound City; and Smith agreed to send, and did send, orders for the purchase or sale of stocks, grain, etc., to the defendant, at St. Joseph, and collected margins thereon at the time such orders were sent. Such margins were deposited to the credit of the defendant in a bank at Mound City, after which Smith had no control over or interest in them. In carrying on the business at Mound City, Smith rented a room, and paid the rent therefor, owned all the furniture therein, and had a broker's license and a city license from said city to transact such business in his own name, both of which were paid for by defendant. The manner in which the business was conducted at Mound City was as follows: There was a telephone in the office, over which Smith received from defendant, at St. Joseph, the market reports. These reports were placed upon a blackboard. Those desiring to buy or sell any commodity on which the market was given would direct Smith to telephone an order to buy or sell, as the case might be, at St. Joseph, Mo. The names of the parties dealing were not telephoned by Smith, but each order was accompanied with a certain number. Sometimes the order would be accepted at St. Joseph, sometimes not. Whatever sales or purchases, or pretended sales or purchases, were made, were made and directed to be made, in St. Joseph, Buchanan county, and not in Mound City, Holt county. The business seems to have been conducted in the name of defendant, at which time he was also conducting the same kind of business in the city of St. Joseph; the two places

being connected by wire, for the use of which he paid. Smith testified that he conducted the business at Mound City under the daily directions of the defendant, and that he was in conversation with him over the telephone many times daily. Defendant also employed one Cannon to solicit business for the establishment in Mound City, paying him \$25 per month for his services. The evidence clearly showed that the business was carried on in violation of the statute.

The defendant insists that the court erred in overruling his motion to quash the information. The argument is that it is insufficient for the reason that it fails to charge the unlawful intent of the parties therein alleged to have been dealing on margins; that the part of the information in which such unlawful intention is attempted to be charged fails to make any averment whatever or statement of any fact. The statute upon which this prosecution is predicated (section 2339, Rev. St. 1899) provides that it shall be unlawful for any person to keep a place wherein is conducted the buying or selling of stocks, grain, or other products, either on margins or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold, or wherein is conducted or permitted the buying or selling of such property on margins when the party selling or offering to sell does not have the full amount of property on hand to deliver upon such sale, or when the party buying or offering to buy does not intend actually to receive the same if purchased, or to deliver the same if sold. The information is in the language of the statute, which is sufficient in all statutory offenses where all the facts which constitute the offense are set forth in the statute. *State v. Davis*, 70 Mo. 467; *State v. Krueger*, 134 Mo. 262, 35 S. W. 604. The offense charged is the keeping and causing to be kept a place wherein he (the defendant) conducted and permitted certain persons named to engage in the pretended buying and selling of shares of stock and bonds, and certain agricultural products, not intending to receive the same if purchased, or to deliver the same if sold, and is not only in the language of the statute, but sets forth the names of certain persons who engaged therein in the pretended buying and selling of the shares of stock and bonds of certain corporations. "On the general principles of common-law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute in all cases when the statute so far individuates the offense that the offender has proper notice, from the mere adoption of statutory terms, what the offense he is to be tried for really is. But in no other case is it sufficient to follow the words of the statute. It is no more allowable, under a statutory charge, to put the defendant on trial without specification of the offense, than it would be under a com-

mon-law charge." *Wharton, Cr. Pl. & Prac.* (9th Ed.) § 220. It was not necessary that the intent of the defendant be alleged in the information, as that is not an ingredient of the offense. He was clearly informed by the information of the nature and character of the offense alleged against him, and could successfully plead his acquittal or conviction in bar to another prosecution for the same offense. The business was all transacted at Mound City, in Holt county. None of the articles pretended to be sold were intended to be delivered; hence there was nothing further to be done than was done to complete the transactions.

At the close of the state's case, defendant asked an instruction in the nature of a demurrer to the evidence, which was refused, and he excepted. The action of the court in this regard is assigned for error; defendant insisting that the evidence showed the sales and purchases were made in St. Joseph, Buchanan county, and not in Mound City, Holt county. The manner in which the business was conducted was for a person who desired to buy any of the articles mentioned in the information to go into the defendant's place of business in Mound City, and employ Smith as his agent to buy for him some article, at the same time depositing with him a certain amount of money with which to make the purchase, or, rather, the "margin," as there was no intention by the seller to deliver the article pretended to be purchased, nor did the buyer expect it. Nor were they ever delivered. If the market value of the article went down, the purchaser lost his margin. Smith received the market from Kentner over the telephone, and, when received, he would call it, and, if it was corn, the buyer would ask what corn was worth. Smith would then inquire of Kentner, who would tell him, and then he would inform the buyer. Then the latter would say, "Buy 10,000 bushels," or 1,000, or any amount he wanted, and Smith would tell Kentner to buy whatever amount he said. Margins were put up on all deals, and, when the money was paid, it was deposited in the Mound City Bank to the credit of Kentner. It would therefore seem that the pretended purchases were made at defendant's place of business in Mound City. There is no question of delivery in this case, and the facts disclosed by the record bring it clearly within the provisions of the statute which denounces the keeping of offices and places of business in this state wherein is conducted or permitted the pretended buying or selling of certain articles named therein, either on margins or otherwise, without any intention of receiving and paying for the property. If the property was to be delivered, the transactions would not, of course, come under the ban of the statute. The defendant was a party to the opening up the room or place of business, and knew the object and purpose. Indeed, he hired Smith, at a stipu-

lated salary per month, to conduct the business for him, and directed by telephone all of its transactions, and received all moneys paid to Smith, as his agent, on margins. He also employed one Cannon, to whom he paid \$25 per month for soliciting business for the place. And it is idle to say that he did not know that the stocks or property bought were not intended to be delivered to the purchaser, or intended to be received by him, but that all of the transactions which took place were deals in options. The instructions given were upon this theory of the case, and presented it very fairly to the jury. There was therefore no error committed in refusing instructions asked by defendant.

The constitutional question raised in the trial court is without merit, and in fact is not insisted upon in this court.

Finding no reversible error in the record, the judgment is affirmed. All concur.

STATE v. CAYOE.

(Supreme Court of Missouri, Division No. 2.
Dec. 9, 1903.)

CRIMINAL LAW—BILL OF EXCEPTIONS—REVIEW.

1. In the absence of a bill of exceptions, the court on appeal in a criminal case can only review the record proper.

Appeal from Circuit Court, St. Francois County; Robt. A. Anthony, Judge.

Elijah Cayoe was convicted of crime, and appeals. Affirmed.

B. H. Marbury, for appellant. Edward C. Crow and C. D. Corum, for the State.

BURGESS, J. The defendant was convicted of a felonious assault with intent to kill one Lewis Cunningham, and his punishment fixed at two years' imprisonment in the penitentiary. From the judgment and sentence he appeals. Defendant is not represented in this court. No bill of exceptions was filed in this cause, so that there is nothing before us for review save and except the record proper, and this we find free from error.

The judgment must be affirmed. It is so ordered. All concur.

STATE v. WEAKLY.

(Supreme Court of Missouri, Division No. 2.
Dec. 9, 1903.)

HOMICIDE—EVIDENCE—INSTRUCTIONS—MAN-SLAUGHTER IN FOURTH DEGREE.

1. Rev. St. 1889, § 3477, provides that manslaughter in the fourth degree includes every homicide not justifiable or excusable which was manslaughter at common law, and which is not declared to be manslaughter in some other degree. Rev. St. 1890, § 2627, makes it the duty of the court to instruct the jury on all questions of law arising in the case. *Held*, that

where, on a prosecution for murder, the evidence showed that accused shot deceased intentionally, but there was evidence that deceased assaulted defendant and struck him over the head with a revolver just before the fatal shot, it was error not to charge on manslaughter in the fourth degree.

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Chance Weakly was convicted of murder in the second degree, and he appeals. Reversed.

Jno. A. Gernez, for appellant. Edward C. Crow and Bruce Barnett, for the State.

BURGESS, J. Defendant was convicted of murder in the second degree, and his punishment fixed at 10 years' imprisonment in the penitentiary, for having shot and killed with a pistol one John Fox, in the city of St. Louis, on the evening of December 25, 1901. The case is before us upon his appeal for review.

Both defendant and deceased were negroes. The killing occurred at a negro clubroom in said city, of which both parties were members. William Fox, a brother of the deceased, and acting vice president of the club, testified on behalf of the state substantially as follows: That at about half past 8 in the evening of Christmas Day he was at the clubrooms, when Chance Weakly, the defendant, came in, and witness said to him, "I told you about your treating me. It isn't right, the way you have acted, shooting here;" and that defendant replied, "What shooting?" and witness said, "You done it;" and defendant answered, "I have done it, and what are you going to do?" and witness said, "There is nothing to do but to go out and stay out;" whereupon defendant put his hand back to his pocket, as if to draw a pistol, and upon this witness' brother John, the deceased, stepped into the room, and pointed a gun at the defendant, saying: "Chance, don't do that. I am bound to protect his life;" and Chance replied, "I have not got nothing." Deceased wanted witness to search defendant, but witness said, "I never took advantage of no one. I am not going to run from him." The defendant then said that he "didn't have nothing," and witness said, "Let him go, John." The deceased then put up his gun, and said to the defendant, "Don't think hard of me for what I have done. I haven't done anything but what you would do for your brother." Defendant then said, "That is all right, John." The deceased then walked into the next room, but a moment later said to the defendant, "Chance, I can talk to you?" and defendant replied, "Certainly." The deceased and the defendant then walked out into the hall, and in four or five minutes deceased returned, saying, "Everything is all right." And the defendant said, "Everything is all right with me and him, John." The deceased then turned his back, and the defendant fired two shots at deceased, which

took effect in the head and jaw. He fell in witness' arms, and, as far as witness could tell, died almost instantly. At the time deceased was shot he had in one hand a cane, which he carried as a regular habit, having become crippled some time before, and in the other hand a cigar, which he was smoking. Witness did not see defendant at the time the first shot was fired, but he did see him as he fired the second shot; defendant having gotten to the door by that time. Immediately after this occurrence, defendant turned and ran away, and was seen no more about the clubrooms. Just before defendant fired the shot, he said, "Yes; it is all right with me, John." Malcolm Powell, who was at the club at the time of the shooting, testified, in substance, that the defendant came to the clubrooms that night with some other parties and witness' brother. Will Fox told defendant that he had mistreated him, shooting off his gun, and that, if he could do no better, he wished he would stay away; that he would do him a great favor by doing so. Words became very hot, causing witness to quit playing cards, and to go to the room where they were in time to hear defendant say to Will Fox, "Well, I have done it. What are you going to do about it?" to which Will Fox replied, "I can do nothing but tell you to stay away;" that defendant then stepped back and made a motion as if to draw a gun from his pocket, whereupon witness' half-brother, John Fox, the deceased, stepped in and lowered a pistol at the defendant, with these words, "Don't do that, Chance. I am saving my brother's life, and at the same time protecting your life." The defendant then said, "I have not got anything. I have not got any gun." The deceased then walked into an adjoining room, but very soon returned, and said to the defendant, "Chance, I haven't done anything more than you would do for your brother. I am protecting my brother's life and yours at the same time. I don't want you to think hard of me. I have not done anything more than you would do. Can't I talk to you?" and to this defendant smiled, and answered, "Yes." Defendant and the deceased then went out into the hall to talk, and soon the deceased returned, saying, "Everything is all right, ain't it, Chance?" and Chance said, "Yes; everything is all right with me." Just as deceased stepped over the door sill, witness heard a shot fired, and defendant then stepped just inside the room and fired a second shot, and deceased fell across the door. The defendant turned and ran away. Galvin Granch, a member of the club, was at the club on that evening, and heard Will Fox saying to the defendant: "When you come here shooting as you did to-day, you know it gives us trouble. The police are around where there is shooting, and it will draw the police. I don't like that way of doing, and, if you want to do that, you will have to stay away"—and heard the defendant reply: "It is done,

and what are you going to do about it?" To which Will Fox responded: "I am not going to do anything, but you can walk out if you don't behave yourself." This conversation continued, and defendant started, "kind of walking sideways," with his hand at his pocket, and saying, "I don't think you have treated me right." At this point John Fox, or deceased, came in and said, "Throw up your hands," and told Will to search him, but Will said, "No; I won't search any one. I don't believe in taking advantage of any one. I believe in treating everybody right, and I want them to treat me right. Put the gun up, and come back in here." Deceased then put up his gun, and a moment later said to defendant: "Weakly, come into the hall. I can talk to you in here. There is no use having trouble." Deceased and defendant went out into the hall, and returned in about five minutes, at the end of which time witness heard deceased say, "It is all right with you, Chance?" Chance answered, "Yes." Witness then thought that the trouble was over, but about three minutes later two shots were fired, and he looked, and saw John Fox fall into his brother's arms, and then on to the floor, just inside the door. These witnesses testified that during the conversation in the hall there was no loud or excited talking. James Massey, a police officer, hearing the pistol shots, hastened to the club, and found the deceased lying on the floor with a bullet wound in his head, the end of the bullet sticking out of the forehead. He had no pistol on his person. D. F. Hochderfer, a physician, testified that, upon a post mortem examination by the coroner at the morgue, he found that the bullet had gone through the defendant's head from behind, coming out at the forehead, and another through his jaw, entering at the rear and coming out in front. Police Officer J. J. Gordon, who put the defendant under arrest soon after the occurrence, testified that the defendant said that he had lost his pistol while running through the alley; that they had chased him, and he lost his gun; that John Fox had stuck a revolver at his stomach, and made him throw up his hands, and then hit him over the head; and that then he (the defendant) shot him (Fox). On cross-examination this witness testified that there was a mark or bruise on the side of the head of defendant; that defendant said that John Fox stuck a revolver at his stomach, and made him hold up his hands, and then he hit him (defendant) over the head. Charles Weinstock, a witness for defendant, described defendant's entry into the clubrooms, and the reprimand administered to him by Will Fox. He related how in the meantime John Fox had held a whispered conference with his half-brother, Malcolm Powell, and was handed something by the latter, which John Fox put in his pocket; how John Fox then walked into the hall from the second room, and in a second reappeared, coming into the buffet,

saying, "Throw up your hands, you s— of a b—." A few words ensued, whereupon John Fox said to the defendant, "Come on out here in the hall. I am not through with you yet;" at the same time catching defendant by the coat and pulling him out into the hallway. Previous to that the witness had heard words in the hall, but could not distinguish what was said. Immediately after the shots he saw John Fox run into the buffet with a revolver in his hand. Both shots were fired in the hall—neither in the buffet. Benson Cobbs, another witness for the defendant, was in the buffet when the defendant arrived. He narrated the conversation between defendant and Will Fox, and then described how the deceased came in from the hallway and "stuck a gun in defendant's stomach," and told him to throw up his hands. After some conversation, the deceased walked into the adjoining room, and returned, saying: "Chance, come here. I want to talk to you. Can I talk to you?" To which defendant answered: "Anybody can talk to me." They went out into the hall, and were there for five minutes. "Q. by defendant's counsel. Did you hear anything? A. I went out into the hall, and I heard something hit—like somebody was hit across the head with a gun or stick—and then I heard two shots in rapid succession, and then John came falling in the door, with a gun in his hand." Lee Houston, who was also present when defendant entered the clubrooms, in the "dancing room," as witness calls it, gives his account of the occurrences: He heard loud words in the buffet. He saw John Fox come from the hall into the buffet, and heard him say to the defendant, "Throw up your hands." After some additional words, John Fox told the defendant to walk out into the hall—that he could talk to him better there—which the defendant did, and John Fox followed him; and John Fox said to the defendant (quoting the witness' words): "He said, 'I am not going to let you kill my brother; and he said, 'I am not going to kill your brother.' He said, 'That is all right,' and John Fox struck at Chance, and he ducked; and when he got to the door he kept his hand in his pocket, and whether he pulled it out of his pocket after he struck at him, I don't know; I would not be sure." Chance Weakly, the defendant, called in his own behalf, testified as follows: There had always been a friendly feeling between the Fox brothers and himself. On Christmas evening, at about 8 o'clock, he, with Ed. Williams and Charles Weinstock, went to the club, of which he was a member. As he started to enter the clubrooms, his companions went in, but he was stopped by Will Fox, who upbraided him for an occurrence of the morning. In the meantime John Fox appeared, and pulled a gun on him. There was some more argument, and then John Fox seizes defendant by the coat, saying: "Come on out here. I am not through with you yet." "Q. (being

asked by defendant's counsel). You went outside? A. Yes, sir. Q. How far did you go outside? A. Coming out like this is the door; it is twice the distance where that corner is; and he takes me clean back to the corner of the hall, and nobody in room can see anything. Q. You went clear back to the angle? A. Yes, sir. Q. What were you talking about? A. There was no talking. He takes me out there, and says to me when he turned me loose, 'That is all right,' and smashes me— Q. With what? A. A Colt's pistol. Q. Did you have a hat on? A. Yes, sir. Q. Did it leave any mark? A. No, sir; I had a new stiff hat on, and it bursted it to pieces. If it had not been for that, it would. When he hit me I ducked down, and when I come up I shot before I straightened up. Q. What was your purpose in shooting? A. To keep him from killing me. I was frightened. I was trying to get away from him." On his redirect examination, defendant stated the blow so received left a mark on his face.

The court instructed for murder in the second degree and self-defense, but not as to manslaughter. To the instructions given, the defendant at the time duly excepted, because of the failure of the court to instruct the jury upon all the law of the case. It is now insisted that the court should have instructed for manslaughter in the fourth degree, and, in failing to do so, committed reversible error. No criticism is made upon the instructions that were given, further than as we have indicated. It is clear from the testimony that the killing was intentional. The defendant was therefore guilty, under the evidence, of murder in the second degree, or of manslaughter in the fourth degree, unless the homicide was justifiable. It has been said that, under our statute, manslaughter in the fourth degree includes every homicide not justifiable or excusable which was manslaughter at common law, and which is not excusable or justifiable, or is not declared by statute to be manslaughter in some other degree—is manslaughter in the fourth degree. *State v. Edwards*, 70 Mo. 480; section 3477, Rev. St. 1889; *State v. Watson*, 95 Mo. 411, 8 S. W. 383. Therefore, "if the party act upon sudden passion, engendered by reasonable provocation, the existence of malice will be negated, and the killing, though intentional, will be manslaughter in the fourth degree." *State v. Curtis*, 70 Mo. 594. But in order to reduce the offense from murder to manslaughter, the killing must be done in a heat of passion, on a reasonable provocation, without malice and without premeditation, and under circumstances that will not be justifiable or excusable homicide. And the passion which will reduce homicide to the grade of manslaughter is an excited state of the mind produced by some lawful provocation, such as a blow or an assault of any kind upon the person. *State v. Ellis*, 74 Mo. 207. It was the duty of the court to instruct the

jury upon all questions of law arising in the case which were necessary for their information in giving their verdict (section 2627, Rev. St. 1899); and as there was evidence tending to show that the deceased assaulted the defendant and struck him over the head with a revolver just before defendant shot him, which, if true, was certainly reasonable provocation, and must have tended to arouse that heat of passion which negatives malice, and whether it did so, or not, should have been submitted to the jury, and the court erred in failing to so do, when its attention was called to the fact that it had failed to instruct the jury upon all the law of the case under the evidence.

For these intimations, the judgment is reversed, and the cause remanded. All concur.

STATE v. ROBERTSON.

(Supreme Court of Missouri, Division No. 2.
Dec. 9, 1903.)

MURDER—INFORMATION—PROOF—VARIANCE —INSTRUCTIONS—EVIDENCE—SUFFICIENCY—EXTENUATION.

1. The information in a prosecution for murder charged that the pistol with which the killing was done was loaded with "a" leaden ball. The proof showed that it was loaded with at least two leaden balls. Defendant claimed that the case against him must fail, because, when the first shot was fired, the only leaden ball alleged to be in the pistol had been discharged, and after this first fire there was, so far as the information goes, no other leaden ball in it, and the state ought not to be permitted to show defendant shot and killed deceased at the second shot, as all the evidence shows he did. *Held*, that the contention was without merit.

2. Testimony of several witnesses showed directly that defendant in a prosecution for murder had declared he went to a certain place with the intention of either compelling deceased to sign a note with or for him, or of killing him if he refused to do so; and there was other evidence tending to show that to be defendant's intention. *Held*, that the evidence justified a charge that, if defendant did go there with that intention, and that deceased refused to sign the note, whereupon defendant killed him, the jury should find defendant guilty of murder in the first degree.

3. There can be no such thing as manslaughter in the third degree when the homicide is intentional.

4. Evidence considered, and *held* to show murder in the first degree.

5. An information charging defendant with murder alleged that "with the bullet so shot out of the pistol defendant gave deceased one mortal wound, and of the mortal wound aforesaid he died." *Held*, that the information was sufficient, though failing to use the word "thereby" in connection with the charge that by reason of the wounding decedent died.

6. It is no extenuation or mitigation of defendant's offense of murdering his father-in-law that deceased merely refused to accede to defendant's demands to sign a note with or for him to enable defendant to relieve his great financial stress, for which deceased was in no way responsible.

Appeal from Circuit Court, Adair County;
Nat M. Shelton, Judge.

John Robertson was convicted of murder in the first degree, and appeals. Affirmed.

J. M. McCall, for appellant. E. O. Crow and Sam B. Jeffries, for the State.

GANTT, J. From a conviction of murder in the first degree in the circuit court of Adair county the defendant prosecutes this appeal.

The prosecution is by information filed by the prosecuting attorney, verified by his affidavit. The information, save in one immaterial point, is in the usual form long approved, and it is unnecessary to set it forth at length. The arraignment was regular, and no complaint is made as to the selection and impaneling of the jury. The information charges that defendant, on the 13th day of November, 1902, at the county of Adair, in this state, willfully, deliberately, premeditatedly, and of his malice aforethought shot and killed George Conkle. The facts are, in substance, the following: The shooting took place at the town of Brashear, in Adair county. Deceased was defendant's father-in-law, a man about 65 years of age, who resided on a farm about a half a mile outside the corporate limits of the town of Brashear. Defendant married deceased's daughter some years ago, and lived with her until he left Missouri and went to Kansas several years thereafter. She then secured a divorce. In 1898 defendant enlisted in the service of the United States in the Spanish-American War. He returned by way of Washington to St. Louis, and then to Kirksville. He went to Brashear, and wrote a note to his former wife, with the proposition that they should be married again. His proposition was accepted, but not without the opposition of the deceased and his family. Shortly afterwards the defendant bought a piece of land near Kirksville. In order to secure the money with which to pay for the farm, the deceased became defendant's security for \$100, while the balance was secured by deed of trust on the land. A short time prior to the 13th day of November, 1902, defendant and his wife concluded to sell the land, and offered it to the deceased's brother, but he, fearing that some trouble might arise, declined to entertain the proposition. On the morning of the homicide the defendant and his wife boarded the train at Kirksville and went to Brashear for the purpose of selling the property to the deceased. Before leaving Kirksville, a conveyancer was obtained, and a deed to the land drawn conveying it to deceased, which was signed and acknowledged by the defendant and his wife. On reaching Brashear defendant went to the bank, and asked the cashier if a note for \$150, signed by the deceased, was good. The cashier told him that it was. Defendant then said he would go out and secure the signature of deceased to the note and return. The note was made payable to the

bank. The defendant and his wife left the bank, and walked down the street about 60 feet, when defendant noticed the deceased in a hardware store. He requested his wife to go in and call her father out. This she did. The deceased, defendant, and defendant's wife then walked from the hardware store to the corner, when defendant asked the deceased to sign the note, stating that they would then deliver the deed they had already executed to the land to him. About this time Harvey Johnson, a witness for the state, came up, and he heard the defendant say to the deceased, "How can you treat me so?" and the deceased said, "Treat hell! See what I have already done for you," and in a moment thereafter the shooting occurred; the defendant stating that the deceased then threatened to do him some violence, and made an attempt as though to draw a knife, and he drew a revolver and shot. The deceased lived but a few minutes thereafter. The defendant was arrested in a short time, but not until he had endeavored to shoot himself and had cut himself badly with a knife in an attempt to take his own life. He was so weakened from the loss of blood that he became unconscious, and remained in that condition for a considerable time. In rebuttal witnesses for the state testified that the deceased was in their full view during the conversation between deceased and defendant, and that deceased at no time drew a knife, or made any demonstration of an assault on defendant. The instructions will be noticed in the course of the opinion.

1. The first error assigned is that because the information alleges that the pistol with which defendant shot and killed deceased was "then and there loaded with gunpowder and a leaden bullet," and that with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid by the said John Robertson discharged and shot off as aforesaid, "the defendant did strike, penetrate, and wound him the said George Conkle," and the proof disclosed that the pistol was loaded with at least two leaden balls, the state's case must fail, because when the first shot was fired the only leaden ball alleged to be in the pistol had been discharged, and after this first fire there was, so far as the information goes, no other leaden ball in it, and the state ought not to be permitted to show defendant shot and killed deceased at the second shot, as all the evidence shows he did. This objection cannot be seriously considered. It matters not how many other balls were in the pistol. The information was sufficient to charge the one ball with which defendant shot and killed deceased. This is the one with which the information charges the pistol was loaded, and with which deceased was killed.

2. Among other instructions given by the court was the following, numbered 8: "If you find and believe from the evidence beyond a

reasonable doubt that on the day of the homicide proved by the evidence defendant went to Brashear with the intention or design of either compelling George Conkle to sign a note with or for defendant or of killing said Conkle if he refused to sign such note, and that he requested said Conkle to sign such note, and that Conkle refused to do so, and that defendant thereupon did kill said Conkle because of such refusal, then you should find defendant guilty of murder in the first degree." This instruction is urged as error for the reason, as defendant insists, that there was no evidence that defendant went to Brashear with the intention or design of either compelling Conkle (the deceased) to sign a note with or for him or of killing him if he refused to do so. S. M. Moore, a witness, testified to a conversation he had with defendant after the homicide, in which witness said to defendant "It was too bad that he went there and got into that trouble," and he (defendant) said: "No, it is not too bad. I went down to kill him, and I did it. There's nothing too bad about it." "I feel better than I have for ten years." J. T. O'Bryan, another witness, testified: "I asked the question did he go down to Brashear to kill that man, and he said, 'Not necessarily.' I asked him what he meant by 'not necessarily.' 'Does that mean, if he did not sign that note, you would kill him?' And he said, 'Yes, that's the way to put it.'" John Musick, another witness, testified that he heard Mr. Johnson ask him (the defendant), "Did you tell Mr. Conkle, before I came out of the store, you would kill him if he did not sign that note?" and defendant said, "Yes, sir; I had no choice." Another witness (C. W. Gordon) testified that defendant asked him, "Is he [Conkle] dead?" I said, "Yes, John. Did you intend to kill him?" And he said, "I did." I said, "Are you satisfied?" and he said, "I have no regrets." In view of all this direct testimony in addition to all the other facts in evidence, it is clear that the objection to this instruction is untenable.

3. The defendant prayed a number of instructions, which the court refused. Instruction No. 5 requested the court to submit whether defendant was guilty of manslaughter in the third degree. Such an instruction would have been manifestly improper in view of the evidence in the case. We have again and again ruled that there can be no such thing as manslaughter in the third degree when the homicide is intentional. *State v. Pettit*, 119 Mo. 416, 24 S. W. 1014; *State v. Barutis*, 148 Mo. 249, 49 S. W. 1004. The fourth instruction asked by defendant was a mere comment on the evidence. Instruction No. 3 was, in effect, a prayer for an instruction on murder in the second degree, and, if the evidence justified such an instruction, it was error to refuse it, even though not couched in a perfectly correct formula. Did the testimony warrant such an instruction? On the part of the state the evidence discloses

that the defendant armed himself with a deadly weapon, and went to Braashear with the intention of compelling his father-in-law to purchase his tract of land, or kill him if he refused. It appears that when the deceased declined to take the land and sign the note the defendant remonstrated, whereupon his father-in-law reminded him of the aid he had already given him, whereupon the defendant without any provocation, either lawful or just, shot him to death. The evidence also shows that the deceased was at the time unarmed, having not even a pocketknife about his person. On the part of the defendant the case depends entirely upon his own unsupported evidence, which, in detail, is as follows: "I handed him [Conkle] the papers, and told him that Jackson Conkle had backed out on the deal on account of his telling Jackson not to buy it; he might cause him some trouble. I said: 'We came to see if you would not take the place. You could turn it over to Jackson or keep it on shares. We have no money. We have nothing to eat. You know it.' He said: 'Yes, I know you are starving. You will have to starve worse.' He stuck his left hand in his pocket, and said, 'Damn you, go away from here, or I'll fix you.' He got his knife out of his pocket. I said: 'Don't do that. I have got a gun. I don't want any trouble. I didn't come for trouble, Mr. Conkle. I don't want any more trouble at all.' Well, we kinder moved back on the sidewalk running north and south. I told him: 'You take the deed, George. Don't be so cruel. Take it. You know we have no money. You know we are starving. Let us have no more trouble.' He keeps his hand on his knife all the time. He made a quick movement, and pulled his knife out, and, to make a long story short, I don't know what took place after that. My brain seemed to be wild." The defendant denied the statements attributed to him by Johnson, O'Bryan, Gordon, and others. He testified that he had no intention or purpose of doing deceased any harm when he went to see him on the day of the homicide. He does not testify directly that he shot deceased because he apprehended deceased was about to kill him or do him some great bodily harm, and did so to prevent the apprehended danger, but the circuit court, giving him the full benefit of his evidence, instructed the jury fully and fairly on the law of self-defense, and, we think, properly did so, and left it to the jury to determine the facts.

Did his testimony require the court to instruct on murder in the second degree? Few questions are more difficult of solution than to determine whether the evidence in a given case is sufficient to reduce a homicide from murder in the first degree to murder in the second degree. Murder in the second degree has been defined by this court to be the wrongful killing of a human being with malice aforethought, but without deliberation. It is where the intent to kill is in a heat of passion, executed the instant it is

conceived, or before there has been time for the passion to subside. "Heat of passion" is not used in its technical sense, but as a condition of the mind contradistinguished from a cool state of the blood. An example is given by Judge Henry in *State v. Wieners*, 66 Mo., loc. cit. 25, as where A. and B., who had been on friendly terms, have an altercation, and A. calls B. a liar, and B. instantly with a deadly weapon, in a passion engendered by the insult, kills A. In such case the deliberation essential to murder in the first degree is absent, and the killing is murder in the second degree. In *State v. Sneed*, 91 Mo. 552, 4 S. W. 411, the evidence on behalf of the state tended to prove, as does the testimony in this case, a case of murder in the first degree; but the defendant in his own behalf testified that deceased and he were walking together, when deceased reached around him, and, upon being asked by defendant what he meant by that, said, "I have been laying for you, and I am going to give it to you now," and made a plunge at him with a knife in his hand, whereupon defendant drew his pistol and shot deceased. This court, in determining whether an instruction on murder in the second degree should have been given, said: "If the deceased was killed under the circumstances detailed by the witnesses on the part of the state, the crime of murder in the first degree was fully made out, and there is nothing in the evidence which required the court to give instructions upon any other grade of homicide. If, on the other hand, the deceased was killed under the circumstances detailed by defendant, the law of self-defense justified him in the killing." In *State v. Robinson*, 73 Mo. 308, it was held that, if two friends casually meet, and get into a heated controversy, and one in apparent anger apply to the other some degrading epithet, or impute to him some act of criminal baseness, and the latter, stung to madness by the insult, should upon the instant strike and kill the former with a deadly weapon, this would be murder in the second degree. In *State v. Smith*, 114 Mo. 406, 21 S. W. 827, it was ruled that when the testimony on the part of the state discloses a clear case of deliberate and premeditated killing by the defendant of an unarmed man, who at the time was making no assault on the defendant, and the evidence on behalf of defendant makes but a case of self-defense, there is no place for an instruction on any lower grade than murder in the first degree. The facts of this case bring it within the principle of those cases. Even the defendant's unsupported evidence discloses no such words of opprobrium or degrading epithets as would naturally arouse such a heat of passion as would reduce the homicide to a less degree than murder in the first degree, and the circuit court properly so declared in its instructions. In view of all the evidence, we are of opinion that the circuit court properly declined to instruct upon any

lower grade of homicide than murder in the first degree.

4. The information was not defective in failing to use the word "thereby" in connection with the charge that by reason of the wounding the said Conkle died. It alleges that "with the bullet so shot out of the pistol defendant gave the deceased one mortal wound, and of the mortal wound aforesaid he died." This was all that was necessary.

This record presents a most unnatural crime. The deceased, who was the father-in-law of defendant, was in no manner responsible for the unfortunate condition of defendant's financial affairs. The evidence shows he had aided him on former occasions, and because he did not desire to purchase the tract of land which defendant offered to deed him was no reason why defendant should ruthlessly take his life. We find no extenuation or mitigation of the defendant's offense in the mere refusal of deceased to accede to his demands. The evidence tends strongly to prove a deliberate and premeditated design to slay his father-in-law without any provocation, either lawful or just.

The judgment of the circuit court must be and is affirmed, and the sentence which the law pronounces must be executed.

BURGESS and FOX, JJ., concur.

BAKER v. McDANIEL et al.

(Supreme Court of Missouri, Division No. 2.
Nov. 17, 1903.)

NUISANCE—ABATEMENT—PUBLIC NUISANCE— SUIT BY INDIVIDUAL—INJUNCTION—ISSUES.

1. The statute provides that an injunction may issue in aid of a civil action when the relief, or any part thereof, consists in restraining some act of defendant, the commission of which would injure plaintiff; and Rev. St. 1889, § 2040, provides that a plaintiff may unite in the same petition as many causes of action as arise out of the same transaction. *Held*, that one may in the same action seek to abate a nuisance, pray for injunctive process, and for damages arising from the nuisance.

2. In order to enable an individual to maintain an action for injuries resulting from a public nuisance, it is necessary for him to show that he has sustained special damages over and above the injury suffered by the community at large.

3. Where, in a suit to abate a public nuisance, from which plaintiff claimed to have suffered special damages, the court made no special finding as to the existence of the nuisance, but found that plaintiff was not entitled to recover, the latter finding amounted to a finding on the existence of the nuisance.

4. An individual sued for the abatement of a public nuisance consisting of fruit stands, etc., which he alleged defendants had erected, in the city, on land dedicated to the public, but which defendants claimed, and of which they had been in possession many years, and the city was not a party. *Held*, that the court was not required to determine the question of dedication, defendants' title, etc.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Suit by Maggie C. Baker against E. E. McDaniel and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

James Baker, Chas. J. Wright, and Wm. A. Gardner, for appellant. Tatlow & Mitchell, for respondents.

Statement.

FOX, J. That we may fully understand this case as presented by the pleadings in the trial court, we here insert them:

"On the 22d day of December, 1899, the plaintiff below and appellant here filed her petition in the Greene county circuit court, and sued out a writ in due form thereon, returnable to the January term, 1900, of said court, which petition is as follows: The plaintiff, for her cause of action in the above-entitled cause, states that she is, and for the last sixteen years has been, the owner in fee simple of the real estate situated in lots seventeen, eighteen, and twenty therein in block five of the original town of Springfield, in Greene county, state of Missouri, bounded and described as follows: Beginning at a point twelve (12) feet east of the northwest corner of the public square; running from thence north fifty (50) feet; thence west one hundred and twenty-nine (129) feet; thence south eighty-one (81) feet; thence east one hundred and seventeen and a half (117½) feet; thence north thirty-one (31) feet; thence east twelve (12) feet, to the beginning. Plaintiff further states that at the time she acquired the title to said land James Baker, her husband, became the owner in fee of the remaining part of said lot eighteen, and a strip 12 feet wide off of the west side of said lot seventeen, lying adjoining it in the east; that the lands so owned by her and her husband in lot seventeen constituted a strip 12 feet in width, extending along the west side of said lot, from the public square north to Olive street, a distance of one hundred and seventeen and a half (117½) feet; that said strip, with 3 feet in width more along the east side thereof added to it, making fifteen (15) feet in width in all, was dedicated to public use as a public highway more than fifty years prior to this date by the then owners thereof, and has been continuously in such use during the whole of that time. That said dedication was and is for public use for pedestrians only, and is a footway, and was, in effect, an extension of the sidewalk along the west side of the public square, thence to Olive street on the north, and is now generally known by the name of the 'Baker Arcade.' Plaintiff further states that the ground adjoining said arcade on the west was divided into eight different lots fronting on the same soon after said dedication was made; that the only access to them was by it, and that it has con-

¶ 1. See Action, vol. 1, Cent. Dig. §§ 463, 587; Nuisance, vol. 37, Cent. Dig. § 99.

tinned to be a public highway in much use ever since its dedication, and that when plaintiff purchased the property so owned by her it was an important and active business center, which had added greatly to the value of her property, and constituted the chief inducement to her purchase; that at the time she purchased the same all of said buildings were occupied for business purposes, and had been so from the time of their construction until removed by plaintiff in 1885 to make room for a large and commodious four-story brick structure 81 feet wide by 100 feet long, completed by her in the year 1886; that said building fronts 50 feet on said arcade on the west side thereof, and 31 feet on the public square; and for the purpose of widening and making the said arcade more useful the front of said building was set back 10 feet west of the west line thereof, making the arcade 25 feet wide instead of 15, as formerly. Plaintiff further states that in the year 1868 the ancestors of the defendants herein, and from whom they derived their title to the same, were the owners in fee of all of said lot seventeen (17) except the 12-foot strip embraced in said arcade as aforesaid; that they then erected thereon a large brick building three stories in height, now known as the 'City Hall,' the west wall of which corresponds with the east line of said 3-foot strip which constitutes a part of said arcade, thereby confirming said former dedication and rededicating the same. Plaintiff further states that in the year 1886 James Baker, her husband, reconstructed said arcade by elevating the grade thereof its entire length and breadth 2 feet, and by paving the same with nice flagstones at a cost of five hundred dollars; that defendants consented to and sanctioned and approved of said reconstruction, and by so doing they fully rededicated said 3 feet to public use, and by permitting and sanctioning the expenditure of the money which such reconstruction cost they are estopped from denying such dedication. Plaintiff further states that said arcade extends along the western line of defendants' lot and building, making it a corner lot instead of an inside lot lying in a closed corner, out of the way of public passage as formerly, and adds more than fifty per cent. to value of said property; that the contribution of a part of the ground occupied by said arcade confers upon the remainder of said lot and the owners thereof valuable private easements or franchises in the whole of it, which did not exist and could not be exercised without it. Plaintiff further states that since the reconstruction of said arcade the whole of it has been in continuous public use as such highway without interruption until the 26th day of November in the year 1890, when the defendants, at a late hour in the night, secretly slipped a cigar stand in there, and placed it upon the paving next to the wall of their building, thereby occupying all the ground

so dedicated to public use by their ancestors and themselves, and a strip 2 feet and $\frac{1}{2}$ inches in width dedicated as aforesaid by plaintiff and those from whom she derived title, extending from the south to the north end of the land owned by her in said lot 17, to which they have not even a color of title. Plaintiff says that said stands are small temporary structures made of boards, and consist of a partition on their west side and at each end, set against the wall of said city hall building, which constitutes the east wall, and are covered with the same kind of boards; that they are $5\frac{1}{2}$ feet wide by 50 feet long; that they are too small for the transaction of the business carried on, and are only used for the storage of the goods kept for sale; that the customers and those who transact the business occupy the public way in the same manner as such business is generally transacted by the keepers on such stands in the public streets, and by so doing they have practically taken possession of and occupy the whole arcade for their private business, without any authority or license to do so; that a large portion of said stands are used for boot blacking and similar purposes, which are carried on by a number of colored men, who with them associate, occupy seats, much of the time, on the pavement in said arcade, constituting a band of loafers, making the place repulsive, instead of attractive, as it was intended to be. Plaintiff further states that said stands and the business carried on in connection with them materially obstruct and interfere with the public use of said arcade as a public highway, and constitute a grievous public nuisance; that they have and do materially injure the property owned by plaintiff fronting on the same, and have caused a reduction in the rental value of more than forty dollars per month; that she has been damaged by said nuisance and trespass to an amount not less than five thousand dollars in the aggregate. Plaintiff further states that, if the 3-foot strip of ground owned by defendants as aforesaid has not been dedicated to public use as hereinbefore stated, and is not in public use, the defendants have no right to use the remainder of said arcade as a means of access to and departure from their private property, that being a private use of the same, which cannot be exercised by any but those owning the property or have a franchise therein by owning a part of the property so in public use; that by so using it they are not only guilty of maintaining a nuisance as aforesaid, but have and are committing a trespass upon the property of plaintiff, thereby increasing the injury they have done to her, and adding to their liability. Plaintiff further states to the court here that the south wall of said city hall building was placed and now stands more than 2 feet south of the south line of lot 17 and the part thereof owned by defendants as aforesaid, by which said building extends upon and occupies a strip of

ground constituting a part of the public square 2 feet in width north and south and 77 feet in length east and west; that said public square is a tract embracing about three acres of land that was long since dedicated to and is now in public use; that said wall so occupying a part of the public square is directly in front of plaintiff's large building aforementioned, and only 3 feet from the lands so owned by her; that it materially injures the view from and free access to her said building, thereby creating a serious continuous special injury to her and her property, and constitutes a troublesome public nuisance. Plaintiff asks for a decree abating each and all of such public nuisance and for an injunction compelling the removal of said stands, and prohibiting the establishing and maintaining any such structure or business in said arcade, and for a judgment of five thousand dollars for the damage so suffered by her, and for her costs, and such other relief as she may be entitled to."

Defendants filed the following answer to the petition as filed by plaintiff:

"Now at this day come the above-named defendants, and for their amended answer to plaintiff's petition say that they admit:

"(1) That in 1868 the ancestors of the defendants and James Vaughan were the owners in fee of lot 17 in block 5 in the town of Springfield, Missouri, except 12 feet off the west side of said lot, and that the defendants derived and acquired title to said land from their ancestors and James Vaughan.

"(2) Defendants admit that their ancestors and James Vaughan in 1868 erected a large three-story brick building on a part of their said property, known as the 'City Hall Building.'

"(3) Defendants admit that more than fifty years prior to the 22d day of December, 1899 (the date plaintiff filed her petition in this case), the then owners of the property immediately west of defendants' said property dedicated to public use as a public highway a strip of ground running from the square north to Olive street, and that the land so dedicated has been continuously in such use during the whole of that time.

"(4) Defendants admit that in the year 1885 the plaintiff erected a four-story brick building on her property, known as the 'Baker Block,' and admit that for the purpose of widening said public highway and making it more useful the front of said Baker Block was set back 10 feet to the west, thereby dedicating the public use 10 feet more on the west of said public highway; and that said public highway has since been known as the 'Baker Arcade,' and that it has continued to be a public highway in such use ever since that time, and leading from the square to Olive street in said city, and separating plaintiff's and defendants' said property.

"(5) Defendants admit that in 1886 said Baker Arcade was reconstructed by elevating the grade thereof 2 feet its entire length and breadth and by paving the same with flagstone.

"(6) Defendants admit that they are in possession and now occupying 5 feet of ground west of their said building, and that the same is occupied by defendants by a cigar stand 5 feet wide and running north the entire length of their said building.

"Defendants deny each and every allegation in plaintiff's petition contained, except the above specified allegations in said petition which the defendants admit to be true. Defendants aver and state that the west wall of said city hall building, so erected by their ancestors and James Vaughan as aforesaid, was and is 5 feet west of the west boundary line of their said property. Defendants further state that the north portion of their said 5 feet west of the west wall of their said building has, since the erection of said building, been occupied by a brick wall entrance to the basement of said building five (5) feet wide by ten (10) feet long north and south and about two and one-half (2½) feet high next to the building, and sloping gradually to the entrance of the cellar, and also occupied by two gratings two (2) feet wide over windows to said cellar on the west of said building, and that the north part of said five (5) feet has been occupied by a small cigar stand five (5) feet wide and ten (10) feet deep, running back from the square, for more than five (5) years prior to the 21st day of June, 1886, and until removed on said 21st day of June, 1886, by the agent of plaintiff, under the written contract hereinafter set out at length.

"Defendants further state that the only ground ever dedicated to public use, and which now constitutes the Baker Arcade, is the (10) feet of ground that was dedicated more than fifty years ago by the then owners of the property immediately west of the defendants' said property, as defendants' property is hereinbefore described, to wit, all of lot 17 in block 5 of the original town of Springfield, Missouri, except 12 feet off the west side of said lot, the west boundary line of which is five (5) feet west of the west wall of their said city hall building.

"Defendants further state that the reconstruction of said Baker Arcade in 1886 by elevating the grade thereof two (2) feet its entire length, and by paving the same with flagging, was done by and under the supervision of James Baker; but defendants say that the said Baker paved said arcade as aforesaid as the agent and representative of the plaintiff in this case, and defendants further say that at the time of the paving of the said Baker Arcade the said James Baker also paved, with the same kind of flagstone with which the arcade was paved, the said five (5) feet of ground of the de-

fendants in this case lying immediately west of their said city hall building.

"Defendants further state that their said five (5) feet of ground was not by said paving dedicated to public use, or made a part of said Baker Arcade, and that the same has never been dedicated to public use by either the defendants, or those under whom they claim, and that there never was any intention on the part of the defendants, or any of them, or any of those under whom defendants claim, to so dedicate said five (5) feet of ground, but that said five (5) feet of ground was paved by the said Baker as the agent of his wife, under a written contract, which is in words and figures as follows, to wit: * * *

"Defendants further state that there is no plat of the original town of Springfield on file in the recorder's office in said county, and that, if said plat ever existed, it had been lost and destroyed many years before the plaintiff or defendants acquired their said property; that the original town of Springfield was laid out from the intersection of the section corners of sections 13, 14, 23, and 24 in township 29, range 22; that said section corners were lost and destroyed, and for many years have been so lost and destroyed and unknown corners, and that hence at the time the defendants' ancestors, William Jasper McDaniel and Charles Sheppard, and James Vaughan, acquired their said property above described, and for many years prior thereto, the boundary lines in said original town of Springfield were in great confusion and uncertainty, and are still so, except as fixed by agreement and possession; and hence it was very difficult, if not impossible, to locate or ascertain the exact boundary lines of lot 17, or any other lot, in said original town of Springfield, or of the lines of the streets or alleys therein.

"Defendants further state that at the time their said ancestors, Jasper McDaniel and Charles Sheppard, and James Vaughan, erected said city hall building on their property in 1868, that it was then and there agreed by and between James Vaughan and the defendants' said ancestors and the then owner of the ground on the west, to wit, John Young, under whom the plaintiff claims title to her said property, that the said James Vaughan and William Jasper McDaniel and Charles Sheppard's west line of their said property was five (5) feet west of the west wall of their said brick building, then and now known as the 'City Hall Building,' and that immediately west of the said Vaughan, McDaniel, and Sheppard's said property (with the west line thereof fixed as aforesaid) was the alleyway so dedicated as aforesaid by those under whom plaintiff claims, running north and south by the said Vaughan, McDaniel, and Sheppard's said property, the width of which said alleyway east and west was about ten (10) feet, and that immediately west of said public

alleyway or passway was the east line of the property now owned by the plaintiff.

"Defendants further state that the said Vaughan, McDaniel, and Sheppard, upon making said agreement, then and there took possession of their said property under said agreement, and that the said Vaughan, McDaniel, and Sheppard, and these defendants, claiming under them, have been in the actual, open, and notorious possession thereof under said agreement since 1868, occupying the same in the manner hereinbefore set out, and by cigar stands, bootblack stands, and in other ways, and have received rent thereon from 1868 to this time, and have always claimed to said line so agreed upon.

"Defendants further state that the then owner of the property now owned by plaintiff, to wit, John Young, took possession of his said property under said agreement and claim to the east line of the said alleyway or passway (which was ten [10] feet wide as aforesaid) under said agreement, and always admitted and never denied that the west line of said alleyway or passway was five (5) feet west of the west wall of the said city hall building.

"Defendants further state that by said mutual agreements and the taking possession by the respective parties above mentioned, and the claiming of possession thereunder, and the recognition thereof, that the defendants' said west line of their said property was then and there established as five (5) feet west of the west wall of said city hall building. Defendants further state that the plaintiff herein also agreed to and recognized the establishment of said west line of defendants' property by a written contract made by her agent, James Baker, as hereinbefore set out at length, and by such contract admitted the possession of defendants to said 5 feet of ground, and expressly agreed thereby that by the paving thereof as aforesaid the possession of the said McDaniel and Sheppard, the ancestors of these defendants, to said five (5) foot strip of ground, should remain and continue as it was before the paving thereof, and that the plaintiff herein is estopped from denying the possession of said McDaniel and Sheppard, and these defendants claiming under them, to said five (5) feet of ground under said agreement.

"Defendants further state that the possession of the defendants and their ancestors of said 5 feet of ground in the manner hereinbefore set out, to wit, by occupying the north portion thereof from 1868 (the time of erecting said building) down to 1886 with their said cellarway and the windows and cigar stand, and collecting rent thereon during said time at various intervals, as defendants had done, and by occupying the south ten (10) feet of said 5-foot strip with a cigar stand for five years prior to the 21st day of June, 1886, and that by occupying it since the 21st day of June, 1886, by collecting rent thereon and exercising other acts of ownership, and

by the continuous possession thereof and occupancy of the same for more than ten consecutive years by cigar stands since 1886, together with said original agreement, and the recognition of such agreement by plaintiff in 1886, is conclusive and binding on plaintiff as to the west line of the defendants' said property.

"Wherefore the defendants say that, the premises considered, the west boundary line of said defendants' property should be and is conclusively established, as against plaintiff and all other persons, at 5 feet west of the west wall of their said brick building; and, having fully answered, pray to be discharged without day and their costs, and for all other and further relief.

"Defendants for another further and separate defense state that they have been in the open, notorious, continuous, and adverse possession of the five-foot strip of ground lying immediately west of the west wall of the building designated in plaintiff's petition as defendants' three-story brick building known as the 'City Hall Building,' and running north and south the entire length of said building, prior to and since the time that the plaintiff acquired her property in lot 17, 18, and 20 in block 5 of the original town of Springfield, Missouri, and have been in such open, notorious, continuous, and adverse possession of said five (5) feet of ground for more than ten consecutive years last past under color of title, and claiming title thereto. Hence defendants say that they have acquired title to said five (5) feet of ground under the ten-years statute of limitations in such cases made and provided in this state, and, having fully answered, pray to be discharged without day and their costs."

The replication is a special denial of the defensive matter set up in the answer.

Upon the submission of this cause to the court upon the evidence as introduced by plaintiff and defendants, the court made the following decree and finding of facts:

"The court finds that the line between the two tracts in controversy herein is two and ninety-one hundredths (2.91) feet at the south end; that defendants and their ancestors have been in open possession of the remaining portion of the five (5) feet for more than ten (10) years, claiming to own the same; that the putting down of the flagging by their permission and consent was a taking and holding of possession, within the meaning of the law, and an improvement by defendants, which is a possession in law; that Judge Baker put down said flagging when he built the Baker Block; that it was all done with his means, and given to his wife. The court fails to find that the south side of the city hall building projects into the public square. The court finds that all these lines are very uncertain and problematical, and it is impossible to ascertain their exact location, and that the parties have acted upon the five (5) feet west of the city hall as being in possession and control

of the defendants; that the plaintiffs are not entitled to recover. To which decree and finding of facts defendants duly excepted at the time."

Upon the finding of facts as herein set forth, the following judgment was entered:

"Now at this day come the above-named parties plaintiff and defendants by their respective attorneys, and this cause now coming on for hearing said parties announce ready for trial, and, a jury being waived by agreement, this cause is submitted to the court for hearing, and the court proceeded to hear the evidence in the case pro and con, and after hearing all the evidence and arguments of counsel, and being fully advised in the premises, the court finds all the issues in favor of the defendants as pleaded by them. It is therefore considered, adjudged, and ordered by the court that plaintiff, Maggie C. Baker, take nothing by her suit herein against defendants, but that the same be and is hereby dismissed, and that the defendants go hence thereof without day, and have and recover of and from the plaintiff, Maggie C. Baker, all the costs herein laid out and expended, for which execution may issue."

From this judgment plaintiff in due time prosecuted her appeal to this court.

Opinion.

A careful inspection of the record in this cause indicates that a volume of evidence was introduced by both parties for the purpose of locating the true lines dividing the property of plaintiff and defendants. Also testimony tending to show a dedication of certain parts of the lots, not only by plaintiff, but also by defendants, to public use. As the view we take of the legal questions involved in this controversy, the question of title or the right of possession, at least to the extent indicated by the briefs of counsel, we will not burden this opinion with a detailed statement of the evidence upon this issue, which seems to have overshadowed the main and only issue presented by the pleadings in this cause—the existence of a nuisance. The trial court did not undertake definitely to settle the lines in dispute, but in its findings said "that all these lines are very uncertain and problematical, and it is impossible to ascertain their exact location." The testimony sufficiently indicated the use and occupation of the property by plaintiff, fronting the arcade, as entitled her to the relief sought, if the testimony established the existence and maintenance of a nuisance on the strip of ground in the possession of the defendants, which operated injury or hurt to the property used or occupied by the plaintiff. The defendants were, at the time of the institution of this suit, in the possession of the strip of ground which it is claimed was dedicated to public use, and the testimony tends to show possession, and claim of title to the property for a number of years, and the finding of the trial court is that defend-

ants had been in possession for a number of years. That defendants claimed the title and right of possession to the property is clearly indicated as far back as 1886 by the agreement with James Baker, as follows:

"This Memorandum, in relation to the possession occupancy of certain real estate in Springfield, Mo., made this 21st day of June, 1886.

"Witnesseth, That Charles Sheppard of Springfield, Mo., and Mrs. E. E. McDaniel as executrix of the will of W. J. McDaniel, deceased, and as devisee thereunder, are now in possession of the following portions of a strip of ground five (5) feet wide on the west side of the brick building occupying the western part of lot No. 17, block No. 5, original survey of Springfield, Greene County, Missouri, known as the City Hall building in the northwest corner of the Public Square, said strip fronting five (5) feet on Public Square, now and for four years has been occupied by a little frame 'shanty' five (5) feet wide by ten (10) feet deep back north. The north end of said strip now occupied and has been for more than ten years by a brick walled entrance five (5) feet wide by (10) feet long north and south to the cellar underneath said City Hall building, and two gratings two (2) feet wide over windows to said cellar and between the fruit stand and the brick wall around cellar entrance for more than ten years, and this Memorandum Agreement is that said Baker may remove said 'shanty,' gratings and brick entrance to cellarway and pave the entire five (5) feet strip of ground, but that said Sheppard and McDaniel do not thereby abandon their said possession of same and that said Baker does not thereby acquire any possession of same, but that the possession of Sheppard and McDaniel to said portion of said strip remains the same as it had been and as if said Baker had not paved the same.

James Baker,

"E. E. McDaniel,

"Chas. Sheppard."

It will be observed that this is a proceeding to abate a nuisance, praying for injunctive process, and also for the recovery of damages for injury to property of the plaintiff, resulting from the erection and maintenance of the alleged nuisance. The nature and character of this cause of action is clearly indicated in that part of the pleading that undertakes to state the cause of action. It avers: "Plaintiff says that said stands are small, temporary structures made of boards, and consist of a partition on their west side and at each end, set against the wall of said city hall building, which constitutes the east wall, and are covered with the same kind of boards; that they are 5½ feet wide by 50 feet long; that they are too small for the transaction of the business carried on, and are only used for the storage of the goods kept for sale; that the customers and those who transact the business occupy the public way in the same manner as such business is

generally transacted by the keepers of such stands in the public streets, and by so doing they have practically taken possession of and occupy the whole arcade for their private business, without any authority or license to do so; that a large portion of said stands are used for bootblacking and similar purposes, which are carried on by a number of colored men, who with them associate, occupy seats, much of the time, on the pavement in said arcade, constituting a band of loafers, making the place repulsive, instead of attractive, as it was intended to be. Plaintiff further states that said stands and the business carried on in connection with them materially obstruct and interfere with the public use of said arcade as a public highway, and constitute a grievous public nuisance; that they have and do materially injure the property owned by plaintiff fronting on the same, and have caused a reduction in the rental value of more than forty dollars per month; that she has been damaged by said nuisance and trespass to an amount not less than five thousand dollars in the aggregate. Plaintiff further states that, if the three-foot strip of ground owned by defendants as aforesaid has not been dedicated to public use as hereinbefore stated, and is not in public use, the defendants have no right to use the remainder of said arcade as a means of access to and departure from their private property, that being a private use of the same, which cannot be exercised by any but those owning the property, or have a franchise therein by owning a part of the property so in public use; that by so using it they are not only guilty of maintaining a nuisance as aforesaid, but have and are committing a trespass upon the property of plaintiff, thereby increasing the injury they have done to her and adding to their liability. Plaintiff further states to the court that the south wall of said city hall building was placed and now stands more than 2 feet south of the south line of lot 17 and the part thereof owned by defendants as aforesaid, by which said building extends upon and occupies a strip of ground constituting a part of the public square, 2 feet in width north and south and 77 feet in length east and west; that said public square is a tract embracing about three acres of land that was long since dedicated to and is now in public use; that said wall so occupying a part of the public square is directly in front of plaintiff's large building aforementioned, and only 3 feet from the lands so owned by her; that it materially injures the view from and free access to her said building, thereby creating a serious continuous special injury to her and her property, and constitutes a troublesome nuisance. Plaintiff asks for a decree abating each and all of such public nuisance, and for an injunction compelling the removal of said stands and prohibiting the establishing and maintaining any such structure or business in said arcade, and for

a judgment of five thousand dollars for the damage so suffered by her and for her costs, and such other relief as she may be entitled to."

The answer puts in sharp dispute the allegations as quoted, hence it is made apparent that the primary purpose of this suit is to remedy the evils and injurious results of a nuisance. It is not sought to try title to the property which may incidentally be involved in the proceeding, nor the right of possession to such property. The vital issue, and the one that must first be determined in this cause, is as to the erection and maintenance of the nuisance complained of in the petition. "Nuisance, in its largest sense, signifies 'anything that worketh hurt, inconvenience, or damage.' It is either public, annoying all the members of the community; or it is private, injuriously affecting the lands, tenements, or hereditaments of an individual." 3 Bl. Comm. 215; 2 Greenleaf's Evidence, § 465. Wood on Nuisances defines a nuisance thus: "A nuisance, in the ordinary sense in which the word is used, is anything that produces an annoyance—anything that disturbs one or is offensive; but in legal phraseology it is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to a right of another or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage. Indeed, it may be stated as a general proposition that every enjoyment by one of his own property, which violates the rights of another in an essential degree is a nuisance, and actionable as such at the suit of the party injured thereby. While it is true that every person has and may exercise exclusive dominion over his own property of every description, and has a right to enjoy it in all the ways and for all the purposes in which such property is usually enjoyed, yet this is subject to the qualification that his use and enjoyment of it must be reasonable, and such as will not prejudicially affect the rights of others." In the earlier cases the power of courts of equity were exercised sparingly in preventing and abating nuisances. In the case of *Welton & Edwards v. Martin*, 7 Mo., loc. cit. 311, Judge Scott, speaking for the court, says: "Eden, in his valuable work on Injunctions, speaking of nuisances, observes: 'Whatever may be the actual jurisdiction upon this point, it is, however, certain that courts of equity are at present extremely unwilling to interpose without a trial at law. A question, therefore, has always arisen in these cases whether the court will grant or continue an injunction till the trial.'" Sherwood, J., in the case of *Paddock v. Somes*, 102 Mo., loc. cit. 240, 14 S. W. 749, 10 L. R. A. 254, says: "The question of nuisance hav-

ing been established at law, and, where this has been done, the courts will grant an injunction as a matter of course, where, as here, such nuisance is of a continuous or constantly recurring character." Under the well-settled rules of practice now the existence of the nuisance need not necessarily first be established by a separate action, before courts of equity will afford permanent relief in keeping with the injury. Wood's Law of Nuisances clearly announces the modern rule in respect to this subject. He says: "The preventive remedy for nuisances, aside from abatement by act of the party, is by injunction issuing out of a court of equity. Formerly this power was exercised sparingly, and only in extreme cases, at least until after the right and the question of nuisance had been first settled at law. But now the only effectual remedy for the abatement of a nuisance, except where special provision is made therefor by statute, is in a court of equity, and the jurisdiction is predicated upon the broad ground of preventing irreparable injury, interminable litigation, a multiplicity of actions, and the protection of rights." The law is settled beyond dispute that the establishment of the existence of a nuisance, the recovery of damages, and the equitable relief of preventing and abating it may be sought in the one proceeding in a court of equity. However, it is equally well settled that, before the power of the chancellor will be put in motion in case of a nuisance, the existence of the nuisance and the injury must be established. The right to a full and complete remedy in an action in respect to a nuisance was fully recognized in the case of *Paddock v. Somes*, supra. It was said in that case upon the question of the union of two causes of action: "In certain circumstances our statute allows different causes of action, whether legal or equitable, to be united in the same petition, provided they be separately stated. A prayer for equitable relief can hardly be called a cause of action; but, if it could be so termed, it was competent under the statute (section 2040) and frequent rulings of this court to unite in the same petition legal and equitable causes of action, when connected with the same subject of action. Besides, our statute authorizes an injunction to issue in aid of a civil action, when the 'relief or any part thereof consists in restraining the commission or continuance of some act of the defendant, the commission or continuance of which during the litigation would produce injury to the plaintiff.'" Wood on Nuisances very clearly announces the sound rule on this subject, which finds support in all of the well-considered cases of the various states. He says: "The jurisdiction of a court of equity over cases of private nuisance is now well established, and in a proper case for equitable interference it will assume and take jurisdiction, and give the party all the relief to which he is entitled, even to the settle-

ment of damages. But, in order to entitle a party to equitable relief, his right must be clear, and the injury established, as in doubtful cases the party will be turned over to his legal remedy." It will be noted that the plaintiff in this cause insists that the business conducted by defendants is on property dedicated to public use, and the manner of conducting the business, the stand erected, etc., constituted a public nuisance. To enable plaintiff to maintain this action for injuries resulting from a public nuisance it is necessary to establish that she has sustained special damage from such nuisance over and above the injury which the community at large suffers. Napton, J., in the case of *Smith v. McConathy*, 11 Mo., loc. cit. 522, in discussing this question, said: "In an action for a private nuisance it is not necessary to allege or prove any special damage. In a private action for a public nuisance such allegations and proofs are necessary. No one individual can maintain an action for a public nuisance, unless he has sustained some special damage from such nuisance over and above the injury which the community at large suffer." However, plaintiff undertakes to bring this cause within the above rule by charging a state of facts, which, if true, would constitute a public nuisance. Then follows the averment of special injury to her property. The allegations as to the character of business, the manner of conducting the business charged to be a public nuisance, and the injury alleged resulting to plaintiff's property, was sharply put in issue by the answer, and this issue was submitted to the trial court upon the evidence introduced. The trial court found the issues for the defendants. The court had the witnesses before it, doubtless observed them, and applied the usual rules in weighing their testimony. The question of the character of business conducted by defendants, and the injuries alleged to plaintiff's property, was all gone over in the trial, and after a careful examination of the testimony, as disclosed by the record, we are not disposed to disturb the court's finding.

It is true that the court made no special finding as to the existence of the nuisance complained of, yet it did find that plaintiff was not entitled to recover, and this was, in effect, a finding upon that issue. It is also insisted that it is the duty of this court to review the testimony, and determine not only the question as to the existence of a public nuisance, but also the questions of dedication to public use, the title to the property occupied by defendants, and the right of possession. It is alleged in the petition that the strip of ground upon which this nuisance is said to exist was dedicated by both plaintiff and defendants to public use to the city of Springfield. The evidence tends to show possession and the claims of possession by the defendants for a number of years. The contention, under this state of facts, amounts

to this: that this court will determine the legal rights of not only the plaintiff and defendants in respect to this property, but also award the enterprising city of Springfield a substantial interest—that of public use—without the city requesting it, without being a party to the proceeding, and this is to be accomplished by a proceeding in equity in a suit by a private individual who seeks to abate a public nuisance. With all deference to the able presentation of this question by the learned counsel for plaintiff, we are unwilling to announce that a court of equity, even under the broad system of equitable jurisprudence, should exercise this power under the facts in this case. In order to warrant the trial court or this court in adjusting the legal rights of parties to this property, all persons having a substantial interest should be before the court. The defendants in this case claim to be the owners of the property in dispute, are now in possession, and the testimony tends to prove that they have been in possession and claiming the same for a number of years, and, if this property has been dedicated to public use, and the public is wrongfully deprived of the possession of it, or if the plaintiff has a right in respect to the property of which she is deprived, in an appropriate proceeding with all the parties in interest before the court, those wrongs can be remedied; but those rights cannot be recovered in a suit by a private individual to abate a public nuisance and recover damages for the injuries resulting therefrom, upon the facts as disclosed in this case.

There is a distinction to be observed in the exercise of the power sought in this case by courts of equity in respect to a private and public nuisance. Mr. Wood, in the text, lays down the rule very strongly; in fact broader than the well-considered cases upon that subject sanction. He says: "It is only in the case of private nuisances or of common nuisances where private rights are invaded that a court of equity will interfere except upon the relation of public officers. And this is the rule even in a case of an obstruction to a public street amounting to a public nuisance." We take the true rule to be, as deduced from all the authorities, that as to private nuisances there is no question as to the proper exercise of the power of courts of equity in affording full and complete relief, provided it is clearly established that the private nuisance exists. As to a public nuisance, where it is clear that some special injury is occasioned to the individual—a continuing injury—courts of equity may exercise their power; but this power is usually exercised at the instance of the public, and not private individuals. We again repeat that upon the weight of the testimony in this cause and the finding of the trial court plaintiff did not establish any special injury to her property, some of the witnesses going to the extent of saying that the business com-

plained of was a benefit, instead of an injury; hence plaintiff does not bring herself within the rule for the suppression of a public nuisance.

Will say, in addition, if the evils complained of in the petition exist, and constitute such a flagrant violation of the rights of the public, by the willful and wrongful obstruction of a highway dedicated to public use, we confess that the city of Springfield is very modest in the assertion of her full and complete power to remedy such an evil.

In support of the contention that the court should, upon the facts in this case, at the suit of a private individual, ascertain and define the rights of all persons in respect to this property, whether parties to the proceeding or not, our attention is earnestly directed to the case of *Wilmarth v. Woodcock*, 66 Mich. 331, 33 N. W. 400. That case in no way conflicts with the conclusions reached in the one before us. It will be noted from the facts in that case it was a private nuisance complained of—a dispute between two individuals—and the court found as a matter of fact that a nuisance existed. The plaintiff in the Michigan case was in possession of the property charged to have been injured by the nuisance. The injury complained of was as to the convenient enjoyment of that possession. The defendant did not take possession of the soil, but erected a barn, the cornice of which extended over her land. It was the extension of this cornice which the court found constituted the nuisance. It is apparent from the views expressed in the opinion that if the only controversy had been the location of the boundary line, the jurisdiction of the court would not have been exercised. The court, in expressing its views in that controversy, makes plain the proposition that the question of boundary line was a mere incident to the main equitable proceeding. It said: "A careful examination of these cases will show that each one differs from the one at bar. Something more is involved here than a mere dispute about a boundary line. It is apparent that an action of ejectment, if it would lie upon the part of complainant, would not be adequate for her relief. But she could not well bring ejectment, as she was in possession of the soil, and her possession was not interfered with as far as the land was concerned. It is not entirely clear that she could bring ejectment when she was holding the ground, and the disturbance to her possession was projecting a cornice in the air over it. But, be that as it may, if the true line between the premises be as claimed by complainant, the maintenance of the cornice where it is is a nuisance, and one in the nature of a permanent injury to her property, if it shall be allowed to continue, which calls into exercise the jurisdiction of equity as the only proper tribunal to afford full and adequate relief." That is not this case, and we repeat that the defendants are in possession of the property, and, as the testimony indicates, have been claim-

ing it against the plaintiff, the city of Springfield, and every other person. This claim is specially emphasized by the agreement with Mr. Baker, introduced in evidence. The court found that plaintiff was not entitled to recover any damages, and, as to the right of possession of the property, plaintiff or the city of Springfield have a full and complete remedy at law in respect to that right. There is an ample and speedy remedy to settle the title or the right of possession to this property without making the unwise precedent of doing so in an action entirely foreign to that purpose.

We fully recognize that just rule that courts of equity, after once acquiring jurisdiction of a cause, will do complete justice, and grant full relief. That does not mean that the court will lose sight of the main subject of the action, but simply means, keeping in view the purposes of the action, it will reach out and adjust all equities necessary to give force and effect to its decree, remedying the evil sought to be corrected in the action. Injunctive process is sought in this proceeding. As has elsewhere been said by an eminent author: "Nor ought the process of injunction be applied but with the utmost caution. It is the strong arm of the court, and to render its operation benign and useful it must be exercised with great discretion, and when necessity requires it."

Entertaining the views as herein expressed, the judgment of the trial court will be affirmed. All concur, except BURGESS, J., absent.

STATE v. HICKS.

(Supreme Court of Missouri. Division No. 2.
Dec. 9, 1903.)

MURDER—INSTRUCTIONS—HARMLESS ERROR—
APPEAL—ASSIGNMENTS OF ERROR—BILL OF
EXCEPTIONS—INFORMATION—SUFFICIENCY—
VERIFICATION.

1. In a prosecution for murder, in which the evidence showed that defendant shot deceased either from ambush, or immediately upon being seen by deceased, an instruction that if defendant armed himself, and sought deceased with the former felonious intention of killing him, or sought or brought on, or voluntarily entered into, a difficulty with the deceased, with the felonious intention to kill, then defendant could not invoke the law of self-defense, was not erroneous, for failure to charge that, if defendant entered into the difficulty without the intent to kill, he would only be guilty of manslaughter in the fourth degree, inasmuch as there was no evidence of any difficulty, so as to require such charge.

2. In a prosecution for murder, an instruction on the law of self-defense, when the evidence was insufficient to raise such issue, was harmless to defendant.

3. In a prosecution for murder, in which defendant claimed that he shot deceased because the latter had seduced defendant's sister, an instruction that, though the jury might believe that the deceased had done so, this would not justify the defendant in lying in wait to shoot deceased, was correct.

4. It is not error to refuse requested instructions sufficiently covered by those given.

5. On appeal in a criminal case, an assignment that the court erred in permitting the introduction in evidence of an affidavit filed by defendant for a continuance cannot be considered when not incorporated in the bill of exceptions.

6. An assignment of error on appeal in a criminal case that the court erred in permitting an affidavit to be introduced by the state cannot be considered where the record does not show that it was so introduced.

7. Under Laws 1901, pp. 138, 139, requiring an information to be signed by the prosecuting attorney, and verified by his oath, or by the oath of some person competent to testify as a witness in the case, an information signed by the prosecuting attorney, and in which the clerk of the court certifies that the prosecuting attorney makes oath that the facts stated are true, is a substantial compliance with the statute.

Appeal from Circuit Court, Douglas County; Asbury Burkhead, Judge.

Columbus Hicks was convicted of murder, and appeals. Affirmed.

Boone & Orr, L. O. Nelder, and Thos. H. Musick, for appellant. Edward C. Crow and C. D. Corum, for the State.

BURGESS, J. From a conviction of murder in the second degree, and the assessment of his punishment at 10 years' imprisonment in the penitentiary, under an information filed by the prosecuting attorney of Douglas county in the office of the clerk of the circuit court of said county, charging the defendant, Columbus Hicks, with having at said county, on the 1st day of December, 1901, shot to death with a rifle gun one Hesz Clay, defendant appeals.

At the time of the homicide, and for many months prior thereto, the deceased and defendant's sister Christeeny Hicks were engaged to be married, and were to have been married on the 25th day of December, 1901. He was very attentive to her, and she spent most of her time with him. The defendant and his father and mother were opposed to the attentions of deceased towards the young lady, and had ordered him to remain elsewhere than at their home. Matters grew more unpleasant as time passed, and the daughter was compelled to leave the home and seek an abiding place wheresoever she might. The bitterness of feeling between the deceased and defendant did not wane, but grew more intense; and they each began to threaten the life of the other. The evidence shows that on the day of the tragedy the deceased and a friend of his, by the name of Goss, passed by the home of defendant, and were observed to pass by him; that a short time before defendant's sister had left home, with the avowed intention of going to a neighbor's. She had not been gone but a short while, when the deceased came along in company with his friend, Goss. They soon came up with the sister of the defendant—whether by previous appointment or not, does not appear. They began to talk with her. Goss soon moved apart, some 20

yards from the deceased, and deceased sat upon the fence. Goss and the defendant's sister both testify that, while the deceased and she stood talking on the public highway, he was shot by some one in ambush. Their testimony is that the deceased was doing nothing more than talking with the girl at the time he was shot, and, on account of the dense woods skirting the roadside, they were unable to discover the identity of the assassin. The deceased was shot with a Winchester rifle, and expired almost immediately. On behalf of the defendant, the evidence tends to show that the deceased was criminally intimate with defendant's sister; that he on one occasion remained all night at the home of the defendant, and occupied the same bed with her; that the defendant's father urged the defendant to either marry his daughter, or else remain apart from her; but that deceased continued his attentions, and persisted in the liaison. Defendant testified that the deceased, at the moment he was killed, was in the act of copulation with defendant's sister, and that the deceased, being discovered by defendant, placed his hand behind him, as if to draw a pistol, whereupon he was killed by defendant; but this was denied by both the sister and Goss, the only witnesses to the occurrence. It is admitted that the deceased was killed early in the afternoon upon a public thoroughfare, and that he and the young lady were standing in full view of Goss. Besides, from the affidavit for a continuance filed by defendant, it appears that he thought he could prove by an absent witness that he was at the residence of the witness at the time the deceased was shot.

The court, over the objection and exception of defendant, gave a large number of instructions, but only the following are complained of:

"(21) The law of self-defense does not imply the right to attack. If you believe from the evidence that the defendant armed himself with a deadly weapon, and sought the deceased with the former felonious intent of killing deceased, or sought or brought on or voluntarily entered into a difficulty with deceased with the felonious intention to kill deceased, then the defendant cannot invoke the law of self-defense, no matter how imminent the peril in which he found himself placed.

"(22) The court instructs the jury that if you believe from the evidence that the defendant shot and killed deceased because of the alleged attempt of said deceased to draw a weapon on defendant, and not because he saw the deceased in the act of sexual intercourse with his sister, then you will not consider such act of sexual intercourse, if they were in such act, or the previous sexual relations of deceased and Tennie Hicks, if such relations existed, but you will confine yourself to the question whether the defendant shot in the necessary defense of his per-

son, as the law of self-defense is herein defined.

"(23) Although the jury may believe from the evidence that the deceased and Tennie Hicks were criminally intimate, this would not, in law, justify or exouse the defendant in lying in wait to shoot and kill deceased, if you believe from the evidence he did so lie in wait. So if the jury believe from the evidence that the defendant followed the deceased, and shot him from ambush, feloniously, premeditated, and with his malice aforethought, as the terms are in these instructions defined, then the criminal relation between said deceased and Tennie Hicks, if it did exist, and if it were known to defendant, does not reduce the killing below murder in the second degree, and affords no justification or mitigation for the shooting, if done under such circumstances."

The defendant asked the court to instruct the jury as follows:

"(1) The law accepts human nature as God has made it, or as it manifests itself in the ordinary man, and, in every sort of conduct in others which usually excites the passions of the mass of men so as to practically overthrow their reason, the law holds to be a sufficient cause for provocation; and in this connection it must not be forgotten what high estimate the men of all nations have placed upon the chastity of their women, and the inviolability of their persons; and therefore if the jury believe from all the facts and circumstances in evidence that Clay had been criminally intimate with the defendant's sister; that, at the time of the homicide, defendant, being armed for his own defense only, because of communicated threats of deceased made against his life, came suddenly and unexpectedly upon deceased in criminal intercourse with his said sister; and that, in consequence of such sight, defendant's mind became inflamed with anger and passion, and without deliberation or premeditation he instantly fired the fatal shot; and if the jury further believe that such conduct on the part of the deceased was reasonably sufficient provocation to inflame the blood under such circumstances—in such case defendant is not guilty of murder, and the verdict should be for manslaughter in the fourth degree.

"(2) The court instructs the jury that if they believe from the evidence that the killing of deceased was committed by defendant, and the defendant, in so killing deceased, acted upon a sudden passion, engendered by reasonable provocation, then the presumption of malice would be negatived, and of the killing, though intentional, will be manslaughter in the fourth degree.

"(3) The court instructs the jury that if they believe from the evidence that deceased and Sam Goss were in conspiracy in making threats against defendant for the purpose and with the object of intimidating defendant from interfering with debaucheries

they were attempting to practice on the sister of the defendant; that, in furtherance of such conspiracy, they had, a few days previously, together visited defendant's home, and there threatened his life, and, in further pursuance of such conspiracy, had together laid in wait for defendant as he was pursuing his ordinary business affairs, and the conduct and attitude of said parties were such as to reasonably produce the belief in defendant's mind, and did so produce the belief, that either one or both of said parties were about to inflict great bodily injury upon defendant—then in such case defendant had a right, in self-defense, to shoot either one of said parties, and the jury will acquit.

"(4) The jury are instructed that, in considering the right of self-defense, they have to take into consideration all the circumstances leading up to the homicide, and then present conditions and situations of the parties as they appeared to defendant, and if they believe that such circumstances and conditions, as they appeared to defendant, were such as to become reasonable grounds for apprehension and fear by defendant that he was in imminent danger of great bodily harm from deceased, and Goss acting in concert with him, and, further, that defendant did at the time entertain such fear and apprehension, in such case the shooting by defendant was justifiable, and the jury will acquit.

"(5) That if they believe from the evidence that for several months it had been brought to defendant's knowledge that deceased was threatening his life, and carrying weapons with which to put such threats into execution; that only a few hours before the homicide deceased and one Goss came to defendant's home and repeated such threats; that thereafter, on the same day, defendant, in going to attend to his ordinary business affairs, and carrying with him a gun for his own protection, only, in traveling along a bypath, entirely unexpectedly by him, came upon deceased and said Goss lying in wait for him, and that, from the herein-stated circumstances, and the demeanor and attitudes of deceased and said Goss, defendant had good reason to believe, and did believe, that deceased and said Goss intended and were about to do him some immediate bodily harm in fulfillment of such threats—then in such case defendant had a right to shoot in self-defense, and the jury will return a verdict of acquittal. And in determining as to the apprehensions of defendant at the time of the shooting, and of the reasonableness of such apprehensions, the jury will take into account all transactions between defendant and deceased on the day of the killing, and the threats, if any, of deceased, together with all the facts and statements of others connected with such transactions, and give to such transactions, facts, and statements, in connection with all other evidence before

the jury, for the purpose herein mentioned, such weight as they may deem proper.

"(6) The court instructs the jury that if they believe from the evidence that defendant is guilty, but entertain a doubt as to whether he is guilty of murder or manslaughter, then they should give defendant the benefit of the doubt, and find him guilty of manslaughter; and if they have a reasonable doubt as to whether he is guilty of any offense against the law, as defined in these instructions, they should acquit.

"(7) The defense presents two theories of this case, founded on two different states of mind, but both of which, under appropriate circumstances, may very well coexist in the mind of man at one and the same time. One such state of mind is fear and apprehension of danger, and the other is indignation. In this case defendant may have been in mortal fear of personal injury by reason of threats and conduct of deceased and Goss, if threats had been made and communicated, and at the same time his passions heated and inflamed by the sudden coming upon deceased in criminal intercourse with his sister, if he did so come upon them; and it is for the jury to say, from all the evidence and circumstances, which of said states of mind, if either, prevailed, and was the inducing cause of the shooting by defendant; and if they believe that he shot by reason of the indignation and passion suddenly aroused in his bosom by debauching conduct of deceased, and if they further believe that such conduct was of a character reasonably calculated to kindle a brother's blood, and arouse, and did arouse, anger and passion to a degree that prevented all premeditation and deliberation, they will find the defendant guilty of manslaughter in the fourth degree, only, unless they further believe that he shot by reason of fear and apprehension of personal injury, induced by suddenly coming upon deceased and Goss lying in wait, and of their attitude and conduct at the time, coupled with their previous threats against his life, and also that such conduct and attitude, coupled with previous threats in evidence, were calculated to induce apprehension of their doing him immediate personal injury. They are further instructed that if they do believe that the shooting was induced by such apprehension of danger, and that there was reasonable ground for such apprehension on the part of the defendant, then in such case defendant should be acquitted."

Which instructions were by the court refused, and the defendant then and there accepted.

Instruction numbered 21 is challenged upon the ground that it does not go far enough, in that it does not tell the jury that, if defendant entered into the difficulty without the intent to kill the deceased, then he would only be guilty of manslaughter in the fourth degree. We are unable to agree to this contention, and are clearly of the opinion that,

under the facts disclosed by the record, the instruction is a correct presentation of the law of the case. Such an instruction as contended for by defendant would have been manifestly erroneous, for the want of evidence upon which to base it. There was no evidence whatever of a difficulty or controversy between defendant and deceased at the time of the homicide, or that defendant was acting in the defense of his person when he shot and killed deceased, or anything else that would have authorized such an instruction as contended for. While the first sentence of the instruction seems to intimate that there was evidence that defendant acted in self-defense, the evidence was to the contrary, and that part of the instruction unauthorized; but whatever of error there is in it is in favor of the defendant, and of which he has no right to complain.

It is argued that instruction numbered 22 is erroneous, upon the ground that it singles out a certain fact; that is, that defendant shot and killed deceased in self-defense. That this instruction ought not to have been given, for the want of evidence to authorize it, is, we think, too clear for argument, for there was no evidence of self-defense in the case. In fact, there was not a particle of evidence that deceased saw defendant at the time he was shot. It is true that defendant testified that he would not have shot if deceased had not made a pass for his pistol, which, in the absence of some evidence that deceased saw him or knew of his presence, was not of a feather's weight, and entirely insufficient upon which to predicate the instruction. But it was an error in favor of defendant, and harmless.

We see no substantial objection to instruction numbered 23. It was well warranted by the evidence, and very favorable to the defendant.

Instructions numbered 1 and 2 asked by defendant were covered by instruction numbered 12 which was given, so that defendant has no ground for complaint on that score. Nor was there error in refusing other instructions asked by defendant, because the questions presented by them were covered by instructions which were given.

The insistence that the court erred in permitting the state to introduce in evidence the affidavit filed by defendant for a continuance cannot be considered, for the reason that it is not incorporated in the bill of exceptions, and for the further reason that the record does not show that it was introduced in evidence. *State v. Hancock*, 148 Mo. 488, 50 S. W. 112.

A point is made on the sufficiency of the information, which defendant says is invalid for the want of verification by the oath of the prosecuting attorney or some other competent person. This point was raised by motion in arrest in the court below, and is now insisted upon in this court. Since the acts of the General Assembly approved

March 13, 1901 (Laws 1901, pp. 138, 139), went into effect, which was before the information in the case in hand was filed, all informations are required to be signed by the prosecuting attorney, and to be verified by his oath, or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information. Section 2477, Rev. St. 1899; Acts 1901, supra; State v. Bonner (not yet officially reported) 77 S. W. 463. But the affidavit is not required to be signed by him. It will be observed that the information was in fact signed by the prosecuting attorney, and the clerk of the court in which it was filed having certified under his hand and the seal of the court that the "prosecuting attorney makes oath and says that the facts stated in the information are true, according to his best knowledge information and belief," it was a substantial compliance with the statute. It was inadvertently said in the case of State v. Pohl, 70 S. W. 695, 170 Mo. 422, that an information for felony, filed on the 24th day of September, 1901, which was after the adoption of the amendment to the Constitution which went into effect on the 19th day of December, 1900, need not be under oath, but was sufficient if presented by the Attorney General or the prosecuting attorney of the proper county under his official oath. As a matter of fact, however, the information in that case was supported by the affidavit of a person who had knowledge of the commission of the offense, and by whom it was committed, as provided for by section 2478, Rev. St. 1899 (Acts 1901, pp. 138, 139). Moreover, no objection was taken to the information by motion to quash, but for the first time by motion in arrest, and then upon the grounds only that the information and the allegations therein contained were insufficient to require the defendant to be placed upon trial, and because the information did not charge the defendant with a crime known to the law. It will thus be seen that no objection was taken to the information because not sworn to by the prosecuting attorney, and what was said by us in this regard was mere obiter.

It is asserted by defendant that the judgment is erroneous upon the ground that it does not show that the defendant was present when it was rendered against him, but this is a misapprehension, as the record shows in express terms that defendant and his attorneys were present in court when the verdict was rendered and judgment rendered thereon.

There were a number of instructions given without any evidence upon which to bottom them, but all such were in favor of defendant. Taken as a whole, the instructions were more favorable to him than he had any right to expect.

The judgment should be affirmed. It is so ordered. All concur.

STATE ex rel. HUDSON v. CARR.

(Supreme Court of Missouri. Dec. 9, 1903.)

TAXATION—ASSESSMENT—PREPARATION OF LISTS—VIEW OF THE PROPERTY—COPY OF FORMER ASSESSMENT BOOK.

1. Rev. St. 1899, § 9143, providing that whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, is, in view of numerous other sections of the statute showing that the making out of the list is for the personal use of the assessor and not for the benefit of the property owner, to be construed as directory only, and not mandatory, so that the failure of the assessor to make out such list does not affect the validity of the assessment.

2. Neither is the assessment invalidated by the fact that the assessor prepared the assessment from the books of his predecessor, and failed to go upon the property, inasmuch as he is also permitted to make out the list on the best information he may obtain.

In Banc. Appeal from Circuit Court, Barry County; H. C. Pepper, Judge.

Action by the state, on relation of J. B. Hudson, as collector of Barry county, against J. T. Carr. From a judgment for defendant, relator appeals. Reversed.

E. C. Frost, for appellant.

MARSHALL, J. This is an action by the collector of Barry county to collect back taxes for the years 1893, 1894, 1895, 1896, and 1897, aggregating \$34.36, on lot 3 of block 12 in the city of Monett. The petition is in the usual form. The answer is a general denial, with a special plea that the assessor did not "proceed to list said lot," nor "assess the value for taxation of said land," as the law directs, and "did not assess said property in any manner," and that "the extension of said pretended taxes on the collector's books was illegal and void," and a further special plea that the taxes for the years 1893 and 1894 are barred by limitation. Upon the trial the plaintiff introduced the certified tax bill, and rested. "The defendant, to sustain the issues on his part, proved that the defendant did not furnish the assessor a list of his property, nor did the assessor of said county make out any such assessment lists of the said lot, and file same with the county clerk, for any of the years for which the taxes are claimed to be delinquent, nor did the said assessor go upon the premises to ascertain its value, nor did he give the defendant any notice requiring him to make out his assessment lists for any of the years aforesaid; that the defendant was a nonresident of Barry county, Missouri, during the years for which the taxes sued for was levied; that the assessor only copied the lot from the assessor's book for the previous years, without doing anything further whatever toward making an assessment of the lot in question. The plaintiff then, in rebuttal, introduced the assessor's books for the several years, showing said lot entered thereon; also the collector's books for the

several years, showing the lot to have been entered therein, and the taxes duly extended therein by the clerk of the county court. To the introduction of which said books the defendant objected at the time, for the reason that the assessors never made out or filed any assessment lists with the county clerk for any of said years. By the Court: Objections overruled. (To which ruling of the court, the defendant excepted at the time.)" This was all the evidence. Plaintiff then prayed the court to declare the law as follows: "The court declares the law to be that the introduction of the assessor's book and collector's book shows a valid assessment of the lot in question for the years mentioned, and the judgment should be for the plaintiff," which declaration of law the court refused. To the action of the court in refusing said declaration, the plaintiff duly excepted at the time. The court, of its own motion, declared the law as follows: "The court finds that the defendant was a non-resident of Barry county at all the times when the assessments of his property were made, and that the assessor did not make an assessment of the property herein on the assessment lists, as prescribed by law, and that the only attempted assessment made of such lot was made by the assessor by copying from the old assessor's books on his book, and for that reason the court declares the law to be that there was no legal assessment of said lot, and the plaintiff cannot recover. To the giving of said instruction, plaintiff duly excepted at the time. The court then rendered judgment dismissing said cause."

From this judgment the plaintiff duly prosecuted this appeal.

1. The first question in this case is whether the assessment is void because the assessor failed to make out a list of the property to be assessed, as required by section 9148, Rev. St. 1899. The precise point here involved does not appear to have heretofore arisen. Section 9144, Rev. St. 1899, requires the assessor, between June and January, to call at the office, place of business, or residence of each person, and require such person to make a correct list of all property owned by him or under his control. The form of such list is minutely prescribed. Section 9145, Rev. St. 1899, provides that, if such person be sick or absent when the assessor so calls, the assessor shall leave at the office, place of business, or residence of such person a written or printed notice requiring such person to make out a list of his property and return it to the assessor. Section 9148, Rev. St. 1899, provides that "whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain," etc. There is no special provision as to

what shall be done in case the property is owned by a nonresident. Now, the point here involved is that the defendant was a nonresident of Barry county, and had no office, place of business, or residence in said county; that the assessor, therefore, could not call on the defendant and require him to make out a list of his property, as required by section 9144, and could not leave a notice for the defendant to make out a list of his property, as required by section 9145, and that the assessor did not make out a list of the defendant's property, as required by section 9148, and that the assessor did not go upon the premises and ascertain its value, but that in making out his assessment books he took the assessment of the land as it appeared on the assessment books of the previous years. And for these reasons the trial court declared the assessments void. It thus appears that the crucial question here is whether a failure of an assessor to make out a list of the property to assess, in case the taxpayer fails to return such a list when required, makes the whole assessment void. It is one of the cardinal rules for the construction of statutes, that the spirit and purpose of the enactment is an invaluable guide to the meaning thereof, for the letter of the law often killeth, while its spirit maketh alive. The sole purpose of the law in requiring the taxpayer to make out and return to the assessor a list of his property is to aid the assessor in discovering all of the taxable property, to the end that it may be assessed and made to bear its proper proportion of the expenses of government. Such list made by the taxpayer, and the valuation placed by the taxpayer on his property, are not conclusive on the assessor. *State ex rel. v. Reed*, 159 Mo. 77, 60 S. W. 70. If the assessor discovers other property of the taxpayer which he failed to list, or which was omitted from taxation, it is his duty to assess it, even if it is discovered years afterwards. Sections 9176, 9177, Rev. St. 1899.

The list made out by the taxpayer is not required to be returned by the assessor to the county court, but only a fair copy of the assessor's books is required to be so returned. Section 9188, Rev. St. 1899. It follows that if the list to be made by the taxpayer is solely for the use of the assessor, and not for the benefit of the taxpayer, and if the assessor has power to assess other property omitted from the list by the taxpayer, then the failure of the assessor to make out a list in the event the taxpayer fails to do so in no wise prejudices the rights of the taxpayer; and therefore section 9148 must be deemed merely directory, and not mandatory, and the failure of the assessor to make out such a list does not affect the validity of the assessment. In *State ex rel. v. Bank of Neosho*, 120 Mo., loc. cit. 173, 25 S. W. 372, this court held that the law respecting the sale of property for taxes is mandatory, but that the law

respecting assessments is, in a large sense, directory, and if an omission of the duty devolved by the statute upon the assessor did not injuriously affect the rights of the taxpayer, and was not an essential to the making of an assessment, it would not vitiate the tax. And the following rules laid down by Cooley on Taxation were cited and adopted: "No one should be at liberty to plant himself upon the nonfeasances or misfeasances of officers, under the revenue laws, which in no way concern himself, and make them the excuse for a failure on his part to perform his own duty. On the other hand, he ought always to be at liberty to insist that directions which the law has given to its officers for his benefit shall be observed. Many eminent judges have endeavored to lay down a general rule on this subject, by which the difficulties in tax cases may, in general, be solved. In one of the most recent cases in which this has been attempted, the general doctrine is stated as follows: 'There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its existence in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the act required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be, and generally would be, injuriously affected, they are not directory, but mandatory. They must be followed, or the acts done will be invalid. The power of the officer in all such cases is limited by the measure and conditions prescribed for its exercise.' The same rule, in nearly the same terms, has been laid down in other cases; and it seems a sound and just rule, and may reasonably be believed to be in accord with the legislative will in the cases to which it is applicable. All legislation must be supposed to take into account the possible, if not probable, mistakes and irregularities of officers in executing the provisions of the law; and it is hardly reasonable to infer an intent on the part of a legislative body that a failure of administrative officers to comply with any provision made for the benefit of the state exclusively, or merely as a guide in orderly proceedings, should deprive the state of all benefit to be derived from a compliance with other provisions that embody the main purpose and object of the law." Cooley on Taxation (2d Ed.) 283, 284, 285, and cases cited. A further analysis of the

same article of the revenue law (article 2, c. 149, Rev. St. 1899) which requires an assessor to make out such a list in the event the taxpayer fails to do so will demonstrate that an omission of such duty by the assessor cannot prejudice the rights of the taxpayer, nor render the tax void. Other sections of the article make it the duty of the probate judges to furnish the assessor with a list of every guardian, administrator, etc., having in charge an estate in such court; and then the assessor is required to obtain from such guardian, etc., a list of the personal property belonging to the estate, and to assess it for taxation. The officers of manufacturing and business corporations and of banks and of building and loan associations are required to furnish a list of taxable property owned by such companies. Then section 9157, Rev. St. 1899, makes it the duty of the county clerk to deliver to the assessor "the assessor's book of the last assessment and the list of taxable lands furnished by the register of lands," and requires the assessor to return them to the county clerk "as soon as he shall have completed his assessment and made his assessor's books for the year." Section 9159, Rev. St. 1899, makes it the duty of the county courts to obtain from the register of the United States land offices of their respective districts plats, etc., showing all lands subject to taxation, and also all private land claims. Section 9161, Rev. St. 1899, makes it the duty of the Secretary of State to procure each year from the register of lands at the various United States land offices in this state a list of lands sold, and to certify the same to the various county courts; and section 9162 makes it the duty of the county courts, annually, to enter the same on such plats or maps, as they are also called. Section 9165, Rev. St. 1899, gives the assessor free access to such maps during the time of assessment, "with a view to ascertain what lands are taxable." Section 9166, Rev. St. 1899, provides, "The assessor, on examination and comparison of the list of property delivered by individuals, and the list of lands furnished by the Secretary of State, and said maps and plats, and after diligent efforts for ascertaining all taxable property in his county, shall make a complete list of all the taxable property in his county, to be called the assessor's book." And section 9188 requires the assessor to deliver a fair copy of this assessment book to the county clerk. Thus it appears that, according to the strict letter of the law, the assessor, in making up his assessment book, under section 9166, is not even required to take into account at all the list which he is required by section 9148 to make in the event the taxpayer fails to return such a list. But waiving this strictly technical consideration, it also appears that in making up the assessment book the assessor is guided not alone by the list returned by the taxpayer, but that

he also takes into consideration the assessment books of the previous years, the list of taxable lands furnished by the register of the United States land office, and the plats and maps procured by the county courts from such United States registers, and the entries annually made thereon by the county court, upon the certificate of the Secretary of State, of the lands shown on such maps that have been sold to individuals.

The list of taxable property returned by the taxpayer constitutes only a small part of the evidence the assessor takes into account in making up his assessment book, showing what lands are subject to taxation. Therefore, even attaching as much significance to the list required by section 9148 to be made by the assessor upon the failure of the taxpayer to return a list as is required to be given by the assessor to the list returned by the taxpayer, it is manifest that the statements contained in either of such lists are not conclusive upon the assessor in making up his assessment book, but that he may disregard either of such lists, and conclude that the best evidence is that afforded by the other sources of information pointed out. Moreover, such lists, whether made by the taxpayer or by the assessor, are only memoranda for the personal use of the assessor in making up the assessment book. They are not evidence in a suit for the collection of the taxes assessed. As Judge Black aptly said in *State ex rel. Miller v. Hutchison*, 116 Mo., loc. cit. 402, 22 S. W. 785, the tax bills are prima facie evidence, but the tax books "are the primary and best evidence." The failure of the assessor to make such a list is no more injurious to the rights of the taxpayer than is the failure of the taxpayer to make such a list; and it comes with bad grace from the taxpayer to say the officer has omitted his duty, when he (the taxpayer) has offended with respect to a like and primary duty imposed upon him. However, such omissions do not go to the essentials of the law governing the assessment of property for taxation, and such provisions of the law are therefore merely directory, and not mandatory. It follows that the failure of the assessor to make out the list did not vitiate the assessment. Neither did the fact that the assessor did not go upon the land and assess it upon his own view, and that he simply accepted the previous assessment as shown by the assessment books that were turned over to him by the clerk of the county court, render the assessment invalid. Section 9148, which requires the assessor to make out the list upon his own view, also permits him to make it out "on the best information he can obtain," and section 9157 permits him to use the previous assessment books in making his assessment. An assessor may be perfectly familiar with a piece

of property or with the value of property in a given locality, and it would be manifestly absurd to require him to leave his office, and travel perhaps many miles, to view personally a piece of property with which he was perfectly familiar, and concerning which he is already possessed of all the information that a personal view thereof could give him. In all governmental, as well as in all private affairs, there are some things that must be left to good business sense, and as to which the courts will not interfere except where fraud is charged and proved. In *State ex rel. v. Seahorn*, 189 Mo., loc. cit. 610, 39 S. W. 809, this court, speaking through Burgess, J., called attention to the difference between proceedings for the assessment of property and those for the sale of property for taxes, and adopted the language of the Supreme Court of Maine in *Rockland v. Ulmer*, 84 Me. 503, 24 Atl. 949, where it was said: "The anterior proceedings, therefore, do not need to be scrutinized so closely. If it appear that the citizen was liable to taxation, and that the assessor had proper authority and jurisdiction, which he did not exceed, minor irregularities in mere procedure, which do not increase his share of the public burden, nor occasion him any other loss, should not prevent a recovery." To which the court added: "All taxation is a burden, yet it is the duty of every citizen to bear his portion of the burden, and no taxpayer should be permitted to escape doing so upon a mere technicality which in no way materially affects his rights." The trial court erred, therefore, in declaring the tax void, and should have given the instruction asked by the plaintiff.

2. The defendant interposes the statute of limitations as to the taxes assessed for the years 1893 and 1894. Section 9313, Rev. St. 1899, requires suits for delinquent taxes to be commenced within five years "after delinquency." Taxes are delinquent after the 1st of January following the year in which they are payable, and it is the duty of the collector to enforce the lien of the state. Section 9291, Rev. St. 1899. The taxes for 1893 became delinquent on January 1, 1894. This suit was begun on December 14, 1899. The taxes for 1893 were barred by limitation on January 1, 1899, and could not, therefore, be recovered in this action. The taxes for 1894 became delinquent on January 1, 1895, and would not be barred until January 1, 1900. They were not barred, therefore, on December 14, 1899, when this suit was begun.

For these reasons, the judgment of the circuit court is reversed, and the cause remanded to that court, with directions to enter judgment for the plaintiff for the taxes for the years 1894, 1895, 1896, and 1897, together with interest, penalties, and costs. All concur.

STATE v. BALCH et al.

(Supreme Court of Missouri, Division No. 2.
Dec. 9, 1903.)

CRIMINAL LAW—STATUTES—PAYMENT OF LABOR—NONNEGOTIABLE ORDER—INDICTMENT—SUFFICIENCY.

1. Laws 1895, p. 206, Rev. St. 1899, § 8142, makes it unlawful to issue for the payment of wages of labor any order, note, check, or evidence of indebtedness or other obligation, unless the same is negotiable and redeemable at its face value in lawful money by the one issuing it. *Held*, that a statement issued by an employer to a laborer, reciting the number of days he had worked, and the rate per day, and the amount due him, and that it was payable on a certain pay day, was not within the statute, it not being in payment, it being assignable, and there being nothing to indicate that it was not to be paid in lawful money.

2. An information, on a prosecution for a violation of the statute, which alleged the issuance of an order by defendant to a certain person, but did not allege that it was issued to him for labor performed for defendant, was insufficient.

3. Under Rev. St. 1899, §§ 2476-2478, as amended by Laws 1901, pp. 138, 139, providing that informations shall be signed by the prosecuting attorney and verified by his oath, or that of some one competent to testify as a witness in the case, or be supported by affidavit of such person, an information not verified in any manner as required by the statute is insufficient.

Appeal from Circuit Court, Osage County; Wm. A. Davidson, Judge.

H. F. Balch and others were convicted of a violation of Laws 1895, p. 206 et seq., and they appeal. Reversed.

Pope & Vaughan, for appellants. The Attorney General and Bruce Barnett, for the State.

GANTT, P. J. At the December term of the Osage circuit court, 1902, and on the 4th day of said month the prosecuting attorney filed in said court the following information:

"In the Circuit Court, Osage County, Missouri, December Term, 1902.

"J. Wm. Vosholl, prosecuting attorney within and for the county of Osage, in the State of Missouri, under his oath of office and upon his best knowledge, information and belief, informs the court that on or about the 18th day of June, 1902, at the county of Osage, in the State of Missouri, the firm of H. F. Balch & Co., consisting of H. F. Balch, Leonard F. Motley and Fred K. Balch, did then and there wilfully and unlawfully issue, pay out and circulate for payment of wages of labor performed by one A. J. Richardson, to the said A. J. Richardson an order, check, note, memorandum, token, evidence of indebtedness and obligation, non-negotiable and not redeemable at its face value in lawful money of the United States.

"That said non-negotiable order, check, note, memorandum, token, evidence of indebtedness, and obligation is in words and figures as follows:

"No. 330 on Maries River Works June 18th, 1902, A. J. Richardson No. 92, has worked as laborer in the month of June 9-10 days at \$1.50 per day, \$135.
.....days' board at.....\$.....
.....days' board at.....\$.....
.....days' board at.....\$.....
.....other accounts.....\$.....
Total to be deducted.....\$.....
Balance due.....\$ 1 35
Why given quit M. Domigonuh, Foreman.
Payable July pay day.
H. F. Balch & Co., Contractors,
"F. L. B."

"That said order, check, note, memorandum, token, evidence of indebtedness and obligation, so unlawfully issued, paid out, and circulated for payment of wages of labor performed by A. J. Richardson to the said A. J. Richardson, was non-negotiable, and not redeemable at its face value in lawful money of the United States, by the firm of H. F. Balch & Co., consisting of H. F. Balch, Leonard F. Motley and Fred K. Balch, who issued the same against the peace and dignity of the State.

"J. William Vosholl, Prosecuting Attorney within and for the county of Osage in the State of Missouri, under his oath of office and upon his best knowledge, information and belief, informs the court that on or about the 18th day of June, 1902, at the county of Osage and State of Missouri, the firm of H. F. Balch & Co., consisting of H. F. Balch, Leonard F. Motley and Fred K. Balch, did then and there issue and cause to be issued, pay out and circulate for payment of wages of labor performed by one A. J. Richardson, to the said A. J. Richardson, an order, note, check, memorandum, token, evidence of indebtedness and obligation which was non-negotiable.

"That said order, note, check, memorandum, token, evidence of indebtedness and obligation is in words and figures as follows:

"No. 330 on Maries River Works, June 18th, 1902, A. J. Richardson No. 92 has worked as Laborer in the Month of June
9-10 days at 1.50 per day.....\$ 1 35
.....days' board at.....\$.....
.....days' board at.....\$.....
.....Other accounts.....\$.....
Totals to be deducted.....\$.....
Balance due.....\$ 1 35
Why given quit M. Domigonuh, Foreman.
Payable July pay day.
H. F. Balch & Co., Contractors,
"F. L. B."

"That said order, note, check, memorandum, token, evidence of indebtedness and obligation is endorsed on the back, 'A. J. Richardson.' That on or about the first day of August, 1902, at said county of Osage in the State of Missouri, the said firm of H. F. Balch & Co., consisting of H. F. Balch, Leonard F. Motley and Fred K. Balch, did then and there wilfully, and unlawfully fail to be at all times during the business hours of the day, prepared to redeem and failed to redeem the above described order, check, note, memorandum, token, evidence of indebtedness and obligation, when presented at their place of business or office in Osage county,

¶ 2. See Indictment and Information, vol. 27, Cent. Dig. § 163.

Missouri, at its face value in good and lawful money of the United States, as demanded by 'L. Well,' who had become the owner of the same for value and was the holder although the said order, note, check memorandum, token, evidence of indebtedness, and obligation, was issued paid out and circulated, by the firm of H. F. Balch & Co., consisting of H. F. Balch, Leonard F. Motley and Fred K. Balch, in payment of wages of labor performed by A. J. Richardson to the said Richardson.

"That the said above set out note, order, check, memorandum, token, evidence of indebtedness, and obligation, so issued as aforesaid by the firm of H. F. Balch & Co., consisting of H. F. Balch, Leonard F. Motley and Fred K. Balch, for the payment of wages of labor performed by one A. J. Richardson to the said A. J. Richardson was on or about the first day of August, 1902, presented at the place of business and office in Osage county in the State of Missouri of the firm of H. F. Balch & Co. consisting of H. F. Balch, Leonard F. Motley and Fred K. Balch, during the business hours of the day for payment in good and lawful money of the United States at its face value and payment so demanded by L. Well who had become the owner of the same for value and said firm of H. F. Balch & Co., consisting of H. F. Balch, Leonard F. Motley and Fred K. Balch, unlawfully and wilfully did refuse and fail to pay in good and lawful money of the United States during the business hours of the day said order, note, check, memorandum, token, evidence of indebtedness or obligation when presented and payment demanded in good and lawful money of the United States by L. Well who had become the owner of the same for value and was the holder, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State."

A motion to quash was duly entered by defendants at the June term, 1903, which said motion is in the following words:

"The defendants now come and move the court to quash the information filed herein against them, for the reason that the same does not charge any crime against them or either of them. And for the further reason that the said information is vague, indefinite, and uncertain in its terms, in this: That it does not charge at what day, or at what hour of the day, or between what hours of the day, the instrument set out in the information was presented for payment, or to whom presented, nor does the information charge in sufficient terms or with sufficient distinctness that the office or place of business of the defendants was in Osage county, or where the same was located or kept at. And for the further reason that the first count in the information upon its face shows that the defendants did not violate the provisions of article 3 of chapter 121 of the Revised Statutes of 1899 of this state, upon which the

information is based. The order or writing set out in the information is not the kind of an order declared against by the statutes. And for the further reason that the information does not charge the defendants, or either of them, with violating the said article 3 of chapter 121 of the statutes aforesaid. And for the reason, further, that the said article 3 of chapter 121 of the Revised Statutes of 1899 of this state is in violation of the terms of section 10 of article 1 of the Constitution of the United States, which declares that no state shall pass any law impairing the obligations of contracts. And for the further reason that the said article, under the provisions of which this information is framed, is in violation of the Constitution of the state of Missouri and the Constitution of the United States, in this, to wit: (1) That all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry. (2) That no person shall be deprived of his life, liberty, or property without due process of law. (3) That they violate that part of the fourteenth amendment to the Constitution of the United States which declares, 'nor shall any state deprive any person of life, liberty or property without due process of law,' nor deny to any person the equal protection of the law. Because sections 8142, 8143, 8144, Rev. St. 1899, upon which the information herein is based, are unconstitutional and void, as being in violation of the constitutional provision 'that no person shall be deprived of life, liberty or property without due process of law.' The defendants especially move the court to quash the second count in the information charging that they did 'issue and caused to be issued' a certain order, note, check, memorandum, token, evidence of indebtedness and obligation, therein described and set out, for the reason that the law does not by its terms declare against or make or attempt to make it a criminal offense 'to cause to be issued' paper of the character therein described. And further because the paper or obligation defendants are charged with issuing and circulating is not by its terms redeemable in anything but lawful money of the United States at its face value, and by its terms is negotiable when properly indorsed by the person to whom given, which is not averred in any count in the information. And further the defendants move the court to quash the second count in the information for the reason that the charge against them therein does not conform to or follow the statutes under which it is drawn, in this: that the statutes, if constitutional, only require the person issuing the obligation therein mentioned to be prepared at all times during the business hours of the day to redeem such order, note, check, memorandum, token, evidence of indebtedness, or other obligation, when presented at their place of business or office, at their face value in good and lawful money of the United States, or in

goods, at the option of the holder, when the charge is that the writing, whatever it is, was issued on the 13th day of June, 1902, was indorsed on the back 'A. J. Richardson'; that about the 1st day of August, 1902, the firm did then and there fail to be at all times during the business hours of the day prepared to redeem, and failed to redeem, said order when presented at their place of business or office 'In Osage county, Missouri,' at its face value, in good and lawful money of the United States as demanded by L. Well, who had become the owner of the same for value, and was the holder, without any reason being assigned for not presenting the same sooner than August 1, 1902, and without charging defendants with failing to be prepared to redeem according to the terms of the obligation, which on its face expressed it to be payable July pay day. And, further, because it is nowhere in either of said counts alleged that the writing was issued for labor performed for defendants, but it on the contrary is averred that the same was issued to A. J. Richardson 'in payment or wages of labor performed by A. J. Richardson to the said Richardson.' And the defendants move the court to quash both counts in the information for the reason that they are not informed therein of the nature and cause of the accusation against them, as required by section 22, art. 2, of the Constitution of the state of Missouri, in this, that the information does not inform them of what provisions of article 3, c. 121, Rev. St. 1899, they are charged with violating, with sufficient certainty to enable them to prepare their defense. And, further, because they are not charged in either count with acts that would constitute a violation of said article."

The motion to quash was overruled, and defendants excepted.

The case then came on for trial before the court and a jury, the defendant having never pleaded to the information. The state, to sustain the issues on its part, introduced H. C. Finck, circuit clerk, who identified the petition, affidavit, and attachment bond in a suit of H. F. Balch & Co. against H. H. Wade, filed on the 20th of June, 1902, in the circuit court of said county, and then offered to introduce the papers for the purpose of proving that defendants were partners doing business as H. F. Balch & Co. This was objected to because the papers were incompetent for that purpose, not having been executed by the defendant, or either of them, but all executed by their attorneys, as shown on the face thereof. This objection was overruled, and defendants excepted. The state then introduced Chas. Vermoillen, and in the course of his examination he was allowed, over defendants' objection, to detail conversations had with L. F. Balch and one Mead, clerks, in absence of defendants, to which exceptions were made at the time. The state was also allowed to introduce in evidence, without proof of execution, a paper which

was a copy of the instrument set out in the information, to which defendants objected and excepted at the time. L. Well was also introduced by the state, who claimed to be the owner of the paper, and said he got it from a saloon keeper at Richfountain who was buying such paper for him, that he did not know Richardson, never saw him, did not know his handwriting or that of defendants; and he likewise was allowed to detail, over defendants' objections, conversations had with clerks at railroad camps, claimed to be officers of defendants. Both witnesses gave the date of demand for payment at the camps or offices as July 8, 1902, when the charges in the information is that the demand was made on or about August 1, 1902. This, substantially, was the testimony of the state, and, when the state closed, defendants asked an instruction in the nature of a demurrer to the evidence, which was refused, and to which exceptions were then taken. The defendants then asked the court to instruct the jury as follows:

"No. 1. The court instructs the jury that under the information and evidence in this case the defendants cannot be convicted, and they will return a verdict of not guilty.

"No. 2. The court further declares the law to be that the statute (sections 8142, 8143, and 8144, Rev. St. 1899) is unconstitutional and void, as being in violation of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, and for that reason the jury will find the defendants not guilty.

"No. 3. The court declares the law of this case to be that it is not unlawful to issue or give out for labor the instrument of writing read in evidence to the jury."

Which instructions were refused, and defendants excepted at the time.

The court instructed the jury as follows:

"The State of Missouri, Plaintiff, v. H. F. Balch et al., Defendants. In the Circuit Court, June Term, 1903. For the purpose of this case under the evidence given, the court declares the law as follows:

"(1) The order, note, check, memorandum, token, evidence of indebtedness, set out and described in full in the first count in the information, and read in evidence to the jury, is such a paper and writing as is forbidden by law to be paid out or put in circulation by any one for the payment of wages due for labor. If the jury believe from the evidence, beyond a reasonable doubt, that the defendants at any time within one year next before the filing of the information in this case, being a firm under the style and name of H. F. Balch & Co., at the county of Osage and state of Missouri, intentionally, for the payment of wages of labor, did pay or did cause to be paid out, or did issue or did cause to be issued, or did circulate or did cause to be circulated, said check, or token, or evidence of indebtedness read in evidence as aforesaid, then the jury will find the said defendant

guilty in manner and form as charged in the information, and will assess the punishment of such defendants at a fine of a sum not less than fifty nor more than five hundred dollars; or by imprisonment in the county jail for a period not exceeding twelve months, or by both such fine and imprisonment.

"And the court further declares that if from the evidence, beyond a reasonable doubt, the jury shall believe that on the 8th day of July, 1902, at the place of business and office of the defendants in the county of Osage, in the state of Missouri, one L. Well was then and there the owner and holder of the check, or evidence of indebtedness, described in full in the first count of the information and read in evidence to the jury, and that said check, token, or evidence of indebtedness, the defendants being members, or a firm, under the name and style of H. F. Balch & Co., had, within one year next preceding the filing of this information, intentionally issued or caused to be issued, paid out or caused to be paid out, circulated or caused to be circulated, said check, token, or evidence of indebtedness aforesaid, for payment of wages due for labor, and as such holder and owner, at said place of business, said L. Well did present to defendants and to their representatives at such place of business, about the hour of 11 o'clock in the forenoon of said day, demanding payment of the sum due on said check and token and evidence of indebtedness, and payment was by defendants or their representatives then refused, then the jury will find the defendants guilty in the manner and form as charged on the second count in the information, and will assess the punishment of each defendant at a fine of the sum of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for a period not exceeding twelve months, or by both such fine and imprisonment.

"The law presumes the innocence of all persons charged with crime, and if the jury have a reasonable doubt of the guilt of the defendants the jury shall acquit; but a doubt, to authorize an acquittal on that ground, should be a substantial doubt touching the guilt of defendants, and not a mere possibility of innocence."

To the giving of which defendants objected and excepted at the time.

The jury returned the following verdict: "State of Missouri v. H. F. Balch & Co. We, the jury, find defendant guilty on the first count and assess their punishment at four hundred and twenty-five dollars each. And we find the defendant guilty on the second count in the information and assess their punishment at four hundred and twenty-five dollars each. Fred Ebert, Foreman."

And thereupon the following judgment was rendered:

"State of Missouri, Plaintiff, v. H. F. Balch, F. K. Balch and L. F. Motley, Defendants. Failure to redeem checks for la-

bor, etc. And now comes the jury herein, Wm. Owens, John C. Laughlin, Fritz Griechen, D. L. Haynes, Fritz Held, August Stock, Joseph Chapman, Earbst Placial, Fred Schmitz, Fred Ebert, Wm. Dahms and John Stock, and return the following verdict:

"Verdict. We, the jury, find the defendants guilty on the first count and assess their punishment at \$425.00 each, and we find defendants guilty on the second count in the information and assess their punishment at \$425.00 each. Fred Ebert, Foreman."

"It is thereupon ordered and adjudged by the court that the state of Missouri have and recover (for the benefit of the public school fund) from defendants, H. F. Balch, L. F. Motley, and F. K. Balch, the sum of \$425 each, the amount of the fine in the first count in the information, as well as all the costs in the case laid out and expended.

"And it is further ordered and adjudged by the court that the state of Missouri have and recover (for the benefit of the school fund) from defendants, H. F. Balch, L. F. Motley, and F. K. Balch, the further sum of \$425 each, the amount of the fine in the second count in the information, as well as all costs in the case laid out and expended."

On the same day defendants filed motion for a new trial, as follows: "In the Circuit Court of Osage County, Missouri, June Term, 1903. State of Missouri, Plaintiff, v. H. F. Balch, L. F. Motley, and F. K. Balch, Defendants. Now come the defendants and move the court to set aside the verdict therein rendered and grant them a new trial, for the reasons following: (1) The court erred in permitting the state, over the objections of the defendants, to introduce improper, incompetent, and irrelevant testimony, to the great prejudice and injury of the defendants. (2) Because the court allowed and permitted the state, over the objections of the defendants made at the time, to introduce hearsay testimony. (3) Because the court refused to quash the information against the defendants, as prayed and moved by defendants, and overruled defendants' motion to quash the information, and because no issue was joined in the case. (4) Because the court refused to give an instruction in the nature of a demurrer to the testimony, as asked by the defendants at the close of the testimony offered by the state. (5) Because the court refused instructions Nos. 1, 2, 3, asked by the defendants to be given to the jury for their guidance. (6) Because the court gave wrong, improper, and harmful instructions to the jury, over the objections of the defendants made at the time. (7) Because all the instructions given by the court to the jury are wrong, and improperly directed the jury as to their duty, and were given against the defendants' objections made at the time they were given. (7) Because the verdict is against the law and the evidence, and should have been for the defendants, and because there was no evidence to sustain the verdict.

(8) Because under the information there should not have been any verdict against these defendants as individuals, as there is no charge against them as such, or any evidence to sustain the charge against either one of them."

The motion was overruled, and defendants excepted. Defendants on same day filed a motion in arrest, as follows: "In the Circuit Court of Osage County, Missouri, June Term, 1903.

"State of Missouri, Plaintiff, v. H. F. Balch, L. F. Motley, and F. K. Balch, Defendants. The defendants now come and move the court to arrest the judgment herein, for the reason that their information on which they were tried does not charge any crime against the laws of this state. (2) Because the statute under which the defendants were proceeded against is contrary to the provisions of the Constitution of the United States and the state of Missouri, and therefore void and of no force and effect. (3) Because upon the face of the record the defendants are not charged with or guilty of any violation of the laws of this state. And because there was no issue joined for the court or jury to try."

1. Various errors have been urged for a reversal of the judgment of the circuit court. The statute upon which this prosecution is predicated was enacted in 1895. Laws 1895, p. 206; Rev. St. 1899, §§ 8142, 8143, 8144, and 8145.

Section 8142 provides that: "It shall not be lawful for any person, firm or corporation in this state to issue, pay out or circulate for the payment of wages of labor, any order, note, check, memorandum, token, evidence of indebtedness or other obligation unless the same is negotiable and redeemable at its face value in lawful money of the United States by the person, firm or corporation issuing the same."

Section 8143 provides that: "All persons, firms, or corporations issuing or circulating any such order, note, check, memorandum, token, evidence of indebtedness or other obligation, shall be ready at all times during the business hours of the day prepared to redeem and shall redeem all such orders, notes, checks, memorandum, tokens, evidences of indebtedness or other obligation when presented at their place of business or office at their face value, in good and lawful money of the United States or in goods at the option of the holder."

Section 8144 provides that a violation of the foregoing sections shall constitute a misdemeanor, and affixes the punishment at a fine or imprisonment in the county jail.

At the threshold arises the question, is the account or exhibit incorporated in two counts of the information such an order, note, check, memorandum, token, evidence of indebtedness, or other obligation as is contemplated by section 8142. That it is not an order, note, check, or token is undeniable. Is it such a

memorandum or evidence of indebtedness or obligation as said section contemplates? In the construction of any statute, the history and reason of its enactment may always be invoked in its construction. The underlying purpose of this act unquestionably was to remedy what the Legislature deemed was an evil in the company stores or "truck system" resorted to by corporations and individuals employing laborers, whereby the employes were practically compelled to purchase their supplies and expend their wages for goods and supplies furnished by their employers, greatly to the disadvantage of the employe. It was obviously intended also to obviate the constitutional objections which this court, in *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789, pointed out to sections 7058 and 7060, Rev. St. 1889, and for which those sections were declared unconstitutional. The Legislature in this act has avoided one of the grounds on which the *Loomis* Case rests, to wit, class legislation. This act, unlike sections 7058, 7060, Rev. St. 1889, is not restricted to "corporations or persons engaged in mining and manufacturing," but applies alike to all persons, firms, and corporations. It was well known that, as in the *Loomis* Case, different mining and manufacturing companies had resorted to a practice of issuing, in payment of wages, scrip, punch-outs, orders, and tokens to their employes, which were redeemable only in goods, wares, and merchandise at the stores of said companies, and on their face nonnegotiable and uncollectible in money at their face value. Accordingly this act was passed to correct these practices. It is to be noted, first, that it prohibits any person, firm, or corporation issuing any such order, note, check, etc., for the payment of wages of labor, unless the same is negotiable and redeemable at its face value in lawful money by such person, firm, or corporation. This is a criminal prosecution, and the act is to be strictly construed in favor of the defendant and against the state. Was it the purpose of the Legislature to say that no person, firm or individual, or corporation in this state should be allowed, if one of their employes quit their service at any time and for any good reason, in auditing his account, to render him an account stated to the time he quit, without subjecting such person, firm, or corporation to a criminal prosecution under this statute? Such a construction, in our opinion, would be utterly unreasonable, and subversive of all the business habits of our people. The statute is not fairly susceptible of such a construction. Men must be allowed to adjust their differences. Take the case before us. There is not the slightest evidence that the defendants issued this statement of Richardson's account to him as and for payment of their indebtedness to him. It was nothing more or less than a statement by one of their foremen that Richardson had worked nine-tenths of a day in June at the rate of \$1.50 a day, and that the amount due him was \$1.35, and that it was

given to him because he had quit work—not issued, paid out, or circulated “in payment” or “for payment” of his wages. It simply showed what amount of work he had done and what was due him therefor. That such an account was negotiable in the sense that it was assignable there can be no doubt. There was nothing on it to restrict its assignment, and nothing to indicate it was not to be paid in lawful money at its face value. The statute does not prohibit an employer from giving his note or check for wages earned by his employé, provided such note or check is negotiable and redeemable in money, and without doubt he is not guilty of a violation of this statute unless he does issue or pay out such note, check, memorandum, or evidence of indebtedness “in payment” of, or “for payment” of, such wages. While in this case the pleader charges such was the case, he further sets out the exact instrument which he alleges was issued to Richardson, and thus has restricted his charge to that, and, as we have seen, it is not such a note, check, or other evidence as was contemplated by the Legislature, but is in substance only a certificate by a foreman of the amount of work done, and the value of it, for the information of his employer when pay day arrived. On the contrary, it states on its face it is payable the next pay day. The second count, based, as it is, on the same account, stated obviously, is no better than the first, because, unless it was a note, check, or obligation within the meaning of the statute, the defendants were not required to be ready at all times to pay it.

2. But, again, the information is fatally defective as a criminal pleading. In such case nothing is left to intentment. Now, there is no allegation that Richardson was in the employment of defendants, or that the note, check, etc., was issued to him for wages for labor performed by said Richardson “for them.” The underlying purpose of the act is to protect employes from unjust practices of their employers. The pleader has not brought his case within the statute. While not insisted on by defendants, we observe that this information is not verified in any manner as required by sections 2476, 2478, Rev. St. 1899, as amended by the Acts of 1901 (Laws 1901, pp. 138, 139). *State v. Bonner* (opinion filed to-day) 77 S. W. 463.

3. We are asked to declare the said sections unconstitutional, but it is always a serious matter to declare an act of the General Assembly unconstitutional, and it should never be done save for grave reasons. Inasmuch as this case can be disposed of without passing on the constitutionality of the act, and as in no event can this prosecution be maintained, we must decline to go into the constitutionality of the sections mentioned.

The judgment of the circuit court is reversed, and the prisoners discharged.

BURGESS and FOX, JJ., concur.

Ex parte GFELLER.

(Supreme Court of Missouri, Division No. 2.
June 30, 1903.)*

ADMINISTRATION OF DECEDENT'S ESTATE—PROCEEDINGS FOR DISCOVERY OF ASSETS—RIGHT OF HUSBAND TO INSTITUTE—PRIORITY OF TAKING DEPOSITIONS—WITNESS' REFUSAL TO ANSWER QUESTIONS—HABEAS CORPUS—ATTORNEY AS WITNESS—PRIVILEGED COMMUNICATIONS—WAIVER BY CLIENT'S REPRESENTATIVE—INCRIMINATING MATTERS—CLAIM OF PRIVILEGE.

1. Rev. St. 1899, § 74, requires, as a preliminary to a proceeding in the probate court for the discovery of assets belonging to a decedent's estate, that some “person interested” shall file an affidavit of his belief that some person has concealed or embezzled, etc., such assets. *Held*, that the decision of the probate court that the husband of the decedent is interested in her estate, so as to warrant his filing the affidavit, is not open to review on habeas corpus to release a witness refusing to answer questions in the proceeding.

2. Under Rev. St. 1899, § 2938, entitling a husband, where there are no children, to one-half of the wife's estate absolutely, the husband is a person interested in the estate, within section 74, authorizing a “person interested” to file an affidavit preliminary to proceedings for the discovery of assets.

3. A proceeding for the discovery of assets belonging to decedent's estate is “a suit pending,” within Rev. St. 1899, § 2877, providing for the taking of depositions in a suit pending, even though the person from whom discovery is sought is charged with embezzlement of the assets; and the notary before whom the depositions are taken has authority to require a witness to answer all legal and proper questions.

4. The institution by an executor of proceedings for the discovery of assets of the estate amounts to a waiver of the privileged character of communications between decedent and her attorney, who is called by the executor as a witness.

5. In proceedings for the discovery of assets belonging to a decedent's estate, a witness against whom similar proceedings had also been instituted was asked when he last saw certain securities belonging to decedent, and whether at or shortly after her death he had any money belonging to her, and what he did with it. The witness declined to answer on the ground that he was decedent's attorney at the time of her death. *Held*, that none of the questions required the witness to violate any professional confidences.

6. The witness also declined to answer on the ground that in the proceeding against himself he was charged with embezzlement. *Held*, that none of the questions called for matters tending to incriminate him.

7. On habeas corpus by a witness committed for contempt in refusing to answer questions before a notary in the taking of depositions, the notary's determination as to the relevancy and materiality of the evidence sought is conclusive.

8. The refusal of a witness to answer questions because the information sought might be used in a proceeding against him in which he is charged with embezzlement, and because the federal and state Constitutions protect him from giving testimony which may lead up to the establishment of any facts supporting a criminal charge against him, does not constitute a refusal to answer on the ground that the evidence sought will tend to incriminate him, so as to amount to a claim of privilege.

¶ 7. See *Habeas Corpus*, vol. 25, Cent. Dig. § 95.

*Received for publication December 24, 1903.

Habeas corpus by Alfred Gfeller against the sheriff of the city of St. Louis to secure release from custody after being committed by a notary for refusing to answer questions as a witness. Petitioner remanded.

Geo. D. Reynolds and O. W. Holteamp, for petitioner. J. Hugo Grimm, for respondent.

BURGESS, J. Catherine Linze died at the city of St. Louis, leaving, surviving her, her husband, Henry Linze. In November, 1901, letters testamentary were duly granted by the probate court of said city upon her estate to the St. Louis Trust Company, in pursuance of her will, duly admitted to probate by said court. On October 11, 1902, the petitioner in this case, Alfred Gfeller, was arrested and held in custody by the sheriff of the city of St. Louis under a commitment issued prior thereto by one Augustus M. Wood, a notary public within and for the city of St. Louis. On the same day Gfeller presented his petition to the Honorable Thomas A. Sherwood, one of the judges of this court, praying for his discharge under and by virtue of the habeas corpus act. The petition was duly verified, and the petitioner being brought before Judge Sherwood, in chambers at St. Louis, a writ of habeas corpus was ordered to issue, returnable to this court in term. The facts are as follows:

The estate of one Catherine Linze being in course of administration in the probate court of the city of St. Louis, the St. Louis Trust Company being executors, the widower, Henry H. Linze, filed in said court two affidavits, in one of which he charged "that he had good cause to believe, and does believe, that Alfred Gfeller has concealed or embezzled various goods, chattels, wares, merchandise, notes, certificates of deposit, bonds, stock in corporations, and other property, evidences of debt and choses in action of the deceased, amounting in the aggregate to between \$40,000 and \$70,000, and constituting the bulk of her estate; and the said Alfred Gfeller has such property in his possession, or under his control, and refused to deliver it up to the St. Louis Trust Company, executor of Catherine Linze, deceased, upon demand made therefor." In the other, Linze charges "that he has good cause to believe, and does believe, that Frederick N. Eckerle has concealed or embezzled various goods, chattels, wares, merchandise, household articles, glassware, and other personal property of the deceased, the exact value of which the affiant cannot state, but which he believes to be over \$500, and that said Frederick N. Eckerle had such property in his possession or under his control, and refused to deliver them up to the St. Louis Trust Company, executor of Catherine Linze, deceased, upon demand made therefor." Gfeller and Eckerle filed answers to the citations, in which they denied that Henry H. Linze had any interest in the estate of his wife, and averred that she died

testate without issue, and that the first clause of her will, which had been duly probated, read as follows: "I declare that I am now married to Henry H. Linze, and that I have no children, and that all the property, real, personal, and mixed, which I now possess, and which I desire to dispose of hereby, is my absolute property, and that my said husband has in no wise contributed thereto, nor has he any interest therein." The answers then severally deny that they have concealed or embezzled any of the various goods, chattels, etc., belonging to the estate of the said Catherine Linze, as charged in the affidavits, or that they have any of them in possession or control; and Gfeller denies that Catherine Linze died seised of an estate amounting to between \$40,000 and \$70,000, as alleged in the affidavit.

Afterwards the trust company, as executor, filed written interrogatories "to be answered in writing" by Eckerle. Those propounded to Eckerle, and his answers thereto, are as follows:

"Interrogatory 1. Is it not a fact that between November 10, 1901, and November 20, 1901, a large quantity of cut glass, silks, satins, linen, curtains, portières, vases, ornaments, clocks, and silverware were taken and removed from the residence of Catherine Linze, lately deceased, and that thereafter a portion of said articles came into your possession, custody, or control? Answer. Mrs. Catherine Linze was my aunt. She took me to raise when I was about twelve years old. I am now about thirty-five years of age. As I had a stepmother, and could not get along with her, and my aunt didn't have any children, she proposed to my father to take me and pay all my expenses, and educate me, clothe me, and to recognize me as her child. My father assented to this arrangement, and relinquished all supervision and control over me in favor of my aunt, who was then Mrs. Becker; her first husband, Mr. Becker, then being alive. I lived with my aunt Mrs. Linze, formerly Mrs. Becker, and was recognized by her as an adopted son, until about three months before my aunt's death, when I married and set up housekeeping for myself. About three weeks before my aunt's death, she bought a lot of household goods, and added to them a lot that was in her house, gave them to me, and had them removed to my house. A day or two before my aunt died, she had two lady friends of hers remove a picture of herself and my young sister, a clock which I had given her, a lot of dresses, some cut glass ware—mainly the pieces of cut glass ware that in the past twenty years I had presented to her—a lot of linen, curtains, mantel ornaments, pictures of relations, and a carving set which I had given her, from her house to the house of one of these ladies, with directions to the lady to give them to me. Afterwards my aunt told me what she had done; that these articles were there for me; and that I should

hold them as a sacred gift from her, and never sell them. These are all of the articles specified in the interrogatory which came into my possession, and I hold and claim them as my property, by virtue of the gift of them of my aunt to me during her lifetime.

"Interrogatory No. 2. Is it not true that at the time of Catherine Linze's death, and at the time of the service of the citation in this case upon you, you had in your possession, custody, or control the articles mentioned in the last preceding interrogatory, or a portion thereof? Answer. I refer to my answer to interrogatory No. 1.

"Interrogatory No. 3. Did you at the time of the death of Catherine Linze, or at the time of this citation upon you, or at any intermediate time, or at any time since, have in your care, custody, or control any money, bonds, stocks, securities, or other personal property belonging to Catherine Linze, deceased, or which belonged to her at the time of her death? Answer. No.

"Interrogatory No. 4. Have you, since the death of said Catherine Linze, delivered to any person, firm, society, or corporation any of the moneys, bonds, stocks, securities, or other personal property belonging to said Catherine Linze in her lifetime? If so, state when and where and to whom. Answer. No.

"Interrogatory No. 5: Did you, prior to the death of Catherine Linze, remove from her residence any money, bonds, stocks, securities, or other personal property? If so, what did you do with same? And was it in your possession at the time of service of citation on you? Answer. I state that it is fully covered by my answer to interrogatory No. 1, and I refer to that. I will say in addition that I took nothing whatever from my aunt's house after her death, except that, as her house was small, and to make room for the people who would probably attend her funeral, I removed from her house to a neighboring house a piano and a sewing machine, which were seen and taken up into the inventory by the executor. I also took away from the room that I had occupied some clothing and personal belongings, such as a guitar, mandolin, and a lot of shirts and underwear, which had always been mine, and which I took to my own house the Monday after my aunt's death. I had kept my musical instruments there at my aunt's request, because she liked to have me play for her own and for her visitors' entertainment. Her husband, Mr. Linze, although living in the city, never went to see her, and she was entirely alone, except for the visits paid her, from time to time, by myself and wife. Although I had gone to Mr. Linze's place of business, and told him of my aunt's deserted condition since I had left the house, and begged him to try and make up with her, he refused to do so."

After the filing of the answers to the interrogatories by Gfeller and Eckerle, the executor proceeded to give notice of the tak-

ing of depositions in both cases before H. M. Wood, a notary public. In the case against Gfeller, the circuit court, on motion, appointed Hon. Daniel Dillon to take the testimony. Eckerle's testimony was taken over objection, and, on application of the counsel for the executor to have Gfeller sworn, he declined; and Judge Dillon, refusing to compel him to testify, certified the matter to the circuit court, where it is now pending. On about May 1, 1902, the trust company caused notice to be given to Eckerle for the taking in this proceeding of depositions of witnesses on May 6th. Before any testimony was taken under said notice, said Eckerle applied to the presiding judge of the St. Louis Court of Appeals for a writ of prohibition against the said trust company, and the notary before whom the depositions were to be taken, to prohibit their proceeding under the notice given. A preliminary rule was made, and after a return by respondents the St. Louis Court of Appeals discharged the preliminary rule of prohibition, and entered judgment for the defendants. After the decision of said matter by the St. Louis Court of Appeals, the St. Louis Trust Company, in August, 1902, caused another notice of the taking of depositions in the said proceeding against Eckerle in the probate court to be served upon him, and under said notice began the taking of depositions on the 27th day of August, 1902. The taking of said depositions was proceeded with day after day, and on the 22d of September, 1902, after a number of witnesses had been examined, the petitioner, Alfred Gfeller, was sworn as a witness, and the taking of his deposition in said cause was begun. On that day, however, he was excused until September 25th; the depositions being continued from day to day in the meantime. On September 25th the examination of Gfeller was proceeded with, and the following questions were put to him by counsel for executor: "Q. 1. When did you last see St. Louis Brewing Association bonds numbered 4,450 to 4,468, inclusive, or any of them; these bonds being for \$1,000 each, and having belonged to Mrs. Linze during her lifetime? Q. 2. Did you, at the time of Mrs. Linze's death, or shortly prior thereto, have in your possession any money belonging to her? If so, what did you do with it? Q. 3. Did you ever see bonds of the city of Houston, Texas, numbered 1,070 to 1,076, inclusive, which were for \$1,000 each, or any of them, which belonged to Mrs. Linze during her lifetime? If so when did you see them last? Q. 4. Did you ever see five bonds of New Orleans Brewing Association for \$1,000 each, or any of them, which belonged to Mrs. Linze during her lifetime? If so, when?" Questions 5 to 14 were in the same form as those above, except that other securities were inquired about. "Q. 15. I asked you whether Frederick N. Eckerle did not leave the city of St. Louis within four or five weeks after Mrs. Linze's death, and go

to his relatives, in Germany, and did he not do so before you disclosed to the St. Louis Trust Company the existence of a safe deposit box in the Miss. Valley Trust Company, which was in the joint names of yourself and Mrs. Linze? You declined to answer this question the other day, claiming that the information came to you in a professional capacity from clients, and I asked their names, and you refused to give them. Do you still refuse to answer the main question, and also refuse to give the names of the client from whom you received this information? Q. 16. You stated that when you responded to the message from Mrs. Linze saying that she wished to see you, and you called at her house on Saturday, November 9, 1901, and that you had a conversation with her, the substance of which you declined to give. Do you still decline to give that conversation? Q. 17. Did that conversation have reference to her property and securities? Q. 18. Where did Mrs. Linze keep her securities, so far as you know? Q. 19. Before Mrs. Linze's death, did you have any money of hers in your possession? Q. 20. If so, what did you do with it? Q. 21. Did you not, on the day of her funeral, pay one or more of her servants? Q. 22. Did you not make these payments out of her money, and where did you get it from? All of which Gfeller refused to answer, for the reasons stated by him after the first question, as follows: "I again decline to answer the questions propounded, for the reasons: First, because in answering the questions I would be compelled to disclose confidential communications and knowledge received as such from my client, Mrs. Catherine Linze, who is now dead; second, because the information sought from me is intended to be used or may be used in a proceeding against me now pending in the probate court of the city of St. Louis, in which proceeding I am charged of having embezzled or concealed the securities mentioned in the question, and other property belonging to the estate of Catherine Linze, deceased; third, because the questions propounded to me are incompetent, irrelevant, and immaterial to any issue involved in the case in which these depositions are taken; fourth, because I dispute the authority on part of Mr. J. Hugo Grimm to put those questions to me, as I have been informed by the chief counsel of the St. Louis Trust Company, A. C. Stewart, the executor of the estate of Catherine Linze, deceased; Mr. Stewart having stated to me that the position which I took in refusing to disclose confidential communications and knowledge coming to me from Mrs. Linze during her lifetime was absolutely impregnable. That conversation of Mr. Stewart occurred prior to the taking of these depositions, and after the affidavit by Henry H. Linze upon which this proceeding is founded had been filed in the probate court, at the office of said St. Louis Trust Company, where I had been re-

quested to call by said Mr. A. C. Stewart, and in which conversation the relations between Mrs. Catherine Linze, deceased, and her husband, Henry H. Linze, were fully discussed by Mr. Stewart and myself. When I told Mr. Stewart that all the knowledge and information I had about Mrs. Linze's affairs or securities or investments had come to me as her counsel, he said I was pursuing the only proper course in declining to give him or anybody else information about it." Counsel for the executor then asked the witness: "Q. Do you mean by this second reason you give, that if you answered this question your answer would tend in any wise to incriminate you? Mr. Reynolds, Counsel for the Defendant: I object to that question, as one that the witness cannot be compelled to answer. The protection of the Constitution of this state and of the United States extends to the witness giving any testimony that may even lead up to the establishment of any facts in a case against him, where the charge against him is criminal, or in the nature of a criminal charge. A. I decline to answer that question, because it is extremely improper, and also for the reasons stated by counsel."

It having appeared, from an examination of F. N. Eckerle as a witness in the proceeding against Gfeller, that the latter had given him a large envelope full of documents of some kind, and directed him to take the same to Germany, which Eckerle did, the witness was also asked the following questions, which he declined to answer for the reasons set out after each question: "Q. 23. What papers did you deliver to Frederick N. Eckerle just prior to his leaving for Europe in January, 1902? Mr. Reynolds: I object to the question as irrelevant and immaterial to any issue in this case, and because it is an improper question. A. I decline to answer that question for the reasons that the question, as put, and the information sought to be elicited thereby, is intended to be used against me, or may be used against me, in the proceeding now pending against me in the probate court of the city of St. Louis, heretofore referred to, and would also involve the disclosure of affairs of some of my clients, knowledge of which came to me in a professional capacity. Q. 24. Give the names of those clients? A. I decline to do so. Q. 25. Were there any of the books, stocks, or securities which belonged to Mrs. Linze during her lifetime among the papers which you handed Mr. Eckerle just prior to his going to Europe in January, 1902? Mr. Reynolds: I object to the question because it assumes that he did hand papers to Eckerle, when the witness has declined to answer whether he did or did not, and this is an indirect way of obtaining the same information; and, for the reason before given, I object to and advise the witness not to answer it. The Witness: I decline to answer for the reasons last given by myself and Mr. Reyn-

olds. Mr. Grimm: I request you to rule whether the witness must answer questions 22, 23, and 24, being the three immediately preceding this one, or not? The Notary: I believe the questions are perfectly proper, and that the witness should answer the same, and I direct the witness to answer the questions. The Witness: I decline to answer for the reasons already given by myself and Mr. Reynolds." The notary ruled that the questions were relevant to the inquiry, and ordered the witness to answer them, and, upon his persisting in his refusal so to do, committed him for contempt, and this action of the notary was at once followed by the petition for writ of habeas corpus.

From the deposition of Gfeller, it appears that he had represented Mrs. Linze during the last few years of her life as her attorney, and had charge of her securities, and that he also was the attorney for Mr. Eckerle. When he first was asked when he had last seen the St. Louis Brewing Association bonds, Gfeller declined to answer, for two reasons: First, "Because the disclosure of professional secrets;" secondly, "Because I ought not to be called upon to testify in this case, as Mr. Eckerle, against whom this proceeding is pending, is my client." Gfeller's deposition shows that both Mrs. Linze and Eckerle had been his clients for a number of years before Mrs. Linze's death, on November 10, 1900.

It is contended by the petitioner that the probate court was without jurisdiction in the proceeding against Eckerle; hence the notary public was without authority to commit him for contempt for refusing to answer questions. This contention is based upon the fact that the statute providing for the discovery of assets (section 74, Rev. St. 1899) requires, as preliminary thereto, that the executor or administrator of, or some person interested in, the estate, shall file an affidavit in the proper court, stating that the affiant has good cause to believe, and does believe, that some certain person has concealed or embezzled, or is otherwise wrongfully withholding, certain personal property belonging to the estate, and that H. H. Linze, who made the affidavit, although the surviving husband of the testatrix, yet, as they never had any children, and she gave him nothing by her will, which was duly admitted to probate, was not interested in the estate, and the court without jurisdiction to issue the citation. This position is, we think, untenable. In the first place, "the probate court, by the terms of the statute under discussion, has authority to cite the person charged, and to require him to answer interrogatories after the filing of an affidavit of the executor or administrator, or 'other person interested in any estate.' It made the citation in the instance under review upon the affidavit of Mr. Linze, husband of the deceased. The orders in that behalf amount to a decision by the probate court that he is

interested in the estate." *Eckerle v. Wood et al.* (Mo. App.) 69 S. W. 45. And whether the decision of that fact by the probate court be right or wrong, it cannot properly be reviewed in this proceeding. In the second place, even if the question as to whether or not H. H. Linze had sufficient interest in the estate to warrant his making the affidavit was open, as the husband of the testatrix—there being no children of their marriage—he was, under the statute (section 2938, Rev. St. 1899), entitled to one-half of her estate; and he clearly had sufficient interest in it to authorize him to make the affidavit.

It is said that the proceeding in the probate court is not a suit, within the purview of section 2877, Rev. St. 1899, which provides for taking of depositions in a suit pending; that sections 2637, 2638, Rev. St. 1899, provide that a defendant in a criminal proceeding cannot be called to testify by the prosecutor, and is only competent as a witness when he offers himself as such. But that was not a proceeding against the petitioners, but against Eckerle, and certainly, as to him, it is no concern of the petitioners whether it be a proceeding criminal in its character, or not. It is "a suit pending, within the meaning of the law for taking of depositions" (*Eckerle v. Wood et al.*, supra), in which the notary public had the right and authority to require the prisoner to answer all legal and proper questions. The case of *Gordon, Administrator, v. Eans*, 97 Mo. 587, 4 S. W. 112, 11 S. W. 64, 370, relied upon by the petitioner, was a proceeding under the statute by an administrator of an estate against the widow of the deceased to recover certain assets of the estate, and it was said by the court "that the sole question was, was the defendant guilty of embezzlement; that is, had she fraudulently appropriated to her own use money or property intrusted to her care by another? * * * This proceeding, it must be remembered, is quasi criminal in its nature, its object and purpose being to discover and compel the surrender of property so fraudulently misappropriated to the party having a right thereto." But notwithstanding these observations, the court held that the probate court had jurisdiction for the sole purpose of ascertaining the guilt or innocence of the defendant of the embezzlement charged. It is perfectly clear that the citation issued in the case against Eckerle was not void, but, at most, only void as to the charge of embezzlement, which charge, if thought necessary, may at any time be abandoned, or the citation amended, by leave of court, by striking out that charge before the trial, and thus relieve the case of any question or doubt as to the jurisdiction of the court over it. In the Matter of Charles Green, 86 Mo. App. 216, who had been administrator of an estate, and was proceeded against by the administratrix de bonis non of the estate, under section 74, Rev. St. 1899, by suing out of the

probate court of St. Louis county a citation against him, and, upon his appearance thereto, propounded to him the following interrogatory, "Did you not conceal, embezzle, or otherwise wrongfully withhold said goods, chattels, money, books, papers, and evidence of indebtedness from the estate of the deceased?" the court said: "The interrogatories propounded to Green are in groups of three or four questions, and in each group he is asked if he has not embezzled or concealed the things described in that group. To all of the interrogatories he has answered, denying that he has in his possession or under his control, or that he has embezzled or concealed, any of the assets mentioned in the interrogatories belonging to the estate of Fleming. In this state of the record, it is apparent that if he has the assets, or any of them, he has embezzled and is secreting them, and that this is the real issue which the jury will have to try. At most, the investigation is in that situation where it reasonably appears that the administrator is seeking to convict Green of embezzlement. And though not in name or form a criminal investigation, it is so in character, and the verdict, if for the estate, must be one of conviction. Rev. St. 1899, § 77. To make out a case for the estate, under the condition in which we find the interrogatories and answers thereto, it will be incumbent on the administrator to adduce evidence proving or tending to prove that Green has embezzled some of the assets described in the interrogatories. From making out such a case against himself, from furnishing a link in a chain of evidence leading to his conviction, and from furnishing any information by which evidence might be obtained tending to convict him, Green is protected by the Constitution, according to all of the authorities—as much so as if he was being prosecuted under an indictment charging embezzlement of the assets of the estate of Alfred W. Fleming, deceased. He is not in the same situation as a witness in an ordinary civil suit, who, to claim his protection, must first be sworn as a witness, and then, when a question is propounded to him, that to answer would criminate or tend to criminate him, must so declare under oath, and invoke the protection of the law. But as before stated, Green's situation as a witness is analogous to that of a defendant in a criminal suit by indictment or on information. He may or may not testify, as he elects. He cannot be called by the opposite party as a witness, nor sworn as such, unless he voluntarily offers himself to be sworn. When he refused to be sworn as a witness, he exercised a constitutional right, and is entitled to his discharge under the writ of habeas corpus. *Ex parte Lange*, 85 U. S. 163 [21 L. Ed. 872]; *People, etc., v. Kelly*, 24 N. Y. 74; *People, etc., v. Liscomb*, 60 N. Y. 559 [19 Am. Rep. 211]; *In re Dill*, 82 Kan. 668 [5 Pac. 39, 49 Am. Rep. 505]."

But as has been said, this is not a proceeding against Gfeller under the statute, in which he declined to be sworn to answer interrogatories propounded to him, but a proceeding under the same statute against another person, wherein he (Gfeller) was sworn as a witness, to the end of having his deposition taken in that suit, and he refused to answer the questions propounded to him, as hereinbefore set forth. By questions 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 14, the witness was simply asked whether he had ever seen the sureties therein mentioned. Question 2 was as to what he had done with St. Louis Brewing Association bonds numbered 4,450 to 4,468, inclusive. To this question the witness replied: "I decline to answer that question, for two reasons. First, because the disclosure of professional secrets; and, secondly, because I ought not to be called upon to testify in this case, as Mr. Eckerle, against whom this proceeding is pending, is my client. Mr. Reynolds: I object to the question because it is irrelevant and immaterial to any issue in the citation against Eckerle. I make the further objection on behalf of the witness that the bonds inquired of are the bonds supposed to be referred to in the citation in the probate court of the city of St. Louis against the witness Alfred Gfeller, in which proceeding said Gfeller is charged with having received or embezzled bonds of this brewing company, and he cannot be compelled in this case or in any case to give testimony concerning or bearing upon that issue." The grounds for the refusal by the witness himself, as well also as given by his counsel for his refusal, to answer the question, were no justification or excuse for not answering the question. If his professional secrets were obtained from Mrs. Linze, as he stated they were, the privilege belonged to her, and after her death to the St. Louis Trust Company, her executor, at whose instance that suit was being prosecuted. Our statute places attorneys and physicians upon substantially the same grounds with respect to privileged communications, and it was held in *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552, that the protection afforded by the statute against calling a physician to give evidence of the information acquired in a professional character from his patient may be waived by the latter, or those representing him after his death, for the purpose of protecting rights acquired under him. The court said: "Notwithstanding our statute provides for no exception, still it deals with a privilege, and it must be taken as established law that the privilege may be waived by the patient, and we have held that it may be waived by the representative, and in this our ruling accords with that of the Supreme Court of Michigan under a like statute. If the patient may waive this right or privilege for the purpose of protecting his rights in a litigated cause, we see no substantial reason why it may not be

done by those who represent him after his death for the purpose of protecting rights acquired under him. Some light may be thrown upon this question by analogy from the rules of law applied to confidential communications between client and attorney. Such communications, it is held in *Russell v. Jackson*, 9 Hare, 390, must not be revealed in cases where the rights and interests of a client, or those claiming under him, come in conflict with the rights and interests of third persons; but this rule, it is held, does not apply to cases of testamentary disposition of property by the client. The disclosure in such cases, it is considered, can affect no right or interest of the client, and is therefore not within the reason of the rule. Taylor says: 'In stating that the privilege does not terminate with the death of the client, care must be taken to distinguish between cases where disputes arise between the client's representative and strangers, and those in which both of the litigating parties claim under the client.' As to the latter class of cases he says, 'It would be obviously unjust to determine that the privilege should belong to one claimant, rather than the other.' 1 Taylor on Ev. § 928, p. 608. See, also, *Blackburn v. Crawford*, 8 Wall. 175 [18 L. Ed. 186]; *Scott v. Harris*, 113 Ill. 454." *Winters v. Winters*, 102 Iowa, 53, 71 N. W. 184, 63 Am. St. Rep. 428, was a will contest; and it was therein held that, as to the attending physician upon the testator in his last sickness, on the probate of the will, the contesting heirs at law, as well as the devisee or the executor, might examine him in respect to information acquired in his professional capacity, though Code, § 3648, prohibits the disclosure of such information unless the party for whose benefit the prohibition is made waives his rights thereunder. While there was no express waiver by the executor in this case with respect to the communication between the petitioner and his client Mrs. Linze, or anything that he may have learned from her in his capacity as attorney for her in regard to the bonds in question, there could have been no stronger evidence of such waiver than to proceed against him as it did under the statute for discovery and production. Nor could the petitioner decline to answer the question upon the ground of privilege growing out of the relations between himself and his client Mrs. Linze, even if his right to do so was not waived by the executor (which we do not concede), for no professional confidence would have been violated in telling where he last saw these bonds, or in answering any of the other questions propounded to him. As was said in *Shanghnessy v. Fogg*, 15 La. Ann. 330: "If an attorney at law were not permitted to disclose who was his client, and what sums of money he had received or disbursed on his account, it would give rise to great frauds. If the attorney may be interrogated as to who is his client, he may also be

asked through whose agency, or in what manner, and at what time, he was retained." See 1 Greenleaf's Evidence, § 245; 2 Starkie on Evidence, 398; *Reeves v. Burton*, 6 Mart. (N. S.) 283; *McCrummen v. Stewart*, 4 La. 500; *Chirac v. Reinicker*, 11 Wheat. 280, 6 L. Ed. 474; *Reynolds v. Rowley*, 3 Rob. 204, 38 Am. Dec. 233; *Travis v. January*, 8 Rob. 230. There are many transactions between attorney and client that have no element of confidence in them, with respect to which the attorney is competent to testify. For instance, he may prove his client's handwriting; may prove what money was collected by him, when paid over, and to whom paid. *Johnson v. Patterson*, 81 Tenn. 626. See, also, *Turner v. Warren*, 160 Pa. 336, 28 Atl. 781. And it would have been competent for plaintiff to have asked the petitioner what property of Mrs. Linze he did have, and what disposition he had made of the same (*State ex rel. Hardy v. Gleason*, 19 Or. 159, 23 Pac. 817, and authorities cited), and it must necessarily follow that it was entirely proper to ask him when he last saw her St. Louis Brewing Association bonds, which were numbered 4,450 to 4,466, inclusive.

As to that part of the objection by the petitioner to answering the question predicated of the fact that Eckerle was his client, it offers but a flimsy pretext for refusing to do so, and places the witness in the enviable position of representing two clients with respect to conflicting interests at the same time; that is to say, the interest of Mrs. Linze, represented by her executor, and the interest of Eckerle. Nor could he, after having been the attorney of Mrs. Linze, and as such come into the possession of facts in regard to her business and property that were not privileged, thereafter become the attorney of Eckerle, and by reason thereof seal his mouth as to matters that were not privileged as the attorney of Mrs. Linze. As to whether the question was irrelevant or immaterial was for the decision of the notary public before whom the evidence was being taken. *Ex parte McKee*, 18 Mo. 599.

Among other reasons assigned by the petitioner for refusing to answer questions numbered 1 to 22, inclusive, was the following: "I again decline to answer the questions propounded, for the reasons, because the information sought from me is intended to be used, or may be used, in a proceeding against me now pending in the probate court of the city of St. Louis, in which proceeding I am charged of having embezzled or concealed the securities mentioned in the question, and other property belonging to the estate of Catherine Linze, deceased." It will be observed that this objection to answering the questions is not based upon the ground that to answer them would incriminate or tend to incriminate the witness, but solely upon the ground that it might be used against him in a proceeding pending against him in the probate court for embezzlement. In this

connection the petitioner was asked by the executor if he meant by declining to answer the question that his answer would tend in any wise to incriminate him, when the following occurred. "Mr. Reynolds, Counsel for the Defendant: I object to that question as one that the witness cannot be compelled to answer. The protection of the Constitution of this state and of the United States extends to the witness giving any testimony that may even lead up to the establishment of any facts in a case against him, where the charge against him is criminal, or in the nature of a criminal charge. A. I decline to answer that question because it is extremely improper, and also for the reasons stated by counsel." The questions numbered 23, 24, and 25, and the refusal for answering same, proceeded upon the same lines. It will be observed that the grounds upon which the petitioner refused to answer the questions now under consideration were not that to answer them would be to incriminate him, or to furnish evidence against himself in a criminal prosecution then pending or about to be instituted against him, but upon the ground that the Constitutions of this state and of the United States protect him from giving any testimony that may even lead up to the establishment of any facts in a case against him, where the charge against him is criminal, or in the nature of a criminal charge. It is apparent, both from the questions propounded to the witness, and the reasons assigned by him for refusing to answer them, that they furnished no justification or excuse for so doing. They were with respect to matters the answers to which in no way tended to incriminate the witness, nor was his refusal to answer the questions placed upon that ground.

The petitioner will be remanded to the custody of the sheriff of the city of St. Louis, and required to answer the questions. All concur.

**STATE ex rel. NORVELL-SHAPLEIGH
HARDWARE CO. v. COOK,
Secretary of State.**

(Supreme Court of Missouri. Dec. 9, 1903.)

**CORPORATIONS—CAPITAL STOCK—INCREASE—
NOTICE OF MEETING—UNANI-
MOUS CONSENT.**

1. Under Const. art. 12, § 8, providing that the stock and bonded indebtedness of corporations shall not be increased except in pursuance of the general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting called for the purpose, first giving 60 days' public notice, as may be provided by law, and Rev. St. 1899, § 962, providing that any corporation may increase its capital stock or bonded indebtedness with the consent of the persons holding the larger amount in value of the stock, which consent shall be obtained at a meeting of the stockholders, called for that purpose, 60 days' notice of the time and place of the meeting having been given, etc., no notice is necessary to entitle a corporation to increase

its capital stock with the unanimous consent of all the stockholders in meeting assembled.

In banc. Mandamus by the state, on the relation of the Norvell-Shapleigh Hardware Company, against Sam B. Cook, Secretary of State, to compel respondent to issue to relator a certificate that it had complied with the law relative to the increase of its capital stock. Writ awarded.

Campbell & Thompson, for relator.

ROBINSON, C. J. On April 24, 1903, the Norvell-Shapleigh Hardware Company, a business corporation of St. Louis, filed its petition in this court asking that a writ of mandamus issue to compel the respondent, Samuel B. Cook, as Secretary of State, to issue to relator a certificate that it had complied with the law made and provided for the increase of its capital stock.

Treating the petition as an alternative writ, and waiving the issuance and service of same upon himself, the respondent filed his return thereto, which is in the nature of a demurrer. Briefly stated, respondent's position is that he had no right to issue the certificate demanded of him by relator, because upon the face of the petition, as by the certified copy of the proceedings of the meeting of the stockholders of relator company, required to be filed in his office before the certificate should issue, it was made affirmatively to appear that relator had failed to give the 60-days public notice of the meeting called to vote the increase of its capital stock proposed, as required by section 8, art. 12, of the Constitution, and section 962, Rev. St. 1899, made in pursuance thereof, which sections read as follows: "No corporation shall issue stock or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased, except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting called for the purpose, first giving sixty days' public notice, as may be provided by law." Section 8, art. 12, Const. Mo. The statute carrying this constitutional provision into effect reads: "The stock or bonds of a corporation shall be issued only for money paid, labor done or money or property actually received. Any corporation may increase its capital stock or its bonded indebtedness with the consent of the persons holding the larger amount in value of the stock, which consent to such increase shall be obtained at a meeting of the shareholders, called for that purpose—sixty days' notice of the time and place of such meeting and of the amount of the proposed increase of stock or bonded indebtedness having been given as hereinafter provided; but the shares of stock or bonds arising from such increase shall only be disposed

of for money paid, labor done or money or property actually received. All fictitious issues or increase of stock or of bonds of any corporation shall be void: provided, however, that the bonded indebtedness of a corporation shall not be increased so that the entire amount thereof shall exceed the amount of the authorized capital, except that any railroad company may issue its bonds in excess of its capital stock for the purpose of constructing or acquiring another railroad, which shall connect with the railroad of the company issuing the bonds, but the bonds so issued in excess of its capital stock shall not exceed the authorized capital stock of the company whose road is constructed or acquired with the proceeds thereof, and shall be secured by mortgage on the railroad franchises and property constructed or acquired with the proceeds thereof, or by the deposit as collateral security of the first mortgage bonds of the railroad constructed or acquired with the proceeds thereof. But no such bonds shall be issued without first obtaining the consent of the persons holding the larger amount in value of the stock of the company issuing the same, at a meeting called for that purpose, and of which and the object and purpose thereof sixty days' public notice shall be given by advertisement in a daily or weekly newspaper published in the town or city in this state where the general offices of the company issuing such bonds may be located." Section 962, Rev. St. 1899.

The position now assumed by respondent herein is identical with that taken by the respondent in the case of *State ex rel. Donnell Mfg. Co. v. McGrath*, reported in 86 Mo. 239, wherein this court held that the refusal of the Secretary of State to issue the certificate then sought was proper. Though the questions involved in the determination of the proceedings in *McGrath's Case* had never since been before us directly in a proceeding by mandamus, as in the present case, the meaning and effect to be given to the Constitution and statutory provisions construed in that case have lately been before the court in a case involving the legality of a certain bonded indebtedness of a local corporation, issued by authority of the unanimous vote of the stockholders of the corporation, without having given the 60 days' notice provided for in said constitutional and statutory provisions, *supra*; and in that case, after a most full and exhaustive review of all the authorities bearing upon the subject, the case of *State ex rel. Donnell Mfg. Co. v. McGrath* was taken up, discussed, and criticised, and the rule therein announced was condemned as being unsound, and the case overruled (*Riesterer v. Land & Lumber Co.*, 160 Mo. 142, 81 S. W. 238); and so the rule will be here announced upon authority of the *Riesterer Case*, without further repetition of the reasons upon which it had been predicated, that corporations in this state have by the unanimous concur-

rence of all the stockholders thereof, in meeting assembled, the right to increase their capital stock or bonded indebtedness, without the necessity of going through the form of giving the 60-days public notice of the time and place of such meeting, as the Constitution and statute designate, when all the stockholders express a waiver of such requirement. Such notice could have served no useful purpose whatever, under the facts as they are made to appear in this particular, where all stockholders of relator company were present and participated in the meeting called. It is our opinion that the 60-days notice does not apply to conditions like the present, and that the construction of a constitutional or a statutory provision should never be adopted which results in the requirement of useless and absurd acts, except where its terms are positive and unavoidable.

The peremptory writ is awarded. All concur.

STATE v. BUTLER.

(Supreme Court of Missouri, Division No. 2.
Dec. 9, 1903.)

CRIMINAL LAW—ATTEMPT TO BRIBE CITY OFFICER—STATUTE—MUNICIPAL CORPORATIONS—CHARTER—ORDINANCE—REMOVAL OF GARBAGE—PUBLIC WORK—POWER TO LET CONTRACT—INDICTMENT—BURDEN OF PROOF—VERDICT.

1. Under St. Louis City Charter, art. 6, § 27, providing that the assembly shall have no power directly to contract for any public work contemplated by the charter, and requiring in all cases, except in case of emergency work, the board of public improvements to let out all such contracts to the lowest responsible bidder, and adding, "any other mode of letting out or contracting for work shall be held as illegal and void," an ordinance placing power in the board of health to contract for removal and disposal of the city garbage is a nullity, such contract being for a public work.

2. St. Louis City Charter, art. 3, § 26, cl. 6, grants the city assembly power to pass ordinances to prevent the introduction and spread of contagious diseases, and to secure the general health of the inhabitants by any measure necessary. Another clause authorizes the assembly to pass all such ordinances as may be expedient in maintaining the good government, health, and welfare of the city. *Held*, that an ordinance placing power in the board of health to contract for the sanitary disposal of the city's garbage is a nullity, in view of section 27, granting power to the board of public improvements only to let contracts for public work, and declaring contracts let in any other mode illegal and void.

3. The rule that when the charter of a municipal corporation authorizes something to be done, and an ordinance undertakes to carry out such power, courts lean towards a construction of the ordinance which will uphold it, has no application where the question is as to the power granted in the charter to pass the ordinance.

4. If there is a fair, reasonable doubt concerning the existence of power in the charter of a city, it will be resolved against the city, and the exercise of the power denied.

5. The absence of power in a municipal assembly to pass an ordinance can never be supplied by construction or acquiescence.

6. An offer of money to a member of the board of health to influence his vote on the let-

tidg of a contract for the removal of the city's garbage does not constitute an attempt to bribe, under Rev. St. 1899, § 2084, defining bribery, and section 2089, declaring that every person who shall offer to give money to any public officer of a city to influence his vote on "any question which may by law be brought before him in his official capacity" shall be guilty of an attempt to bribe, where the board of which the officer was a member had no power to let the contract concerning which the offer of money was made to influence his vote in favor of a certain bidder.

7. Under Rev. St. 1899, § 2089, declaring that every person who shall offer to give money to any city officer to influence his vote on any question which may by law be brought before him shall be guilty of an attempt to bribe, a law effective at the time of the offer to bribe is meant; and the completion of the offense cannot be made to depend on future action of the lawmakers, who might possibly some time in the future enact a law which would require the officer to act on questions which may come before him, since this would make the offense depend on a contingency which might never happen.

8. A statute defining a criminal offense must be strictly construed.

9. An indictment for attempted bribery of a public officer cannot be predicated on Rev. St. 1899, § 2089, declaring every person who shall offer to give money to any public officer to influence his vote on any question which may "by law be brought before him in his official capacity" guilty of an attempt to bribe, where there is no law authorizing the question on which he is sought to be influenced by bribery to be brought before him.

10. In a prosecution for attempt to bribe a public official, under Rev. St. 1899, § 2089, defining the offense, and making it a material element thereof that the offer to bribe shall be on a question which may by law be brought before him in his official capacity, the burden is on the state to prove beyond a reasonable doubt that the offer to bribe was made after the ordinance on which the indictment was predicated went into effect.

11. When, in a prosecution for attempt to bribe a city officer, under Rev. St. 1899, § 2089, defining the offense, and making it a material element thereof that the offer to bribe shall be on a question which may by law be brought before him in his official capacity, a verdict of guilty cannot be sustained on proof by the state that the offer was made on or before the day preceding that on which the law became effective.

12. A city ordinance is not, as a matter of law, effective until approved by the mayor.

13. A prosecution for attempted bribery of a city officer, under Rev. St. 1899, § 2089, defining the offense, and making it a material element thereof that the offer to bribe shall be on a question which may by law be brought before him in his official capacity, was predicated on the offer having been made to influence his vote on a contract to be let under a city ordinance. *Held*, that as the court charged the jury that they were not required to find that the alleged offer to bribe was made after there was a valid municipal ordinance in force, by which the matter might be brought before the officer in his official capacity, in order to convict, a claim by the state that the jury found as a fact that the offer was made after the approval of the ordinance on which the indictment was predicated is without merit.

Appeal from Circuit Court, Boone County; Jno. A. Hockaday, Judge.

Edward Butler was convicted of attempting to bribe a city officer, and appeals. Reversed, and defendant discharged.

T. J. Rowe and W. M. Williams, for appellant. E. C. Crow and Jos. W. Folk, for the State.

FOX, J. The indictment in this cause was filed in the circuit court of the city of St. Louis on April 5, 1902. Judge O'Neill Ryan granted the defendant a change of venue from the Eighth Judicial Circuit, and transferred the case to the circuit court of Boone county, where it came on for trial on November 10, 1902. The indictment charged the defendant with attempting to bribe Dr. Henry N. Chapman, a member of the board of health of St. Louis, by offering him \$2,500 if he would vote, as a member of said board, to accept the bid of the St. Louis Sanitary Company for the reduction of the garbage of the city. Omitting caption, the indictment is as follows: "The grand jurors of the state of Missouri, within and for the city of St. Louis, now here in court duly impaneled, sworn, and charged, upon their oath present: That on or about the twenty-ninth day of September in the year one thousand nine hundred and one the city of St. Louis afore said was a municipal corporation of and in the said state of Missouri. That by the provisions of its charter the legislative power of said city was vested in a council and a house of delegates, styled the 'Municipal Assembly of the City of St. Louis,' and that every ordinance passed by a majority vote of the members of said council and said house of delegates, respectively, and approved by the mayor of said city, became and was an ordinance and law of said city, ten days after said approval, unless an emergency was declared to exist by a two-thirds vote of the members of said council and house of delegates, respectively, in which event such ordinance became and was a law of said city from and after the date of such approval by said mayor. That on the day and year aforesaid there was an ordinance and law of said city which had been theretofore duly passed by a majority vote of the members of said council and of said house of delegates respectively, so constituting the municipal assembly of said city as aforesaid, known and designated as 'City Ordinance Number 20,476,' entitled 'An ordinance for the protection and preservation of the public health by providing for the sanitary removal of all slops, offal, garbage, vegetable matter, and animal matter of the city of St. Louis, by a process known as the Merz process,' where-in it was ordained by the said municipal assembly of said city, among other things, that the board of health of said city was thereby authorized and directed by a vote of a majority of its members to provide for and enter into a contract for the sanitary disposal of all slops, offal, garbage, vegetable matter, and animal matter of the said city by the Merz process. That said contract should be let within fifteen days from the approval of said ordinance. That within fifteen days

from the approval of said ordinance the said board of health should, under the supervision of the register of said city, cause to be inserted for five days, in the newspapers doing the city printing, an advertisement asking for sealed proposals for the disposal of all slops, offal, garbage, vegetable matter, and animal matter of said city by the Merz process, in accordance with the provisions of said ordinance. That the contract aforesaid should be awarded by the said board of health to the best bidder therefor, and that the said board of health should have the right to reject any and all bids. That in the body of said ordinance an emergency was expressed and declared to exist, and that the said municipal assembly, by a vote of two-thirds of all the members elected to each house thereof, directed that said ordinance should take effect and be in force from and after its approval by the mayor of said city, on the 17th day of September, A. D. 1901, and that said ordinance then and thereafter, under the provisions of the charter of said city as aforesaid, became and was a law of said city of St. Louis. That by the provisions of the charter of said city there had been created, and was existing at the time of the passage and approval of the said ordinance, and thereafter, a board of health of said city of St. Louis, consisting of the mayor aforesaid, the presiding officer of the aforesaid council, a commissioner of police of said city, an officer denominated the health commissioner, and two regular practicing physicians; and it was provided by ordinance of said city that the two regular practicing physicians aforesaid should be appointed by the mayor of said city, and such appointment confirmed by a two-thirds vote of the council aforesaid. That pursuant to the provisions of the ordinance and law aforesaid, numbered 20,476, and approved September 17, A. D. 1901, and within fifteen days after the approval of the said ordinance as aforesaid, to wit, on the 23d day of September, A. D. 1901, the said board of health did, under the supervision of the register of said city, cause to be inserted for five days, in the newspapers doing the city printing, an advertisement asking for sealed proposals for the disposal of all slops, offal, garbage, vegetable matter, and animal matter of said city by the Merz process, in accordance with the provisions of said ordinance and law, and setting forth that such sealed proposals would be received at the office of said board of health in said city on Tuesday, the first day of October, A. D. 1901, at four o'clock in the afternoon of that day, at which time such sealed proposals would be publicly opened and read. That at the time of the passage and approval of the said ordinance numbered 20,476, and for a long time prior thereto and thereafter, at the said city of St. Louis, one Henry M. Chapman was a regular practicing physician, and a member of the board of health aforesaid, duly appointed, confirmed,

and qualified, and was then and there a public officer of the said city of St. Louis. That, under the provisions of the aforesaid ordinance and law of said city numbered 20,476, the said Henry M. Chapman, as a member of said board of health, and in his official capacity and character as such member, was authorized, empowered, directed, and required to give his vote, opinion, judgment, and decision upon any question, matter, and proceeding which might by law, and under the provisions of the said ordinance, be brought before the said board of health, and before him, the said Henry M. Chapman, in his said official capacity and character as a member of said board of health, and particularly upon the question, matter, and proceeding of examining and considering such sealed proposals as might, under said ordinance and law, be made and submitted to said board of health for the sanitary disposal of all slops, offal, garbage, vegetable matter, and animal matter of said city by the Merz process, and to give his said vote, opinion, judgment, and decision in the premises either to award the contract provided for by the said ordinance and law to the best bidder therefor, or to reject any and all bids therefor, as aforesaid. That at the said city of St. Louis, and on or about the twenty-ninth day of September in the year one thousand nine hundred and one aforesaid, one Edward Butler, well knowing the premises, and then and there well knowing that the said Henry M. Chapman was then and there a member of the said board of health, and a public officer as aforesaid, and then and there unlawfully, corruptly, and feloniously devising, contriving, and intending to corruptly influence the vote, opinion, judgment, and decision of the said Henry M. Chapman, in his said official capacity and character as a member of the said board of health and as a public officer as aforesaid, upon a question, matter, cause, and proceeding which might by law be brought before him, the said Henry M. Chapman, in his official capacity and character as aforesaid, did then and there unlawfully, corruptly, and feloniously offer and attempt to bribe him, the said Henry M. Chapman, public officer as aforesaid; and, in such offer and attempt to bribe, he, the said Edward Butler, then and there well knowing the premises as aforesaid, and then and there well knowing that the said Henry M. Chapman was then and there a member of the said board of health and a public officer as aforesaid, did then and there unlawfully, corruptly, and feloniously propose and offer to give him, the said Henry M. Chapman, public officer as aforesaid, a large sum of money, to wit, the sum of twenty-five hundred dollars, as a bribe and inducement to him, the said Henry M. Chapman, public officer as aforesaid, that he, the said Henry M. Chapman, in his official capacity and character as a member of the said board of health as aforesaid, should and would give his vote,

opinion, judgment, and decision in favor of awarding the contract provided for in the said ordinance and law, numbered 20,476, to the St. Louis Sanitary Company, a corporation, which said St. Louis Sanitary Company, a corporation as aforesaid, was then and there, as averred by him, the said Edward Butler, about to make, deliver, and submit to the said board of health a sealed proposal and bid for the sanitary disposal of all slops, offal, garbage, vegetable matter, and animal matter of said city of St. Louis by the Merz process, in accordance with the provisions of the ordinance aforesaid, pursuant to the advertisement aforesaid. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

Upon the trial of this cause, the testimony directly applicable to the charge in the indictment was substantially as follows:

The St. Louis Sanitary Company had the contract for the reduction of the garbage of the city. This contract expired in November, 1901. At the time the defendant saw Dr. Chapman, the sanitary company was seeking to secure the new contract to be let upon the expiration of the old. The sanitary company received some \$85,000 a year for garbage reduction under the old contract. The Excelsior Company had the contract from the city of hauling the garbage to the reduction works. The defendant, Edward Butler, was the owner of 185 shares of stock in the St. Louis Sanitary Company, and was largely interested in the Excelsior Hauling Company, and materially represented it. The St. Louis Sanitary Company paid the defendant, Butler, a salary of \$2,500 a year in order to promote "good feeling between the hauling company and the sanitary company." On September 30, 1901, the St. Louis Sanitary Company made a contract with the Excelsior Hauling Company whereby the sanitary company agreed, if it secured the contract from the city for the reduction of garbage, after the expiration of the contracts it then held, the sanitary company would pay the Excelsior Hauling Company \$45,000 in cash, and the further sum of \$17,000 a year for each of the three years to be covered by said contract. On July 30, 1901, there was introduced in the city council of the city of St. Louis an ordinance providing for the protection and preservation of the public health by providing for the sanitary disposal of all slops, offal, vegetable, and animal matter of the city of St. Louis by a process known as the Merz process, and authorizing the board of health to advertise for bids for the sanitary reduction of garbage, and award the contract to the best bidder. This ordinance was passed and signed by the president of the council on September 11, 1901, and signed by the speaker of the house of delegates on September 13, 1901. The emergency clause was passed by the necessary vote to have the ordinance go into effect at

once. On September 17, 1901, the mayor reported to the council that he had signed the ordinance. The board of health thus authorized to let the contract for the sanitary reduction of garbage was composed of Dr. M. C. Starkloff, Dr. Albert Merrill, Dr. H. N. Chapman, Mr. Andrew Blong, Hon. Joseph Hornsby, president of the city council, and Hon. Rolla Wells, the mayor of the city.

Dr. Henry N. Chapman testified in respect to the attempted bribe, as follows: "Q. Do you know the defendant, Edward Butler? A. Yes, sir. Q. I will ask you whether or not you saw the defendant, Edward Butler, on or about the 16th or 17th of September, 1901? A. I did. Q. If so, where did you see him? A. I saw him at that time in my office. Q. In your office at your house? A. At my house; yes, sir; the only office I have. Q. What time of day was it when he came there? A. It was twilight, just in the evening; probably six or seven o'clock. Q. Will you state, doctor, all that passed between you and the defendant on that occasion—what he said and what you said? A. Mr. Butler was in the front room of my place—the front office—when I was sent in. I did not open the door. He came in—some one let him in—and I followed into the room after him. We shook hands, and he began to speak about the garbage reduction works in South St. Louis, telling me what a very fine place it was, all of which I appreciated, for I had seen it, and he told me of the great expense that the sanitary company had been put to in fitting up these works, and how it was the most complete works in the United States, and how perfectly they were ready to take and handle any amount of garbage; and he then went on to speak of the ordinance that had been passed for a new garbage contract. He said: 'Our company intends to put in a bid, and we would like to get it.' He said: 'In fact, we think it is due us. We have worked there for ten years and made no money, and the city rather owes it to us to throw it our way if possible.' I said to him that if there was more than one bid the board of health would be compelled to give it to the lowest bidder, and that, if he was the lowest bidder—if his bid was the lowest—of course, he would get it. He then went on to speak of the terms of the ordinance, and he said: 'You know, doctor, that in the ordinance it calls for a \$50,000 cash bond to be put up by the bidder who is successful in receiving the bid. You know,' he said, 'this \$50,000 is intended to cover the faithful completion of the works.' He said, 'You know we have the complete works down there, and therefore this cash bond will not have to stay up very long; and at the time this comes down, and the board of health signs the release and takes it down, I would like to come to you, doctor, and make you a present of twenty-five hundred dollars, if you will vote for our company to get this contract.' I said: 'Mr. Butler,

I can't do that. It would not be money that I could take and spend with any satisfaction to myself, and I can't do it.' He then said: 'Well, doctor, I will see you again,' and shook hands with me and left the house. Q. That was about what day? A. I would fix that date around about the 16th of September, 1901. Q. When did you next see the defendant? A. I didn't see him again until around about the 1st of November of the same year. Q. Where did you see him then? A. In the same room—in the same place. Q. Describe how he came in, what he did, what he said, and what you said to him? A. It occurred in the same room in which the previous interview occurred. When I went into the room, Mr. Butler was standing in a dim light. There was no light in the house, but in front of my house is a gas lamp which reflects distinctly into the office, and shows up fairly a good deal of light; plenty of light; enough to recognize people in the room. When I stepped in he was standing close to the folding door that separated the two rooms. I walked up and says, 'Good evening, Mr. Butler.' He responded, and then peered about the room, and says to me, 'Doctor, I am a man of my word, and I am here;' and he held towards me a roll of money. I said, 'Mr. Butler, I thought I made it plain to you that I would not take that money.' He said, 'Well, doctor, you are not a millionaire;' and I says, 'No, I am not a millionaire; and, further than that, I could use and place every penny of the money you are offering to me, but I won't take it, and I can't use it.' He then appeared to get somewhat excited, and said, 'Well, doctor, you are one man in a million;' and he turned and said, 'I hope you won't hold it against me.' I said, 'No, Mr. Butler; I suppose according to your lights it is right, but according to my lights it is wrong.' He said, 'If I can ever do anything for you, call on me;' and he said, 'Good evening,' and stepped out. Q. How are you able to state the 16th of September as the date upon which this first interview occurred? A. I don't quite know how far I can proceed in answering that. Q. Well, proceed as far as you can, and we will determine how successful you have been. A. On September 22d the wife of a very dear friend of mine returned from Europe to St. Louis—Mrs. Bell. I had told her husband—I had told her husband previous to her returning. The date of telling her husband was on Monday, and, if I recollect it properly, the Monday preceding her return to St. Louis was the 16th of September. Q. You then fix the 16th of September by reason of your having told some one of this occurrence between the defendant and yourself? A. Yes, sir. Q. Now, when was it that you told this person of the occurrence? A. I told him definitely on the Monday preceding the return of his wife from Europe. Q. His wife returned on the 22d? A. Yes, sir. Q. And you told your friend definitely on the Mon-

day before her return? A. Yes, sir. Q. Do you know what day of the week the 22d of last year was? A. My recollection was it was Sunday. Q. Then, according to that, the 16th would be on Monday? A. That is my recollection of it. Q. So that you are quite positive, are you not, that this occurrence took place on the 16th of September? You haven't very much doubt about that, have you? A. Not very much doubt about that. It was on or about the 16th. Q. Yes; you are quite positive that it was on the 16th? A. On or about the 16th. Q. Very well. You have said that you told your friend whose wife returned on the 22d of this occurrence on the Monday before her return. Do I understand that to be the same date on which you had this interview with Mr. Butler? A. I state that the interview with Mr. Butler was on or about the 16th, and I definitely told him about it on the 16th. That is what I stated. Q. You told your friend then? A. Yes, sir. Q. Then it must have occurred before you told your friend? A. It must have; yes, sir. Q. If it occurred on the 16th, then you told your friend on the same day that it occurred—of course, at a later hour than this occurrence. It occurred about dark, didn't it? A. Along about dusk. Q. So you told your friend during the evening of the 16th? A. Yes, sir. Q. You say here positively that you told your friend of this occurrence as early as the 16th of September, don't you? A. Yes, sir. Q. Therefore your interview with Mr. Butler must have occurred before you told your friend? A. Yes, sir."

The wife, servant, and cook of Dr. Chapman testified to defendant's visits to the house of the doctor.

Dr. Albert Merrill, also a member of the board of health, over the objections of defendant, testified that the defendant approached him and said, "When the contract is approved and becomes a law, I will make you a present of twenty-four hundred dollars." It further appears from this doctor's testimony that the defendant visited him twice. The second time, he says, the defendant had in his hand what appeared to be a quantity of gold coin and bills. As to these visits, as testified by Dr. Merrill, no precise date was fixed. One of them was fixed at about the 29th of September.

On the part of the defendant, the testimony tended to show that the St. Louis Sanitary Company was the only corporation or individual possessing a plant in the city of St. Louis that could do the work required by the ordinance. It tended to show that it was a physical impossibility for another plant to be constructed within the time required. It was claimed for the defendant that there was no occasion for him to offer a bribe to the members of the board of health, as the contract necessarily would have to be let to the St. Louis Sanitary Company.

Defendant testified in his own behalf. He

unqualifiedly denied visiting Dr. Chapman during the month of September, 1901, as was detailed by the doctor. He further states that he was ill nearly all the month of September, and unable to leave the house.

James J. Butler and Edward Butler, Jr., testified substantially that their father, the defendant in this cause, was on the 16th of September, 1901, confined to his room by sickness. It is also disclosed by the record that witness Dr. Chapman, to whom it is charged the bribe was offered, did not disclose what had transpired between the defendant and himself to the board of health, the circuit attorney, or his assistants, or to any one else who would probably undertake to have the defendant prosecuted for the offense of attempted bribery, until some time in the winter or spring, when he was called before the grand jury and related the conversation with the defendant.

This is a sufficient recitation of the facts to determine the legal propositions involved.

At the close of the evidence the court instructed the jury, and the cause was submitted to them for their consideration. It will answer no needful purpose to burden this opinion by inserting the instructions. Such of them as demand discussion will be noted during the progress of the opinion. The jury returned a verdict of guilty, and assessed defendant's punishment at three years' imprisonment in the penitentiary. In proper time, motions for new trial and in arrest of judgment were filed, which were by the court overruled, and the defendant, in due form, prosecuted his appeal, and this cause is now before us for review.

This is a criminal charge for attempted bribery. The indictment is predicated upon sections 2084, 2089, Rev. St. 1899. The former section defines the completed offense, and the latter has application to an attempt to commit the offense, as defined by the former. As applicable to this case, the offense may be defined as follows: "Every person, who shall directly or indirectly [offer to] * * * give any money * * * to any * * * public officer of this state or, * * * city thereof * * * with intent to influence his vote, opinion, judgment or decision on any question, which * * * may by law be brought before him in his official capacity," shall be guilty of an attempt to bribe. The elements of the offense, as denounced by this statute, are, first, there must be a public officer of the state or city thereof; second, that the offer must be made with intent to influence the vote, opinion, judgment, or decision of such public officer; third, that the vote, opinion, judgment, or decision must be in respect to some question which may by law be brought before the public officer in his official capacity. To constitute this offense, all the elements herein noted must be shown to exist, and the absence of either one of them would be fatal

to this charge, because not within the terms of the statute defining the offense.

The most vital question presented in this cause for consideration is involved in the first contention of appellant—that there was no law in force at the time of the alleged attempted bribery, in respect to a subject-matter, which imposed the burden of any action, vote, opinion, judgment, or decision on the public officer. This contention is predicated upon two theories: First, that under the provisions of the charter of the city of St. Louis there was no authority in the assembly to adopt the ordinance introduced in evidence, authorizing the board of health to let the contract for the sanitary disposal of garbage collected from the public streets and alleys of the city and from private premises; second, that the testimony failed to show that at the date of the alleged attempted bribery the ordinance authorizing the letting of the contract for the removal of the garbage had been approved and signed by the mayor, and for that reason there was no ordinance in existence at the time the alleged offer was made. These are the propositions confronting us. This case should not and will not be made an exception. The rules of law should not be relaxed to reverse it, nor should they be extended to affirm it. The law must be universal in its application, and, as applicable to this case, fairly and reasonably interpreted, must at last be the solution of the questions involved.

Ordinance 20,476, introduced in evidence, so far as pertinent to the discussion of the questions presented, provides as follows:

"Section 1. The words 'slops, offal, garbage, vegetable matter and animal matter' referred to in this ordinance, shall be construed to mean the refuse matter from kitchens, pantries, dining rooms and other parts of hotels, restaurants, boarding houses, tenement houses, dwelling houses, the public institutions belonging to the city of Saint Louis, market houses, private hospitals and club houses, the animal refuse from slaughter houses, the refuse garbage and animal matter from butcher shops and meat shops and vegetable stands, the refuse, fruit and vegetables from stores and commission houses, the refuse animal matter from poultry stores, the refuse animal and vegetable matter from grocery stores, the refuse from fish stores, all dead animals, including dogs, cats, goats, sheep, fowls, horses, mules, steers, cows and bulls that may be collected from the streets, alleys, parks or from private premises in the city of Saint Louis.

"Sec. 2. The board of health of the city of Saint Louis is hereby authorized and directed, by a vote of a majority of its members, to provide for and enter into a contract for the sanitary disposal of all slops, offal, garbage, vegetable matter and animal matter of the city of St. Louis by the 'Merz process.'"

The other provisions of the ordinance re-

late to the details of the contract, its nature, duration, etc., which are not essential to the determination of the questions before us; hence no necessity for burdening this opinion with them.

The charter of the city created the municipal assembly, and all the powers of such assembly must emanate from the charter. It is the origin of all the powers vested in the assembly, and every act of the legislative department of the city government must find support for the acts performed by the express or implied powers granted the municipality in its charter. The power of the board of health to contract for the disposal of garbage collected from the various places in the city must find support in the grant of such power by the charter, and, if such power is not granted by the charter of the city, then we take it that the proposition is too plain for discussion that an ordinance by the assembly authorizing the exercise of such power by the board of health would be absolutely without any legal force or effect.

The powers granted in the charter upon which counsel for the state insist that this ordinance is properly predicated are contained in the following provisions of the charter: Section 26, cl. 6, provides: "To establish and enforce quarantine laws and regulations; to prevent the introduction and spread of contagious diseases; to establish and regulate hospitals, and to secure the general health of the inhabitants by any measure necessary." The general welfare clause of section 26 provides: "Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient, in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties, not exceeding five hundred dollars, and by forfeitures not exceeding one thousand dollars." Clause 2 of section 26 provides that the municipal assembly shall have the power, by ordinance, "to establish and maintain a sanitary system, a system of police and a fire department."

Appellant challenges the power to authorize the board of health to contract for the disposal of the garbage under the foregoing provisions of the charter. This contention is based upon section 27, art. 6, of the charter, which provides: "The assembly shall have no power directly to contract for any public work or improvement, or repairs thereof, contemplated by this charter, nor to fix the price or rate therefor; but in all cases, except in case of emergency work or necessary repairs requiring prompt attention, the board of public improvements shall prepare and submit to the assembly an ordinance, with an estimate of the cost indorsed thereon by the president of the board, authorizing the doing of any proposed work, and, under the direction of the ordinance authorizing the same, shall advertise for bids, in the papers doing the city

printing, three times, the last publication to be at least ten days before the day appointed for the opening of the bids, stating the general nature of the work to be done and the time and place when the bids will be received, and shall let out said work by contract to the lowest responsible bidder." This provision is emphasized by the positive and emphatic declaration: "Any other mode of letting out or contracting for work shall be held as illegal and void." It is apparent that these two conflicting contentions in respect to the powers granted by the provisions of the charter herein quoted sharply present the question as to the proper interpretation of the charter provisions. The garbage designated in this cause, to be disposed of by the city, includes that collected from the public streets, alleys, and similar places, as well as from private premises. There is no dispute that the removal and disposition of it is paid for out of the city treasury, and the question upon this particular contention is narrowed down to the application of the terms "public work," as used in section 27, art. 6, of the charter. If the terms "public work," as used in section 27 of the charter, are applicable to the work of removing garbage, then, if the provisions of section 27, art. 6, of the charter mean anything, there can be but one conclusion reached, and that is that the municipal assembly is absolutely prohibited from authorizing the board of health to contract for the removal and disposal of such garbage. If the removal and disposal of garbage is a class of public work contemplated by section 27, supra, it follows that, as to that work, there is an express provision in the charter as to where the power is vested to contract for the performance of it, and the manner of letting the contract. It will be observed that the provisions of the charter to which our attention has been invited by counsel for the state, in section 26, art. 3, only confer the power, if at all, by implication, to authorize the making of this contract by the board of health. The law is well settled, and clearly stated by Judge Dillon in his work on Municipal Corporations, that, where the charter expressly provides how the act shall be performed, a general provision which only confers the power by implication cannot abrogate the limitations contained in the special provisions applicable to the method of performing the act. In treating of this subject, Judge Dillon says: "Municipal charters or incorporating acts are sometimes silent as to the power to pass by-laws or ordinances, and where this is the case the municipal body has the power, incidental to all corporations, to enact appropriate by-laws. Occasionally the charter or incorporating act, without any specific enumeration of the purposes for which by-laws may be made, contains a general and comprehensive grant of power to pass all such as may seem necessary to the well-being and good order of the place. More frequently, however, the charter or incorporating act authorizes the enactment of by-laws in certain

specified cases, and for certain purposes; and after this specific enumeration a general provision is added, that the corporation may make any other by-laws or regulations necessary to its welfare, good order, etc., not inconsistent with the Constitution or laws of the state. This difference is essential to be observed, for the power which the corporation would possess under what may, for convenience, be termed 'the general welfare clause,' if it stood alone, may be limited, qualified, or, when such intent is manifest, impliedly taken away, by provisions specifying the particular purposes for which by-laws may be made. It is clear that the general clause can confer no authority to abrogate the limitations contained in special provisions. When there are both special and general provisions, the power to pass by-laws under the special or express grant can only be exercised in the cases and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject-matters." *Dil. Mun. Corp.* (4th Ed.) pp. 392, 393.

There is only one way to settle this question. That is, to apply the reasonable and ordinary rules of interpretation to charter provisions of this character. In doing this, we should seek to give force and effect to the intention and purposes sought by the framers of the instrument; and, in this connection, it will not be inappropriate to refer briefly to its history in respect to public works. The board of health of the city of St. Louis is composed of the mayor, the president of the council, a commissioner of the board of police commissioners, designated by the mayor, two regular practicing physicians appointed by the mayor, and the health commissioner. This board is called the "Health Department" of the city. The chief duties and powers are devolved upon the health commissioner, and in certain respects specified he acts under the supervision or with the approval of the board of health. With the exception of the mayor and the president of the council, who are elective, the members of the board are either appointed or designated by the mayor. The composition of the board embraces the executive of the city, the highest representative of the legislative branch of the city government, a representative of the police power of the state, two physicians, and the health commissioner, who is an administrative officer. The health commissioner and the board together have a general supervision over the health of the city; over the city's eleemosynary institutions; also over nuisances in the city. But while they can condemn a nuisance, if any public work is required in abating it such work must be contracted for by the board of public improvements. They deal primarily and almost exclusively with questions of health and hygiene. The board of public im-

provements is composed of a president, who is elective, and the five commissioners, who are the heads of the five principal administrative departments of the city, and who are appointed by the mayor, and are known as the street commissioner, the water commissioner, the harbor and wharf commissioner, the sewer commissioner, and the park commissioner. The president of the board has a supervising control over all the other commissioners. Prior to the adoption of the present charter of the city, and under section 17, art. 5, of revised charter of the city of St. Louis of 1870, there was created the office of city engineer. The duty of contracting for public work was cast upon him. After an experience of several years, the present system of contracting the public work was adopted, and the burden was changed from the city engineer to the board of public improvements by the enactment of section 27, art. 6, of the city charter, in terms as broad as it was possible to make them. The adoption of this system seems to have been original with the framers of the charter, but the workings have proved so satisfactory, and the correction of so many evils that had formerly prevailed, has been so satisfactory, that the system has been adopted by many other cities, including the charter of Greater New York. The composition of the board of public improvements includes persons who are elected or selected for their special fitness and skill, so that all public work for which the city is to pay out of its general revenue, or that is to be paid for by special tax bills, shall originate with, be under the direction and supervision of, and subject to the control and judgment and experience and skill of, the board. Hence the adoption of the system set forth in section 27, art. 6, of the charter, which, not only in the broadest, but most emphatic and positive, terms, prohibits the contracting of the public work by any other board or persons other than the board of public improvements, and then proceeds to detail the manner of letting the contract for such public work, and that it shall be let to the lowest responsible bidder, and then provides that any other mode of letting the contracts shall be illegal and void. The purpose of all such provisions is not only apparent on their face, but is a matter of common knowledge and municipal history, as written in the reports of adjudicated cases. It was to remove the evil of any one man or set of men letting contracts to favored individuals at exorbitant prices, and to establish a system of checks and balances whereby the city's and the citizens' interests should be safeguarded by vesting the power in the highest, most skilled, and most representative officers in their line of the city. In this way, no public work can be legally done without the knowledge of, first, the board of public improvements; next, the municipal assembly; next, the mayor; and, lastly, the taxpayers, who are notified by publica-

tion of the intention to let the contract for the work. We are by no means unmindful of the importance of the functions of the board of health. Their functions are of great importance, but they are not by any means as varied or extensive as those of the board of public improvements. As before stated, the members of the former deal primarily and almost exclusively with questions of health. The members of the latter deal with the business of the city, its improvement, its development, and its material necessities.

It is insisted by counsel for the state that the disposal of the garbage collected from the public streets, alleys, and other designated places is not the character of public work contemplated by section 27, art. 6, of the charter. If not, to what class of public work does it belong? To dispose of it requires work. It must be received at the plant. It must be handled and subjected to the action of machinery constructed for its disposal, all of which contemplates work. Is it public work? If not, what kind of work is it? The entire inhabitants of the city are interested in the work which results in the sanitary disposal. It is paid for out of the general revenue of the city, gathered from its taxpaying citizens. The municipal authorities contract for the performance of it. It costs the city over \$100,000 annually to have it done. In point of cost, it approaches very closely the most expensive of the designated departments over which the board of public improvements have jurisdiction. If this is not public work, as contemplated by section 27, we confess the term "public work" is not susceptible of a definition. It is not only public work, but it is of the most important character, and requires, for the protection of the city, that the performance of it be under the supervision of the most skilled and experienced officers connected with the city government.

It is next insisted that this is not public work, for the reason that the contract is not for the building of the plant or works by which the garbage is disposed of. It is true the city does not pay for the machinery or plant which does the work, but it certainly will not be disputed that the city does pay for the work done through the operation of the machinery. The disposal of the garbage for the city, whether done by machinery, or hauling and dumping in the Mississippi river, is the performance of public work.

It is next urged that the removal and sanitary disposition of garbage constantly accumulating in a large and populous city is a matter which clearly falls under the jurisdiction of the health department. If that is true, it is strikingly singular that there is not an utterance or even an intimation, in a single provision under which it is claimed that this power was vested in the board of health, which authorizes it to contract for the performance of any character or species

of public work. And it is apparent that the provisions of the charter herein quoted, in respect to the prevention of the spread of contagious diseases and the establishment of a sanitary system, does not contemplate, nor did the framers of the charter entertain any such purpose, the exercise of the power to authorize the board of health to contract for the performance of public work. No doubt that the health department is more capable than any other to determine what substances, if allowed to remain in the streets and alleys and on private premises, would be injurious to public health. They may be entirely competent and efficient in that respect; but that furnishes no reason for disregarding the plain provisions of the charter, nor does it militate against the reasonableness of them; but it is the reverse, it is in strict accord with the purpose and spirit of the framers of the charter, that, where an immense debt was to be incurred by the city for the doing of work for the public, the responsibility for making the contract for such work should be placed upon that department of the city government that deals with the business interests of the city, and not specially with its health.

It is also argued that the reduction of the garbage of the city "is not a public work of a constructive nature, susceptible of improvement or repair." Is there anything in the charter which indicates that the framers of it intended the use of the term "public work" to be restricted to work of a constructive nature? None that we can discover. It does appear, from an examination of the charter, that the use of the term "public work" was intentional, and was used for the purpose of covering all classes of public work not specially designated and covered by other provisions. Unless the term was used for that purpose, it is clearly meaningless and has no place in the charter. As to the work of a constructive nature, to which it is contended this term is to be applied, it is fully and specially covered in other provisions of the charter. Section 14 of article 6 covers the construction and reconstruction of streets. Section 21 of the same article applies to sewers, and the manner in which the contract for building them must be let. Section 29 of article 6 provides for contracts in relation to street sprinkling. Section 3 of article 7 makes special provision concerning supplies for the water works. Sections 3 and 4 of article 8 pertain to the public parks. Section 2 of article 11 to the fire department. Then section 27 of article 6 covers all public work.

We must keep in view the positive and broad language employed in section 27 of this charter: "The assembly shall have no power directly to contract for any public work or improvements or repairs." It will be noted that the general term "public work" does not follow the terms "improvements or repairs," but precedes them, and is used in-

dependent of them; hence the recognized rule of construction which requires that "where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters ejusdem generis with such class," cannot be invoked. It is clearly indicated, by the use of the term "public work" in section 27, *supra*, the manner and place in which the term is used, that it was intended to cover all classes of public work not specially provided for in other parts of the charter.

In support of the proposition that the sanitary reduction of garbage is not the character of public work contemplated by section 27, *supra*, the cases of *State ex rel. v. City of St. Louis*, 169 Mo. 31, 68 S. W. 900, and *Nebraska City v. Nebraska City Hydraulic Gas Light & Coke Co.*, 9 Neb., loc. cit. 348, 2 N. W. 870, are cited by counsel for the state. An examination and analysis of these cases will make it apparent that they have no application to this question, and by no means sustain the contention.

The first case cited, decided by this court, was a proceeding to restrain the treasurer of the city of St. Louis from paying certain money in conformity to an ordinance passed by the municipal assembly. Certain citizens on Flad avenue were in need of facilities for securing a supply of water. The city was not prepared to extend its system of waterworks and to lay the pipes on Flad avenue, but the water commissioner gave permission to the property owners to lay such pipe. In pursuance of such consent, they did so. This work was not done by the city, but by private individuals. Subsequently the city wanted to include the pipes and appurtenances which belonged to the property owners in its system, and provided by ordinance, not for the doing of any public work, but for the purchase of the pipes and appurtenances on Flad avenue. The opinion of the court was clearly right, and it is apparent that no contract for public work was involved. *Brace, J.*, speaking for the court in that case, said: "The water pipe and its appurtenances mentioned in the ordinance was laid in Flad avenue with the consent of the city, by the citizens named in the ordinance, and, as appears from the evidence, was of the value of \$2,000. * * * Nor does this ordinance fall within the inhibitions of section 27, art. 6, of the charter, as to contracts for any proposed public work or improvement or repairs to be thereafter done or made in pursuance of such contracts. This ordinance, regarded as a contract, is not for any public work or improvement or repairs to be done or made in pursuance thereof, but is simply a contract for the present purchase of existent property which the city needed as a part of its waterworks plant, and, however dependent its power to make such a purchase in this manner may be on other provisions of

the charter, it is not within the inhibitions of this section."

The *Nebraska Case* has no application whatever to the question before us. That simply involved a contract by which *Nebraska City* purchased from the gaslight company its supply of gas for lighting purposes. The gaslight company was not doing any public work for the city of *Nebraska*; it was simply selling to the city the result of the work done for itself. This is made apparent from the opinion of the court. It said: "Only one point more is it necessary to notice. It is contended that before the city could have lawfully entered into this contract an estimate of the probable expense must have been made, as provided in section 32 of the act relating to the incorporation of cities of the second class. *Gen. St. p. 151, c. 9.* But we think otherwise. This section has no application to contracts of this description, but to those respecting streets, bridges, or other work or improvement to be made for and owned by the city. Its language on this subject is: 'Before the city council shall make any contract for building bridges or sidewalks, or for any work on streets, or for any other work or improvements, an estimate of the cost thereof shall be made by the city engineer and submitted to the council, and no contract shall be entered into for any work or improvement for a price exceeding such estimate,' etc. Now, all that was contracted for here was the supplying the city with light, not for the erection of gasworks to be owned and operated by the city. And the contract was made with the company, which had the exclusive right to that business within the city, the only source from which such light could have been obtained."

That is not this case. The city of *St. Louis* is not purchasing anything from the contractor who disposes of the garbage, nor does the city contract to erect the plant for the accomplishment of the work; but it is beyond dispute that the city does contract for the reduction of the garbage. The city pays for it. Somebody must do it; it does not reduce itself. It involves action and labor, and it is done for the city, and the entire people are interested in it, and it is public work beyond question. So it is with the public work of the city in paving its streets. The material, such as brick, asphalt, and the like, are prepared by machinery. The city does not pay for the construction of the machinery, but it does contract and pay for the public work done by the operation of it. The machinery is simply the instrument used by the contractor in the performance of the public work.

In the discussion of this case we find that well-recognized and familiar rule invoked, as expressed by *Sherwood, J.*, in his dissenting opinion in the case of *Verdin v. City of St. Louis*, 131 Mo., loc. cit. 117, 118, 33 S. W. 502, 36 S. W. 52. It is thus stated: "The univer-

sal rule is that, in construing statutes passed by the General Assembly of the state, the courts will lean toward a construction which favors and upholds their constitutionality; and it would seem that a similar favorable attitude should be assumed by the courts when construing municipal ordinances, because, when speaking of cities, this court has well said: "Their charters are their constitutions, which authorize the councils to act, and a city council is a miniature general assembly, and their authorized ordinances have the force of laws passed by the Legislature of the state."

It is insisted that under that rule, if there is a doubt as to the validity of the ordinance involved in this case, the doubt should be resolved in favor of upholding it. The rule announced is correct, but its application is erroneous. When the charter of a municipal corporation authorizes something to be done, and an ordinance undertakes to carry out such power granted in the charter, in such case the courts lean towards a construction of the ordinance which will uphold it. But that is not the question before us. Ordinance No. 20,476, introduced in evidence, is not being construed; it needs no construction; it speaks for itself. The question is as to the power granted in the charter. The rule applies to authorized ordinances. If the power is contained in the charter of the city of St. Louis which would authorize the passage of the ordinance, then there could be no question as to the validity of the ordinance; but that is not the point in judgment before us; the question here presented is not the construction of the ordinance, but it is the interpretation of the charter itself, and as to what power it possesses. The rule to be applied in determining the powers which may be exercised by municipal corporations, under their charters, is entirely different to the one invoked in this cause, as to the construction of an ordinance under an undisputed grant of power in the charter.

The question before us for consideration is the correct interpretation of the charter itself. Is there anything in it which authorizes the municipality to exercise the power granted by this ordinance? The rule upon this subject has been very clearly and forcibly stated by the Supreme Court of Oregon, with citation of authorities to support it. Speaking through Chief Justice Lord, that court said: "'A municipal corporation,' says Mr. Justice Bradley, 'is a subordinate branch of the domestic government of the state. It is instituted for public purposes only, and has none of the peculiar qualities and characteristics of a trading corporation, instituted for the purpose of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The Legislature invests it with such powers as it deems adequate to the ends to be accomplished.' Mayor v. Ray, 19 Wall. 475, 22

L. Ed. 164. But in construing the powers given to a municipal corporation by its charter, regard being had for the ends to be accomplished, the courts have inclined to adopt a strict rather than a liberal construction of such powers, thus applying substantially the same rule that is applied to charters of private incorporations. Cooley on Constitutional Limitations, 196, and note. They can exercise no powers but such as are expressly conferred upon them by the act by which they are incorporated, or are necessary to carry into effect the powers thus conferred, or are essential to the manifest objects and purposes of the corporation. The rule is well expressed by Mr. Justice Nelson in the case of *Minturn v. Larue*, 23 How. 435, 16 L. Ed. 574, in the following language: "It is a well-settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public. The principle has been so often applied in the construction of corporate powers that we need not stop to refer to authorities." *City of Corvallis v. Carlile*, 10 Or., loc. cit. 140, 141, 45 Am. Rep. 134. Upon the same subject, Judge Dillon says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." Dillon, *Mun. Corp.* (4th Ed.) p. 145. This court has spoken in no doubtful terms as to the powers which can be exercised by municipal corporations. It said, in *City v. Eddy*, 123 Mo., loc. cit. 557, 558, 27 S. W. 474: "Now, it is settled law that municipal corporations possess and can only exercise such powers as are granted in express words, or those necessarily incident to or implied in the powers expressly granted. They are creatures of the law, established for special purposes, and their corporate acts must not only be authorized by their charters, but those acts must be done by such officers or agents, and in such manner, as the charter directs." Applying the undisputed rule, as announced by Judge Dillon and all the courts, in passing upon the question of the powers which may be exercised by a municipal corporation, we are forced to the conclusion that, if there is a fair, reasonable doubt concerning the existence of the power in the charter, it will be resolved against the corporation, and the exercise of the power denied.

We have carefully analyzed the provisions of this charter, and feel that no one can read it and escape the conclusion that the framers of it intended, above everything else, to throw around the taxpaying citizens secure safeguards against exorbitant prices for public work. With this spirit in view, we are unable to reconcile it with the theory of the state's counsel that the term "public work," in section 27, must be rejected as to the disposal of garbage, and the making of one of the most important contracts in the city government must look for its support from an implied power in the general welfare clause, or some other provision of the city charter. If the power is to be exercised by implication to make this contract, then all the safeguards which are provided by section 27, in the interest of the public, go for naught, and the municipal assembly may pass an ordinance, under the general welfare clause, authorizing the making of this most important contract for public work by such person, and upon the terms, as in its wisdom it may see proper.

It may be said, and it is argued, that the construction given this charter by the departments of the city government, and the long acquiescence in the construction so given, that the power was granted by the charter to authorize the board of health in this contract, would justify the powers exercised in this case. The recognition and acquiescence in an act of the Legislature or the provisions of a charter, for any length of time, cannot have the effect to legalize it. Doubtless many statutes can be recalled that have stood undisturbed for years, and were acted upon and acquiesced in by the public; but when at last the test of their legality was applied, they were declared inoperative and illegal. This construction and acquiescence in a provision may be considered in reaching a conclusion as to the power granted, but the absence of power can never be supplied by construction or acquiescence. Endlich on Interpretation of Statutes makes this clear. He says: "Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it." Construction and acquiescence by the entire city government as to the application of terms used in a provision of the charter, while it is entitled to respectful consideration, should not be permitted to nullify the plain and unambiguous terms of section 27, which expressly provides how all public work shall be contracted. It was very appropriately said by Mr. Justice Trunkey, of the Supreme Court of Pennsylvania: "Neither the debates, nor supposed views of the people, nor the dictum of this court, nor all combined, can set aside the plain meaning of a constitutional provision; but if the sense of a clause be doubtful, the contemporaneous understanding is material." *Pike Co. v. Rowland*, 94 Pa., loc. cit. 249.

Whenever this court has been called upon

to construe the provisions of the charter in respect to contracts for public work, it is very clearly indicated that "public work," in keeping with the spirit of the charter, is to be given its broadest signification.

The case of *State ex rel. v. Barlow*, 48 Mo. 17, is very correctly interpreted in the argument of Judge Williams, of counsel for appellant, where he says: "This court, in *State ex rel. v. Barlow*, construed the amended charter of St. Louis of 1870. That charter provided for the letting of public work by the city engineer. The question before the court was whether a contract for repairing, cleaning, and lighting the street lamps was within the terms of that section of the charter. It was claimed by the relator that the charter had no application to the work of that character, since it required the engineer to submit 'plans, profiles, and estimates of cost,' and that these terms, as to plans and profiles, could not refer to work of the kind involved. The court, however, held that the direction of the charter as to the manner of letting public work was applicable, and any other mode of doing so was void. It is significant that the framers of the freeholders' charter omitted from section 27 of article 6 the requirement as to 'plans and profiles.' It seems evident that the *Barlow* Case was in the mind of the framers of the instrument, and these words seem to have been left out to avoid any such contention as was made in that case."

In *State ex rel. Belt v. City*, 161 Mo. 371, 61 S. W. 658, this court held that a contract for erecting boxes on the streets of the city, for the purpose of holding waste paper that might be thrown in them by passers-by, was public work, and must emanate from the board of public improvement. It will be observed in that case there were provisions of the charter specially applicable to cleaning the streets, and it was said that this work had relation to the cleaning of the streets; yet the court did not base its conclusions altogether upon the special provisions, but said, speaking through Gantt, J.: "Section 27 expressly prohibits the assembly from directly contracting for 'any public work contemplated by this charter,' which necessarily includes the street cleaning mentioned in section 17. So in this case, this provision of the charter in section 27, one of the most admirable and salutary in the charter, applies in full force." Marshall, J., in his dissenting opinion in that case, after a full and careful consideration of the questions presented, clearly and correctly announces the views of this court as to the class of public work contemplated by section 27 of article 6 of the charter. While his views are expressed in a dissenting opinion, it is apparent, as to the application of the terms "public work," there was no disagreement. He says: "It may be broadly and emphatically stated, therefore, that no contract for any kind, character, or species of public work or improvements, or repairs thereof, or for cleaning streets, is

valid unless the ordinance authorizing it is recommended by the board of public improvements, after it has faithfully complied with all charter prerequisites to its action. This proposition cannot be stated too strongly or unequivocally. If, therefore, the ordinance before the court in this case contemplates, involves, or provides for the doing of any public work, or the making of any public improvement, or the cleaning of the streets, it falls within the condemnation of the rule announced and is void." This is in perfect accord with one of the fundamental principles applicable to the construction of statutes, "That words shall be taken in their plain or ordinary and usual sense." The term "public work" has no technical meaning, and this charter speaks for itself. It means what it says, and the public work contemplated in section 27, *supra*, includes every species and character of work done for the public, and for which the taxpaying citizens are liable.

In accordance with the views as herein expressed, it must be held that the provisions of the charter of the city of St. Louis did not authorize the power exercised by the municipal assembly in contracting the public work designated in the ordinance.

This leads us to the consideration of the second vital proposition involved in this cause. This proposition is pointedly stated under subdivision 4 in the argument of the circuit attorney, as set forth in the brief before us. He says: "Under our view of the law, it is immaterial in this case whether the garbage ordinance be valid under the charter or not." Having reached the conclusion that the municipal assembly could not, under the charter, exercise the power of authorizing the board of health to contract for the disposal of the garbage, we start out on this proposition that there was no law in force which required Dr. Chapman, in his official capacity as a member of that board, to vote upon or take any action in respect to awarding the contract for the performance of that public work. He could only be required to perform that duty by an authorized ordinance empowering the board of health to make the contract. We must keep in view the elements of the offense as charged in the indictment. One of the essential elements of this offense is that the attempt to bribe must be in respect to a matter which "may by law be brought before him in his official capacity." In other words, to state the proposition sharply, there must be a law in force, at the time of the attempted bribery, which imposes upon him the duty of acting in his official capacity, upon a subject-matter which may be brought before him. It is not essential, under the statute defining the offense charged, that he should act upon the matter or that the matter should ever come before him, but it is vitally important, to constitute this offense, that there should be a law in force, at the time the bribe is offered, which would cast the burden upon him of

acting, should the matter come before him. Unless this duty is imposed upon him by law, there can be no bribery. It will not do to say that there may be in the future a law enacted which would require the performance of this duty. When will this law be enacted—in a month, a year, or in the next century? The offense must be complete at the time of the commission of the act. The very purpose of the statute is to prevent public officials from being influenced in respect to questions upon which they are authorized to act. How can an officer be influenced to act when there is no law requiring him to do so, and no power under the law authorizing him to act? It may be said that it was thought the power existed, and there should be a conviction of bribery or attempted bribery. So it may be said that a witness who swears falsely, as to an immaterial matter, before the court or the grand jury, ought to be convicted of perjury, because he thought it was material; but what court would for a moment hold that a defendant could be convicted for swearing falsely as to matters immaterial to the legitimate subject of inquiry? Why not? Because the law is so written. That is a sufficient answer. The words in the statute, "which may by law be brought before him," must be construed to mean a law in force at the time of the offer to bribe. This is the only reasonable construction of which it is susceptible. The offense must be complete at the time of the offer, and cannot be made to depend upon the future action of the lawmakers, who might possibly, some time in the future, enact a law which would require the officer to act upon questions which may come before him. This would make the offense depend upon a condition or contingency that might never happen. The views herein expressed find support in the cases of *In re Yee Gee* (D. C.) 83 Fed. 145; *State v. Howard*, 187 Mo. 288, 38 S. W. 908. The cases cited by respondent, *People v. Markham*, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700; and *Commonwealth v. Donovan*, 170 Mass. 228, 49 N. E. 104, do not militate against the doctrine herein announced.

It may be added that this is a statute defining a criminal offense, and must be strictly construed. *Burgess, J.*, in *State v. Howard*, *supra*, unqualifiedly approves the announcement of the rule applicable to the construction of statutes of the character of the one before us, by *Sherwood, J.*, in *State v. Schuchmann*, 183 Mo., loc. cit. 117, 33 S. W. 36, 34 S. W. 842, where it is said: "Moreover, the statute is both penal and criminal, and therefore to be strictly construed; construed strictly as to those portions which are against defendants, but liberally construed in those which are in their favor—that is, for their ease and exemption. No person is to be made subject to such statutes by implication, and, when doubts arise concerning their interpretation, such doubts are to weigh

only in favor of the accused. Bishop, Stat. Cr. (2d Ed.) §§ 193, 194, 227."

In this discussion of this proposition, it is important to keep in view the real questions presented. The proposition we are considering is not that the ordinance did not emanate from the board of public improvements; this is merely a preliminary step, affecting the validity of the ordinance; but the proposition involved is more far-reaching; it challenges the exercise of the power to let a contract for public work by the board of health, and asserts that the only power to contract for public work as contemplated by section 27 of the charter is vested in the board of public improvement. Again, the question as to the official position of Chapman is not involved. No one controverts the fact that he was a member of the board of health. The question as to whether he was an officer *de jure* or *de facto* is not before us, but the sole and only question involved in this proposition is, as a member of the board of health, was there any duty imposed upon him by law which required him, in his official capacity, to act in the matter of letting the contract for the doing of public work? The adoption of the ordinance introduced in evidence, being the exercise of a power not granted by the charter, was invalid. From this it must logically follow that there was no law in force, at the time of the alleged attempted bribery, which required Dr. Chapman, in his official capacity as a member of the board of health, to pass upon the question of letting the contract for the public work to be performed for the city. We have reached the conclusion that the absence of this essential element of the offense charged is fatal to this indictment, and that the facts disclosed by the record fail to bring it within the terms of the statute upon which this indictment is predicated.

The questions involved in the case at bar have frequently been in judgment before the courts of this country, and the uniform and unqualified expression of all the courts fully support the views herein expressed and the conclusion reached.

In *Collins v. State*, 25 Tex. Supp. 204, the rule as applicable to the case before us is very clearly announced. It is specially applicable, for the reason that the indictment was based upon a provision of the Code similar to the one upon which the indictment is based in this cause. Roberts, J., speaking for the court, said: "The indictment in this case is founded on article 250 of the Penal Code, which makes it an offense for any person to offer a bribe to any executive, legislative, or judicial officer, 'with intent to influence his act, vote, opinion, decision or judgment, on any matter, question, cause or proceeding which may then be pending, or may thereafter by law be brought before such officer in his official capacity.' Besides others, the substantial exception was taken to the indictment that 'the defendant is not

legally charged with any crime in said indictment.' This is, in substance, the same as one of the exceptions which the Code permits to be taken to an indictment, to wit: Article 487, '(1) That it does not appear from the face of the same that any offense against the law was committed by the defendant.' The indictment states that defendant offered to bribe the district attorney with intent to influence his act 'as an officer' in and concerning 'a certain cause or criminal charge and proceeding then and in the district court of said Bexar county pending, it being case No. —, wherein the said A. J. Collins is charged with,' etc. The omission to state the cause or charge and proceeding, or to give some definite description of it, renders the indictment defective, not only in form, but also in substance, because it does not appear to be a matter pending in court, upon which the district attorney was required or authorized by law to act in his official capacity. The offer to bribe the officer, the intent to influence his official act thereby in relation to a cause pending in court, may or may not come within the denunciation of the provision of the Penal Code above quoted. If it relate to a cause upon which the district attorney is required or authorized to act officially, it does; otherwise, it does not. There should therefore be some averment or description which would show it to be such a cause. The court should have sustained this exception, and, for the error in not doing so, the judgment must be reversed."

It is apparent that the court, in that case, applied the crucial test, "Was the proceeding one in which the district attorney was required or authorized to act?" If it was, it was within the terms of the Code; if not, it was not within the denunciation of the provisions of the Code. Applying the same rule to this case, if Dr. Chapman was not required or authorized to act in letting the contract, then the same conclusion as the Texas court is inevitable.

We find the same principle announced by the Supreme Court of Illinois, in *Gunning v. People*, 59 N. E. 404, 82 Am. St. Rep. 433. The defendant in that case, who held the office of assessor, was indicted and convicted for proposing to receive a bribe to influence his action in respect to assessment of property. The proposition was that he would reduce the assessment of the property. The indictment failed to allege that any of the real estate upon which the assessment was sought to be reduced was situated in the town of which the defendant was the assessor. The court, speaking through Carter, J., said: "It is not even averred that Gunning, as assessor, had the power or authority to assess the property in question, or to reduce the assessment upon it. It is plain that the indictment should have been quashed."

It is made clear in that case why the Supreme Court declared that it was plain that

the indictment should be quashed; it was upon the same principle involved in this case. The indictment failed to disclose that the assessor was required or authorized to act in respect to the assessment of the property described in the indictment. If he was not authorized to act, then there could be no bribery to influence his action.

There is no rule so uniformly adhered to by the courts, both state and federal, as the one "that there can be no bribery of any official to do a particular act, unless the law requires or imposes upon him the duty of acting." It is bottomed upon the sound and logical principle that he cannot be influenced to do something that he has no power or authority to do. In *U. S. v. Boyer* (D. C.) 85 Fed. 426, a case in the federal court of the Western District of Missouri, under a federal statute defining the offense of bribery of an officer of the United States, the essential elements of the offense were the same as is provided by the Missouri Code. To indicate their similarity, and the application of the decision of the learned judge in the *Boyer* Case, we here quote that part of the federal statute. It is provided that the offer must be made to the United States officer, "with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit." In that case the validity of an act of Congress conferring authority upon a government officer was involved. The court declared the act unconstitutional, and, after reaching that conclusion, Judge Rogers, proceeding to dispose of the remaining question before the court, said: "I think it clear from what has been said that Congress has no power, even if it had done so by express legislation, to create the offices of inspectors, and impose upon them, or upon agents appointed in pursuance of law by the heads of departments, the duties alleged in the indictment. And the question now arises, if this be true, whether or not to offer a person a bribe not to do something which no valid law enjoins him to perform is an indictable offense, under the statute? * * * In *U. S. v. Gibson* [D. C.] 47 Fed. 833, it was held not to be a crime to offer a bribe to an internal revenue officer of the United States with intent to cause him to enter and burn a distillery. The court quashed the indictment, saying: 'The bribe offered was for an act entirely outside the official function of the officer to whom it is claimed the bribe was offered. * * * The alleged offers cannot be said to have been made to induce the officer to do, or omit to do, any act in violation of his lawful duty.' In that case, had the internal revenue officer burned the distillery, it would have been no offense against the United States. No duty rested upon him to see that the distillery was not burned.

Doubtless, if he had burned the distillery, he would have been guilty of arson under the state statutes, but of no offense whatever against the laws of the United States. In the case at bar, had the inspector received the bribe, it would have been no offense against the laws of the United States, for the reason that it was intended to induce him not to do a thing which no valid law of Congress imposed upon him to do. It would not have been an infraction of the state law, because no state law imposed upon him the duties alleged in the indictment, nor was he an officer of the state. I am unable to perceive, by any course of sound reasoning, that the facts alleged in the indictment constitute an offense against the United States; and hence the demurrer should be sustained to each of the three separate counts in the indictment, and the indictment dismissed."

The learned judge in that case very clearly presents the question involved in the proposition before us in the case at bar. He treats of one of the essential elements of the offense of bribery—that there must be a duty enjoined upon the officer by a valid law, in order to make an offer to such officer bribery within the terms of the statute. It is true that in the discussion of the case it is said that there are no common-law offenses against the government; that the offenses must be defined by the acts of Congress. This does not change the application of the rule announced to the proposition involved in the case before us. While it is true there are common-law offenses against the state of Missouri, yet it will not be contended that the offense charged against the appellant in this case is based upon the common law. He was charged and convicted for the violation of an express statute of this state. The indictment is predicated upon the statute, and this judgment of conviction must stand or fall by its terms. Hence the principle announced by Judge Rogers in the *Boyer* Case is directly applicable, with all of its force, to the question now being discussed.

In *James v. Bowman*, 23 Sup. Ct. 678, 47 L. Ed. —, it was held that section 5507 of the Revised Statutes of the United States (*U. S. Comp. St.* 1901, p. 3712) was invalid, and that defendant could not be convicted of bribery under its provisions. Mr. Justice Brewer, after fully reviewing all the authorities pertinent to the questions involved, and declaring that the statute was inoperative, and that defendant could not be tried or convicted for bribery, very clearly and forcibly announced the views of that court in opposition to construing statutes to fit some particular transaction. He said: "We deem it unnecessary to add anything to the views expressed in these opinions. We are fully sensible of the great wrong which results from bribery at elections, and do not question the power of Congress to punish such offenses when committed in re-

spect to the election of federal officials. At the same time it is all-important that a criminal statute should define clearly the offense which it purports to punish, and that when so defined it should be within the limits of the power of the legislative body enacting it. Congress has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the nation is directly interested, or in which some mandate of the national Constitution is disobeyed; and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms, and in these terms beyond the power of Congress, and change it to fit some particular transaction which Congress might have legislated for if it had seen fit."

The Court of Appeals of Kentucky is in harmony with the unbroken line of decisions in adhering to the rule that there must be a duty required to be performed before there can be any bribery in attempting to influence the action of the person upon whom the duty is imposed. *Commonwealth v. Reese* (Ky.) 29 S. W. 352, was a case in which the defendant was charged with attempting to bribe a councilman to vote for a particular candidate for the office of "Sealer of Weights and Measures." It seems, prior to this election, the office sought had been abolished. It was held that, there being no such office in existence, there could be no bribery in an offer of a bribe to the councilman for his vote to secure it. It is clear that this ruling is based upon the principle that, there being no office in existence, there was no duty imposed requiring the councilman to act, and, if not required to act, his action was not subject to be influenced. To the same effect are *Kitby v. State* (N. J. Sup.) 31 Atl. 213; *People v. Purley*, 2 Cal. 564; *Newman v. State* (Ga.) 23 S. E. 831; *Ruffin v. State* (Tex. Cr. App.) 38 S. W. 169.

Numerous cases are cited by counsel for respondent in the discussion of the proposition now being considered. We have examined them with a marked degree of care, and are unable to find in any of them an announcement of a rule as applicable to the question involved in this case that is in conflict with the cases cited and reviewed in support of the conclusions reached by this court. An examination of them will demonstrate clearly the line of demarkation between the rules applied and announced in the cases relied upon by counsel for the state and those which determine the only real question involved.

The Attorney General, in the discharge of his duty to the state, has filed a separate brief covering in a very careful and painstaking manner all the questions presented, and we have also the brief filed by the circuit attorney, who prosecuted this case in the trial court, presenting his views very carefully and fully upon the propositions now before us. The reasonable limits of this opinion

render it impossible to review all the cases cited. We must therefore be content with a discussion of those mostly relied on.

It is well enough to keep closely in view the controverted proposition. The conclusions reached by this court do not dispute that Dr. Chapman was an officer *de jure*, under the city government; secondly, the proposition is not denied that a *de facto* officer is as fully the subject of bribery as an officer *de jure*. It is not denied that an officer who assumes the duty of an office and performs the functions pertaining to it cannot, in a prosecution for bribery, deny that he was duly elected or appointed to such office. But the conclusion reached does assert the proposition that under the terms of the statute it is an essential element of the offense charged that there must be a valid law in existence at the time of the offer to bribe authorizing and requiring the officer to act. Without this, his action is not subject to influence, and there can be no bribery within the terms of the statute. The first case to which our attention is directed is *State v. Graham*, 96 Mo. 120, 8 S. W. 911. The defendant was indicted under the statute denouncing "bribing officers to appoint to office." There was a demurrer filed to the indictment, and the ground alleged in the demurrer was the failure of the indictment to allege that the defendant was eligible to the office. This demurrer was overruled, and correctly so, for the reasons expressed in the opinion of the court, where it was said: "The indictment in question alleges every fact necessary to constitute the offense defined by the statute. It charges that Rickman was the mayor of the city of Sedalia, and as such had the power to appoint defendant to the office of engineer of the steam fire engine of said city, subject to the confirmation of the city council; and the defendant did feloniously, etc., give to said Rickman twenty-five dollars, with the intent to corruptly influence said Rickman, as mayor, to appoint and procure for him the office of engineer of said engine. It was not necessary under this statute, in order to make a valid indictment, to aver that defendant was eligible to the said office for the purpose of being appointed to which he gave the bribe. The gravamen of the offense interdicted by the statute is the intention to influence the official action of the officer by giving him a bribe, and this is sufficiently set forth in the indictment." It is apparent that this case does not conflict with the views of this court as expressed. The statute did not make the eligibility of the defendant an element of the offense; hence it was necessary to allege it or prove it. With that case the correct principle can be demonstrated beyond dispute. Suppose that at the time the defendant offered to bribe the mayor to appoint him engineer of the city of Sedalia, there was no law in existence which authorized the mayor to make the appointment, would it be contended for

a moment, even though the defendant offered him thousands of dollars for the appointment, that such act was the subject of bribery? Certainly not, for the plain reason that, as in this case, there is an absence of any law which imposed upon him the duty of such appointment. Again, suppose the indictment in that case had failed to allege the power of the mayor to make the appointment, would any court hesitate for a moment to quash the indictment, for the reason that it failed to charge any offense? Most certainly not. It is stated with great particularity in that opinion that the indictment alleges "that Rickman was the mayor of the city of Sedalia, and as such had the power to appoint defendant to the office of engineer." Without such averment, the indictment would not have charged any offense.

The case of *Florez v. State*, 11 Tex. App. 102, involved simply this question: The defendant was indicted and tried for attempting to bribe a deputy sheriff and jailer to release a prisoner. During the progress of the trial he attempted to show that the officer was not regularly appointed, but was simply a de facto officer. The court very properly held that this defense could not be availing; that the legality of the claim of the deputy sheriff to the office, the functions of which he was performing, could not be tested in this way. The de facto officer was performing the duties of an officer de jure. His acts were valid, and he was an officer, as much subject to bribery as one whose title to the office was beyond question. The law imposes the duty upon the deputy sheriff de jure to safely keep the custody of his prisoner, and the de facto deputy was simply performing the legal duties of the de jure officer, and his right to the office can only be tested by the modes pointed out by law. This is not the question in this case. There is no contention that Dr. Chapman was not an officer de jure. The question is, was he corruptly approached about a matter which by law would come before him? It was incumbent upon the court to determine as a question of law whether there was a law in force at the time which required the matter to be brought before him.

The *Moseley Case*, in 25 Tex. App. 518, 3 S. W. 652, is equally without application. It was held in that case that an officer accepting a bribe for releasing a prisoner should not be permitted to deny the legality of his own act by asserting that the arrest was illegal. That is the announcement of a clear legal principle. It will be observed that the officer in that case was authorized by law to make arrests, and the only question involved was after having exercised the authority as to the preliminary steps necessary to legalize the arrest. It was held, and correctly so, that, having authority to make arrests, and accepting a bribe to release a prisoner, the preliminary steps were immaterial, and he would not be permitted to deny the

legality of his acts. It is very apparent that this case does not militate against the conclusions reached in the one before us, and was never intended to be understood as announcing a different rule, for it was this same court that spoke in no doubtful terms in *Collins v. State*, supra, as to the correct rule applicable to the proposition being discussed. It was very aptly said in that case that, where a defendant was charged with attempting to bribe the district attorney, it was not bribery, and not within the terms of the statute, unless it was a matter or proceeding upon which the attorney was authorized and required to act. The same court, in the recent case of *Moore v. State* (Tex. Cr. App.) 69 S. W. 521, very clearly distinguishes the *Florez* and *Moseley Cases* from the rule announced in the line of decisions applicable to the question involved. It is made clear that, for a defendant to be brought within the terms of the statute for the bribery of a public officer, the offer to bribe must be in respect to the discharge of a legal and official duty. In other words, to more clearly state the proposition, the law must require and authorize the performance of a legal and official duty before the action of the officer to be subjected to an improper influence is made the subject of bribery.

The Texas court, in the *Moore Case*, speaking through Brooks, J., said: "It will be seen from an inspection of the foregoing facts that appellant was not, in contemplation of law, under legal arrest at the time the offer to bribe the officer was made. This prosecution is based upon article 138, White's Ann. Pen. Code, which provides: 'If any person shall bribe, or offer to bribe any sheriff or other peace officer to permit any prisoner in his custody to escape, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than five years.' Article 144, White's Ann. Pen. Code, reads: 'By a "bribe," as used throughout this Code, is meant any gift, emolument, money, or thing of value, testimonial, privilege, appointment or personal advantage, or the promise of either bestowed or promised for the purpose of influencing an officer or other person, such as are named in this chapter, in the performance of any duty, public or official, or as an inducement to favor the person offering the same, or some other person.' Construing these two articles together, it is made to appear that, in order to bribe an officer, as contemplated by article 138, he must be in the discharge of a legal and official duty; and the custody of appellant, therefore, must have been a legal custody; otherwise it is not an official act in arresting appellant. The cases of *Florez v. State*, 11 Tex. App. 102, and *Moseley v. State*, 25 Tex. App. 515, 3 S. W. 652, seem to support, upon a casual reading, the state's contention. But a closer scrutiny thereof will make manifest the fact that neither of said cases is in point. The *Florez Case* was an effort on part of

appellant to bribe an officer to release him from jail, and the evidence disclosed that appellant was already under judgment of court; and the question of whether or not the mittimus had been issued was held to be immaterial. In the Moseley Case appellant received a bribe to release a prisoner he had illegally arrested. The court held that appellant would be estopped from setting up the illegality of the arrest as a defense to the prosecution. But in the case at bar appellant has nothing to do with the illegality of the arrest, except that, in contemplation of law, he was suffering an injury to his personal rights by reason thereof. He was not a party to it, he had not acquiesced in it, and could not be stopped from asserting his rights under the conditions and provisions of article 138, White's Ann. Pen. Code. The moral aspect of this question appeals strongly to us, as suggested by appellant's counsel, but we must decide the case according to the statute. The statutes under consideration do not make appellant guilty, under the facts in this record, because appellant was not legally arrested."

The next case to which our attention is earnestly directed is *State v. Ellis*, 33 N. J. Law, 108, 97 Am. Dec. 707. The disclosures of the record in that case clearly distinguish it from the line of cases which support the conclusion reached by this court. The facts upon which the prosecution was predicated in the case last cited were about as follows: Application was made to the common council of Jersey City to lay a railroad track on one of the public streets of said city, and the defendant offered a bribe to one of the members of the council to vote in favor of the application. The contention was made by the defendant that the city council had no power to grant the application, hence there could be no bribery. The court ruled adversely to the contention of the defendant upon this proposition, and we fully concur in that ruling. It was clearly correct as to the case before it, and is in no way in conflict with the conclusions reached in this case. In the first place, the indictment in that case was for a common-law misdemeanor; but, aside from that, the charge contained all the essential elements of bribery. It was immaterial whether the action of the council could be enforced. It was a matter pending before the council, upon which the members had a right to vote. It was not necessary "that the vote, if procured, would have produced the desired result." The simple question was, was the member of the council authorized to vote upon the matter pending? It is very frequently of greater importance to the public for a member of the city council to vote upon a question pending, where the effort is to secure unauthorized legislation, than upon matters fully authorized. Under such conditions the members of the council are not only authorized

to vote, but it is their duty to vote, and to vote "No," and every attempt to influence their action, by the offering of a bribe, in respect to such vote, constitutes the offense of bribery. That the decision in that case is not pertinent to the proposition now being discussed, we think is too plain for discussion.

In *Glover v. State*, 109 Ind. 391, 10 N. E. 282, the defendant was school trustee. He was indicted for accepting a bribe to enter into a contract for the purchase of school furniture and supplies. It was not questioned that, as such trustee, he had the power and was authorized to make the contract. The indictment properly avers such power and authority. The contention of the appellant was that the contract, as reduced to writing, was not binding upon the school township. The court, upon that proposition, very correctly said: "It is not material whether the contract entered into could have been enforced against the township or not. If it was already executed, and the amount paid out of the township funds, of course it could not be material whether or not the contract was in writing. Nor could it be material in any event. The question is not whether appellant entered into a contract binding upon the township, but whether he accepted the bribe." That is not this case; but if, on the other hand, there had been no law which authorized and required the school trustee to make the contract, and some person should have attempted to bribe him to make it, then we would have the identical question presented in this case; and it certainly will not be disputed that in the supposed case there would be no offense for the reason that the bribe offered was not in respect to the performance of a legal and official duty required by law.

In the Ohio case of *State v. Gardner*, 42 N. E. 999, 31 L. R. A. 600, the question involved was as to the right of the defendant, was who charged with bribing an officer, to test, in that proceeding, the right of a de facto officer to perform certain duties. It was held in that case that the party charged to have been bribed was a de facto officer, and that defendant could not attack the constitutionality of the law creating the office. In this case the title of Dr. Chapman to the office of membership of the board of health is not questioned; nor are the legitimate duties authorized by the city charter questioned. But the sole question is as to the exercise of power by the municipal assembly, under the charter, in respect to imposing the duty upon the board of health to let a contract for public work. While that case does not necessarily involve the proposition now being discussed, yet upon the questions which seemed to have been determined by it—that is, as to officers de facto and the right of attacking the constitutionality of a statute creating an office—will say

that it is directly in conflict with some of the most carefully considered cases in this state. Will discuss this conflict later in the opinion.

We have examined the Kansas, Iowa, and Indiana cases cited, and find that the reasons heretofore assigned are applicable to those cases; that the propositions involved are not the ones presented for our consideration in this case, and do not militate against the conclusions reached.

It is earnestly contended that the validity of Ordinance 20,476 cannot be attacked in this proceeding; in other words, it is urged that it cannot be attacked collaterally. So far as the adjudications of this court applicable to this contention, there is but one exception, and the contention urged does not fall within it. The cases relied upon to maintain this proposition are specially applicable to that one exception. This court has uniformly and correctly held that when the constitutionality of an act, such as the organization of a county or of a court, depends upon facts extraneous to the legislative act, then the courts will not undertake, in either a criminal or civil proceeding, to investigate the facts upon which the constitutionality or unconstitutionality of such an act must rest. On the other hand, as the history of our adjudications will bear witness, there never has been a case in this state where the court, either in a criminal or civil proceeding, has refused to declare an act of the Legislature or an ordinance invalid when, by a comparison with the organic law, its invalidity could be ascertained. Our attention is directed to the cases of *State v. Rich*, 20 Mo. 393, *State v. York*, 22 Mo. 462, and *State v. Wiley*, 109 Mo. 443, 19 S. W. 197, as supporting the rule invoked in this contention. These cases all determine the same question, and no expression by this court in the present opinion can more fully demonstrate that they have no application to the attack upon the validity of the ordinance in this proceeding than the clear announcement of the court itself in one of the cases cited. In passing upon the question before it in *State v. Wiley*, supra, Gantt, J., speaking for the court, said: "That this court may declare an act of the Legislature unconstitutional when it transcends the limits prescribed by the organic law is now accepted by all branches of the government, but it is equally well determined that the invalidity of the statute must clearly appear before the court will assume so serious a function. Ordinarily, these questions arise from the face of the act itself, but here a comparison of the act of the Legislature with the Constitution will not disclose any conflict. It is clear that if a county has a population of fifty thousand, the Legislature may establish a criminal court for it. The power to create the court depends upon a fact 'in pais'—something extraneous to the act. It was the duty and the right of the Legislature to determine before passing the act—to inquire and ascer-

tain—that Greene county had the requisite number of inhabitants. A proper respect for a co-ordinate branch of the government compels us to presume that they did make the proper investigation, and found from the facts that they were not infringing the Constitution. The court was accordingly established, and the practical question now arises, must this court and its officers, every time an indictment is found and a prisoner put on trial, submit, as a preliminary question, to an investigation of the fact of the existence of fifty thousand inhabitants in Greene county on April 26, 1899?" The same distinction is drawn in *State v. Layton*, 160 Mo. 474, 61 S. W. 171, 83 Am. St. Rep. 487. That is not this case. We take judicial notice of the provisions of the charter of the city of St. Louis, and the ordinance is before us, having been introduced in evidence, and from them, and not any extraneous facts, we determine the power of the municipal assembly to adopt the ordinance. The Ohio case, *State v. Gardner*, heretofore adverted to, is cited as maintaining this contention. That case seems to hold that there can be a de facto officer without any de jure office, and that the constitutionality of an act creating an office cannot be called in question in a prosecution for bribery of an officer who assumes to perform the duties under the act creating the office. This is in direct conflict with the decision of this court in *Ex parte Snyder*, 64 Mo. 58. The petitioner, Snyder, in that case, was convicted of grand larceny, and sent to the penitentiary, and was there confined at the time of his application. This court held in that proceeding that the act of the Legislature creating the probate and criminal court of Cass county was unconstitutional, and that the acts of the judge in sending the petitioner to the penitentiary were void. The application of Snyder involved the performance of duties by a public officer. It was not a direct proceeding to declare that act unconstitutional. In fact, no such proceeding is provided for. It was the ordinary application for writ of habeas corpus. The same question would have been determined upon appeal. After disposing of the first question as to the validity of the act, this court, speaking through Sherwood, J., said: "We are thus led to the discussion of our second point, and respecting this there would, owing to the disposition made of the first point, appear to be but little difficulty. Numerous cases can be instanced from the books where the acts of an incumbent of an office have been held valid upon the ground that such incumbent was an officer de facto. But an officer of that description necessarily presupposes an office which the law recognizes. And a quite extensive research has failed to discover an instance where an incumbent has been held an officer de facto unless there was a legal office to fill, and all the cases cited from our own Reports were of that sort." It is apparent that the an-

nouncement of the rule in the Gardner Case is not in accord with the settled law and practice of the courts of this state.

Our attention has been directed to the case of *State v. Williams*, 136 Mo. 293, 38 S. W. 75. It does not support the contention in respect to the collateral attack upon this ordinance. That was an indictment and conviction for an attempt to corruptly influence a juror in the case of *State v. Taylor*. The Taylor Case was tried, and the court passed upon the competency of the jurors, and it was its province to pass upon any irregularities in summoning the panel. The defendant challenged the correctness of the indictment for its failure to contain an averment that the panel was summoned by order of the county court. The court correctly held that such allegation was not necessary. The failure of the county court to order a summons for the panel of jurors is not a matter of defense to the offense of corruptly attempting to influence a juror. That was a question to be settled, and presumably was settled, in the case in which the jury were summoned. The rule announced in that case does not in any manner conflict with the firmly established practice of attacking the validity of an ordinance or act of the Legislature, in any proceeding in which they are involved.

There is no direct proceeding known to the law by which an invalid act of the Legislature or ordinance can be set aside, but the universal rule and practice in this state has been that, whenever an ordinance or act of the Legislature is invoked to support any civil or criminal proceeding, their constitutionality may be put in issue and may be attacked. To hold otherwise would overthrow the settled practice of this state ever since this court was organized, as indicated by the innumerable cases in which such practice was adopted. *State ex rel. Belt v. City*, supra, was not a direct proceeding to set aside the ordinance in that case. The ordinance involved provided for the imposition of certain duties upon the members of the board of public improvements. The proceeding was to compel the board to perform the duty imposed. This court held the ordinance requiring the performance of that duty void and of no effect. *U. S. v. Boyer*, supra, was not a direct proceeding to invalidate the act of Congress creating the office and authorizing the government officers to perform the duties of it in pursuance of the act. It was simply a criminal prosecution for bribery of a public official. Yet it was held by Judge Rogers in that proceeding that the act of Congress was in violation of the Constitution; hence there was no law requiring the performance of any duty, and there could be no bribery in attempting to influence the action of the officer.

This brings us to the consideration of the last proposition in this cause. Counsel for defendant urge that, even though the mu-

nicipal assembly of the city of St. Louis had the authority to enact Ordinance No. 20,476, and that the contract was not void because it was not let by the board of public improvements, because the gathering, removal, and reduction of garbage was not public work within the meaning of the charter, still the conviction of defendant cannot stand, because that ordinance was not approved by the mayor until September 17, 1901, as shown by the state's own unchallenged documentary evidence. It will not be questioned that there was no statute of the state of Missouri which required Dr. Chapman, as a member of the board of health, to vote or pass upon defendant's bid for the contract for the disposal of all slops, offal, garbage, etc., of the city of St. Louis by the Merz process. Neither was any such obligation cast upon him by the common law. The state is therefore relegated to an ordinance of the city of St. Louis. No other ordinance is relied on save Ordinance No. 20,476, approved by the mayor September 17, 1901. Now, if the defendant made his proposition to give Dr. Chapman \$2,500 if he would vote for defendant's company to get the contract before the ordinance was approved by the mayor, as required by the charter, it is obvious defendant was not guilty of an attempt to bribe, for the reason that there was no ordinance which made it the duty of Dr. Chapman to vote or pass upon defendant's bid. About this proposition there can be no cavil.

By the charter of St. Louis the mayor is a part of the lawmaking or ordinance enacting power of the city government, and his concurrence in legislative action is essential to its validity, unless the ordinance is passed over his veto. Sections 23-25, art. 3, Charter of St. Louis; *Eichenlaub v. City of St. Joseph*, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590. If, in fact, then, the alleged attempt to bribe was committed by defendant after the council and house of delegates had passed Ordinance No. 20,476, but before its approval by the mayor, there was no ordinance requiring the board of health to make any contract for the removal or reduction of garbage, and hence no duty in respect thereto which could be brought before Dr. Chapman, as a member of the board of health, in his official capacity. Was the alleged offer to bribe thus made before the approval of the ordinance by the mayor? On this point there was one witness only—Dr. Chapman himself. He testifies there was no one present but himself and defendant at the interview. He was asked if he saw the defendant "on or about the 16th or 17th of September, 1901." He answered that he did, and then detailed what occurred between defendant and himself. Question by circuit attorney: "That was about what day? Ans. I would fix that date around about the 16th of September, 1901." Having testified about another meeting or visit on November 1, 1901, he was again asked by the circuit at-

torney: "What was the date of the first visit? Ans. September 16th, 'about." On cross-examination by Judge Krum, counsel for defendant, he was asked: "How are you able to state the 16th of September as the date upon which this first interview occurred? Ans. I don't quite know how far I can proceed in answering that. Q. Well, proceed as far as you can, and we will determine how successful you have been. Ans. On September 22d the wife of a very dear friend of mine returned from Europe to St. Louis. Mr. Folk: Give the name. A. Mrs. Bell. I had told her husband— Judge Krum: Well, I object. Witness: You asked it from me. I had told her husband previous to her returning. The date of telling her husband was on Monday, and, if I recollect it properly, the Monday preceding her return to St. Louis was the 16th day of September. Q. You then fix the 16th of September by reason of your having told some one of this occurrence between the defendant and yourself? A. Yes, sir. Q. Now, when was it you told this person of this occurrence? A. I told him definitely on the Monday preceding the return of his wife from Europe. Q. His wife returned on the 22d? A. Yes, sir. Q. And you told your friend definitely on the Monday before her return? A. Yes, sir. Q. Do you know what day of the week the 22d day of September of last year was? A. My recollection was it was Sunday. Q. Then, according to that, the 16th would be on Monday? A. That is my recollection of it. Q. Yes; you are quite positive that it was on the 16th? A. On or about the 16th. Q. Very well. You have said you told your friend whose wife returned on the 22d of this occurrence on the Monday before her return. Do I understand that to be the same date on which you had the interview with Mr. Butler? A. I state that the interview with Mr. Butler was on or about the 16th, and I definitely told him [his friend] about it on the 16th. That is what I have stated. Q. Then it must have occurred before you told your friend? A. It must have; yes, sir. A. So you told your friend during the evening of that 16th? A. Yes, sir." Later on the witness was asked: "Why do you say, 'On or about the 16th'? A. For the simple reason that that is exactly the date I mean—on or about the 16th. Q. You say here positively that you told your friend of this occurrence as early as the 16th of September, don't you? A. Yes, sir. Q. Therefore your interview with Mr. Butler must have occurred before you told your friend? A. Yes, sir. Q. It either occurred earlier on the 16th than the point of time at which you told your friend, or else it occurred before the 16th. In either event, it occurred before the ordinance was approved by the mayor? A. I don't know anything about the approval of the ordinance at all." Again: "Q. You are, however, able to locate the 16th of September as the date of this interview from

the fact that you told your friend about it. That is the only reason for stating it? A. Yes, sir." The witness was interrogated as to a conversation with Claud Wetmore, and was asked: "Q. Now, at that interview, didn't you state to him that you were unable to recall exactly the date of Mr. Butler's first visit? A. I did, sir. Q. Why is it you are able to recall it now? A. Because the incident of Mrs. Bell's return from Europe has come up since that date. My knowledge of the date of the incident has come since that. Q. She returned as early as the 22d of September, 1901? A. Yes, sir. Q. You had told her husband, as you say, on the 16th of September, 1901? A. Yes, sir." The foregoing is all the evidence on the part of the state as to the time when the alleged attempt to bribe Dr. Chapman was made.

The approval of Ordinance No. 20,476 was on the 17th day of September, 1901, as appears by the official communication of the mayor to the council on that day. The entire evidence of Dr. Chapman is to the effect that the offer to bribe him was made on the 16th day of September, 1901. It is true that Dr. Chapman says in his examination in chief that the offer was made "on or about the 16th of September, 1901," but his cross-examination discloses beyond the peradventure of a doubt that it was on Monday, the 16th of September, 1901. If Dr. Chapman's evidence is to be believed—and he is vouched for by the state, and certainly we have no desire to question it—the offer of defendant could not have been made later than the 16th, for while he persisted in saying, "on or about the 16th of September, 1901," when questioned as to his interview with defendant, when he was interrogated as to the time he told his friend Bell of defendant's offer, he positively fixes it on the evening of September 16, 1901, or the Monday preceding the 22d day of September, 1901, which was the 16th. So that, in justice to him, it must be said that the only doubt he felt about the date of the attempted bribe was whether it might not have been prior to the 16th, but never later than that day. And this is not a case of an inadvertent reference to a date, but it is fixed by the return of Mrs. Bell from Europe on the 22d of September, 1901, and the positive remembrance that on the Monday preceding the 22d he told her husband of the offer. Nor was the fixing of this date a matter of which the witness had no notice. On the contrary, the importance of fixing the date of an attempted bribe had been impressed on him, and on a previous occasion he had stated to Mr. Wetmore he could not definitely fix it, and subsequent to that interview with Wetmore he had inquired and his attention had been called to Mrs. Bell's return on the 22d, and then he could positively say that on the 16th of September, 1901, he had told her husband of the attempt to bribe him. So that the state's own witness fixes the date as the 16th of September as the very latest time at which the offer to bribe

could have been made to him. But counsel for the state answer that this was submitted to the jury under proper instructions, and the jury found the fact against defendant; in other words, that, although there was absolutely no evidence that the offense was committed after the approval of Ordinance No. 20,476, the defendant is precluded by a finding by the jury that he made the offer after the 17th of September, 1901, when for the first time the ordinance became a municipal law. The courts give full effect to a verdict when there is substantial evidence to support it, or when the evidence is contradictory; but when there is no evidence upon which to base it they are not bound by it.

Moreover, this is not a case where the date is immaterial—a case in which a variance of a day or two could be disregarded without affecting the rights of the defendant. The question of time is all-important to the defendant with reference to the ordinance which the state asserts authorized and empowered the board of health to let the contract and accept bids for the removal of offal and garbage. Until the ordinance was passed and approved, to wit, September 17, 1901, there was no law by which the letting of the contract could come before the board of health. Obviously, then, the burden was on the state to prove beyond a reasonable doubt that the offer to bribe was made after the ordinance was approved by the mayor, and testimony merely to the effect that it was made “on or about the 16th of September, 1901,” would not meet the requirement; but when the state went further, and established beyond all cavil that the offer was made on or before the 16th of September, 1901, and the records of the city conclusively established the ordinance was not approved until the 17th of September, 1901, it is evident that the state failed to make a case, even if the ordinance had been a valid one. This verdict can only be accounted for, however, by the third instruction given to the jury on behalf of the state. That instruction is in these words: “If you believe and find from the evidence beyond a reasonable doubt that the ordinance aforesaid numbered 20,476 was passed by the municipal assembly of said city of St. Louis by a majority vote of the said council and house of delegates, respectively, in the month of September, 1901, and that it might therefore become the duty of the said board of health as aforesaid to advertise for such sealed proposals as aforesaid under the terms of said ordinance, and to enter into a contract as aforesaid with the best bidder therefor; and that afterwards, and before any such sealed proposals were received, or such contract awarded by such board of health, the defendant, Edward Butler, knew that such ordinance had been so passed by the municipal assembly aforesaid, knew that it would or might be the duty of said board of health to advertise for such sealed proposals as aforesaid, knew that the said board of health would

or might be authorized to let said contract as aforesaid to the best bidder therefor, knew that said board of health would be authorized and have the right to reject any or all of any such sealed proposals, knew that the said Henry M. Chapman was a member of the said board of health, knew that the said St. Louis Sanitary Company was a corporation, and was about or intended to make to said board of health a sealed proposal for the sanitary disposal of all slops, offal, garbage, vegetable matter, and animal matter of said city under the ‘Merz Process’ in accordance with the provisions of said ordinance; and that the defendant, Edward Butler, at any time between the passage of said ordinance and the opening of any such sealed proposals, at the said city of St. Louis, did unlawfully, corruptly, and feloniously offer and propose to pay to the said Henry M. Chapman the sum of \$2,500, or any other sum of money, with the intent then and there unlawfully and corruptly to influence the opinion, decision, and vote of the said Henry M. Chapman as a member of the said board of health, and in his official capacity and character as a member of the said board of health, for and in favor of a sealed proposal of said St. Louis Sanitary Company, or to award such contract to said St. Louis Sanitary Company, for the sanitary removal of all slops, offal, garbage, vegetable matter, and animal matter of the city of St. Louis by the ‘Merz Process,’ under the provisions of said ordinance—then you should find the defendant guilty of an offer and attempt to bribe an officer, as charged in the indictment; and unless you do believe and find beyond a reasonable doubt it is your duty to acquit him.” The jury were not advised in this instruction that the ordinance was not legally passed until the approval of the mayor on the 17th day of September, 1901. This was a matter of law, which the court should have told the jury in plain terms. On the contrary, the jury might well have concluded that, if the ordinance was passed by the council and house of delegates before the 17th, as it was, and thereafter it might become the duty of the board of health to advertise and receive bids, it would be sufficient, even though not approved by the mayor. Thus the jury was not required to find that the alleged offer of defendant was made to Dr. Chapman after there was a law or valid municipal ordinance in force by which the matter might be brought before Dr. Chapman in his official character or capacity; but until then, as we have seen, no such duty existed, and hence the claim that the jury found as a fact that the offer was made after the ordinance was approved is unsupported by the facts in evidence.

We have thus given expression to our views upon this cause as disclosed by the record before us, which results in the final conclusion that the learned and esteemed trial judge should have either sustained the demurrer to the indictment, or, at the close of the state's

case, given the peremptory instruction to find the defendant not guilty, as requested by counsel for appellant.

The judgment in this cause will be reversed, and the defendant discharged.

GANTT, P. J., and BURGESS, J., concur.

PARSONS v. JOHN L. CLARK & CO.

(Court of Appeals at St. Louis, Mo. Jan. 21, 1903.)

APPEAL—REFUSAL OF MOTION FOR NEW TRIAL—EXCEPTIONS—SUFFICIENCY OF RECORD—REVIEW OF EXCEPTIONS DURING TRIAL.

1. A bill of exceptions stated that, four days after verdict, plaintiff filed his motion for a new trial, which was set out in full. It then recited that, in four days after verdict, plaintiff filed a motion in arrest of judgment, which was also fully quoted. It then recited, "And said motion, coming on for hearing, * * * was by the court overruled, to which ruling plaintiff at the time excepted, and saves now his exceptions." Held, that the exception thus saved applied only to the overruling of the motion in arrest of judgment.

2. Where no exception is saved to the refusal of a new trial, exceptions saved during the trial cannot be considered on appeal.

Appeal from Circuit Court, Knox County; Edwin R. McKee, Judge.

Action by Fred B. Parsons against John L. Clark & Co. Judgment for defendants, and plaintiff appeals. Affirmed.

O. D. Jones and D. A. Rouner, for appellant. Chas. D. Stewart, George Balthrope, and Ellison & Campbell, for respondents.

GOODE, J. The petition contains two counts; the first being on a promissory note given to plaintiff by the defendants in consideration of a stock of general merchandise they bought of him; the second set out the contract between the parties for the sale and purchase of said stock, which was alleged to constitute an equitable lien or mortgage on the merchandise for the security of the promissory note aforesaid, and prayed that it be enforced and foreclosed, and that a receiver of the goods be appointed pending the action. A writ of attachment was sued out, by virtue of which the property was seized and sold by the sheriff. Defendants filed a plea in abatement, and the trial of the issues joined on the averments of the affidavit for the writ of attachment resulted in a verdict in their favor, pursuant to a peremptory instruction given by the court, and properly given, because there was no substantial evidence tending to sustain the grounds of attachment laid in the affidavit. The answer to the petition alleged the defendants were defrauded in the sale by the false representations of the plaintiff as to the value of the merchandise, his failure to inventory the goods at their actual cash value, as he had agreed to do, and, instead thereof, his inventorying them at prices from 40 to 50 per cent. more. By reason of the

alleged fraud, it was further averred, the sum already paid plaintiff at the time the suit was begun on the note given for the purchase money had fully paid him for the true worth of the goods, and hence had satisfied the defendants' indebtedness to him.

Numerous exceptions were saved by the appellant to rulings on the admission of evidence and on the instructions, which we find it impossible to review, on account of the state of the record. It appears by the record, dehors the bill of exceptions, that the motion for new trial was overruled; but the bill itself is silent as to that matter, and contains no exception to the overruling of said motion. It states that, in four days after the verdict was returned, plaintiff filed his motion for a new trial, which is thereupon set out in full. At the conclusion of it appears a recital that, in four days after verdict, plaintiff filed a motion in arrest of judgment, which is likewise fully quoted. Then follows this statement: "And said motion, coming on for hearing, and being seen and understood, was by the court overruled, to which ruling plaintiff at the time excepted, and saves now his exceptions." The exception thus saved must necessarily be held to refer to the ruling immediately preceding it, to wit, the overruling of the motion in arrest, which only brings up for review the record proper, in which we detect no error. *White v. Caldwell*, 17 Mo. App. 691; *Hubbard v. Quisenberry*, 32 Mo. App. 459. As there was no exception saved to the court's action on the motion for a new trial, we cannot consider the exceptions that were saved during the trial. *Ross v. Railway Co.*, 141 Mo. 390, 88 S. W. 928, 42 S. W. 957; *Hoffman v. Trust Co.*, 151 Mo. 520, 52 S. W. 845.

The judgment is therefore affirmed.

BLAND, P. J., and REYBURN, J., concur.

PORTER v. KANSAS CITY & N. CONNECTING R. CO.

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

RAILROADS—RIGHT OF WAY—ACQUISITION—CONSTRUCTION OF DEED—RESERVATION—EFFECT.

1. The fact that a railroad company acquired a right of way over a person's land, and paid for the value of the land acquired and the damages sustained to the remaining land, constituted no defense to a claim for damages growing out of the company obstructing a right of way reserved to the landowner over the railroad right of way.

2. A railroad company acquiring a right of way over a person's land, subject to the reserved right of the landowner to a way over the railroad right of way, cannot obstruct its right of way so as to materially interfere with the landowner's reserved right.

3. The clause in a deed granting land to a railroad company for a right of way, reciting, "reserving a right of way over and across said above described tract sixty feet wide * * * for the purpose of a roadway of egress and re-

gress to and from the remainder of said land," inserted after the granting clause and a description of the land by metes and bounds, constitutes a reservation.

4. A railroad company, acquiring a right of way through a minor's land by virtue of a deed reserving to the minor a right of way over the railroad right of way, could not object to the reservation because the order of the court authorizing the minor's curator to execute the deed contained no such reservation, where the company received all it paid for.

Appeal from Circuit Court, Clinton County; Alonzo D. Burnes, Judge.

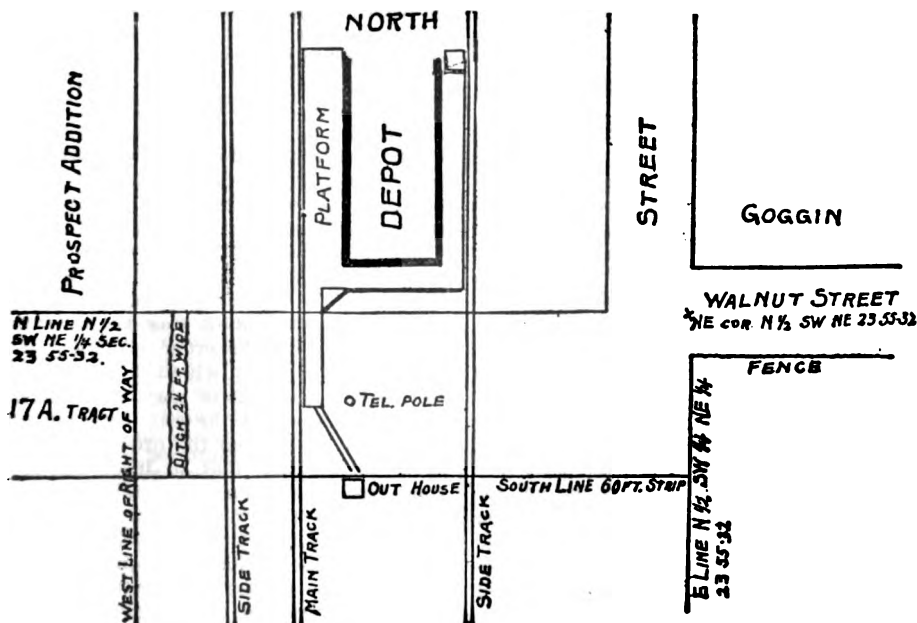
Action by William A. Porter against the Kansas City & Northern Connecting Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. T. Herndon and J. G. Trimble, for appellant. E. C. Hall and Roland Hughes, for respondent.

BROADDUS, J. This suit is for damages alleged to have been sustained by plaintiff in consequence of the alleged wrongful act of defendant in obstructing a right of way claimed by plaintiff over defendant's land.

On and prior to August, 1897, plaintiff, who was a minor, owned certain real estate adjoining the town of Plattsburg, Clinton county, Mo., over which it became necessary for defendant to have a right of way for its railroad tracks. The railroad line as located passed over plaintiff's land from north to south, and in doing so left 17 acres on the west side of said line and $27\frac{9}{100}$ acres on the line and the east side thereof. The depot of defendant was located on land north and adjoining the said land of plaintiff. A plat showing the lands described, depot, depot platform, railroad tracks, and other surroundings, is hereto attached.

The agent whose business it was to obtain the right of way for defendant entered into negotiations with one Charles L. Porter, who was then plaintiff's curator, to purchase said $27\frac{9}{100}$ acres. It is agreed that for a certain consideration an agreement was entered into between said right of way agent and said curator by which a sale was made to defendant. It became necessary, however, to have an order of the probate court of the county to effectuate such sale and convey the title to the property. For that purpose the curator filed a petition in said court, reciting, among other things, that a railroad was to be located over plaintiff's land and property, and a necessity existed that the land in question should be sold for the best interest of the minor. Such order was obtained, sale approved, and order made to convey the land to the purchaser. The curator made the deed conveying the property to the Northern Townsite Company, which seems to have been a corporation utilized to take and hold real estate in its name for and on behalf of defendant. After the granting clause and a description of metes and bounds of $27\frac{9}{100}$ acres, the deed recites: "Reserving a right of way over and across said above described tract sixty feet wide across the north end which would be the extension of Walnut street in Plattsburg for the purpose of a roadway of egress and regress to and from the remainder of said land." Said order of sale does not mention said reservation. The admission in defendant's answer, as well as the evidence, was that an open right of way not less than 60 feet wide across the land should be reserved in the deed when it should be made. The evidence disclosed that a part of defendant's depot platform extended part-



ly over the reserved right of way, a ditch 24 feet wide extended entirely across it, and that it was otherwise obstructed, all of which "prevents plaintiff from having free access to and from his remaining land." There was evidence that the damages to plaintiff's remaining land would be about \$2,000 should the obstruction remain permanent, and the temporary damages \$200. Plaintiff sues for the damages he alleges he has sustained by reason of said obstruction on said 60-foot strip. He also alleges that his said remaining land has no other outlet to the streets and highways except said 60-foot roadway, and that unless defendant be required to remove said obstructions he will be irreparably damaged. He prays judgment for his damages and for a removal of the obstructions. The answer of the defendant is that the land in question was purchased for a railroad right of way, which was understood by all the parties at the time, and that plaintiff was to have a roadway or crossing over the same 60 feet wide for the purpose of egress and regress to and from the remainder of his land, but that it was understood and agreed that said right of way should be over and across defendant's railroad; and, further, that it paid to plaintiff's curator \$1,500 for said right of way, and as damages on account of the building and constructing of said railroad across said tract of land, and as damages to the remainder. The answer also sets out that the order of said probate court made no reservation of a right of way over such land, and for that reason the curator had no right to insert such reservation in the deed aforesaid. Defendant prays that the court require plaintiff to elect whether he will stand upon the order of sale and deed directed to be made, or upon the contract made by the curator and defendant, and that upon such election that the deed be corrected and made to conform to said order of the probate court or to the agreement entered into between the parties, as plaintiff may elect. The court rendered judgment dismissing plaintiff's bill for an injunction, but gave judgment against defendant for \$300 temporary damages. Defendant appealed.

Defendant contends that it was error in the court to render a judgment against it for any damages whatever. That the land in question was to be used for railroad purposes we think may be clearly implied from all the circumstances in evidence, especially from the recitations of the curator's petition for an order for its sale; and it was both proved and admitted that, notwithstanding the land was to be so used, the plaintiff was to have an open right of way over it 60 feet in width as a means of access to his remaining land; and there has been no reason urged why the plaintiff should not have damages assessed against defendant for its obstruction. Defendant's position that when it paid \$1,500 for said land it was in satisfaction not only for the value of the land but

also for damages to plaintiff's remaining land occasioned by the location and construction of its railroad, while, ordinarily, a proper statement of the law, has no application to this case, for here the damages claimed grow out of a violation of the terms of the deed itself for failure to reserve to plaintiff said right of way as therein provided, and not by reason of the construction of the railroad. The defendant had the right to construct its railroad over the land, for it was so contemplated at the time of the purchase, and was so understood by all parties and the probate court making the order of sale, but not in such a way as to interfere with its reasonable use by plaintiff. It had no right to obstruct it by the platform, the ditch in question, its railroad tracks, or in any other way which would materially interfere with plaintiff's reserved rights. That it might dig a ditch, build a platform, or lay its tracks over the reservation, there can be no question. But it does not follow that by any of these means plaintiff's right of way would be necessarily obstructed so as to materially interfere with its use. Common observation teaches differently. The defendant under its deed was vested with the title to the land, incumbered with plaintiff's right of way as an easement. This provision for a right of way was not in the nature of an exception. "The exception in a deed is always a part of the thing in being, and a part of the thing granted; while a reservation is of a thing not in being and is newly created, as rents and the like." Coke on Litt. §§ 147, 476. "An exception withdraws from the operation of the conveyance some part of the thing granted, which, but for the exception, would have passed to the grantee under the general description; while a reservation is the creation, in behalf of the grantor, of some new right issuing out of the thing granted; that is to say, something which did not exist as an independent right." *Snoddy v. Bolen*, 122 Mo., loc. cit. 486, 24 S. W. 142, 25 S. W. 932, 24 L. R. A. 507, and authorities there cited. Besides, from all the facts and circumstances shown, it was the object of the parties to create a reservation. *Barnes v. Burt*, 38 Conn. 541, and other cases cited in *Snoddy v. Bolen*, supra.

The defendant's prayer for equitable relief is, substantially, that the deed containing a reservation of right of way be reformed to correspond with the order of sale made by the probate court, in which there was no reference to such right of way. It is true, the curator derived all the authority he had to make said deed from the order of the court. It is not claimed that in inserting in said deed the reservation for a right of way the ward was injured in his property rights, but, on the contrary, he was benefited. And, besides, this reservation, as we have seen, was in pursuance of the original agreement between curator and defendant's agent. The defendant by its prayer is not seeking equity.

The equity of the case is against it. It bought the land and paid for it, less said right of way. This is admitted. To reform the deed would therefore operate to that extent in favor of defendant at the expense of plaintiff. The defendant was not wronged. It received all it paid for. If the plaintiff, who was then a minor, does not complain, it does not lie in the mouth of the defendant, who was not injured, to interpose an objection to the regularity of the proceedings in the probate court. The only party who could complain is the plaintiff. The court very properly ignored the prayer for equitable relief.

The court also ignored plaintiff's prayer for equitable relief, but of this he does not complain. But as he excepted to the action of the court, and filed his bill of exceptions, he asks that the cause be reversed because the court failed to give him judgment for permanent damages. The action of the court should be upheld. The injury here is temporary, and only damages for such as had been suffered could have been given. *Brown v. Ry. Co.*, 80 Mo. 457; *Pinney v. Berry*, 61 Mo. 359; *Foncannon v. Kirksville*, 88 Mo. App., loc. cit. 284.

The evidence to support temporary damages was slight. We find none in the record fixing plaintiff's damages greater than \$200. For this oversight the cause is reversed and remanded, unless plaintiff shall within 20 days enter a remittitur for \$100, in which event the cause will be affirmed. All concur.

BAKER et al. v. PULITZER PUB. CO.*

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

ARCHITECTS—ACTION FOR EXTRA SERVICES— EVIDENCE—INSTRUCTIONS— HARMLESS ERROR.

1. An instruction, in an action by architects for services, that if plaintiffs, in consideration of \$500, agreed to render all the services actually rendered, they can recover no more, but if plaintiffs agreed for \$500 to prepare plans for and superintend only certain specified work, to cost not more than \$5,400, and afterwards defendant directed them to prepare plans for and superintend other work costing \$41,000 more, not included in the original contract, then plaintiffs are entitled, in addition to the \$500, to the usual and reasonable compensation for such additional services, and if such usual reasonable compensation is a fixed percentage on the cost of the work designed and superintended the jury should, besides the \$500, allow such usual compensation on \$41,000, is not open to the objection of singling out plaintiffs' evidence, and commenting on it, and making it unduly prominent.

2. Extra work performed by plaintiffs at defendant's direction is not performed for an agreed amount, but for its reasonable value, defendant having agreed to pay no certain amount, though plaintiffs in conversation with defendant would speak of 10 per cent. as the commission they always charged for such work and as the compensation they expected.

3. Architects who, in addition to work which they contract to do for a certain sum, do other work for defendant, may recover the reasonable value thereof, if defendant promised, before the work was done, to pay them the reasonable value thereof, or if it ordered them to do the extra work.

4. Defendant, in an action by architects for services, having given in evidence its letter to them tending to prove that there was an understanding whereby they agreed to accept \$500 as full compensation for their services and calling for an explanation of their demand for compensation for extra work, their letter in reply, giving the explanation and tending to rebut defendant's assumption that \$500 was to be the compensation for all of the work, is admissible in rebuttal.

5. Admission of part of a letter from plaintiffs to defendant not stating any fact, but merely making an argument in their favor which they or their attorneys might have made at the proper time, is harmless.

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Alfred M. Baker and others against the Pulitzer Publishing Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Judson & Green, for appellant. Rassieur & Rassieur, for respondents.

BLAND, P. J. Plaintiffs are partners doing business under the firm name and style of Baker & Knell. The defendant is a business corporation. The petition is in three counts. The sums demanded in the second and third counts were confessed by the answer. The issues were made up on the first count. The evidence was all directed to these issues. It is alleged in the first count that plaintiffs are architects, and as such were employed by defendant to furnish drawings and specifications and to superintend the making of the following alterations in defendant's buildings, Nos. 210 and 212 North Broadway, in the city of St. Louis, to wit: "Certain excavations in basement; a granitoid floor in basement; brick foundations for two presses for basement; a longitudinal partition on first floor, separating the counting room from the press room and stereo room; a seventy-foot marble top counter for the first floor; one flight of stairs from first to second floor; a tile vault on first floor eight feet by ten feet; the removal of inside front show windows and rear wood partition; the building of a platform on first floor with mail chute from second floor; six mailing tables; the making of fifty carrier boxes; two dark rooms and ten water-closets; and certain other work, now to the plaintiffs unknown, all of which work was to be erected in the manner then contemplated by the defendant, of a quality and character, however, not to exceed an aggregate cost of fifty-three hundred or fifty-four hundred dollars." That the defendant agreed to pay plaintiffs \$500 for the above alterations.

*Rehearing denied December 15, 1903.

¶ 3. See Contracts, vol. 11, Cent. Dig. §§ 1075, 1075a.

The petition further alleges that the plaintiffs entered upon the performance of their undertaking with defendant, "And from time to time the defendant, upon the suggestions of the plaintiffs, and of its own motion, changed the character of the work contemplated under their said original agreement, and requested the plaintiffs to do other and different work than that contemplated in their said agreement, and directed the plaintiffs to furnish the necessary drawings and specifications for and to supervise the making of the following alterations for the defendant in its said building; that is to say, in addition to the alterations aforesaid, except where such alterations were changed by the work hereinafter specified, the defendant required the plaintiffs to furnish the drawings, detailed drawings, and specifications for, and to supervise the erection of, the following work and alterations, to wit: The defendant required that independent steel foundations be erected for its old Sextuple press, which was to be installed on the first floor, to prevent the inconvenience and annoyance of vibration which would necessarily result if said press had been set upon the floor of said first story, as originally contemplated by the defendant; that the longitudinal partition separating the press room from the counting room should be placed to the south side of the columns in said building, instead of to the north side, to prevent the conducting of the noise of the press room into the counting room; that the stereo room originally contemplated for the first floor be constructed on the fourth floor, to provide for ventilation for the counting room, and also to provide proper quarters for a shipping room; that such shipping room be arranged on the first floor; that independent steel foundations be also constructed for another press to be installed on the first floor, but which was not originally contemplated by the defendant; that the counting room, which was originally to be constructed of plain wood, and painted, should be constructed and finished in mahogany, with mahogany ceiling, columns, partition, and wainscoting, and mahogany panels, mahogany counter, cabinets, and special desks, and tile floor, railings, cages, and a circular post-office arrangement, none of which was originally contemplated; that the defendant also required a change of the stairways, and the putting in of different stairways; that a newsboys' room, with granitoid floor, cages and inclosed steel stairway, be constructed; that all stairways from second to sixth story be incased with partitions; that a mail chute be constructed; also a suspended mailing gallery on second floor; also certain additional partition work on second floor, and railings separating the different departments of the editorial room on third floor; also pigeonhole cabinets on third floor. Defendant also changed the plumbing throughout, requiring better and more costly work. Defendant also required the erection

of a fire escape; also an independent foundation for its Scott press, which was not contemplated under the original agreement; also a safety vault to be constructed in the basement within said press foundation; also certain partitions in basement. Defendant also required a change of its whole store front; also a maple floor, back of counter, in counting room, and a lot of detail work in connection with the presses, gallery, railing floor glass, and iron stairway to basement, none of which was contemplated under their original agreement. The plaintiffs state that at the request of the defendant they performed the service of preparing the plans and detail drawings for all of said work and for all other work required by the defendant in the remodeling of said building and in making the changes and alterations then made by defendant, and plaintiffs supervised the construction of all of said work, including the painting thereof; that said services were rendered continuously from December 6, 1901, until about December 1, 1902, and that for at least four months of said time the plaintiffs were also required to perform the services required as aforesaid, at night, in order to complete the same as the requirements of the defendant demanded; that the cost of said work in the aggregate was at least forty-six thousand four hundred dollars (\$46,400), instead of the maximum of fifty-four hundred dollars, as contemplated under their original agreement. That, in addition to the foregoing, the plaintiffs also, at defendant's request, prepared the plans for the remodeling of the basement of the adjoining premises, No. 208 North Broadway, and the connections between the same and said building No. 210-212 North Broadway; and the plaintiffs also rendered service in appearing, at the request of the defendant, before the commissioner of public buildings, and before the board of appeals, and procuring a permit for the erection of the fire escape in the rear of said building No. 210-212 North Broadway, instead of on the front, as originally required by the said commissioner. Plaintiffs further state that under their original agreement they are entitled to a compensation of five hundred dollars (\$500) for the work so required and work done in lieu thereof, costing fifty-four hundred dollars (\$5,400) in the aggregate; and for all additional work performed by them, as aforesaid, in excess of the cost originally contemplated under their said agreement, they are entitled to the reasonable value of their services in performing the work required of them, in devising, planning, and supervising the said additional work, the cost of which was forty-one thousand dollars (\$41,000), as aforesaid; and the defendant, through its legally authorized representatives, from time to time during the progress of the work, and before the performance of the same by the plaintiffs, promised to pay plaintiffs such reasonable compensation for all such addi-

tional work so required. That the reasonable value of such services, as rendered by the plaintiffs, in excess of the work originally contemplated, costing \$41,000, as aforesaid, is ten per cent. of such cost, to wit, forty-one hundred dollars (\$4,100). That in December, 1901, at the request of the defendant, one of the plaintiffs—but for the said partnership—went to Chicago, Ill., with a representative of the defendant, for the purpose of making an examination of newspaper establishments in said city, in order to promptly advise the defendant as to the proper construction of certain parts of the work then contemplated by the defendant in the remodeling of its said building No. 210-212 North Broadway, and plaintiffs made such examination and advised the defendant in the premises. That three days were consumed in rendering such special service for the defendant, and such service was reasonably worth one hundred and fifty dollars (\$150), and the defendant promised and agreed to pay the same, but failed to do so."

Omitting immaterial allegations, the answer to the first count is as follows: "Further answering said first count, defendant says that on or about the sixth day of December, 1901, it entered into an agreement with plaintiffs whereby, for a consideration of five hundred dollars (\$500) to be paid by the defendant to plaintiffs, said plaintiffs agreed to furnish all the necessary drawings and specifications and to supervise the making of all repairs, alterations, and changes defendant might desire to have made in its building known as Nos. 210 and 212 North Broadway, in the city of St. Louis, it being agreed that the said sum of \$500 should be in full for all services that plaintiffs, as supervising architects, might be called upon to render in furnishing the necessary drawings and specifications and in supervision of said alterations and repairs; and defendant denies that said contract or agreement between it and plaintiffs was ever thereafter changed, added to, or modified in any form or manner whatsoever; and defendant says that it was further agreed between it and plaintiffs at the time said contract was made that any changes in the plans for said alterations and repairs that might thereafter be made should not increase the amount to be paid plaintiffs for their said services. Defendant further says that the aforesaid agreement between plaintiffs and defendant also covered and included all repairs and alterations in the basement of the adjoining premises No. 208 North Broadway and the connections between said building and the building Nos. 210 and 212 North Broadway, and also all services rendered in appearing before the commissioner of public buildings and before the board of appeals for the purpose of procuring a fire escape in the rear of said buildings Nos. 210 and 212 North Broadway, and any and all other work done by plaintiffs in connection with said repairs and altera-

tions to said buildings, or either of them. Defendant further says that it has paid plaintiffs on account for said services the sum of \$300, and that there still remains due from defendant to plaintiffs on account of said \$500 agreed to be paid for said services the sum of \$200, which amount defendant has always been ready and willing to pay said plaintiffs, and hereby tenders the same into court for the use and benefit of plaintiffs."

A reply was filed denying the new matter in the answer.

The evidence shows that, a few days prior to the making of the contract to pay \$500 for plans and specifications and the supervision of the work, a rough plan and an estimate of the cost of the alterations to be made was submitted by one of defendant's agents to the plaintiffs; that the cost of the alterations as shown by the estimate was \$5,400. Plaintiffs' evidence shows that on this estimate they agreed to furnish plans and specifications and to supervise the construction for \$500. After plaintiffs entered upon the performance of their contract, additional work of reconstruction, amounting to \$41,000, was required by defendant, for all of which extra work plaintiffs, at defendant's request, furnished plans and specifications and superintended the work. It is claimed by plaintiffs that for this extra work defendant agreed to pay them a reasonable compensation, and that 10 per cent. of the cost was such reasonable compensation; and plaintiffs' evidence tends to prove that the defendant's superintendent agreed to pay a reasonable compensation for the extra work. Plaintiffs showed by the evidence of three architects that 10 per cent. of the cost of reconstructing a building was the usual and customary price paid to architects in the city of St. Louis for furnishing plans and specifications and supervising the work of reconstructing a building.

The evidence of the defendant shows that the plaintiffs agreed to furnish plans and specifications and to superintend all work (except the boiler and electric work) of reconstruction for a flat sum of \$500, and that at the time of making the contract it was not known to the defendant or plaintiffs what particular alterations would have to be made to prepare the building for defendant's business, and that the alteration would have to be ascertained as the work progressed; that it was distinctly understood between defendant and the plaintiffs that plaintiffs were employed as architects for the purpose of not only preparing plans and specifications for particular work, but also to make plans and specifications for such alterations and reconstruction as were useful and necessary to convert the structure into a large printing house. There is a square contradiction in the evidence of plaintiffs and that of the officers of the defendant in respect to compensation for the extra work. The verdict of

the jury, however, settled that controversy in favor of the plaintiffs.

Plaintiffs sent a bill to the defendant, in September, 1902, when the work was about completed, charging 10 per cent. of the cost of the extra reconstruction work, and demanding payment of the same. On receipt of the bill, September 24th, W. C. Steigers, business manager of defendant, wrote plaintiffs the following letter:

"St. Louis, Mo., Sept. 24, 1902.

"Messrs. Baker & Knell, City—Dear Sirs: I find the enclosed bill on my desk. As I have no knowledge whatever of any arrangement which justifies a bill of this character, will thank you to explain why we are presented with this. You could not have forgotten the arrangement made with your firm and myself for a flat rate in compensation for your services of supervising the work to be done at our present building. Awaiting your reply,

"Yours truly, W. C. Steigers,
"Business Manager."

On the following day plaintiffs wrote and sent to Steigers the following answer to the above:

"Sept. 25th, 1902.

"W. C. Steigers, Esq., Business Manager Post-Dispatch—Dear Sir: Yours of 24th as to our bill received. The flat rate that you speak of was upon the basis of actual cost of alterations as at that time contemplated, and the flat rate that you mention was based upon the estimates you furnished us at that time from Mr. Sam. Ross, based upon the work you then contemplated; this estimate amounted to \$5,400; our position at the time was that we expected a ten per cent. commission which would make our commission \$540; you suggested that we make it a \$500 flat rate, and as this was only \$40 less than what, on a percentage basis of ten per cent., our commission would amount to, we acquiesced and agreed to do the architectural work necessary to perform \$5,400 worth of work for \$500. At that time your Mr. Taylor made the proposition to our Mr. Knell that he accept seven per cent. as a commission, but Mr. Knell declined this on account of it being so much below the usual charge of ten per cent. for this character of work; it is obvious, therefore, that we expected more than Mr. Taylor's proposition of seven per cent. The alterations, instead of costing \$5,400 as per estimates furnished us by you, and instead of taking only five weeks' work to perform as by you then suggested, cost nearly \$50,000, and consumed almost the entire time of ten months' hard work on our part, including night work, Sunday and holiday work, and labor on our part that no commission even at ten per cent. could pay for. Your letter seems to express a surprise that we should have the effrontery to make such a claim. Permit us to remind you that we both told you of our expected increase in compensation and to recall the time and

place to your mind: You will recall taking Mr. Knell and Mr. Baker to Caesar's Café to show them your idea as to tiling; you will also recall that at that time we both told you that you could not expect our original estimate to hold good, as the work that was already proposed at that time would far exceed your original intent. You told us not to worry about that part of the agreement; that we could rely upon the justice and intelligence of the Post-Dispatch management to cover that part of the question. It might seem presumptuous on our part to make a comparison between humble architects and the business manager of a great paper, but for the sake of argument put yourself in our position: Suppose that some person would come to you and propose that you assume the management of a paper the circulation of which amounted to 5,400 copies daily. You would estimate that this would take but little of your time, and that you could furnish your services on a basis proportionate to this small circulation. Now suppose that, after assuming charge of the paper you would find that instead of the paper having a circulation of 5,400 copies daily, its circulation would be 50,000 copies, would you, or could you be expected by any reasonable person, to manage the latter at the same compensation as the former? The proposition is so palpable that we must express the same surprise at your letter as you would seem to have expressed at our statement as to what we deemed you owed us.

"Very sincerely, Baker & Knell,
"Architects."

Counsel for defendant objected to the admission of the letter, and especially to the last part of it. The following occurred during the reading of this letter: "Mr. Green: I object to that portion of the letter, and ask to have it excluded. The Court: I don't see how I can cut it out. Mr. Green: I ask the court to instruct the jury that that is no evidence of the facts stated in the letter. Mr. Rassieur: Then offer a written instruction. The Court: Proceed." No part of the letter was excluded by written instruction or otherwise.

The court gave an instruction for plaintiffs as follows: "(1) It is admitted by the defendant that it employed the plaintiffs to render certain architectural services, and that it agreed to pay to the plaintiffs the sum of \$500 therefor, and that but \$300 of this sum was paid to them prior to the institution of this suit. And the defendant also admits that the plaintiffs performed all of the services alleged to have been performed by them, and that the cost of the work designed and superintended by them was at least \$46,400. Therefore if you believe from the evidence that the plaintiffs, for a consideration of \$500, agreed to render all of the services which were actually rendered by them for the defendant, then the plaintiffs can only recover upon the first count of the

petition the sum of \$200, which has been tendered into court since the institution of the suit. But if you find and believe from the evidence that the plaintiffs agreed for a sum of \$500 to prepare plans or drawings and superintend only certain work which was then specifically referred to by the defendant and agreed to by the plaintiffs, and which was not to cost more than \$5,400, and afterwards the defendant directed and required the plaintiffs to prepare plans or drawings for and superintend the other work in the petition referred to, which cost in the aggregate at least \$41,000 in addition, and that such other work was not included within the work agreed upon by the parties at the time when the defendant employed the plaintiffs—if you find that they did agree upon certain work only, which was to cost not more than \$5,400—then the jury should allow the plaintiffs, in addition to the sum of \$200 above mentioned, the usual and reasonable compensation for such additional services; and if you find that what is such usual reasonable compensation is determined by a fixed percentage or commission upon the cost of the work designed and superintended, then you should allow the plaintiffs, besides the \$200, such usual commission on \$41,000, being the excess cost over and above the maximum cost of \$5,400, if you find that such maximum of cost had been agreed upon. And in that event you will also add interest at 6 per cent. per annum from January 17, 1903, the date of the institution of this suit."

The defendant asked the following instruction, to which the court added the clause in italics and gave it as modified: "(3) The court instructs the jury that the burden of proof is upon plaintiffs, and plaintiffs cannot recover against defendant upon the first count of their petition for more than \$202, unless they prove by a preponderance of all the evidence: First, that the alleged extra work described in the first count of their petition was not included in their agreement of December 6, 1901; and, secondly, that defendant, through its officers promised and agreed to pay plaintiffs the reasonable value of such additional or extra services before the said services were rendered, in addition to said sum of \$500 promised by the agreement of December 6, 1901; or that defendant's servants ordered said extra work to be done by plaintiffs."

Defendant contends that instruction No. 1 given for plaintiff singles out the evidence of the architects and comments upon it and makes it unduly prominent. The instruction, in effect, tells the jury that if they should find that the compensation for architects' services in reconstructing buildings is a fixed per cent. of the cost of reconstruction, and that such per cent. is reasonable, then the plaintiffs' compensation, if the jury should find for them for the extra work, should be the fixed and reasonable per cent. on the cost of the extra work. The instruc-

tion does not single out the evidence of any witness or witnesses for the plaintiffs, but directs their attention to the evidence introduced by plaintiffs to show what would be reasonable compensation for the extra work. This was not only legitimate, but necessary, as a guide to the jury in estimating plaintiffs' damages, should they find plaintiff entitled to compensation for the extra work. Another objection to the instruction, and to instruction No. 3 given for defendant as modified by the court, is that plaintiffs' petition avers, and their evidence proves (if it proves anything), that defendant expressly agreed to pay 10 per cent. commission on the cost of the reconstruction, and that these instructions authorized a recovery on a quantum meruit.

There is no controversy as to the payment of the \$500. The allegation of the petition, in respect to the extra work, is that defendant "promised to pay plaintiff such reasonable compensation [10 per cent.] for all such additional work so required." Baker's evidence is that, in discussing the question of compensation for the extra work, Steigers said: "We want you to weld all the individual parts of this work into one harmonious whole;" * * * that, according to Mr. Knell's theory, "if any of these parts of work must be taken in with our [plaintiffs'] work, we would have to get additional compensation." Knell, the other plaintiff, testified that when they were called upon to do, and were doing, the extra work, he and Baker had a conversation with Steigers in respect to their compensation; that in this conversation Steigers said: "I am perfectly satisfied that you should have more commission, which, of course, we never expected this work would cost so much, or we had any such fine work to be done." There is nowhere to be found in the record an express promise by defendant to pay 10 per cent. commission for the extra or any other work. Plaintiffs, in conversation with Steigers, would speak of 10 per cent. as the commission they always charged for such work and as the compensation they expected, but nowhere is it stated by any witness that Steigers promised to pay 10 per cent. commission for the work, and we think the instruction given for defendant—No. 3, as modified and given by the court—correctly declared the law of the case.

In respect to the letter of September 25, 1902, from plaintiffs to Steigers, it is to be observed that it was offered in rebuttal, and that defendant had laid a foundation for its introduction by previously introducing the letter of September 24th from Steigers to plaintiffs. The latter letter not only tended to prove that there was an understanding whereby plaintiffs agreed to accept \$500 as full compensation for their services, irrespective of the cost of reconstruction, but it also called for an explanation of the previous demands of plaintiffs for compensation for the extra work. The let-

ter of September 25th gave the explanation called for, and tended to rebut the assumption of Steigers that \$500 was to be a flat rate of compensation for all the work of reconstruction, and, in so far as it explains plaintiffs' understanding of the agreement, was legitimate testimony in rebuttal. The last paragraph—the argumentative clause—might with propriety have been excluded, and we think should have been excluded. But this clause does not state a single fact, or purport to state any fact, and could not have been accepted by the jury as evidence. It is a mere argument in plaintiffs' behalf, which either of them or their attorneys might have made at the proper time, and all that can be said against it is that it was out of order, and we cannot see how the jury was prejudiced by it.

Discovering no reversible error in the record, the judgment is affirmed. All concur.

NELSON v. CAL HIRSCH & SONS' IRON & RAIL CO.

(Court of Appeals at St. Louis, Mo. Nov. 17, 1903.)

SALES — CONTRACT — DEFINITENESS — QUANTITY — TIME OF DELIVERY — REPUDIATION BY SELLER — BREACH — RESALE — REASONABLE TIME — ACTIONS — CAPACITY TO SUE — DAMAGES — INTEREST — CONSTRUCTION OF CONTRACT — SUBMISSION TO JURY — HARMLESS ERROR.

1. Under Rev. St. 1899, § 541, providing that a trustee of an express trust is entitled to sue in his own name, where plaintiff and certain associates obtained franchises for the construction of street railways in a city, and before incorporating tore up certain existing railways, and plaintiff, while so doing, contracted on behalf of himself and his associates to sell to defendant certain of the material so torn up, plaintiff was entitled to sue for breach of such contract in his own name.

2. Where at the time secondhand rails were sold the rails had not been taken up, and the quantity of each grade was estimated, it being agreed that all the rails to be taken up by plaintiff in the reconstruction of the street railroad in a certain city were sold to defendant at certain prices per ton for each grade, the contract was not void for indefiniteness as to the thing sold.

3. Where correspondence preceding an offer and acceptance for the sale of secondhand rails stated that the seller would be ready to deliver in car-load lots in from 40 to 60 days, and the buyer stated his willingness to receive in 30 to 60 or 90 days, the offer and acceptance were not ineffectual to constitute a contract by reason of the fact that no time for delivery was specified therein.

4. Where correspondence relating to the sale of goods constituted a contract of sale, and the jury so found, the fact that the court submitted the question of the existence of a contract to the jury was not reversible error.

5. Where plaintiff contracted to deliver secondhand rails suitable for relaying at a certain price, and defendant thereafter contended that the contract was for "first-class" relayers, the fact that plaintiff immediately informed defendant that he had no "first-class relayers," and that he therefore hesitated to ship without an inspection by defendant, did not constitute a repudiation of the contract by plaintiff.

6. Where a buyer repudiated a contract of sale, and the seller resold the goods without no-

tice to the buyer, the measure of the seller's damage was the difference between the price agreed on and the market value of the goods at the time and place agreed on for their delivery, though they might have brought less than their market value at the resale.

7. Defendant broke his contract to purchase secondhand rails from plaintiff, the letter of cancellation being dated April 24, 1900, and probably received by defendant two days later. Plaintiff testified that he still hoped to induce defendant to take the rails, and by reason of a declining market did not immediately endeavor to resell the rails, and did not sell the same until June 18th, when the market had become somewhat better. *Held*, that the resale was within a reasonable time.

8. Where delay in delivering goods sold beyond the contract period was in part due to a letter written by the buyer to the seller demanding a quality of rails not stipulated for in the contract, and by the buyer's refusal or disinclination to inspect the rails before shipment as requested by the seller, the latter was entitled to recover for the loss sustained by defendant's breach of the contract, notwithstanding the delay.

9. Where, in an action for breach of a contract for the sale of secondhand rails at a certain price per ton, the number of tons deliverable under the contract was uncertain at the time of the breach, and thereafter defendant was not notified of the number of tons of each grade deliverable under the contract, and no demand was made for payment of damages sustained by the seller on resale for the buyer's account, the court properly restricted the computation of interest on the amount due to the commencement of the suit.

10. Where defendant broke a written contract to purchase secondhand rails from plaintiff, plaintiff was entitled to recover interest on the damages sustained, under the express provisions of Rev. St. 1899, § 3705.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by S. L. Nelson against the Cal Hirsch & Sons' Iron & Rail Company. From a judgment in favor of plaintiff, defendant appeals. Modified.

A. L. Hirsch, for appellant. Hornsby & Harris, for respondent.

BLAND, P. J. On January 22, 1900, plaintiff wrote defendant from Wichita, Kan., as follows: "Dear Sir: We shall have for sale within thirty or forty days several carloads of 35 lb. T rails and 45 lb. girder rails. Both will be suitable for relaying. What can you offer f. o. b. cars here?" From the date of this letter up to and including February 9th a regular and frequent correspondence in respect to the rails mentioned in plaintiff's letter of January 22d was kept up. On February 9th, in answer to a direct inquiry for prices, plaintiff wired defendant as follows: "Scrap twelve fifty, girder fifteen, relayers twenty, gross ton, Wichita."

On the same date plaintiff wrote defendant as follows:

"Dear Sirs: Have wired you as follows: 'Scrap \$12.50, girder \$15, relayers \$20, gross ton, Wichita.' If accepted, we will, if you desire, commence loading as soon as our new material is on the ground, and we can commence the work of reconstruction."

On the same date defendant telegraphed plaintiff as follows:

"S. L. Nelson, Gen. Mgr. & Pur. Agt., Springfield, Ohio: Telegram received. We accept scrap, girder rails and thirty-five pound relaying tee rails your price."

This telegram was followed by a letter from defendant to plaintiff accepting the plaintiff's offer f. o. b. Wichita, with the request that plaintiff let defendant know when he would ship same, and indicating defendant's desire to give shipping directions before any of the material should be loaded, and also requesting that plaintiff give defendant an idea as to how many hundred tons of girder and 35-pound relaying rails there would be. Again, on February 12th, defendant wrote plaintiff, inquiring the number of tons of 35-pound relayers plaintiff would have to ship, and giving directions to ship by the Rock Island, and to consign mixed scrap to Cal Hirsch & Sons Iron & Rail Company, V. & C. Belt, East St. Louis, Ills., and saying: "It would favor us if you would ship the relaying T rails with splices at once—two to four carloads or more." A car load of scrap was shipped by plaintiff to defendant, which was received by it, and paid for. On February 16th, and also on the 20th, defendant wrote plaintiff to hurry up shipment of relayers, and again on the 22d wrote plaintiff: "We will thank you indeed to let us know when you are ready to ship the 35 lb. first class relaying T rails with fastenings, and how many carloads or tons there will be. Also let us know when you are going to ship the other material." On February 23d plaintiff wrote defendant as follows:

"Gentlemen: We are just in receipt of your favor of the 22nd. The beginning of our work is delayed on account of a few minor materials which have failed to arrive. We are advised, however, that on to-morrow or Monday shipment of all these things will be made. This ought to mean that with favorable weather our work should begin vigorously next week. If so it is barely possible that we can give you one car of relayers on March 15th or 20th. We doubt whether there will be more than one car available for some time. These relayers will not be as you state, 'first-class relaying rails,' and will not include the fastenings. We have found upon investigation that nearly one-half of the splices are broken and our new joints will require the use of one of the old bars so we do not believe that you can count upon receiving any at all. We doubt very much whether these relaying rails will be suitable for any other than logging tramways. We shall have in perhaps sixty days about one hundred tons of 35 lb. T iron rails. These of course you understand will be worth more as scrap than as relayers. What will you offer us for them? We will respect your instructions with regard to routing and will advise you a day or two in advance of any further shipments. When Mr. Cohn returns

will be glad to have him go with us and look at the relayers. He perhaps can report to you more satisfactorily than we can."

Defendant answered this letter as follows:

"Dear Sir: We have your letter of the 23rd, contents noted, for which accept our thanks, but Mr. Nelson as we purchased fifty tons or more of good, first-class relaying rails from you and we sold them, you therefore see our position, and as for the iron tee rails, you will find that they are not worth as much for scrap as for relayers, as old iron tee rails have declined very much; nevertheless, we would like to get the fifty (50) tons of good, first-class relaying rails according to purchase and would ask you to let us know when you will be able to ship them to us. We also wish to call your attention to the fact that you wrote in your original letters when you offered us this material that you did not know whether you would sell iron or steel relaying tee rails and we understood that we bought all of the 35 lb. relaying rails which you had, all in first-class relaying condition as the sale and purchased of you according to your letters and our letters as well as telegrams, and we thank you to let us hear from you. Doubtless you have some of the fastenings which will be all right for these rails. Of course, we do not expect more of these than you can scrape up for us, but will appreciate to get as many as possible of these fastenings that are first-class. Thanking you in advance for your kind attention and feeling assured that you desire to do the proper thing and awaiting your prompt answer fully, we are," etc.

To this letter plaintiff replied:

"Gentlemen: Your esteemed favor of the 26th just received. I am unable to find a copy of my original letter to you concerning scrap and relayers, and am under the impression that they are on my file in Springfield. There was absolutely no intention on our part to misrepresent what we had for sale. The information which we sent out was obtained from the old management of the property. In starting our track work a few days ago uncovering the rails, it developed that the base was badly rusted and decayed and a great many of them (rails) are considerably bent. It may be that these same conditions may not prevail in all parts of the town, but we will not know until we have made discovery in the same manner as in this instance. I wish you would send us an exact copy of our letter to you as the writer will not return to Ohio for ten days or two weeks. We think that you must have misunderstood us in reference to the iron rail as it has not been our intention at any time to replace that rail until practically all of our other work has been completed. We regret exceedingly that there has been any misunderstanding or that we have apparently offered something for sale which we cannot deliver. With reference to the fastenings we will advise you after we have taken up

a considerable portion of the track and find the exact condition they are in, but we are quite sure that we will not have any fastenings to ship for the reason there is perhaps a mile and a half of track without any joints at the present time."

On March 3d defendant wrote plaintiff as follows:

"Dear Sir: We have yours of the 28th ult. and we herewith enclose you a copy of your letter to us and we hope indeed that you will let us hear from you at once how many tons there will be of first-class relaying 35 lb. rails, iron or steel, on account of our having disposed of same, and of course we expect to get all you have got. Please let us know how many tons there will be of first-class relaying 35 lb. rails, iron and steel and about when you think you will be able to ship them all. Please answer at once."

On the 30th of March defendant directed plaintiff to ship all material by the Rock Island Railroad, and requested plaintiff to let it know when he would have relayers ready to ship. On April 2, 1900, plaintiff drew a draft on defendant for \$572, the proceeds of two cars of girder rails shipped on that date. On April 4th, defendant wrote plaintiff as follows:

"Dear Sir: We have yours of the 1st, contents carefully noted. Regarding the 35 lb. rail you have, in order to make this matter satisfactory, and as you intend to use some of these rails, and as you state, you will naturally retain the best, then the only just thing you can do is to put the tee rails in at the same price as the girder rails, and then will not demand the relaying rails you have sold us, and will stand the loss by supplying relaying rails from another source, which will entail a loss. Will you kindly answer, stating that this is satisfactory and that you will ship all the tee rails you have at the same price as the girder rails. Please answer at once as the market is very weak and as prices have gone down considerably and still going lower, so do not fail to answer at once and oblige," etc.

On April 6th plaintiff wrote the defendant declining its proposition to let it have T rails at the price of girder rails, and calling defendant's attention to plaintiff's letter of January 28th, in which it was asked to note that plaintiff had said in that letter, "and perhaps fifty tons of 35 lb. T rails," and said: "While we believed that they were fairly good relayers we had no knowledge that they were and did not so state. If you will inspect these rails they may perhaps be as good as you desire but we will not dispose of them except in accordance with our previous arrangement." In answer to this letter, defendant, on April 9th, wrote plaintiff, calling his attention to some previous correspondence, insisting that he should let them have the T rails on the agreed price of the girder rails, but said nothing about inspecting the rails before shipment. On April

20th defendant telegraphed plaintiff not to ship any material, as it was too crowded to receive it, and added: "When will you be ready to ship the 35 lb. T rails and how many tons will there be to ship to us?" To this telegram plaintiff replied as follows:

"Gentlemen: Your favor of the 20th asking us to not ship any more material at present, received. Too late, however, as several days ago we placed an order for cars and yesterday loaded them. Same have gone forward. We will not make further shipments until we hear from you. We expect next week to complete all of our track work in the pavements, replacing the girder rail and will immediately thereafter commence work on our 35 lb. T. As previously stated, however, we shall hesitate to make shipments of any of this T unless same has been inspected by you. It may be that the rail on other lines will make a better showing than those already taken up, in which case we will be very glad to ship them. I should say, however, that by May 1st or 20th would be as early as we can possibly ship them.

"Yours truly,

S. L. Nelson.

"We have one car rail at our power house (girders) which we would like to get out of the way. They are on Missouri Pacific track. Can you use them in week or ten days?"

Plaintiff, on the 24th, notified defendant that he had about three more car loads of girder rails he would like to ship. On the same day defendant wrote plaintiff as follows:

"Dear Sir: As we wrote you please do not ship up any more material as we cannot receive it, and if you have any cars on the track, kindly leave them set there and have them unloaded again as we have not possibly any room, nor can we receive same as written you; besides we desire to know about the 35 lb. relaying rails we purchased of you first, whether you intend to put these in at the same price as the girder if not being first-class relaying as we bought of you, by your own statement, and secondly, you not being able to furnish us what we purchased of you—35 lb. relaying tee rails.

"We asked you this question before and have had no definite response. Of course if you cannot comply with our contract originally made to furnish us 35 lb. relaying tee rails, as well as the other material the whole contract is cancelled, which doubtless you appreciate is expected and quite justifiable.

"We wired you through the R. I. agent to-day not to ship any more cars as we cannot receive them. Therefore, please do not do so and unless you can fill contract as originally bought—give us relaying tee rails as purchased, then cancel the contract entirely, which of course you understand is to be expected and quite the proper thing.

"Yours truly,

"Cal Hirsch & Sons Iron and Rail Co.

"I. O. Hirsch, V. P. & T.

"P. S. We have accordingly cancelled contract since you cannot fill it as per original contract."

On April 24th plaintiff shipped defendant five car loads of girder rails, which defendant refused to receive. In regard to this shipment plaintiff wrote defendant as follows:

Gentlemen: We wired you last night as follows: 'Bank advises you refuse payment our draft. Why? Answer quick.' We have this morning received your reply as follows: 'Our letter to you 20th also 24th explained exactly, also telegram 18th to R. I. agent at Wichita, not to ship.' As advised in our letter of the 22nd, the five cars were loaded before your request to not ship them was received. The agent of the R. I. says he received no instructions from you not to ship. These cars have gone forward in strict accordance with our contract and we insist on a strict and full compliance with same. Unless we hear from you by telegraph tomorrow morning, April 27th, stating that you have paid our draft for \$1297.76, we shall take the train for St. Louis with the intention of demanding from you a settlement. On failure to respond promptly and to carry out other terms and conditions of contract, we will at once enter suit against you for any and all damages and expenses in which we may be involved. It is not our practice to make a contract and then simply because the market declines to permit the contractor to cancel same at will. We are prepared to fully comply with the conditions of our contract and we shall insist that you do the same. Bear in mind that if the writer is obliged to go to St. Louis that it will be at your expense."

Defendant answered this letter, calling attention to its former instructions not to ship, and to plaintiff's inability to fill his contract to furnish T rails, and on the 26th again wrote as follows:

"Dear Sir: We have yours of the 24th enclosing five bills of lading, which we herewith return to you, as doubtless the cars have never left Wichita, and as we cannot receive same, as explained to you, in so much as you have violated your contract, by not giving us what you sold us in the way of relaying rails, which naturally cancelled our entire contract with you, as explained. Therefore, we could not give you shipping instructions for three more cars, but would like very much to have you notify us when you have anything to offer for sale, and we will pay you all it is worth, but hereafter, please be positive as regards what you sell us. I gave you an opportunity to rectify matters, which you declined and refused, that is to put in 35 lb. tee rails at the same price as the girders, and therefore our contract with you is off entirely, as explained. Kindly acknowledge receipt of these bills of lading and oblige," etc.

On the 27th plaintiff wrote defendant, notifying it that he would sell the stuff (the five

car loads) at the best price obtainable, and charge it up with the loss, if any; and on the 28th notified it that he had sold the five car loads of girder rails at \$12 per ton, and charged its account with the difference between what he had sold them for and the contract price (\$259.55), and calling upon it to pay the loss. Defendant notified plaintiff that it declined to pay this loss, or to receive any more material, for the reason, as charged by it, that plaintiff had been unable to furnish the 35-pound T rails sold by him to it.

Plaintiff testified that the market was down at the time defendant refused to receive the five car loads of girder rails, and that he sold the rails at \$12 per gross ton, being the best price he could get for them at the time, and that the loss was \$259.55; that for some time after this he hoped defendant would yet take the rails, and for this reason he did not make an immediate effort to put them on the market, but made inquiry to find out the market price of the material, and eventually sold it all at the best price obtainable; that prices had gone down very materially, and he gave in detail the sales he had made, the dates, the persons or corporations to whom sold, and the price of each sale; that the first sale was made on June 18th, the last on November 19, 1900, and that he obtained the very best prices that he could; that the sales were all made at private sale, and for the market value of the rails at the time. He further testified that a first-class relaying rail was worth on the market as much as a new one; that what was understood in the trade by "relayers" were rails used around mills, saw works, brickyards, and things of that kind, and need not be first-class; that he sold between 57 and 58 tons of relayers.

The defendant offered evidence tending to show that by relaying rails were meant rails that were safe for either steam or street railroads, and that plaintiff sold the material at less than its market value, but that the material was worth less on the market in April, May, June, and July than earlier in the season; that the market was on the decline from early in the spring of 1900 until some time in the fall.

The verdict and judgment were for plaintiff for \$1,450. Defendant's motion for new trial proving of no avail, it appealed.

1. Defendant contends that by plaintiff's own evidence it is shown that he was not the real party in interest, and that, this fact having been alleged in the answer, the trial court should have sustained defendant's instruction in the nature of a demurrer to the evidence. The evidence of plaintiff shows that two franchises were obtained in Wichita by purchase—one a street railroad, purchased by a Mr. Woodman; the other an electric light franchise, purchased by a Mr. McKinney—but that the conveyance of both franchises was to the plaintiff, and remained in his name until the parties in interest incor-

porated, which occurred in April, 1900; that after the incorporation he transferred the property to the corporation; that when the franchises were acquired Woodman, McKinney, himself, and several others were interested in their purchase, and the purchases were made with a view of incorporation, and with the intention that when incorporated he should transfer the property to the corporation; that the street railroad franchise acquired took in the street railways of Wichita; that they had to be reconstructed, and their reconstruction was placed in his charge, and was done under his supervision, in his individual name, both before and after the corporation was formed; that he received all the moneys which the old rails and materials brought, and paid all the bills in the reconstruction by his individual checks, except about \$40,000, paid out for new rails, which was paid by the corporation's eastern office. By section 541, Rev. St. 1899, a trustee of an express trust is authorized to sue in his own name. This section declares: "A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." According to plaintiff's evidence—and there is none in the record to contradict him—the contract was made with defendant for the benefit of himself and his associates in the purchase of the Wichita franchises. As to these (his associates) he was clearly the trustee of an express trust, as defined by section 541, *supra*, and authorized to prosecute this suit in his own name. *Snider v. Adams Express Co.*, 77 Mo. 523; *Sawyer v. Railway*, 156 Mo., loc. cit. 475, 57 S. W. 108; *Springfield, to Use, v. Weaver*, 137 Mo., loc. cit. 671, 37 S. W. 509, 39 S. W. 276; *Ellis v. Harrison*, 104 Mo. 277, 16 S. W. 198; *Chouteau v. Boughton*, 100 Mo., loc. cit. 411, 13 S. W. 877; *Gunnell v. Emerson*, 73 Mo. App. 291; *Harrigan v. Welch*, 49 Mo. App. 496.

2. Defendant insists that for the reason the exact number of gross tons was not mentioned in the correspondence between plaintiff and defendant there was no contract. The contract is definite and certain in respect to the material contracted for and the price to be paid for the two grades of rails. The quantity of each grade was estimated or guessed at. The rails were laid in the streets of Wichita, and plaintiff testified that the defendant knew as much about them as he did when the contract was made. The correspondence shows that defendant knew the rails had to be taken up before they could be shipped, and that it accepted the plaintiff's offer of an indefinite and somewhat uncertain number of tons of rails. The thing sold was agreed upon, to wit, all the girder and T rails to be taken up by plaintiff in the reconstruction of the street railroad in Wichita. This was a sufficient identification of the thing sold. Besides, the uncontradicted

evidence is that the defendant accepted and paid for the scrap iron brought into the contract by the correspondence, and it ought not be allowed to accept a portion of goods that proved profitable to it, and to refuse the remaining goods that were probably not profitable. It cannot accept the beneficial portion of the contract and repudiate the balance, though it would cause it a loss.

3. It is further contended by defendant that the time for delivery is so indefinite as to invalidate the contract, and that no time of delivery at all is mentioned in the contract. If nothing but plaintiff's telegram offering prices and defendant's acceptance is looked to for the terms of the contract, then there was no time whatever agreed upon for the delivery of the material. But the offer and acceptance must be interpreted by the preceding correspondence. Plaintiff had represented that he would be ready to deliver in car-load lots at Wichita in from 40 to 60 days. The defendant expressed its willingness to receive the rails in 30, 60, or 90 days, and the parties must be presumed to have had this correspondence in mind when the subsequent offer was made and accepted, and the contract, as to time of performance, be construed a contract to deliver in 30, 60, or 90 days.

4. The court submitted to the jury for them to find whether or not there was a contract made. Defendant contends that this was error. When a party relies upon a writing or a number of writings to establish a contract, it is unquestionably the province of the court to determine from the writing or writings whether or not a contract was entered into, and to instruct the jury not only as to its existence or nonexistence, but also, if it finds there was a contract, to instruct the jury what it is, and what the respective parties agreed to. But it is not reversible error to submit the question of the existence or nonexistence of a contract made up by a writing or number of writings, if the jury, as was done in this case, find what the court should have found for them, to wit, that there was a contract.

5. It is also contended by defendant that plaintiff's letters of March 28th and April 1st, stating that he would hesitate to ship any more rails unless defendant would inspect them, or have them inspected, amounted to a repudiation or cancellation of the contract. These letters were induced by a previous one of defendant, in which it claimed first-class T rails. The contract did not call for first-class relayers, and plaintiff promptly informed the defendant that he had no first-class relayers for sale, and, we think, was justified in hesitating to ship without inspection. His letters certainly nowhere indicate a purpose on his part to repudiate the contract. He did not demand an inspection as a right under the contract, but asked it as a favor for his own protection and for the satisfaction of the defendant.

6. Defendant insists that in no event has plaintiff any right to recover more than \$259.50, the loss on the five car loads of rails shipped April 24th, which defendant refused to receive or pay for. Defendant notified plaintiff by letter of April 24th that it canceled the contract. This letter was probably received on April 26th, and plaintiff testified that he still hoped the defendant would take the rails, and made no immediate effort to sell any of them, and made no sales until June 18th. The contention is that he delayed for an unreasonable time to resell the rails, and that he resold without notice to defendant. The evidence of plaintiff shows that as soon as he became convinced that defendant would not take any more of the material, he at once made inquiry in regard to its market value; that the price was unsatisfactory, and for this reason he made no sales until June 18th, when the price had become somewhat better. He further testified that he did not want to sacrifice the material, but endeavored to protect both himself and defendant, and held off the sales for this purpose, and when he did sell he obtained the full market value of the material. It is the law that upon a breach of a contract of sale by the vendee the vendor may at once, or within a reasonable time, resell the property, and recover the difference between the contract price and the net amount realized upon the resale, provided he give notice of the resale to the vendee. *Rickey v. Tenbroeck*, 63 Mo., loc. cit. 567, and cases cited; *Logan v. Carroll*, 72 Mo. App. 613. But if the vendor does not give notice to the vendee of the resale, the latter is not precluded thereby, and the measure of the vendor's damages will be the difference between the price agreed upon and the market value of the goods at the time and place agreed upon for their delivery, although they may have brought less than their market value at the resale. *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; 2 *Mechem on Sales*, § 168; 2 *Sedgwick on Damages* (8th Ed.) § 555. We think the evidence tends to show that under the circumstances plaintiff did resell within a reasonable time, and that he obtained the market value of the material when he did resell, and realized more than he would have realized had he made the sale immediately after defendant repudiated the contract.

7. Defendant contends that plaintiff did not offer to deliver all the rails within the contract period. The evidence tends to prove that such was the case, but it is also in evidence that the delay was occasioned, in part at least, by the letter of defendant not to ship, by its demand for a quality of relayers not stipulated for in the contract, and its disinclination or refusal to inspect the rails, as requested by plaintiff, before shipment should be made; and we conclude that the plaintiff is not estopped by his failure to deliver the material within the contract pe-

riod to recover damages for the loss he has sustained by reason of the breach of the contract on the part of defendant.

8. It is finally contended that the verdict is excessive. The trial court, by its instructions to the jury, properly limited the damages to the loss on 200 tons of girder rails and 55.48 tons of 35-pound relaying T rails. The plaintiff's evidence shows that the losses sustained by him are as follows:

On 5 cars of girder rails shipped to St. Louis	\$ 259 50
On the sale of 5 tons of T rails.....	16 00
On the sale of 21.85 tons of T rails.....	222 95
On the sale of 110 tons of mixed rails.....	440 00
On the sale of 20 tons of girder rails.....	160 00

Making a total loss of..... \$1,098 45

That he gained over the contract price \$19.20 on a sale of 8 tons of T rails, and \$25.80 on a sale of 10½ tons of T rails, making a gain of \$45 over and above the contract price on the sale of 18½ tons of T rails, leaving a net loss of \$1,053.45. To this amount the court instructed that interest at 6 per cent. for one year 9 months and 8 days should be added. With this interest to the principal, the recovery should have been for \$1,164.05. It is contended by appellant that this was error. There was no fixed sum agreed upon to be paid. This amount had to be ascertained by the number of tons of relaying and girder rails the plaintiff would have for delivery after taking them up. The market price of the rails had declined at the time defendant breached the contract, and it was reasonably certain that the breach would occasion damage to plaintiff; but the amount of the damage was uncertain, not agreed upon, but the elements by which to ascertain the damages were not wholly at large, as in actions *ex delicto*. However, the defendant had no means of ascertaining, nor could it be ascertained, what the damages would be until the number of tons of each grade of rails had been ascertained. After this was done, no notice of the fact was given to the defendant, nor was any demand made upon it for payment of the difference between the contract price and the market value at the time of the breach, and the court properly restricted the computation of interest to the commencement of the suit. But it is contended by the appellant that no interest at all should have been allowed, and cites the case of *Wiggins Ferry Co. v. Railway*, 128 Mo. 224, 27 S. W. 568, 30 S. W. 430, as supporting this contention. The action in that case, as in this, was for breach of contract; but the damages were for loss of profits the plaintiff would have made in its ferry business had the defendant lived up to its contract. The damages sustained in the case in hand are the difference between the contract price of goods sold and the market value of the same goods at the time defendant refused to receive them under its contract. These damages accrued under a written contract, and the plaintiff was entitled to interest thereon under the express provisions of section 3705, Rev.

St. 1899. But in the present case the damages assessed by the jury are \$285.95 in excess of the amount of loss, with interest, as shown by plaintiff's evidence.

It is therefore considered by the court that unless the plaintiff, within 10 days from the date of the filing of this opinion, remit \$285.95 from his judgment, the same will be reversed, and the cause remanded for new trial; but, if the remittitur be entered within the time herein allowed, the judgment for \$1,164.05 will stand affirmed.

REYBURN and GOODE, JJ., concur.

SANDERFUR-JULIAN CO. v. STATE.

(Supreme Court of Arkansas. Nov. 28, 1903.)

INTOXICATING LIQUORS—UNLAWFUL SALE—STATUTES—CONSTRUCTION—INSTRUCTIONS.

1. In a criminal prosecution against a corporation, the report of the Secretary of State for a particular year was hearsay, and inadmissible to prove that the defendant was a corporation.

2. Under Acts 1901, p. 125, prohibiting any person or corporation from soliciting orders for the sale of intoxicating liquors in any place in the state where the sale of such liquors is forbidden by law, an instruction, in a prosecution thereunder, that the defendant was guilty if its agent "took or accepted orders" in the forbidden territory, and the refusal of a request that, in order to convict, the jury must be convinced that defendant's agent "solicited orders" for the sale of such liquors, was error.

Appeal from Circuit Court, Pike County; William S. Curran, Special Judge.

The Sanderfur-Julian Company was convicted of soliciting orders for intoxicating liquors in a place where the sale of such liquors is forbidden by law, and it appeals. Reversed.

Jas. H. Harrod, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

RIDDICK, J. This is an appeal from a judgment in a case where the defendant was convicted for violating the statute of 1901 (Acts 1901, p. 125) making it unlawful for any person or corporation to solicit orders, either by agent or otherwise, for the sale of intoxicating liquors in any place in the state where the sale of such liquor is forbidden by law. The sale of such liquors is forbidden by the statute of 1895 (Acts 1895, p. 177) within 10 miles of Saline Camp Ground, in Pike county. The indictment alleged that the defendant, a corporation, did unlawfully solicit and procure orders for the sale of such liquors within such forbidden district. On the trial the court permitted the prosecuting attorney to read to the jury, as evidence to show that the defendant was a corporation, the report of the Secretary of the State for the year 1895. This was hearsay evidence, and incompetent. After the evidence was in, the court instructed the jury that the jury should convict if the evidence showed that the defendant, by its agent, took or ac-

cepted orders in the forbidden territory, and refused the request of the defendant to the effect that, in order to convict, the jury must be convinced that the defendant, by its agent, solicited orders for the sale of such liquors. The Attorney General has confessed error in these instructions, and we think that the confession is right, and must be sustained.

We can concur in the law as stated by the circuit court that it is not necessary to show under this statute that the agent actually requested parties to purchase whisky in the district. If the defendant sent its agent into the district for the purpose of procuring orders for the sales of whisky to persons in the district, and if the agent went there for that purpose, taking with him samples of the liquors which he desired to sell, and by that means procured orders for sales in the district, this would be sufficient evidence to justify a jury in finding that he solicited orders for the sale of such liquors. The "taking" of an order may be evidence that the order was "solicited," but the words "taking" and "soliciting" do not mean the same thing, and are not convertible terms. So, whether the defendant did in truth solicit orders is a question of fact, which should have been submitted to the jury. The court refused to submit that question to the jury, but told them that it was sufficient if they found that the agent took orders; but the statute does not forbid the mere taking of an order for the sale of liquor in such district. It forbids the "soliciting," not "the taking," of an order. We have no doubt that the statute would be a much more effective law if it meant what the circuit court held it to mean. But we must take the law as we find it, and the language of it is too plain, as we think, to support the view of it adopted by the circuit court.

For the error indicated, the judgment is reversed, and a new trial ordered.

ST. LOUIS, I. M. & S. RY. CO. v. COLUM (two cases).

(Supreme Court of Arkansas. Nov. 28, 1903.)
RAILROADS—NEGLIGENCE—CHILDREN—APPRECIATION OF DANGER—PARENTS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. Evidence in an action for personal injuries to a child eight years old, in which the evidence showed that he stepped upon defendant's railroad track in front of a car, held to justify a finding that the child was not sui juris, and hence not capable of being guilty of contributory negligence.

2. A father leaving a boy eight years old, and incapable of appreciating the danger, unattended at a railway station, where he is injured by a moving train, is guilty of contributory negligence, barring his right to recover for loss of services occasioned by the injury to the boy.

Appeal from Circuit Court, Conway County; Geo. M. Chapline, Judge.

Separate actions by Robert Colum and William Colum, by next friend, against the St.

Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff in each action, defendant appeals. Judgment in the action of Robert Colum reversed, and final judgment rendered against him, and judgment in the other action affirmed.

Dodge & Johnson, for appellant. C. C. Reid and J. H. Carmichael, for appellees.

BATTLE, J. Robert Colum brought two actions against the St. Louis, Iron Mountain & Southern Railway Company—one for himself, and the other, as next friend, for William Colum, a minor, who is his son. Both actions were based upon injuries that were caused by a car of the defendant running against and over William Colum. One was on account of the loss of services of the son, during minority, sustained by the father; and the other was for damages to William Colum that were caused by the injuries. By consent of parties, these actions were consolidated, and determined upon the same testimony.

Plaintiffs in both actions alleged in their complaints that William Colum was on the 22d day of December, 1898, about eight years old, and the son of the plaintiff, Robert Colum; that on that day the defendant negligently, without warning or notice, pushed its car against and upon William, and thereby injured him to such an extent and in such manner as to cause the amputation of his left arm and permanently cripple him. The defendant answered both complaints, and denied every allegation of negligence, and alleged that the father and son were guilty of contributory negligence. In the trial of the issues joined, the jury impaneled for that purpose returned a verdict in favor of the father for \$1,000, and in favor of the son for \$2,500, for which judgments were rendered, and the defendant appealed.

The following are substantially the facts in the case: On the 22d day of December, 1898, Robert Colum drove to the defendant's railroad station at Menifee, in this state, and carried with him his son William, who was at that time about eight years old. While there, a train of defendant arrived, and its locomotive was used in switching cars from one track to another. The father drove away, leaving the son at the station. In a short time thereafter the engine shoved a car against and upon the boy, and seriously injured him. As to the facts connected with the injury, the evidence is conflicting and obscure. A part of it tended to prove that appellant negligently pushed the car against the boy. But the cause of the injury cannot be explained upon any reasonable theory, except that the fault of the boy concurred with that of the appellant in producing the injury; that is to say, the injury would not have happened without his concurring and co-operating fault. One witness testified that he was attempting to crawl under the car when he was injured. The testimony of his own witnesses, if true, proved that he

stepped upon the railroad track in front of one end of the car while the engine was near and approaching the other end, and was too near to allow him time to go across the track, a distance of six feet, or farther than three feet, and there is no evidence to show that the defendant discovered him in time to avoid the injury. But the conduct and tender years of the boy were sufficient to, and, it seems, did, convince the jury that he was incapable of apprehending the danger to which he was exposed, and of exercising the prudence or foresight necessary to protect himself against the same, and could not legally be guilty of contributory negligence. That being true, the father was guilty of contributory negligence in allowing him to remain at a station, where he was exposed to danger, unattended by any one responsible for his care and protection. *St. Louis, Iron Mountain & Southern Railway Co. v. Dawson*, 68 Ark. 1, 56 S. W. 46.

The two verdicts, according to the facts in this case, are in irreconcilable conflict. The judgment in favor of the father should be set aside, and final judgment upon the merits should be rendered by this court against him in favor of the defendant, and the other judgment should be affirmed; and it is so ordered.

WILLIAMS v. STATE.

(Supreme Court of Arkansas. Nov. 28, 1908.)
INTOXICATING LIQUORS—ILLEGAL SALE—
BEER.

1. Where, in a prosecution for the illegal sale of intoxicating liquors, the state's witness testified that defendant sold him beer, and that he did not drink it, because he and another person entered into an agreement after the beer was purchased that "they would not drink any more," it sufficiently appeared that the beer referred to was an intoxicating liquor.

Appeal from Circuit Court, Woodruff County; Hance N. Hutton, Judge.

Anderson Williams was convicted of illegally selling liquor, and appeals. **Affirmed.**

E. M. Carl-Lee, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

RIDDICK, J. This is an appeal from a judgment convicting defendant of selling intoxicating liquors, and assessing a fine against him therefor. The witness for the state testified that the defendant sold him six bottles of beer, for which witness paid him 75 cents, and the contention is made that this evidence is not sufficient to show that the beer sold was an intoxicating drink. But the primary meaning of the word "beer" is a malt and fermented liquor containing more or less alcohol. See Webster's Dict.; Century Dict.; 3 Am. & Eng. Ency. Law (2d Ed.); Black on Intoxicating Liquors, § 17. Courts generally take judicial notice of the fact that this species of beer is intoxicating, and the sale of it without license is prohibited by our statute. *Waller v. State*, 38 Ark. 656; *Briffit v. State*, 58 Wis. 39, 16 N. W. 39, 46 Am.

Rep. 621; State v. Rush, 13 R. I. 198; Myers v. State, 93 Ind. 251.

There is a secondary sense in which the word "beer" is used to describe certain non-alcoholic beverages, as root or persimmon beer, but when so used it is generally preceded by a word descriptive of the kind of beer referred to as persimmon beer, root beer, and the like. When the word "beer" is used alone, without the descriptive word, it is generally, almost universally, taken as referring to the malt liquor sold under that name, and there are many decisions unholding convictions on such testimony. Black on Intoxicating Liquors, § 17, and cases cited. Now, in this case the witness said that he purchased six bottles of beer. He further stated that he did not drink this beer. As a reason why he did not do so, he stated that he and another person, after the beer had been purchased, entered into an agreement that they would "not drink any more," and so he gave this beer away. And here, again, the witness was not asked to state what class of liquids he had agreed to stop drinking. But as it is not supposable that he had agreed to quit the use of all kinds of liquids, we know that he referred to intoxicating drinks, the use of which to any great extent is generally regarded as harmful. The fact that he could not use this beer without violating his promise not to drink any more indicates very clearly that in the opinion of the witness the "beer" referred to by him was the malt and alcoholic liquor sold under that name. This was the only witness introduced, and as he was not asked to define the kind of beer referred to more specifically, we think that it is evident that all parties understood that he used the word "beer" according to its universally understood meaning, and was speaking of the alcoholic and malt kinds. We therefore think that the evidence justified the conviction.

Judgment affirmed.

WHITMORE v. STATE.

(Supreme Court of Arkansas. Nov. 28, 1903.)

INTOXICATING LIQUORS—WHAT CONSTITUTES SALE—INSTRUCTIONS.

1. To purchase whisky, without a license, for others at their request and with their money, is not a violation of the liquor license laws.

2. Where one pretends to purchase liquor for another, his guilt as to making a sale instead of a purchase depends on his own good faith, not that of the person ordering.

3. That one who purchases whisky for another pays for it before he receives pay does not render it a sale in violation of the liquor law.

4. A defendant's request to instruct that he cannot be convicted for ordering whisky unless he solicited and got others to make orders through him will not prevent him from taking advantage of the error in an instruction that where one employs another to order whisky for him, and pays the price in advance, it is lawful,

provided the party ordering acts in good faith, the instructions not being substantially the same.

5. That one solicits another to permit him to order whisky for him, though it is competent evidence of a sale, does not constitute a sale, it being lawful for him to solicit others to join with him in giving an order.

Error to Circuit Court, Howard County; Wm. C. Rodgers, Special Judge.

Bill Whitmore was convicted of selling intoxicating liquor without a license, and brings error. Reversed.

Bill Whitmore, the defendant, was indicted for selling intoxicating liquors without license. On the trial there was evidence tending to prove that he sold whisky without license. On the other hand there was evidence which tended to show that he did not sell whisky or intoxicating liquor, but that he only made out orders for whisky to St. Louis parties dealing in whisky for such of his neighbors as requested him to do so as a favor to them, he having no interest in the sale, and only acting as agent for the party wishing to purchase.

The court gave, among other instructions, the two following, at the request of the prosecuting attorney, to the giving of which the defendant objected and excepted in due time:

"No. 2. The court instructs the jury in this case that if they believe from the evidence, beyond a reasonable doubt, that the defendant in Howard county, Ark., within twelve months before the filing of this indictment, procured the sale of ardent, vinous, malt, fermented, or intoxicating liquors for others by taking orders therefor, and that he took orders for different parties together or severally, and then purchased the liquors for them with money given by them for this purpose to the defendant, and distributed it among them according to their orders, he (the defendant) would then be guilty of an unlawful sale of liquors to said parties, and you should convict the defendant.

"No. 3. A party has a right to order whisky through an agent, and the agent could do anything in the way of getting the liquor that the person employing him could; and where one employs another to order whisky for him, and pays the price and all the expenses incident to the purchase and delivery of the whisky before the order and delivery are made, it is lawful, provided the transaction is made in good faith on the part of the party ordering."

For the defendant the court gave at his request the two following instructions:

"No. 4. The court tells the jury that they have no right to disregard the testimony of the defendant on the ground alone that he is the defendant, and stands charged with the commission of the crime. The law presumes the defendant to be innocent until he is proved guilty, and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony, together with all the other evidence in the

¶ 1. See Intoxicating Liquors, vol. 29, Cent. Dig. § 180.

case, taking into consideration the interest he may have in the result of your verdict.

"No. 5. The court instructs the jury that you cannot convict the defendant for ordering whisky from one authorized by law to sell liquor unless you further find from the evidence that the defendant solicited and got others to make orders through him, either directly or indirectly."

There was a verdict of guilty, and judgment accordingly, from which the defendant appealed.

Feazel & Bishop, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

RIDDICK, J. (after stating the facts). In this case the Attorney General has confessed that there was error in the instructions given by the court, and, after considering the same, we concur in that opinion, and sustain the confession of error. The second instruction given by the court of his own motion would justify the conviction of the defendant if he did nothing more than purchase whisky for others at their request and with their money. But there is nothing in our statute that makes it unlawful for one to purchase whisky for another without license. The license is required of those who sell, not of those who buy, and one may purchase either for himself or another all the whisky in the state, and under our statute he commits no crime by making the purchase. The presiding judge was no doubt fully conscious of this, and he undertook to cover that phase of the law by his third instruction. But this instruction, though correct in the main part, is in certain respects somewhat too stringent. It correctly states the law that it is lawful for one to buy or order whisky for another, but it seems to make the lawfulness of the transaction, so far as the agent is concerned, depend upon the good faith of the party ordering the whisky, whereas, if one pretends to purchase whisky for another, his guilt or innocence, so far as the crime of making a sale instead of a purchase, depends upon his own good faith in doing only that which he pretends to do, for the law rarely, if ever, makes the guilt of one party depend upon the intention or the good faith of another.

There is another respect in which this instruction seems to be misleading, though it probably did no harm under the facts of this case. The language used seems to carry the idea that, to make the purchase of whisky for another unlawful, the purchase money and other expenses of the purchase must be paid in advance. But a purchase of whisky is like the purchase of any other commodity, and, as one may advance money and purchase wheat or corn for another without making the transaction a sale of wheat or corn by him to the other, so in like manner he may purchase whisky. If one, seeing his neighbor on his way to town, requests him to purchase for him a bottle of whisky, promising to return

the purchase money when he sees him, and the neighbor does so, and leaves the bottle at the house of the one for whom he purchased, this does not render the party purchasing the whisky guilty of making a sale of whisky. Nor, if he acted in good faith about the matter himself, would he be guilty, although the money was never returned, even though it should turn out that the buyer acted in bad faith and never intended to repay it, for the transaction would be nothing more than the loan by the neighbor of the price of the whisky to the party for whom he purchased.

There would, no doubt, be considerable profit in the retailing of whisky and other intoxicating beverages if the business could be safely carried on without the payment of a license. To evade the law and accomplish this purpose, subterfuges of various kinds are at times resorted to by those who have no scruples about violating the law. But crimes of this kind may be established by circumstantial evidence, as other facts may be thus proved; and, whenever the illegal sale is shown to have been made, the law inflicts the penalty without regard to what the parties may have agreed to call the transaction. The evidence in this case makes it seem probable that the defendant, under the pretense of ordering whisky for others, may have been engaged in the business of buying and selling whisky to others as a source of profit to himself. But whether a sale is made is generally a question of fact which should be fairly submitted to the jury for their decision, and we think that the instructions do not do that in this case.

We have not overlooked the fact that the defendant himself asked for an instruction somewhat on the same lines as those given by the court of which he complains. If the instructions were substantially the same, we should affirm the judgment, notwithstanding the error in instructions, on the ground that the defendant has no right to complain of a statement of the law which he indorsed and induced the court to give, for, if error was thus committed, it was one which he himself invited.

But the instruction asked by the defendant, though not a correct statement of the law, is not the same as those given by the court of which he complains. The defendant's instruction No. 5, set out in the statement of facts, tells the jury not to convict unless the defendant "solicited and got others to make orders through him, directly or indirectly," while the instruction given by the court of which he complains, which is also set out in full in the statement of facts, tells the jury that if the defendant procured the sale of intoxicating liquors for others by taking orders therefor, and by purchasing the liquor and distributing it among them according to their orders, he would be guilty of making an unlawful sale of liquors to those parties. Now, while these instructions are not the

same, so that we cannot say that by asking for one of them the defendant invited the court to give the other, yet the defect in each of them arises from a similar cause, and that is that in each of them there is an attempt to make an act which may or may not be evidence of a sale as equivalent to the sale itself. The fact that one takes orders from others for the purchase of whisky, and afterwards delivers the whisky, may be evidence of a sale, but it does not in all cases constitute or prove a sale, and the question as to whether such evidence amounts to a sale is generally a question for the jury. The fact that one solicits another to permit him to purchase or order whisky for him may tend to show that the one who solicits intends to make a profit out of the transaction, and that he really intends to make a sale of the whisky to the party for whom he pretends to order. But though it may be evidence of a sale, it is not the same thing as a sale, and the party who solicits may be entirely innocent of making a sale. If one wishing to purchase a half gallon of whisky comes to the conclusion that he can procure it on better terms by getting his neighbor to join with him in the purchase of a gallon, each taking a half gallon, he has, under our statute, the right to do so, and it is therefore incorrect to say that if one solicits another to allow him to purchase whisky for him, and the other permits him to do so, the one soliciting is guilty of selling whisky.

There is nothing in the decision in *Hunter v. State*, 60 Ark. 312, 30 S. W. 42, that supports the instructions given as requested by the defendant or given by the court. In that case the facts were peculiar, and a majority of the judges were of the opinion that the defendant was guilty because they found that he aided and assisted a distiller in violating the law which forbade him to sell in quantities less than five gallons. But it is not claimed in this case that the party in St. Louis had no right to ship this whisky to the parties ordering in any quantities that they might order. nor is there any evidence to show that the defendant was acting as agent of the seller, so we think the reasoning of that case does not apply here.

Though there is evidence sufficient to sustain the conviction had the case been properly submitted, we are of the opinion that there was prejudicial error in the instructions. The judgment is therefore reversed, and a new trial ordered.

PLUNKETT v. MEREDITH.

(Supreme Court of Arkansas. Nov. 28, 1903.)

WATERS AND WATER COURSES—CONTRACT FOR DIGGING WELL—ACTIONS ON—STATUTE OF FRAUDS—INTEREST IN LAND—EASEMENTS—BREACH OF CONTRACT—MEASURE OF DAMAGES.

1. An agreement to dig a well on another's lot is not a contract for an interest in land, is

not within the statute of frauds, and need not be in writing.

2. A contract by a lot owner to dig deeper, and until it affords a sufficient supply of water, a well on the dividing line between his lot and the one adjoining, half of the well being on each lot, and to allow the owner of such adjoining lot to use the same, is a contract for an interest in land, which is an easement, and cannot be enforced unless in writing.

3. Where the owner of two adjoining lots contracts with the vendee of one of them, as part of the consideration for the purchase thereof, to deepen a well on the line between the lots until it affords a sufficient supply of water for the use of such vendee, and fails to do so, the measure of damages is the cost of making it of such depth.

4. If such vendor prevents the vendee from so deepening the well, the measure of damages is the cost of making a new well of such depth on the vendee's own premises.

5. If he contracted to dig a well for the use of the vendee, and failed to do so, the measure of damages would be the cost of digging such well.

Appeal from Circuit Court, Pulaski County; Joseph W. Martin, Judge.

Action by C. A. Meredith against R. D. Plunkett. Judgment for plaintiff, and defendant appeals. Reversed.

W. S. & F. L. McCain, for appellant.

BATTLE, J. Mrs. C. A. Meredith bought a house and lot in Little Rock from appellant, Plunkett. Three years afterwards she brought this action, alleging that when she bought the house and lot a well was in progress of being dug on the dividing line between said lot and the adjoining lot, both of which defendant Plunkett owned, and that to induce her to purchase he agreed that he would sink the well deeper and secure for her a good and sufficient well of water for her business, which was that of washing for the public; but that he had neglected to sink the well and secure the water as agreed, to her damage \$300.

The defendant, R. D. Plunkett, answered, and denied making any agreement about the well, and pleaded the statute of frauds.

Mrs. Meredith testified "that, when she went to look at the place to buy it, she told Plunkett she was a washerwoman, and wanted a good well of water; that Plunkett owned not only the house and lot she bought, but also the adjoining lot, on which latter was a house, and that there was a well right on the line, which was a partition well used by the people from both houses; that it was a shallow well, only 12 or 14 feet deep; that she was afraid it would not furnish water enough, and that he told her that if she would buy the place he would guaranty that it would furnish water enough for her use, and that if it did not do so he would dig it deeper until it would do so." Defendant objected to this testimony because it was not in writing, and, his objections being overruled, they were saved by proper exceptions.

¶ 5. See *Damages*, vol. 15, Cent. Dig. §§ 232, 294.

She further testified: "I told Mr. Plunkett that I would not buy the place under any circumstances unless he would guaranty me a good well of water, and he said he would do it. I told him that I had made my living and supported my family for 20 years by washing for the public, and water was the main thing for me."

She testified: "That she had bought the land, got Plunkett's deed, and paid him his price—\$425 in cash; had given him notes for the remaining \$75; that in the summer time the well gave out entirely, and that she had to obtain water from a neighbor's well and from a branch." Being asked how much it was worth by the week or month to carry the water she needed from the branch and from the neighbor's well, the defendant objected, but his objections were overruled, and she answered, "\$5 or \$6 per month." Appellee's son corroborated his mother's testimony about their having to carry water from the branch and from a neighbor's well, and, being asked what this was worth, defendant objected, but his objections were overruled, and he then answered, "at least \$4 or \$5 per month." Appellant's daughter, against defendant's objection, was also allowed to answer the same question asked her brother. Defendant saved exceptions to all the foregoing rulings, and made them grounds for a new trial.

Defendant, testifying in his own behalf, said that the land was sold to plaintiff by his agent, and that he had never seen appellant in his life until some while after the sale, and denied making any agreement about the well. He said that when the partition well went dry he proposed to her that they join in digging it deeper, and each share half the expense; that she agreed to this, and he then had the well dug 10 feet deeper, but she declined to pay any of the expense, and he then dug a new well on his lot 10 or 12 feet distant from the partition well, and that the new well cost \$75. The partition well was five feet in diameter, half on each lot.

Boone testified "that there was no trouble to get water on the lot; that he had bored the new well for plaintiff, and went down about 40 feet and got a good supply of water, but that he had got a good supply of water on another adjoining lot at 23 feet; that a dug well did not need to be so deep as a bored well, and that it was worth \$1 to \$1.50 a foot to dig a well."

The defendant requested the court to instruct the jury as follows:

"(3) A contract for the use of a well which is on the division line between two landowners must be in writing.

"(4) If defendant made a contract with plaintiff to deepen a well so as to obtain a sufficient supply of water for her use, this contract cannot be enforced if the well was half on plaintiff's land and half on defendant's land, and if the plaintiff's right to use

the whole of the well was part and parcel of the contract.

"(5) Where a person makes a contract to dig or deepen a well, and he neglects to do so, the greatest amount of damages which could be recovered against him would be the reasonable and necessary cost of digging the well. Therefore, even if defendant agreed to deepen the well so as to obtain a sufficient supply of water for plaintiff's use, and if he neglected to do so, plaintiff can recover no more than it would have cost her to have had the work done by some one else."

And the court refused to give either of them, but modified and gave the fifth, with these words added: "Unless you find from the circumstances that plaintiff was justified in resorting to other means to get a supply of water."

The court, on its own motion, and over the objections of the defendant, instructed the jury as follows: "If the jury believe from the evidence that the plaintiff had a contract with the defendant to deepen the well on the partition line between them so as to furnish her a sufficient supply of water for her use, and the defendant neglected or refused to do this, then defendant became liable to plaintiff for whatever amount of damages the evidence shows she suffered by reason of this breach of the contract on the part of the defendant."

The jury returned a verdict in favor of the plaintiff for \$65, and the court rendered judgment accordingly, and the defendant appealed.

An agreement of appellant with appellee to dig a well on her lot is not a contract for an interest in land, is not within the statute of frauds, and need not be in writing. But a contract to dig a certain well, on the dividing line between the lots of appellant and appellee, one half of which is on the lot of appellant and the other half is on the lot of appellee, deeper and until it affords a sufficient supply of water, and to allow appellee to use the same, is a contract for an interest in land, which is an easement, and should be in writing; and it cannot be enforced against the party pleading the statute of frauds in bar of the right to maintain an action thereon, unless it be in writing. Such a contract, if enforced, would necessarily give to appellee the right to use the land of appellant for a well. *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; *Rudisill v. Cross*, 54 Ark. 519, 16 S. W. 575, 28 Am. St. Rep. 57; *Walker v. Shackelford*, 49 Ark. 503, 5 S. W. 887, 4 Am. St. Rep. 61.

It follows that the trial court erred in refusing to instruct the jury in accordance with this opinion.

It also erred in instructing the jury as to the measure of damages. If appellant contracted with appellee to deepen the well on the line between their lots until it afforded a supply of water sufficient for her use, and failed to do so, the damages recoverable

would be the cost of making it of such depth; or, if he prevented her doing so, the measure of damages would be the cost of making a new well of such depth on her own premises. If he contracted to dig a well for her use, and failed to do so, the cost of digging such well would be the damages recoverable. *Varner v. Rice*, 39 Ark. 344.

Reversed, and remanded for a new trial.

BONNER et al. v. GORMAN.

(Supreme Court of Arkansas. Oct. 10, 1903.)
JUDGMENT—COLLATERAL ATTACK—PROBATE COURT—APPEAL—ORDER GRANTING APPEAL—DISMISSAL.

1. Where, on appeal to the circuit court from a judgment of the probate court, it appeared that no order granting the appeal had been entered in the probate court, it was properly dismissed, notwithstanding that there had been a prayer for appeal.

2. A judgment of a probate court on a balance struck against an administrator cannot, in an action in the circuit court against the administrator's sureties, be collaterally attacked on the ground of fraud on the part of the probate court.

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

Action by H. P. Gorman against E. Bonner and others. From a judgment against defendants, they appeal. Affirmed.

Jas. P. Clarke and J. R. Beasley, for appellants. Jno. Gatlin, for appellee.

BUNN, C. J. This is a suit against the appellants, as sureties on the bond of L. P. Featherstone, original administrator of the estate of Mary N. Cole, deceased, by H. P. Gorman, administrator in succession. L. P. Featherstone having become a nonresident, his letters as administrator were revoked by the probate court of St. Francis county, and a settlement of his account was afterwards made by said probate court, and a balance struck against him, in the sum of \$991.28, and judgment rendered accordingly on the 20th January, 1900, reciting the appearance of Featherstone and these sureties. Answer and exception to this judgment was filed on the 17th February, 1900, and demurrer thereto filed on 12th March, 1900, but no action was taken on the demurrer. Both answer and demurrer are left out of transcript, under rule 15 of this court, as stated by the clerk making the same. An appeal from this judgment of the probate court appears to have been taken on the 12th February, 1900, by filing affidavit and supersedeas bond (the latter being unnecessary); and this appeal was dismissed in the circuit court at its March term, 1901, on the ground that the appellate court had no jurisdiction of the subject-matter of the appeal, because no order granting the appeal appears to have been entered in the probate court. In the meantime

the administrator in succession, H. P. Gorman, had brought this suit against the appellant sureties in the circuit court to recover said amount adjudged against L. P. Featherstone as such original administrator by the probate court as aforesaid. The defendants filed their answer, setting up mainly that in adjusting Featherstone's accounts the probate court had charged him with \$1,000, the proceeds of the decedent's homestead, which they say was not used by him as assets in his hands, but was sold by the heirs of the intestate, and the proceeds paid to them direct by the purchasers, and that said administrator did not sell the same, nor procure any order from the probate court to sell the same, nor did he ever receive any of the proceeds of the same, and was therefore not accountable for said proceeds. A demurrer was interposed to this answer, and the same was sustained, and, defendants failing to plead over, judgment was rendered against them as aforesaid.

The said answer to the complaint on the bond was a collateral attack in the circuit court upon the judgment of the probate court, from which the appeal to the circuit court had been taken, or attempted to be taken, and there denied as aforesaid. If the judgment of the probate court was wrong, it was a mere error, and should have been corrected on appeal of other proper direct proceeding, and in fact the order of appeal had been made and entered in the probate court, that was a perfect defense that could have been made against the order dismissing the appeal in the circuit court. If no order had been entered by the probate court, granting the appeal, notwithstanding a proper affidavit had been made and filed therein, there was a way, perhaps, to compel the probate court to do its duty in the premises, and thus the order of dismissal prevented. *Beebe v. Lockert*, 6 Ark. 422. As the record stands, there was no appeal taken, for a mere prayer for appeal does not avail, without the necessary order of the court, and the imperfect appeal to the circuit court was properly dismissed. *Neale v. Peay, Receiver*, 21 Ark. 93.

The effort to correct the alleged error in allowing the debt of \$1,000 against the defendant by allegation of fraud on the part of the probate court is not allowable, because the judgment of that court will be presumed to be correct, unless correct for error on appeal or other direct proceeding. The settlement of an administrator after confirmation may be surcharged and falsified in chancery, but this rule does not apply to the correction of alleged errors on the part of the probate court, for all such errors, however gross, will be held and presumed to be mere errors of judgment to be corrected as aforesaid. It would unsettle the uniform rules of practice to reverse the judgment on the grounds presented in this case, and the same must be affirmed.

¶ 2. See Judgment, vol. 30, Cent. Dig. §§ 910, 951.

**WESTERN UNION TELEGRAPH CO. v.
UVALDE NAT. BANK.**

(Supreme Court of Texas. Dec. 21, 1903.)

**TELEGRAPHS—FORGED MESSAGE—WARRANTY
OF AUTHENTICITY—NEGLIGENCE—
PRIMA FACIE CASE.**

1. While, by delivering a message, a telegraph company represents to the addressee that the message was received by the company, at the place from which it purports to come, from him who appears to be the sender, and was transmitted by the company over its wires to the place of delivery, such representation does not amount to an absolute warranty of the authenticity of the message, so as to render the company liable, even though free from negligence, for loss occasioned an addressee by the tapping of a wire and the sending of a forged message; but the ground of liability in such cases is negligence.

2. In an action against a telegraph company for delivering a forged message sent by wire tappers, whereby loss was occasioned to the addressee, proof of the delivery of the message, of its forged character, and of loss resulting from reliance on it, constitutes a prima facie case; and the burden of the defense of freedom from negligence rests on the company.

3. In an action against a telegraph company for delivering a forged message sent by wire tappers, whereby loss was occasioned to the addressee, it is not a sufficient defense to show that a false message was put on the company's wires by strangers and deceived its servants at the receiving station, without fault on their part, without a further showing that precautionary measures were taken by the company, such as due care and foresight would suggest, to guard against the perpetration of such frauds.

**Error to Court of Civil Appeals of Fourth
Supreme Judicial District.**

Action by the Uvalde National Bank against the Western Union Telegraph Company. Judgment of the Court of Civil Appeals (72 S. W. 232) affirming a judgment for plaintiff, and defendant brings error. Affirmed.

Norman G. Kittrell, Webb & Finley, and M. S. Hallan, for plaintiff in error. Ellis, Garner & Love and B. L. Ball, for defendant in error.

WILLIAMS, J. The judgment brought in review by this writ of error was recovered by the bank against the telegraph company upon the facts which are stated in detail in the opinion of the Court of Civil Appeals. In substance they are that two imposters, calling themselves Fisher and Rief, conspired together to obtain money from the bank by means of forged telegrams sent over the defendant's telegraph lines. Fisher had been around Uvalde for some days, and had made the acquaintance of some of the employés of the bank, and claimed to have been buying cattle at Cline. On August 16, 1900, Rief tapped the wire at a point near Uvalde station, and between it and San Antonio, and, by means of other wires connected with it, attached an instrument in such way as to enable him to send messages to Uvalde, and to intercept and receive messages from that place intended for San Antonio. He

then sent to Fisher, in care of the bank at Uvalde, this message, purporting to come from San Antonio, dated August 15th: "We will advance forty-five hundred your wire Cline. [Signed] Jno. Wood's Sons." The firm whose name appeared signed to the message were bankers in San Antonio. This message passed over defendant's wire to its office at Uvalde station, was received by the telegraph operator, and, through a private telegraph line operating between the station and the town of Uvalde, was transmitted to and delivered to the president of the bank. Within a few minutes after its receipt Fisher inquired of the president for a telegram to himself, and upon receiving this one, opened and showed it to the president and proposed to draw upon John Wood's Sons for \$4,500. This the president refused to permit him to do without confirmation of the message. The president then wrote out and delivered to the owner of the private telegraph line connecting with defendant's office at the station this message: "Uvalde, Texas. Aug. 16, 1900. John Wood's Sons, San Antonio, Texas—Will you pay draft of C. W. Fisher \$4,500? Answer quick. Uvalde National Bank." This was transmitted to and received by defendant's agent at the station, and he undertook to send it on to San Antonio, but it was intercepted by Rief, and never reached that place. Before any answer to it was received, Rief sent this telegram: "Kansas City, Mo. 15th. To Bank of Uvalde, Texas, Uvalde, Texas—if our representative Mr. Fisher calls, please notify go ahead and contract for balance of Moore cattle. [Signed] Scruggs Hall Co."—which was duly received by the bank. Later, Rief also sent the following message in answer to that from the bank to John Wood's Sons: "San Antonio, Texas. Aug. 16th. To Uvalde National Bank, Uvalde, Texas—Yes we will honor C. W. Fisher's draft for forty-five hundred. [Signed] John Wood's Sons." The bank thereupon received Fisher's draft on the San Antonio bankers for \$4,500, paid him \$1,200, and gave him a letter of credit for the remainder. All of the messages received by the bank were of course forgeries, and on the next day the fraud was discovered.

The evidence justified the conclusion of the Court of Civil Appeals that the operation of tapping the wire commenced as early as 7:40 a. m. of August 16th, and that about four hours elapsed between that time and the receipt of the last message. It also appears that each of the offices of the defendant is designated in sending telegrams by what is termed a "call," consisting of certain letters, and each of its operators has a private signature used in telegraphing, which is also a letter. The call for San Antonio was "S. A." and that for Uvalde station was "D. A." In sending a telegram from the former to the latter place, the sending operator would call, "D. A." and sign, "S.

A.,” and add his private signature. This custom was observed by Rief in sending the messages in question, the call and signature being correctly given. How he learned the private signature of the operator at San Antonio is unexplained, but the evidence indicates that this is not ordinarily of much importance, as operators along the line are not acquainted with the signatures of all others, and pay little attention to them. It does sufficiently appear, however, that knowledge of the call for Uvalde station was essential in order to reach it by wire, and that it was communicated to Rief by defendant's operator at a neighboring station a few days before the fraud was perpetrated. Whether these signals were in use as a precaution against impositions such as that in question, or were merely employed for brevity and convenience in conducting the business, is not clearly revealed by the evidence. So far as it goes, the evidence rather tends to raise the inference that they were not regarded by the employes as a safeguard, and that they would be ineffectual, as such, to prevent such frauds. The operator who disclosed the call to Rief states that there was nothing unusual in giving such information to a casual inquirer professing, as Rief did, to be an operator; and both he and the only other witness who testified on the subject state that any one acquainted with telegraphy, listening about the station, could learn the calls from the sound of the instrument. There is no evidence that employes were required to keep these things secret. At the same time one of them states: “The system we used was an up to date system. As far as I can say, I think the methods used by the telegraph company since I have been an operator have proven sufficient for all practical purposes to transact the business by telegraph for the public.” Unless the usages described are such, the evidence shows that no precautions are taken by the company by which the genuineness of messages passing over its wires may be tested and forgeries detected, although the witnesses say that it is within the power of any expert operator at any time to tap the wires and send and control messages as was done by these swindlers, and that no operator can tell where a message goes or whence it comes, except from what they are told by those controlling the wire and manipulating the instrument. The evidence as to the practicability of devising safeguards against such abuses of the telegraph is meager and unsatisfactory. Both of the operators say they know of no method in use. One of them says: “Nothing could be done which would make it very difficult for parties like this man to perpetrate these frauds, because that man was in a position to learn all such signals. I do not know that they could devise means as against every one except telegraph operators by which it would be almost impossible to

perpetrate these frauds. I suppose they could.” The other, for 40 years an operator, says: “I think there could be a code of signals adopted by which messages could be identified as coming from the station from which they purport to come; I never thought of the matter before, but still I think there could be.”

This cause was so tried in the district court as to make the decision here depend upon the broad question whether or not there is in the facts any basis for the judgment holding the telegraph company liable for the loss of the \$1,200 sustained by the bank. Some complaints are made of rulings of the trial court on incidental questions, but we find nothing in them requiring any addition to what the Court of Civil Appeals has said, and we shall confine our discussion to the fundamental question just stated.

The charge of the trial judge made the right of plaintiff to recover depend upon a finding of negligence on the part of defendant; but counsel for plaintiff contend for a more stringent rule, under which defendant would be treated as having represented to plaintiff the authenticity of the message that caused the damage, and held bound absolutely to make good the truth of such representation, or to compensate for the loss occasioned by its falsity. We are unable to sustain this view, regarding it as not only unsupported by correct authority, but as contrary to the principles established by this and other courts, governing the responsibility of telegraph companies. The English courts directly and distinctly repudiate the idea that the delivery of a message by a telegraph company constitutes a representation to the person to whom it is delivered of authority from the person whose name is signed to it. *Playford v. The United Kingdom, etc., Telegraph Co.*, 4 Law Rep. (Q. B.) 706; *Dickson v. Reuters Telegraph Co.*, 2 C. P. 62; same case on appeal, 3 C. P. 1. Those cases also hold that the addressee of a message has not, merely as such, any cause of action against the telegraph company for negligence in its transmission and delivery. This is based upon the propositions that the contract is wholly between the company and the sender of the message, where he is not the agent of the addressee, and that there is no privity of contract between the company and the addressee; that the duty of the company is wholly contractual, and not imposed by law; and that, as breach of a duty is essential to actionable negligence, the addressee cannot hold the company liable on the ground of negligence. This is not the law as established in the United States generally and in this state. Telegraph companies, as they exist here, are charged by law with the performance of duties to those who employ and rely on them, and are alike responsible to the senders and addressees of messages for losses resulting from their failures to properly discharge that duty. With this duty in

mind, we do not see how it can be truly said that there is no representation at all in the delivery by such a company to one person of that which purports to be a telegraphic message from another. The act of delivery does contain an assertion that the message was received by the company, at the point from which it purports to come, from him who appears to be the sender, and that it was transmitted by the company over its wire to the place of delivery. This much is, it seems to us, necessarily true, because the receipt, transmission, and delivery of messages is precisely the service which the company holds itself out as performing, and this is what the delivery imports to those accustomed to rely upon such means of communication. But is the representation absolute and unqualified?

In *May v. Western Union Telegraph Company*, 112 Mass. 90, a declaration, considered on demurrer, in one count alleged, in substance, that the defendant negligently delivered to plaintiff a telegram purporting to have been sent by certain persons, which had not in fact been so sent, by reliance and action on which plaintiffs sustained loss; and in another count alleged that "defendant falsely represented to the plaintiffs that it was authorized to send the message, whereas it was not authorized." Both counts were held good. Little is said in the opinion about the first count. As will be observed, it charged negligence on the part of the company in the delivery of a message never sent, and was held good for that reason; and the ruling upon it is not authority for the proposition that a delivery of a message, never sent by him whose name is signed to it, without negligence on the part of the company, would render it liable. Of the other count the court said: "In an action against a telegraph company for delivering a message never sent, and alleging that the defendant falsely represented that it was authorized to deliver such a message, and thereby caused the plaintiff to send goods and suffer damages, it is not necessary to allege that it was done with intent to deceive, or that it was false within the knowledge of the defendant. It is not an action for deceit. It is an action in the nature of a false warranty against one acting as agent, who represents that he has authority when he has not. Whether such representation is made in terms, or tacitly and impliedly, he supposing but not knowing the fact to be true, he is liable to the person misled. *Jefts v. York*, 10 Cush. 392; *Bartlett v. Tucker*, 104 Mass. 336 [6 Am. Rep. 240]; and cases cited. Nor in such an action for false representations is it necessary for the plaintiffs to allege that they used due care and diligence to ascertain if the representations were true. Nor do any presumptions arise in this case, from the subject-matter of the alleged false representations, that make such an allegation necessary." This is not a holding that the mere

delivery of a false message constitutes an absolute representation or warranty that it is true, or is what it purports to be. The allegation was that the company represented that it was authorized, etc. This could have been sustained by proof of an actual representation of authority, in addition to the mere delivery of the message. The decision, therefore, rests upon the principles of law concerning liability for false representations of agency, or of other facts, which need not be discussed at length. They are stated in many authorities, of which the following give condensed and accurate summaries: *Bishop*, on Noncontract Law, §§ 830, 1211, 1212; *Smout v. Ilberry*, 10 Mees. & W. 1.

Many cases have occurred in which telegraph companies have been required to compensate persons damaged by reliance on false and fraudulent telegrams, all of them based upon an express finding of negligence, which would have been superfluous had there existed so stringent a rule as that contended for by the plaintiff in this case. *Elwood v. W. U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Bank of California v. W. U. Tel. Co.*, 52 Cal. 280; *Pac. Postal Tel. Co. v. Bank of Palo Alto*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 713; *McCord v. W. U. Tel. Co.*, 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143, 12 Am. St. Rep. 636; *Strause v. W. U. Tel. Co.*, Fed. Cas. No. 13,531, 8 Biss. 104. In none of these cases was it asserted that the telegraph company, by delivering a message, warranted its integrity, or represented, absolutely and unconditionally, that it was sent by the person who appeared to be its sender; but in all of them negligence was assumed, and in some of them declared, to be an essential element. That such companies are not insurers of the accuracy of messages delivered by them has passed into a truism. It has generally been affirmed as applicable to mistakes and alterations occurring in transmission, but we cannot see why it is not equally applicable here. A message delivered by a telegraph company, which, through error in transmission, differs materially from one actually delivered to the company to be sent, is, in law, as truly a message never sent by the person purporting to be its sender as that here in question. If it be found that there was no fraud or negligence in either case, why should a guaranty of accuracy or authenticity be implied in one case more than the other? The reason given why mistakes in transmission, without negligence, do not give rise to liability, is that the media through which telegraph companies must perform their duty are uncertain and sometimes uncontrollable in their action, and the process of telegraphing is such that excusable mistakes on the part of the agents transmitting and receiving easily occur; which considerations have been thought to make it unjust to require more of such companies than that they avoid miscarriages and mistakes so far as, with proper care and circumspection, it is practicable to do so. The sub-

ject of interferences with their apparatus by strangers does not appear to have received much discussion, probably for want of occasion. In stating the reasons why the responsibility of insurers is not imposed, the Court of Civil Appeals of Kentucky, in *Smith v. Western Union Telegraph Company*, 83 Ky. 104, 4 Am. St. Rep. 126, uses this language: "The wire is exposed to the interference of strangers; a surcharge of electricity in the atmosphere, or a failure of or irregularity in the electrical current, may stop communication; and it is continually subject to danger from accident, malice, and climatic influence when the company has not the actual, immediate custody of the message, as the common carrier has of the merchandise it carries; and it should not, therefore, like a common carrier, be treated not only as a bailee, but as an insurer. *Western Union Telegraph Co. v. Blanchard*, 45 Am. Rep. 480, and cases there cited." It is doubtless true that, although it is sometimes impossible, with all the care that can be applied, to foresee and avoid errors in transmission, it is usually within the power of the agents of the telegraph companies to ascertain the identity of persons delivering messages for transmission; but this only makes it easier to impute negligence in the latter case than in the former, and constitutes no reason why there should be a warranty in one case and not in the other. Negligence and fraud aside, there is no better reason for a liability in one case than in the other; for, except as proper care may guard against them, the actions of strangers to their business are as much beyond the control of telegraph companies as are the influences which cause mistakes. The dangers to be apprehended from fraud and collusion of servants also exist in one instance as well as in the other. A rule which would require an absolute warranty of the genuineness of telegrams would necessarily make it the duty of telegraph companies to ascertain the identity of every person who tenders a message, and must, in justice, authorize them to refuse to receive a message without such identification. This would hardly be consistent, in many supposable cases, with the duty which they owe to the public to receive and promptly send telegrams tendered to them. They are, of course, neither bound nor authorized to send forged telegrams, but as it is true that in some cases they cannot, while in others they can, with proper care, distinguish the genuine from the false, the true ground of liability must be negligence. Such representation as there was in the delivery of the telegram of plaintiff was therefore not broader nor more absolute than the duty which rested on the defendant. It was qualified by the nature of the service which defendant undertook to perform, and meant only that, so far as, by the exercise of proper foresight and care, defendant could know, the message came from John Wood's Sons. As the defendant and its servants did not know of the fraud, the case comes down to the ques-

tion whether or not they were guilty of negligence in allowing themselves to be thus deceived by the use of their own apparatus—in other words, were they guilty of negligence? Both the district court and the Court of Civil Appeals so held, and the remaining question for us to consider is whether or not there is evidence of negligence to support the verdict of the jury.

When the plaintiff proved the delivery of the message, the loss resulting from reliance and action on it, without negligence on its part, and that no such message had ever been sent by John Wood's Sons, it made out a case calling for the production of evidence from the defendant to exculpate itself. *Elwood v. Tel. Co.*, supra; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 461, 20 Am. Rep. 606; *Ryan v. M., K. & T. Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589. The defense offered is that the defendant had itself been imposed upon and made the innocent medium through which a false representation was made to plaintiff. The deception was practiced partly by means of defendant's own wires, instruments, and servants, of which it should have had exclusive control. Under the circumstances, and in view of the duty of defendant to exercise, in the organization and conduct of its business, a degree of foresight and care adequate to give reasonable protection to the immense interests daily dependent on the reliability of the intelligence it carries, we are of the opinion that the defense was not complete with the mere showing that the false message was put upon its wires by strangers and deceived its servants, and that it was incumbent on the defendant to make it appear that this was accomplished despite the exercise of the care incumbent on it. Nor is this met by proof that the agent at Uvalde was not in fault. Admitting that he was without fault, the question still remains, was it not in the power of the defendant, had it exercised reasonable foresight, to have prevented the fraud by furnishing him and its other agents with means of detecting it? The evidence shows that this business is open to the perpetration of such frauds at any time by a device so well known that one of the defendant's operators was able to describe, without having seen, the method by which it was perpetrated. If this is true to-day, it has been true for all the time telegraphs have been in use. The evidence suggests that the weakness consists in the absence of any means by which one operator may be enabled to determine whether a message comes from another office. The question at once arises whether or not, with proper foresight, some regulation might not have been devised to remedy this, and prevent, or render more difficult, the accomplishment of the designs of swindlers. So far as the evidence goes, it tends to answer this question in the affirmative. If the defendant had made any regulation, or adopted any code of signals, or made any provision against this known danger, the evidence fails to disclose the fact, unless the signals stated

at the outset constituted one. If these were designed for this purpose, which is not shown, then the servant of the company was in fault in defeating that purpose by disclosing the call for Uvalde, and it would be difficult to answer the view of the Court of Civil Appeals that this was, of itself, sufficient evidence of negligence. It is reasonably apparent, however, that the agents did not treat these matters as having any such signification, and we are inclined, upon the whole evidence, to accept their view. The case then stands in this attitude: The defendant is engaged in the business of conveying from place to place intelligence, often of vast importance in business and other affairs; it invites the confidence of the public that its service is as reliable as the exercise of care and foresight, commensurate with the importance of the interests involved, can make it; at the same time it is, to its knowledge, exposed to a constant danger of being made, through the use by swindlers of its own appliances and servants, the instrument of fraudulent deceptions upon its patrons; and when such a deception has been accomplished upon one, it does not show that it had taken any precaution against it, or that none was practicable. We are unwilling to establish the first precedent that a defense going no further than this is sufficient, and to hold that the jury were not warranted in this state of the evidence in finding that defendant was guilty of negligence. If it be urged that the burden was on plaintiff to show negligence, the answer is that it did show that the company was apparently in the wrong in delivering a false telegram. The defendant, charged with the duty which, as we have seen, rested upon it, should have shown, not only that it was ignorant of the falsity of the message, but that it was justifiably ignorant. It could not establish this without showing that the imposition upon it occurred notwithstanding the use of proper care on its part. The character, necessities, and limitations of its business, as well as its regulations and modes of conducting it, were best known to it. In the arrangement and conduct of this business it commands the best skill that can be had, and it is peculiarly in its power to develop and explain all that should be known to court and jury in the determination of the questions like that before us. *Ryan v. Railway*, supra.

We have said that no showing was made of the impracticability of making provision against such frauds. We say this because the employes of the defendant who testified seem to express the opinion that such provision could have been made, and such of their testimony as tends the other way is so vague and unsatisfactory that the jury were not bound to accept it. Whether or not swindlers might be able to circumvent the best safeguards that could be erected, is not the question. The better the safeguards, the more improbable that such frauds would be attempted, or, if attempted, would succeed. The defendant makes

good its defense when it shows that it has done all that due care and foresight would suggest, and, if loss occur in spite of this, it is not liable; but without such showing, it does not appear to have been innocent in its apparently wrongful act by which plaintiff was deceived.

Affirmed.

HENNE & MEYER v. MOULTRIE.

(Supreme Court of Texas. Dec. 21, 1903.)

APPEAL—ENTRY OF JUDGMENT NON OBSTANTE VEREDICTO—POWER OF COURT OF APPEALS.

1. Under Rev. St. 1895, art. 1027, authorizing the Court of Appeals, upon reversal, to render such judgment "as the court below should have rendered," the Court of Appeals has power to render such judgment as the evidence demands, though it thereby disregards a verdict for the appellee, which, under article 1335, requiring the trial judge to enter judgment in conformity with the verdict, the court below could not have done.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Action by Henne & Meyer against Paul Moultrie. From a judgment for defendant, plaintiffs appeal to the Court of Appeals, which certifies questions to the Supreme Court. Questions answered.

E. A. Wallace and Henderson, Morrison & Freeman, for appellants. N. H. Tracy, James Bass, and Moore & Moore, for appellee.

BROWN, J. These are certified questions from the Court of Civil Appeals for the Third Supreme Judicial District. The statement and questions are as follows:

"Appellants, Henne & Meyer, sued appellee, Paul Moultrie, on a promissory note for \$23.45, with interest and collection fees, and to foreclose a chattel mortgage included in the same instrument with the note. Appellee pleaded general denial, payment, and certain counterclaims, and in reconvention for damages. The case originated in the justice's court, but was appealed to and tried by the county court, and the amount in controversy, by reason of appellee's answer, was sufficient to give this court jurisdiction on appeal. Upon trial in the county court the evidence, without contradiction, showed the execution and delivery of the note. There was no evidence to sustain appellee's counterclaim and plea in reconvention. The only evidence to sustain the plea of payment was that certain sums were paid by appellee to appellants, but the undisputed evidence showed that they were properly applied by appellants to other indebtedness owing by appellee, and that the note and mortgage sued upon were unpaid. The trial was before a jury, and we have concluded that under the undisputed evidence in the case the lower court should have instructed a verdict for plaintiffs for the amount of their note and a foreclosure of their mortgage. The court,

however, authorized the jury to consider the question of payment, and the jury returned a general verdict for the defendant. Appellants presented a motion in the lower court to enter judgment in their favor on the note and mortgage, non obstante veredicto. This motion was overruled, as was also appellants' motion for a new trial, and judgment was entered for the defendant. Appellants have brought the case to this court, and, under proper assignments, ask a revision of the action of the lower court in overruling their motion to enter judgment, and also ask that under the undisputed evidence in the case we set aside the judgment of the county court, and render judgment in their favor on the note and mortgage.

"The power of this court to reverse and render in such case seems to be clearly stated in the cases of *H. & T. C. Ry. Co. et al. v. Strycharski* (Tex. Sup.) 37 S. W. 415, and *Patrick v. Smith*, 90 Tex. 267, 38 S. W. 17. In the case of *Ablowich v. Bank*, 67 S. W. 79, 4 Tex. Ct. Rep. 394, however, where the jury found a verdict for the amount of the note sued upon, and the court rendered judgment in addition foreclosing the lien, the judgment was reversed and remanded by the Supreme Court, after having been affirmed by the Court of Civil Appeals, and the court there says: 'It is not a question whether the pleading sufficiently set out the instrument, nor a question as to whether the evidence was sufficient to justify a finding in favor of the lien, for these are beyond dispute; but under the well-settled rules of this court the trial court has no power to enter judgment upon facts well pleaded and undisputably proved, unless the issue presented and proved has been found by the verdict in favor of the party for whom judgment is rendered.'

"Article 1027, Rev. St. 1895, authorized this court upon reversal to render such judgment as 'the court below should have rendered.' In view of the expressions in the case last cited and the line of authorities supporting it, we have doubt as to our power to set aside a judgment based upon a verdict, and render judgment in accordance with the undisputed evidence in the record. We therefore, under the foregoing statement of facts, certify the following questions:

"(1) Did the county court have the power, under the undisputed evidence in this case, upon the motion of appellants, to enter judgment in their favor on the note and foreclosing their mortgage, notwithstanding the verdict of the jury in favor of defendant?

"(2) If that court did not have such power, has this court the power to reverse said judgment, and render judgment in favor of appellants upon said note, with foreclosure of said mortgage?"

The first question certified is explicitly decided in the case of *Houston & Texas Central Railway Co. v. Strycharski*, 92 Tex. 10, 37 S. W. 415, where the authorities are cited to which we respectfully refer the honorable

Court of Civil Appeals for answer to this question.

The second question has been decided by this court in each of the following cases: *H. & T. C. Ry. Co. v. Strycharski*, before cited; *Patrick v. Smith*, 90 Tex. 267, 38 S. W. 17; *Stevens v. Masterson*, 90 Kan. 417, 39 S. W. 292, 921. In each of the cases cited the conclusion of this court is expressed in the negative form, but necessarily implies the affirmative; that is, the Courts of Civil Appeals, upon reversing judgments of the trial courts, may enter final judgment when it appears from the evidence in the record that one party, as a matter of law, is entitled to such judgment, the evidence being of such conclusive nature that the trial court, in the performance of its duty, should have directed a judgment in favor of that party.

Upon the facts stated, the trial judge should have directed the jury to return a verdict for the plaintiff, and, upon such verdict, judgment should have been entered in the trial court for the plaintiffs. Therefore, the Court of Civil Appeals, upon reversing the erroneous verdict and judgment, has authority to enter such judgment as the trial court ought to have entered upon the facts. Rev. St. 1895, art. 1027. The language, "the court shall proceed to render such judgment or decree as the court below should have rendered," does not mean that the Court of Civil Appeals is restricted to entering such judgment as the judge of the lower court should have rendered upon the verdict of the jury in case of a jury trial, for that would not change the result, except where the judge had entered a wrong judgment contrary to a proper verdict, or in such cases as might be tried without a jury. "The court," as used in the article above cited, means the body organized to administer justice, and includes judge and jury. *Hobart v. Hobart*, 45 Iowa, 503. After having set aside an erroneous verdict and judgment, the Court of Civil Appeals is empowered by article 1027, Rev. St. 1895, to enter such judgment, under the conditions named in the article, as should have been rendered by the trial court upon the facts of the case. Article 1335, Rev. St. 1895, requires the judge of the trial court to enter judgment in conformity with the verdict of the jury. In a proper case the judge may direct the verdict, but he cannot disregard a verdict properly returned, and give such judgment as the party is entitled to upon the undisputed evidence. The inconsistency arises out of positive legislative enactments which apply to the different courts. They cannot be reconciled by construction, but must be enforced by the courts.

There is no conflict between the decisions of this court before cited and the case of *Ablowich v. Greenville National Bank*, 67 S. W. 79, 4 Tex. Ct. Rep. 394. In that case the Court of Civil Appeals did not reverse the judgment of the district court, and render such judgment as the trial court should have

entered, but affirmed the judgment of the district court. The *Ablowich* Case did not involve either of the questions certified, nor did it involve any question decided in either one of the cases cited by the honorable Court of Civil Appeals. In the case of *Ablowich v. Bank*, the jury found against the mortgage lien, but the district judge entered judgment for the sum found by the jury, and foreclosed the lien, which was not embraced in the verdict. We held that to be error, and cited the authorities in that opinion to which we refer. That was the only question involved in the case.

TINKLE v. SWEENEY et al.

(Supreme Court of Texas. Dec. 10, 1903.)

INTOXICATING LIQUORS—DEALER'S BOND—CONSTRUCTION OF STATUTE—MINORS—SALES—ENTERING AND REMAINING.

1. The statute requiring a liquor dealer's bond to be conditioned that he will not sell liquor to a minor, or permit a minor "to enter and remain" in his saloon, provided that where the sale was made in good faith, and on reasonable belief that the person was of full age, there can be no recovery, attempts to repress two evils—one, the purchase of liquors by minors; and the other, the immoral influence resulting to them from loitering in saloons—and where the entering and remaining in a saloon were merely for a time sufficient to get a drink, and the sale was made in good faith, on reasonable grounds of belief that the person was of full age, there could be no recovery on the liquor dealer's bond, though such person was a minor.

Certified Question from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Emily Tinkle against M. J. Sweeney and others. From a judgment for defendants, plaintiff appeals. Certified question from the Court of Civil Appeals. Question answered.

J. H. Randell, for appellant.

GAINES, C. J. This is a certified question from the Court of Civil Appeals for the Fifth Supreme Judicial District. The statement and question are as follows:

"Appellant brought this suit against M. J. Sweeney, as principal, and C. C. McCarthy and R. S. Legate, as sureties, on a liquor dealer's bond, for permitting appellant's minor son to enter and remain in said Sweeney's saloon, and for selling him intoxicating liquors. The facts are that M. J. Sweeney, as a liquor dealer, executed a liquor dealer's bond under the statute, with the parties above named as sureties. The minor, Fred Tinkle, son of Emily Tinkle, appellant, was under twenty-one years of age, though, under the evidence, the jury were authorized to find that said Sweeney, in good faith, believing that said Fred Tinkle was twenty-one years of age, sold to him intoxicating liquors. On one occasion said minor entered Sweeney's saloon for the purpose of getting a check cashed. When the check was cashed, he bought a drink of liquor, paid for it,

and went out. On two other occasions said minor entered said saloon, bought drinks, and remained only long enough to get the drink, and then went out.

"The foregoing states all the facts which we deem necessary for the submission of the question hereafter to follow. On the issue presented, there seems to be a conflict between the decision of the Court of Civil Appeals for the Third District and that of the First District. See *Cox v. Thompson*, 75 S. W. 819, 7 Tex. Ct. Rep. 577, and *Qualls v. Sayles*, 18 Tex. Civ. App. 400, 45 S. W. 839.

"Question: Do the facts in either case, as above stated, show a breach of the condition in the liquor dealer's bond which prohibits the liquor dealer from allowing a minor to enter and remain in his place of business?"

We are of opinion that the answer should be in the negative. So far as bears upon this question, the condition in the bond as required by the statute is that principal or principals, as the case may be, "will not sell or permit to be sold in his or their house or place of business * * * any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication to any person under the age of twenty-one years * * * and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business * * * provided, that where the sale is made in good faith, with the belief that the minor was of age and there is good ground for such belief, that shall be a valid defense to any recovery on such bond; and provided further, that where the sale to an habitual drunkard is made in good faith, with the belief that he was not an habitual drunkard, and there is good ground for such belief, that shall be a valid defense to any recovery on such bond." To constitute a breach for a sale, merely, it must take place in the house or place of business where the liquor is, and of necessity implies that the minor must enter where the liquor is sold. It is clear, also, that some definite period of time must be occupied in making the sale, and that he must, in one sense of the term, remain during the time necessary to complete the transaction. If, therefore, remaining in the latter sense is a breach of the condition of the bond, it follows that the same transaction must constitute two breaches of the obligation, and also that if the dealer has acted in good faith, and upon the reasonable belief that the minor is of full age, he is not liable by reason of the sale, but is liable because he permitted the minor to remain while the sale was being made. The Legislature has the power to make an unreasonable law, and, where the intention to do so is manifest, the courts must give it effect; but, where a statute admits of two constructions, one of which is reasonable and consistent with its provisions, and the other not, we are of opinion that the former should prevail. The word "re-

main" is not confined to the restricted sense above indicated. The definitions of the word as given in Webster's International Dictionary are: "(1) To stay behind after others have withdrawn. * * * (2) To continue unchanged in place; * * * to abide; to stay; to endure; to last." According to the authority named, its synonyms are: "To continue; to stay; wait; tarry; rest; sojourn; dwell; abide; last; endure." In *Baldwin v. Ely*, 66 Wis. 198, 28 N. W. 392, the Supreme Court of Wisconsin say, "The word 'remain' presupposes and implies something that exists or continues after some other time or event." It is quite clear, therefore, as we think, that by saying "remain" the Legislature may have meant something more than staying during the length of time employed in making the sale. A penalty was provided for making the sale. Why make another for remaining during the time the sale was being made? It seems to us that this was not intended, but that the Legislature considered that there were two evils which ought to be repressed—one, the purchase of intoxicating liquors by minors; and the other, the immoral influence resulting to them from tarrying or loitering in the place where such liquors are sold. If the construction be that it was not intended to affix a penalty for permitting a minor to enter and to remain merely while making a purchase, in addition to the penalty for making a sale, we can see a reason why a distinction was made between a sale to a minor, and permitting a minor to remain, with respect to the good faith and belief of the dealer that he is of full age. It may have been thought that the hurry of business should excuse the dealer for making a mistake as to the age of the minor, while, if he tarried or loitered in the place after the sale was complete, or if he so tarried or loitered without making a purchase, the same reason for excusing him would not exist. We are aware that this does not quite account for the apparent inconsistencies in the statute. For example we have held, with reference to a sale of liquor to a student, the good faith of the dealer is no excuse. *Peacock v. Limburger*, 95 Tex. 258, 66 S. W. 764. In that case, as in the case of a minor's entering and remaining, he must know the fact, or take the chance of incurring the penalty. It may be that, in making the proviso as to good faith in a sale to a minor or to an habitual drunkard, the Legislature did not consider the propriety of a similar provision as to a sale to a student, or it may be that they acted upon some consideration which does not now suggest itself to our minds. But the conditions in the bond required to be executed in relation to a sale to a minor and as to permitting a minor "to enter and remain," are so closely connected in the subject-matter, as well as in the context of the statute, that the question of making a distinction between the two could hardly have been overlooked.

This precise question has just been under consideration by us in the case of *Minter v. State*, 76 S. W. 312, 8 Tex. Ct. Rep. 246, upon an application for writ of error by the state. There the Court of Civil Appeals for the Second Supreme Judicial District held in accordance with our ruling in the present case, and we have this day refused the writ of error. The Court of Civil Appeals for the Third Supreme Judicial District, in *Cox v. Thompson*, 75 S. W. 819, 7 Tex. Ct. Rep. 577, made the same ruling, but no writ of error was applied for in that case. The case of *Qualls v. Sayles*, 18 Tex. Civ. App. 400, 45 S. W. 839, is distinguishable in its facts, but whether it may be distinguished on principle we need not here determine.

HARRIS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 2, 1903.)

CARRYING CONCEALED WEAPONS—TRAVELER—EVIDENCE.

1. In a prosecution for carrying a pistol, evidence that defendant had gone a short distance from one county to another was not sufficient to require a charge defining a traveler, in the absence of any showing that defendant was going from or returning home, or that he had any home.

Appeal from Polk County Court; A. B. Green, Judge.

Elijah Harris was convicted of unlawfully carrying a pistol, and appeals. Affirmed.

F. Campbell, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of unlawfully carrying a pistol, and fined \$25; hence this appeal.

The Assistant Attorney General has filed a motion to dismiss the appeal on account of an alleged defective recognizance. We have examined the recognizance, and it is in substantial compliance with article 887, Code Crim. Proc. 1895.

Appellant contends that the court committed an error in charging on appellant's right to carry a pistol if he had been threatened and was in apprehension of danger. We agree with the contention of appellant in this respect, to wit, that there was no evidence to have required the court to charge on this phase of defense; yet we fail to see how such a charge could have injured appellant.

He also complains that the court should have acquitted him on the ground that he was a traveler. The court instructed the jury, in general terms, if they believed he was a traveler, to acquit him. However, appellant contends that the court should have given his special requested charge defining what a traveler was, and, if they believed he was carrying a pistol for a temporary purpose, going to his home from one county to another, to acquit him on the

ground that he was a traveler. In response to appellant's proposition, it is sufficient to state that the burden of proving this defense was on appellant, and, in our opinion, the evidence does not raise the defense at all. The most that can be said is that he had gone a short distance from one county to another, but there is no proof that he was going home or returning from home. For aught that appears, he had no home. There was no evidence to authorize or require the requested charge to be given. *Blackwell v. State*, 34 Tex. Cr. R. 476, 31 S. W. 380.

There being no error in the record, the judgment is affirmed.

KIPPER v. STATE.*

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

HOMICIDE—CONTINUANCE—DILIGENCE—MATERIALITY OF EVIDENCE—EVIDENCE—ADMISSIBILITY—RES GESTÆ—CONSPIRACY—WITNESSES—IMPEACHMENT—CROSS-EXAMINATION—REDIRECT EXAMINATION—INSTRUCTIONS—WEIGHT OF EVIDENCE—APPLICABILITY TO EVIDENCE—ASSAULT—SECOND DEGREE MURDER—APPEAL—ASSIGNMENTS OF ERROR—QUESTIONS PRESENTED—PREJUDICIAL ERROR.

1. In a prosecution for murder, a second application for a continuance for the absence of a witness was properly denied where it did not appear that, after the indictment was presented, the witness was summoned, and, while the depositions of the witness were forwarded to the place where he was, it was not shown that any funds were forwarded with the same, or that the witness actually resided at the place where the depositions were sent, but it was merely stated that defendant's friends provided all necessary funds to pay the expenses, and where the only excuse for want of diligence was that witness, who had been a soldier, was discharged and denied re-enlistment, and that defendant had been unable to locate him until the time that he sent the depositions.

2. In a prosecution for murder, evidence proposed to be introduced in an application for a continuance was not material where what was to be proven by the absent witness was merely in impeachment of testimony of a witness who stated that he looked from the window on the morning after the homicide, and saw defendant taking off his fatigue trousers; the effect of the absent witness' testimony being that he was present with such witness, and that he did not go to the window.

3. In a prosecution for murder, the fact that the names of jurors for the regular term were not placed in the box from which the names of jurors on the special venire were drawn was not prejudicial to defendant—conceding that the names of such jurors, who had served in a former trial against defendant and in trials against his codefendants, should have been placed in the box—where there was no suggestion that the list was not drawn fairly, or that defendant was deprived of any rights.

4. Where the state's testimony was to the effect that the homicide was committed in the attempted rescue of one of defendant's companions from jail, evidence that such person had been arrested for drunkenness was not proof of another offense, but was a part of the *res gestæ*, as the occasion of the rescue.

5. In a prosecution for murder committed in the attempted rescue of one of defendant's com-

panions, evidence that such companion had been jailed for a petty offense, like drunkenness, was not prejudicial to defendant; and likewise the disposition of the case against him was immaterial.

6. In a prosecution for murder, it was competent for a witness to state his opinion as to the distance between two places, and the time of the occurrence relative to which he was testifying.

7. In a prosecution for murder committed by soldiers in an attempt to rescue a companion who had been jailed, it was competent for the state to show that, at a certain hour of the night of the homicide, witness observed a body of men, of about the number that were implicated with defendant in the transaction, on their way from the post where they were stationed to the scene of the homicide, and also as to such men returning towards the post in the morning, even though defendant was not identified as of the number.

8. In a prosecution for murder committed by soldiers in rescuing an imprisoned companion, evidence as to acts of defendant and his co-conspirators in the rescue when they returned to the post in the morning after the homicide, in disposing of their guns, their clothes, etc., was admissible as part of the *res gestæ*.

9. In a prosecution for murder, it was competent for the state to prove by an officer in the company to which defendant belonged that the district attorney had given witness authority to offer immunity from punishment to any person who would disclose the facts with reference to the murder; such testimony being adduced on re-examination after similar questions had been asked of him on cross-examination.

10. In a prosecution for murder committed by soldiers, it was proper for the court to permit an officer in the company to which defendant belonged to explain how he paid \$5 toward the prosecution.

11. In a prosecution for murder, defendant was not prejudiced by questions asked of his witness relative to his attempt to get some one else to lie in regard to defendant's case, where the answers to such questions were in the negative.

12. In a prosecution for murder, cross-examination of one of defendant's witnesses, showing that he had been convicted in one county for complicity in the crime, and that the case against him had been dismissed in another county, was competent for purposes of impeachment.

13. In a prosecution for murder, it was proper for the state, on cross-examination of a witness who had testified that he had taught school at the post at which defendant was quartered, and had loaned money to the soldiers, to show the rate at which he loaned money.

14. An objection to evidence as immaterial does not raise any question on appeal.

15. The fact that a witness for defendant in a prosecution for murder was contradicted by two of the state's witnesses does not authorize proof of his veracity, where it was not shown that he was a stranger in the locality of the trial.

16. Declarations of deceased to the effect that "they have got me," soon after the homicide, are, in a prosecution therefor, harmless to defendant.

17. In a prosecution for murder, it was competent for the state, on redirect examination, to show that a witness had previously made statements corroborating his testimony delivered on the stand, and the circumstances connected therewith, after it had been shown on cross-examination by defendant that witness had made different statements and testified differently in reference to the transaction.

18. In a prosecution for murder, testimony as to a conversation between one of defendant's accomplices and a witness to the effect that the former wished the latter "to be doubtful" in reference to something about the case was admissible.

*Rehearing denied December 12, 1903.

19. In a prosecution for murder, an instruction that impeaching testimony was admitted solely for the purpose of aiding the jury in passing on the credibility of the witnesses, and in determining the weight to be attached to their evidence, was not a charge on the weight of the testimony.

20. The court was not required to give special instructions relative to the impeachment of one witness by another when such witnesses merely contradicted each other in their original testimony as to certain facts.

21. The court was not required to instruct specially as to the testimony of one witness to the effect that another witness, whom defendant had attempted to impeach, had made the same statements to him that he made on the trial.

22. In a prosecution for murder, there was no occasion for an instruction that the jury could not convict of an assault with intent to murder where the evidence was of a conspiracy to release a companion of the defendant and his accomplices from jail, and the killing was actually accomplished in the furtherance of that conspiracy.

23. In a prosecution for murder, there was no occasion for a charge on the acts of other conspirators in the absence of defendant, where the testimony on the part of the state was positive that defendant was present with the other conspirators and participated in the homicide, and the court gave a sufficient charge on principals.

24. An assignment of error that the court failed to define "implied malice" does not raise the question of failure of the court to charge on murder in the second degree.

25. In a prosecution for murder, the testimony of the state was of a conspiracy formulated by soldiers in order to release a companion from jail; that, in furtherance of that conspiracy, defendant and his accomplices procured axes and rifles, mounted bicycles, and deliberately rode to the jail; that, while some stood on the outside, others entered the jail; that, as soon as they were resisted, they opened fire on the jailer both from within and without the jail, inflicting upon him mortal wounds, resulting in death. Defendant's evidence tended towards the establishment of an alibi, solely, and no defense was made on the theory of passion or excitement. *Held*, that there was no occasion for an instruction on murder in the second degree.

Brooks, J., dissenting.

Appeal from District Court, Dallas County; Chas. F. Clint, Judge.

John Kipper was convicted of murder in the first degree, and appeals. Affirmed.

P. M. Stine, Albert Walker, and R. B. Allen, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

There are about 75 bills of exceptions in this record—some of them are quite lengthy, and a great many upon questions that are absolutely unimportant, or that have frequently heretofore been decided adversely to appellant. As to some of the propositions contained in the bills, a number contain the same question, in effect. Really all that is important could have been condensed and put into a dozen bills of exceptions. In discussing the questions presented in these numerous bills, we will condense as far as pos-

sible, treating only such matter as we deem necessary; and, if any question is omitted, it may be considered that we do not deem the exception taken of any significance, so far as the appeal is concerned.

On the trial the state relied on murder in the first degree; claiming that the homicide was committed in pursuance of a conspiracy or agreement on the part of appellant and some eight companions, all of whom at the time were colored soldiers belonging to Company A, Twenty-Fifth Regiment, stationed at Ft. Bliss, some five miles northeast from El Paso. The state showed, substantially, that the conspirators were appellant, Kipper, a sergeant in said company; Geo. McElroy, Wm. H. Powell, and Jas. H. Hull, corporals; Davis, Roberts, Carroll, Wright, and Elazer, who were privates. That on the evening of the 16th of February, 1900, Samuel Dyson, a member of said company, was arrested by a policeman on the streets of El Paso on a charge of being drunk and disorderly, and imprisoned in the city jail. Some time about 2 o'clock on the morning of February 17th, appellant and Davis went to the jail in order to get Dyson out. They did not succeed. It is then shown that appellant and his companion returned to the post at Ft. Bliss, riding bicycles; that they aroused the other parties heretofore named, and they all procured arms, getting Krag-Jorgenson rifles and ammunition; also two axes out of the barracks; declaring that they intended to go to town (El Paso) and release Dyson, who was confined in jail. They rode on their bicycles to town. Two of the party, to wit, Elazer and Wright, dropped out on the way. The others proceeded to the jail, where Dyson was confined. Some of them entered the jail. The jailer, Blacker, was aroused, and also deceased, Newton Stewart, a policeman, and immediately the firing began, both on the inside and outside of the jail. Blacker relates that he was aroused by hearing the scuffle of feet in the front office, he sleeping in the room back thereof; that he immediately waked up, and saw a negro soldier standing in the front office, back of the desk; that he grabbed his pistol, which was lying by his side, and shot at the negro. The party retreated, and he (witness) immediately left the building through a window. In the meantime there was shooting in the front office and on the outside. Deceased, Stewart, was in the front office; and after the mêlée, when witness returned to the office, he found Stewart down on the floor, suffering from two gunshot wounds, one in the front and one in the shoulder. There were several bullet holes in the front office, and one or two bullet holes through the front window. The facts tend to show that one of the shots fired through the window must have struck deceased, Stewart. This occurred between 4 and 5 o'clock in the morning. After other parties gathered, Corporal Hull was found dead in the street, near the jail, caused from

a gunshot wound, and four or five Krag-Jorgenson rifles were found in and around the jail, and two axes, all belonging to the government station at Ft. Bliss. In order to connect appellant with the homicide, the state made use of the testimony of Powell, one of the accomplices; and in support of his testimony as to what was done by the conspirators, and as to the presence of appellant at the time, a number of circumstances, coming through other witnesses, were shown. Appellant pleaded "Not guilty," and relied mainly on an alibi. This is a sufficient statement of the case in order to discuss the issues presented.

Appellant made a motion for continuance on account of the absence of Grant Bryant, who was alleged to reside in Davidson county, Tenn. We will state here that defendant was indicted in El Paso county on April 6, 1900, and was tried at the April term of said court. Said witness was subpoenaed at said trial, and testified. The case was appealed to this court, and was reversed and remanded. 62 S. W. 420, 2 Tex. Ct. Rep. 411. At the April term, 1900, of the district court of El Paso county, said case was dismissed, and defendant reindicted. Subsequently, at the June term, 1900, the venue was changed to Dallas county. It does not appear that, after the second indictment was presented, said witness was summoned in this case. Appellant attempts to excuse the want of diligence by reciting that the witness was discharged and denied re-enlistment about this time in the company; that he left El Paso, and the commandant, or parties at the post, interfered with appellant securing jurisdiction of said witness, and that he had since been unable to find out where the witness was, until about the time of the convening of court in Dallas, in August, 1901, when he propounded interrogatories to him, and forwarded them to Nashville, Tenn. We do not believe the facts related show sufficient diligence on the part of appellant to ascertain the whereabouts of said witness during the interim between the dismissal of the first case and the trial of the second at Dallas. Moreover, in this connection, it is not shown that this is the first application for continuance. A previous application had been made at the first trial of the case at Dallas, there having been two trials of the case there; the first trial having occurred about the last of July, and the jury having been discharged for failing to agree. At that time an application for continuance was made, and this is the second application, and must be treated as such. It is shown that the depositions of said witness were forwarded to Nashville, Tenn., on the 8th or 9th of August, but it is not shown in that connection that any funds were forwarded with same. It is merely shown that defendant stated his friends provided and furnished all necessary funds to pay the expense of taking said depositions. There is no showing in this application that said wit-

ness really resided in Davidson county, Tenn. It does not occur to us that there was sufficient diligence shown to have entitled him to a continuance on a first motion—much less, a second. Moreover, it does not occur to us that the testimony of said witness was material. What he proposed to prove by him was in impeachment of the witness Henry Freeman as to what Henry Freeman testified in regard to seeing appellant taking off his fatigue trousers on the morning of the 17th at the empty barracks at Ft. Bliss; said witness Freeman having testified for the state that he looked from the window on the east side of the hospital building, in the north end of said building, and saw Kipper at the canteen, or empty barracks, pulling off his trousers, about 6 o'clock in the morning of the 17th of February. Appellant says he expects to prove by the absent witness that he was present with said Freeman in the hospital building, and that he did not go to the window and look out. However, in addition to this, appellant stated he expected to prove that said witness went to the window himself, looked out, and recognized the party whom Freeman testified about to be one Elmo Sears, a private in said Company A, and not Kipper. In this connection, we would observe that appellant introduced Sims, who testified that Freeman did not go to the window and look out, as he swore. So, this being the second application, the testimony would be cumulative as to that matter. But this witness himself testifies that he went to the window and looked out, and he took the man to be Kipper. So that, we take it, appellant could not reasonably expect his witness to testify to the facts stated, and, if he did, it was not probably true. Consequently we do not believe the court erred in overruling appellant's application for continuance.

In the second bill of exceptions, appellant complains that the court refused to order a special venire of 150 jurors as requested by him, but, instead, ordered only 100. No injury is shown to have resulted to appellant from this. Nor is any error shown in the instructions of the court to the sheriff in summoning talesmen.

Complaint is made as to the method of drawing the jury out of the box by the clerk. This question seems to have been raised after the original venire was exhausted, and only two jurors had been selected, at the time when special talesmen had been brought in. Appellant's attorneys say that they first discovered the names of the jurors for the term were not placed in the box when the clerk drew out the special venire. It is shown by the court, in his explanation to the bill, that the names not placed in the box were the names of jurors who had served in appellant's former trial at the same term and venires drawn for two of his codefendants, Leroy Roberts and W. H. Davis. It does not occur to us that this action of the court was

calculated to affect appellant injuriously, even if it be conceded that the jurors who had served in appellant's former case and in two cases against his codefendants should have been placed in the box. There is no suggestion that the list of jurors was not drawn fairly, or that appellant was deprived of any right by the failure to place the names of said other jurors in the box. Besides this, in the affidavit of the attorneys representing appellant it seems the course adopted by the clerk was agreed to and indorsed by them, until it was ascertained that the men drawn on the special venire appeared to live almost entirely in two neighborhoods in Dallas county.

It is insisted that the testimony adduced by the state to the effect that Dyson, the party arrested on the streets of El Paso and placed in jail, was drunk and disorderly at the time, and was arrested and jailed for that offense, was improperly admitted. This was objected to on the ground that it was proving another offense, and was proof by parol of a fact which was of record. It was not proof of another offense not connected with this case, but was a part of the res geste, and the occasion of the attempted rescue. It does not appear that there was any written complaint or other record testimony of the offense in the bill of exceptions. The objections stated in the bill are not certificates of facts. We can see no injury that could possibly result to appellant by proving the person attempted to be rescued was charged with simply a petty offense, for being drunk and disorderly. It is true, it was immaterial what he was placed in jail for, but the fact that he was placed in jail for the petty offense could not injure appellant. If he had been placed in jail for a much graver offense, there might be some question. The offense for which he was confined being immaterial, it was equally immaterial as to whether or not he was ever tried for it. Of course, what was done after the homicide as to Dyson's case would not be admissible for appellant.

Certain questions and answers are embodied in bill No. 15, with reference to the examination of the witness Powell. The effect of these questions and answers was to show witness Powell had been indicted for the same offense, and that he came to be a witness against appellant by having told what he knew about it; that no promise had been made to him by Capt. Loughborough to induce him to testify against appellant. Then follow the objections urged to this testimony, to wit, "that it was irrelevant, immaterial, and that it was not proper for the state to show how he came to be a witness in the case; and because the testimony was calculated to prejudice the jury against defendant, and was introduced by the state during the examination in chief of said witness, and prior to the time defendant had introduced any testimony in said

case, for the purpose on the part of the state of establishing the credibility of said witness, and showing he was worthy of belief." Now, it has been held that a bill of exceptions, so far as the conditions under which the testimony was admitted, should be complete within itself, and the facts should be shown in the bill, and that a ground of objection urged, which recites conditions, is not a certificate on the part of the judge that such objections were in fact true as to the conditions therein recited. *Hamblin v. State* (Tex. Cr. App.) 50 S. W. 1019; *White's Ann. Code Cr. Proc.* § 857. Of course, circumstances can readily be imagined under which it was admissible to have elicited the testimony complained of from the witness Powell. His cross-examination may have been such as to have authorized it, or some attempt to impeach him may have been made. If the statement of facts, in connection with the bill, had shown that this testimony was elicited in chief, and when no assault had been made on the witness, it may not have been admissible. Still it does not occur to us that the testimony was hurtful. It is not shown here that the witness testified that he made any particular statement to Capt. Loughborough or to any one else. The same observations here made apply to bills Nos. 29 and 31.

We believe it was competent for state's witness Geo. Harris to give his best opinion as to the distance between the place where he was standing guard and the soldiers' quarters. Nor was it improper for him to give about the time he thought it was. Distance and time are authorized to be given as matters of opinion. *Lawson, Expert & Opinion Ev.* p. 460.

We hold it was competent for the state to show by the witness Daley and others that at a certain hour of the night of the alleged homicide they observed a body of men—some seven or eight—who appeared to be armed and riding bicycles on their way to the city of El Paso from the direction of Ft. Bliss, and also that some of the witnesses observed men on the road, whom they took to be soldiers, returning that morning from towards the city of El Paso in the direction of Ft. Bliss. True, appellant and others were not identified by these witnesses, yet the evidence here offered was a circumstance tending to show that a body of men, about that hour of the night, who appeared to be armed, went from the post to El Paso, and returned therefrom, about the time stated by other witnesses—especially witness Powell—that appellant and his confederates made the trip from the fort to the jail.

We believe it was admissible to show, after the parties, or any of them, returned to the post, or should have returned, from El Paso, what disposition was made of the guns, if any, or that guns were found out of the rack where they belonged. Evidently the object of the conspiracy, if one was en-

tered into, comprehended both going to El Paso and releasing the prisoner, and then returning to the post and disposing of any evidences of guilt connecting appellant and his confederates with the transaction. And this also applies to what Carroll and others may have done with reference to pulling off their fatigue suits after their return to the post. They were shown to have worn these fatigue suits to El Paso on the expedition. It was not usual for them to wear the same at reveille, or unless on some special duty requiring the wearing of fatigue suits. The fact that they were seen in the early morning, by the time it was light, pulling off their fatigue suits, and putting them away, was a part and parcel of the transaction, tending to connect all of such parties therewith, as confederates with appellant Kipper; and, as to him, the evidence is positive, through witness Powell, one of his confederates, that he was at the jail on that night at the time of the homicide. And it was also proven that appellant was seen to pull off his fatigue suit after his return. "Declarations or conduct of a codefendant, made after the consummation of the offense, and when defendant was not present, is evidence, where the testimony connects them in the perpetration of the crime, if the fact testified to would tend to prove the guilt of the codefendant then on trial—as, for instance, the subsequent finding of the weapons or means used in the commission of the homicide in the house or possession of the codefendant." *Pleron v. State*, 18 Tex. App. 524; *Rodriguez v. State*, 32 Tex. Ct. R. 259, 22 S. W. 978. And in *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817, it was held competent for the state to prove that 10 days subsequent to the robbery a part of the fruits of the robbery were found in the possession of defendant's co-conspirator.

There are several bills of exceptions in regard to the admission of testimony concerning these fatigue suits, and their custody and identity. We have examined the same, and, in our opinion, the objections go to the weight, but not to the admissibility, of the evidence.

Objections were made to the testimony of Loughborough to the effect that he was acting in the line of his duty as an officer when he undertook to do what he did to help the civil authorities by turning over the parties to this crime, and that his sole purpose was to ascertain, if possible, who had left the post and gone to El Paso and murdered Newton Stewart, the policeman, and to arrest them; that that was his sole purpose. The objections to this testimony are that it was immaterial and irrelevant, and that it was simply an opinion and conclusion of the witness, and that it was not proper for the state to corroborate and bolster up the character of the witness by the testimony above set forth. The objections as to the immateriality and irrelevancy of the evidence have

been held not sufficient to raise the question as to the admissibility thereof. *Hamblin v. State* (Tex. Cr. App.) 50 S. W. 1019. And it is not shown that this evidence was not adduced in legitimate examination of the witness after he had been cross-examined. The bill shows that it was on redirect examination of the witness. Further than this, it is not shown that the witness testified to any fact injurious to appellant.

Nor was it incompetent to prove by witness Loughborough that the district attorney of El Paso county had given him authority to offer immunity from punishment to any person who would disclose the facts with reference to the murder of Newton Stewart. As explained by the court, this testimony was on re-examination of said witness, after he had been asked a number of questions of like character by appellant on cross-examination. Nor is there any merit in appellant's contention that the court erred in allowing Loughborough to explain how it was he may have paid \$5 toward the prosecution.

Again, appellant objected to the redirect examination on the part of the state of said witness to the effect that he did not at any time or in any way keep the persons charged with the offense from making their defense, and that he afforded M. W. Stanton, Esq., who defended said parties, all facilities in his power to aid him. This may have been admissible in the re-examination of said witness after appellant had attempted to break him down by showing acts and conduct attempting to interfere with appellant or his counsel. Furthermore, the court certifies this evidence was brought out in explanation of defendant's cross-examination, also in contradiction of Wright and Yarbrough.

On the cross-examination of Boyer Wright, witness for defendant, it was permitted to be shown that he knew Arthur Taylor, and the state then attempted to show that he (Wright) tried to get Arthur Taylor to tell a lie in court in regard to appellant's case. Witness answered that he did not. It is sufficient to say that the answers of the witness were of a negative character, and not calculated to prejudice appellant.

While witness Ben F. Carroll, for defendant, was on the stand, on cross-examination he stated that he had been convicted at El Paso for this offense, and that the case against him had been dismissed in Dallas county. This was objected to on the ground that it was wholly immaterial and irrelevant. We believe it was competent evidence, as going to his credit. It also having been shown by defendant that Carroll taught school at the post, and loaned money to the soldiers, it was not improper for the state, on re-examination, to show the rate at which he loaned such money. At least, the answer of the witness was not injurious to appellant.

With reference to the testimony of Milton Chisum regarding a telegram said to have been received by him from Sam E. Dyson, objection that same was immaterial does not raise any question. Besides, the contents of said telegram are not shown, and could not possibly injure appellant.

It does not occur to us that the bill shows there was any contingency for proof to establish the reputation for truth of the witness Dr. Beard. The statement of the facts in connection with said bill does not show that he was impeached by the state. The fact that he was contradicted by Loughborough and Freeman would not of itself authorize his being bolstered up, unless the bill had shown in this connection that he was a stranger in that locality.

We believe the testimony of W. T. Stewart with reference to what his son said to his mother when they carried him into the room and laid him on the bed was admissible as dying declarations. At any rate, it was harmless. He merely said, "They have got me."

With reference to bill No. 18, we hold it was competent, as explained by the court, for the state, on redirect examination of the witness Taylor, to show that he had previously made a statement corroborating and agreeing with his testimony delivered on the stand, and the circumstances connected therewith. This was after it had been shown on his cross-examination by appellant that he had made different statements and testified differently in reference to the transaction. When a witness has been impeached by showing that he has made contradictory statements to his evidence on the trial, it is competent to sustain the witness by showing that shortly after the event, or before any inducement was offered for him to state the matter falsely, he had made a statement coinciding with his testimony delivered on the stand. This also disposes of bill No. 32, as explained by the judge. The statement was offered to corroborate the witness Taylor after appellant had attacked him by showing that on the former trial of the case he (Taylor) had testified that he did not know whether the person he had seen passing in at the post at 2:30 was Kipper or not. Under the circumstances, it was competent to show that he had made a sworn statement shortly after the event in which his testimony on that point coincided with the testimony given on the trial.

Appellant reserved a number of exceptions to the remarks of the court during the trial. We have examined the same, and, in our opinion, there is no merit in his contentions.

Bill No. 51 appears to have been drawn by the court in lieu of one presented to the court by appellant. We understand from it that Loughborough testified that "Sims' only, reply to said statement of said Petrick was that he would not be certain who it was." This statement in this bill would not show

that the witness was impeached upon irrelevant or immaterial matter, but would simply show a failure to impeach him, even if it be conceded that the matter was hearsay.

We do not see how it could prove hurtful to appellant to show, as was done by witness Loughborough, that Elmo Sears was absent, and he had not seen him since September 27, 1900, and that he was a witness in the Kipper case when it was tried in El Paso. For aught that appears, this may have been legitimate testimony on the part of the state after said witness had been cross-examined by appellant. As explained by the court, appellant's bill of exceptions No. 45 is not well taken.

The court properly admitted the testimony of Edward Whitrow as to that part of the conversation which he heard between Boyer Wright and Arthur G. Taylor. Taylor testified as to the whole conversation, and Whitrow testified that he heard Boyer Wright tell Taylor "that he wanted him to be doubtful," and that he understood from that connection that it was something in reference to the case he wanted him to be doubtful about. We think the objections go to its weight, rather than to its admissibility.

Appellant reserved several exceptions to the court's charge, and also requested a number of charges which were refused, and he saved his bill of exceptions. We do not think it was incumbent on the court to charge on alibi further than was done in the main charge. Nor was it necessary that the court should give the requested charges on accomplice testimony. The charge of the court was full and fair on this subject. The court gave a sufficient charge covering the witnesses whose testimony it was required to limit. The court instructed the jury that said impeaching testimony was admitted before them solely for the purpose of aiding them in passing on the credibility of the witnesses named, and in determining the weight to be attached to the evidence of said witness. This was not a charge upon the weight of the testimony.

Nor was the court required to give special requested instructions with reference to the impeachment of Annie Parker by Chisum. This was original testimony on the part of both witnesses. They contradicted each other concerning a fact admissible in evidence. The same may be said as to the witness Fannie Reed's evidence in contradiction of the witness Davis. Davis said he slept with Beulah, who was living at Fannie Reed's, part of the night of the homicide. Fannie stated that no such woman as Beulah was living with her at the time. She merely contradicted him as to a fact testified to by him, and there was no danger of her testimony being used by the jury for any other purpose. There was no objection to Powell's evidence in impeachment of B. F. Carroll on the ground that it may have trans-

pired subsequent to the conspiracy. However, we think the testimony was admissible. *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Pierson v. State*, 18 Tex. App. 524. It being original evidence on the part of Powell, his contradiction by Carroll as to the fact did not require a charge thereon.

Nor was the court required to instruct the jury as to the testimony of Loughborough concerning the statement of Arthur C. Taylor. The testimony of Loughborough merely showed that Taylor made the same statement to him that he testified to on the trial. This testimony was admitted to corroborate Taylor after an attempt had been made to impeach him by defendant. There is no danger that the testimony would be appropriated for any other purpose by the jury, and the court was not required to charge thereon.

There was no occasion, so far as we have been able to discover from the statement of facts here, for the court to instruct the jury that they could not convict defendant of an assault with intent to murder.

Nor was there anything in the testimony requiring the court to give the requested charge on the acts and conduct of other conspirators in the absence of appellant. The testimony on the part of the state is positive that appellant was present with the other conspirators and participated in the homicide, and the court gave a sufficient charge on principals.

Appellant also excepted to the court's charge because it failed to define "express malice" and "implied malice." It occurs to us that the charge here defining "express malice" is in accord with the authorities. It is a better definition of "express malice" than was approved by this court in *Stevens v. State*, 42 Tex. Cr. R. 154, 59 S. W. 545. The court did not define "implied malice" at all. If by this it was intended to raise the question of the failure of the court to charge on murder in the second degree, we do not think it sufficiently does so. Concede, however, that the question as to whether the court should have given a charge on murder in the second degree is sufficiently presented (and we understand the rule to be, if there is a doubt as to whether the killing was upon that cool deliberation which characterizes a murder upon express malice, it is the duty of the court to charge upon murder in the second degree. *Smith v. State*, 40 Tex. Cr. R. 391, 50 S. W. 938); let us see the shape of the case on this proposition. The evidence here establishes beyond any question that appellant and the other parties named conspired together to go from their barracks to the city jail in El Paso, and there release one Dyson, who was confined in said jail on a charge of misdemeanor. Now, if their design embraced within its scope the determination to use whatever force might become necessary to consummate their purpose, even to the taking of human life, then all the par-

ties engaged in the conspiracy, and who were present at the time, were guilty of murder. See *Mercersmith v. State*, 8 Tex. App. 211; *Kirby v. State*, 23 Tex. App. 13, 5 S. W. 165; *Bowers v. State*, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901. As was said in *Kirby's Case*, supra: "The joint responsibility of parties for each other's misconduct rests on the principle that, when an act is committed by a body of men engaged in a common purpose, such act is treated as if specifically committed by each individual. It should be observed, however, that, while parties are responsible for collateral acts growing out of the general design, they are not responsible for independent acts growing out of the particular malice of individuals. Thus, if one party of his own head turn aside to commit a felony foreign to the original design, his companions do not participate in his guilt. * * * But it is equally as well settled that 'all combining to commit an offense to which homicide is incident are principals in homicide. As where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view, if the murder be in the furtherance of the common design. * * * Malice in such a killing may be inferred as a presumption of fact from the nature of the design and the character of the preparation. Whether the deceased fell by the hand of the accused or otherwise is immaterial.'" And see 1 *Russell on Crimes*, pp. 342, 343. 855. Evidently, from this record, the parties not only contemplated releasing the prisoner, Dyson, from the jail, but they also apprehended opposition. They expected that it might become necessary to break the jail, and so they carried axes. They further believed that they would be resisted in their attempt, and they armed themselves with guns—Krag-Jorgenson rifles—with which to overcome resistance. Appellant, who was the leader of the party, had been to the jail before, and was there denied permission to go to the cell of the prisoner; and he had reason to believe that in their attempt to enlarge the prisoner they would be opposed. So that, beyond controversy, the conspirators contemplated the use of deadly weapons to overcome opposition. It cannot be said that their design was simply to slip into the jail and release the prisoner. And it is not like a case where parties intended clandestinely to release a prisoner, and they are apprehended in the act, set upon by the jailer, and one of the parties, suddenly, without deliberation, and in order to effect his escape, should pick up a club and kill the jailer. In such case it might be murder in the second degree. But here the parties evidently intended to overcome resistance at all hazards, and they pre-

pared for such a contingency. Did they do so in that calm and deliberate state of mind and under circumstances which indicate they contemplated the natural result of their attempt, so as to characterize the homicide committed as murder upon express malice? To quote from the decision of Judge Roberts in *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520, defining express "malice," he says: "Malice in fact (express) is a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized. The evidence of such a malice must arise from external circumstances, discovering that inward intention, as lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various according to variety of circumstances.' * * *

And again: It may be concluded, then, in determining whether a murder has been committed with express malice or not, the important questions are: Do the external facts and circumstances at the time of the killing, before or after that time, having connection with or relating to it, furnish satisfactory evidence of the existence of a sedate, deliberate mind on the part of the person killing, at the time he does the act? Do they show a formed sign to take the life of the person slain, or do him some serious bodily harm, which, in its necessary or probable consequences, may end in his death, or such general, reckless disregard of human life as necessarily includes a formed design against the life of the person slain? If they do, the killing, if it amount to murder, will be upon express malice." Now, testing this question by the rule laid down, there can be no doubt that the parties, including appellant, contemplated in the first instance a felony; that is, release from the jail of the prisoner, Dyson. Not only so, but they expected to be resisted, and they prepared themselves with the latest improved weapons of warfare to overcome that resistance; thus manifesting a determination to shoot down any person who might oppose them in their design. They had ample time to deliberate in regard to this. There is no evidence of excitement on their part, every step being taken with military precision. In order to expedite their march to the appointed place, and to make good their retreat, they mounted bicycles, and proceeded to the jail where the prisoner was confined. While some stood on the outside, others entered the jail. Immediately, as soon as they were resisted, they opened fire on the jailer both from within and without the jail, inflicting on him two mortal wounds, which caused his death. There is nothing in the record to indicate that their purpose was not formed when the minds of the conspirators were cool and deliberate; and, if the state's theory be correct, there is nothing to mitigate or lessen the degree of this homicide below that of murder in the first degree. According to appellant's theory, he did not place himself in contact with the

homicide. He made no defense as to its diabolical character, but claimed and offered testimony to show that he did not participate in the homicide. Evidently the jury did not believe his theory, but believed he was present and was the moving spirit of the enterprise, as they had a right to do from the testimony. His presence at the scene of the homicide, and his participation therein, was properly proven by his accomplice and confederate, Powell, and his evidence was amply supported by facts and circumstances proven by other witnesses. The jury were amply warranted in believing the theory of the state, and disbelieving the theory offered by defendant; and, when they found his alibi was not true, there was nothing in the case to authorize them to find appellant guilty of a less offense than murder in the first degree. *Henry v. State*, 38 Tex. Cr. R. 306, 42 S. W. 559; *Ransom v. State*, 70 S. W. 960, 6 Tex. Ct. Rep. 259. And for other authorities, see *White's Ann. Pen. Code* 1901, §§ 1228, 1229.

After what has been said, it is not necessary to discuss the charge of the court as applied to the facts of the case. He simply instructed the jury, in effect, that if appellant, with the other parties named, or any of them, agreed to arm themselves with rifles and axes for the purpose of going to the jail and freeing Dyson therefrom by whatever force or means might become necessary to effect that object, and, in pursuance of such agreement and purpose, the defendant and all or any of the parties named did arm themselves with rifles and go to the jail of El Paso for the purpose of releasing said prisoner Dyson, and that appellant, or any of said party, in pursuance of said previous design, with express malice, shot and killed said Stewart with a gun, appellant would be guilty of murder in the first degree, whether or not he, in point of fact, fired the fatal shot.

We have examined the record carefully, and, in our opinion, there was no error committed in this case authorizing a reversal thereof. The judgment is affirmed.

BROOKS, J., dissents on the ground that murder in the second degree was an issue on the trial, and the court should have given in charge the law applicable to that degree of murder, the record showing that issue.

BAKER v. STATE*

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

CRIMINAL LAW—MANSLAUGHTER—EVIDENCE—RES GESTÆ—REVERSIBLE ERROR.

1. In a prosecution for manslaughter, it appeared that deceased's attentions to defendant's niece were resented by her father, defendant's brother; that defendant, some three weeks be-

*Rehearing denied December 14, 1903.

fore the homicide, acted as peacemaker between the parties, deceased agreeing to stay away from the girl; that the truce was broken by his renewing his attentions; that a few days thereafter defendant, the girl's father, and another brother armed themselves, met deceased and another on the road, when the killing occurred; that that morning defendant remarked, while at a neighbor's house, after inquiring as to the whereabouts of deceased, that the matter would "be settled, and settled right." *Held*, that threats made by the girl's father against deceased at meetings of neighbors to discuss the trouble were admissible against defendant.

2. There being a conflict in the testimony as to who began the difficulty when the two parties met on the road, the prior threats of the girl's father were admissible as tending to solve the question.

3. Deceased and his companions had pistols, while defendant and his brothers had shotguns and rifles. A witness testified that he heard the report of the first shot, and that it was from a pistol. *Held*, that a remark made by the witness at the time that somebody was trying his "pop" was not admissible as part of the res gestæ.

4. Remarks of bystanders, not heard by the participants in a difficulty, are not res gestæ.

5. The fact that a witness was improperly asked if he had not stated that defendant and his brothers were going to kill deceased and brother if they had to go under the bed for them, and answered "No," was not reversible error.

Appeal from District Court, Polk County; L. B. Hightower, Judge.

Nat Baker was convicted of manslaughter, and appeals. Affirmed.

J. C. Feagin, C. L. Carter, Holshousen & Manry, and E. T. Branch, for appellant. Howard Martin, Asst. Atty. Gen., and S. A. McCall, Dist. Atty., for the State.

DAVIDSON, P. J. This conviction was for manslaughter, the punishment being two years' confinement in the penitentiary.

It is disclosed by the record that John Baker, a widower with several children, the oldest being a girl 13 or 14 years of age, lived in the same neighborhood with a family named Copeland. Among the Copelands was a young man, Gabe Copeland, about 20 years of age, whose attentions to the elder daughter of Baker were distasteful to her father. This led to trouble and bitter feelings between the Copelands upon one side and the Bakers on the other; at least so far as John Baker was concerned. Finally the feeling became rather acute, and Copeland was ordered to remain away from the residence of John Baker and cease his attentions to his daughter. One trouble was added to another until the matter assumed rather grave and serious aspects, when appellant (brother of John Baker), then living at Groveton, in Trinity county, went down into Polk county, where the parties lived, and adjusted a settlement between them. The basis of this settlement was that Copeland was to remain away from John Baker's, and cease his attentions to John Baker's

daughter, and the parties were to pass and re-pass each other in a friendly way. This occurred about the 1st of August—perhaps on that day. On the following Tuesday John Baker placed his children in charge of Ira Denham while he made a trip into Angelina county to secure the services of an old lady living in that county as his housekeeper. On the following morning after Baker left home deceased went to Baker's residence, where his children were, taking his elder daughter off to a house on the farm, and, armed with a Winchester, kept her in this vacant house most of the day; they being alone. Later, and during the evening, he escorted her from this vacant house to the residence, and spent a while in the residence with her. Late in the evening he mounted his horse, armed as before, and left John Baker's premises. Denham went from his premises to Baker's premises, and tried to induce the girl to come away from deceased, but failed. It seems he sent the smaller children for the girl later on, and they came back crying, without their elder sister. John Baker returned late that evening, and Denham gave him full information as to the occurrences of the day and the conduct of appellant towards Baker's daughter. This brought up and renewed the troubles. It seems there was a meeting Wednesday night among the neighbors to try to settle this trouble, and inferentially it is made to appear that deceased, Gabe Copeland, was to leave the neighborhood. Thursday John Baker sent to Groveton, in Trinity county, for appellant. He also sent for his brother Charley, who lived six or eight miles off in Polk county. Saturday night the two brothers, appellant and Charley, met John Baker at his residence. Sunday morning they went to the residence of witness Marsh, inquiring for the Copelands. They were informed that the Copelands had passed up the road some time earlier. John Baker took one of the witnesses off to one side, and had a conversation with him, asking the whereabouts of the Copelands. Appellant, Nat Baker, is shown to have remarked while at Marsh's residence, and after inquiring about the Copelands, that the matter would "be settled, and settled right." The killing followed that evening, under circumstances, as proved by the state, showing preparation and lying in wait for deceased; on the part of appellant, an accidental meeting, and the beginning of the difficulty on the part of the Copelands, two of whom were present and began shooting at John Baker before the Bakers undertook to fire any shots. Gabe Copeland was killed, Cicero Copeland shot down, as was Charley Baker. Three weeks before the killing—about 10 or 12 days prior to the first settlement brought about by Nat Baker—appellant John Baker is said to have remarked in substance, "If they [the Copelands] do not let me alone, I will take my gun and get in the bushes, and hell will be to pay." On

Wednesday night, at the meeting of the neighbors to discuss the trouble between Copeland and John Baker, it is shown by some of the state's evidence that John Baker said that he and Gabe Copeland (deceased) could not live in the same country. Exception was reserved to these remarks and threats, mainly because there was no conspiracy between the Bakers. The facts show that Nat Baker had brought about a sort of armistice between the parties, the conditions of which were that deceased should stay away from John Baker's daughter and house, and John Baker was to pass and repass deceased Copeland in a friendly manner. This conditional treaty of peace was broken by deceased during John Baker's absence in Angelina county. On Thursday, after the deceased visited the girl, John Baker sent for the two brothers, and on Saturday night they met him at his residence. The acts and conduct of the Bakers subsequent to the meeting on Saturday until the killing occurred indicated very clearly that an agreement had been reached to settle the matter in a different way from what they had previously settled it, as one of the witnesses state appellant remarked the matter would be settled, and settled right; and it was settled, so far as deceased is concerned, a few hours later. Taking these facts together, it shows that appellant, three weeks before the homicide, went to his brother's residence, and canvassed the entire matter of their difficulties between the Copelands and John Baker. Therefore he became thoroughly acquainted with the whole situation. Upon this visit he was a peacemaker, and succeeded conditionally. These conditions were broken by Copeland by the last visit of deceased to the daughter of John Baker and niece of appellant. Nothing criminal is shown in the record further than the statement that he kept her in these two houses during the major part of the day. Taking all these facts together, we are of opinion that the testimony as to the statements of John Baker were admissible. The parties met Saturday night, and acted together thence until the death of deceased. Appellant must have been thoroughly acquainted with all that had preceded, and with a full knowledge of those facts he entered into this killing. He had before been a peacemaker; this time anything else. He knew the conditions, because he brought about these conditions, and knew they were broken. The threats that occurred three weeks before the killing were withdrawn by the court, and the jury instructed to disregard them. Under the authorities and the decisions of this state, we believe all these statements of John Baker were admissible against appellant. We believe he was sufficiently connected with all the antecedent matters, with full knowledge of all that transpired antecedent to the insults of deceased toward his niece. They were admissible upon another ground. The state's theory was

that the Bakers had secreted themselves at the junction of two roads, anticipating the Copelands would return that evening along that road. Appellant was seen by a party at the point of the homicide, about 30 minutes before it occurred. The other two Bakers were not visible to this witness. As the Copelands approached, the three Bakers put themselves in evidence. The state's contention is that they began the shooting at the Copelands at once, and such is the testimony of Cicero Copeland, one of the parties wounded in the difficulty; and they continued to shoot until Gabe Copeland was killed and he (Cicero) shot down. Defendant's theory was that they were at the point of the difficulty en route to a friend's house, who lived farther down the road, and the meeting was purely accidental, and that the Copelands began the difficulty by both of them jumping from their horses and shooting at John Baker. The prior statements of John Baker, under this state of facts, were admissible as tending to solve the question as to who began this difficulty. It became very important testimony under the circumstances. *Cline v. State*, 33 Tex. Or. R. 491, 27 S. W. 128; *Id.*, 34 Tex. Cr. R. 347, 31 S. W. 175. There was no error on the part of the court admitting this testimony.

The witness Coogler testified that at the time of the shooting he was about three-fourths of a mile from the scene of the killing, and heard the shots. After testifying as to his experience in the use of firearms, and that he could distinguish and designate the difference between the reports of pistols, Winchesters, and shotguns, he states that he distinctly heard the report of the first gun fired, and that it was a pistol shot. The Copelands were armed with pistols, and the Bakers with shotguns and Winchesters. That immediately upon hearing the first report he made the statement that somebody was trying his "pop," or somebody was trying his "pistol." This expression of the witness was excluded, or rather was not permitted to go to the jury. Exception was reserved to this ruling of the court, and from the discussion of the matter by appellant's counsel it seems to have been offered as *res gestæ*. The court's action was correct. There is no ground to make this testimony admissible as *res gestæ*. Even if it was put upon the ground that he was a bystander, it would be inadmissible, because remarks of bystanders, not heard by the participants in the difficulty, are not *res gestæ*. *Ex parte Kennedy* (Tex. Cr. App.) 57 S. W. 648; *Felder v. State*, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777; *Wills v. State* (Tex. Cr. App.) 22 S. W. 969.

State's counsel asked Ira Denham, on cross-examination, this question: "I will ask you to state whether or not you made the statement to either Ben Oliver or in his presence there at Kickapoo Church, or near there, Saturday before the killing, to the effect, in substance, that the Bakers were going to kill the

Copelands if they had to go under the bed for them?" This was an improper question, and should not have been asked. Appellant could not be affected in any manner by what the witness may have stated to others in his absence. But the witness answered that he did not make the statement, and here the matter ended. Oliver was not placed upon the stand to contradict the witness Denham, and the bill simply shows the question asked witness and the statement denied by him. We do not believe there was such error in this as required a reversal. The case of *Tijerina v. State* (Tex. Cr. App.) 74 S. W. 918, does not justify the conclusion that for this character of cross-examination alone the judgment should be reversed. There were other questions in that case which required the reversal, and that portion of the decision relied upon by appellant was mentioned among the other matters.

It is also contended that the indictment is insufficient because the name of the county of Polk is not printed with sufficient distinctness to show the word "Polk." For this purpose the original indictment has been sent up. We have carefully examined this indictment, and, while the lower portion of the two letters "lk" are not as distinct as they might have been printed, still the name "Polk" is sufficiently clear and definite. We do not regard this contention as meritorious.

We have carefully reviewed this record, and, in our opinion, there is no reversible error, and the judgment is affirmed.

SINCLAIR v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION—ORDERS—SUFFICIENCY—PUBLICATION—PROSECUTIONS—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS—AGENCY—PLACE OF SALE—TRIAL—RESPONSE TO JURY—APPEAL—BILLS OF EXCEPTIONS.

1. Under the provision of the local option law authorizing the county judge to designate a newspaper for the publication of the order of the commissioners' court declaring the law in effect, the fact that the order did not specify a particular newspaper did not invalidate it.

2. The order of the commissioners' court declaring local option in effect was not invalid because it did not state that the court "opened" the polls and counted the votes, when it did sufficiently show that the commissioners tabulated and counted the votes.

3. An objection stated to the introduction of evidence in a bill of exceptions does not constitute a certificate by the trial judge that the facts on which the objection was predicated existed.

4. On appeal from a conviction of violating the local option law, a bill of exceptions on the admission of certain telephone memorandums, which does not show what the memorandums were, nor contain a certificate of the trial judge that the facts on which the objections were predicated existed, is insufficient.

5. In a prosecution for violation of the local option law, memorandum made by a telephone company at the time calls were placed by defendant with the company, and which were paid for by defendant, were admissible against him.

6. In a prosecution for violating the local option law, testimony as to a custom to telephone orders for whisky to a certain town, which orders were often given by one person for a number of others, and which were filled by the goods being sent to the parties as directed by the message, was properly excluded, where defendant and those for whom he dealt were not shown to have had any knowledge of such custom.

7. In a prosecution for violating the local option law, a response to questions of the jury, asked after retirement, to the effect that agency was a question of fact to be determined by "the rules heretofore given," was not open to the objection of erroneously informing the jury that agency was a pure question of fact.

8. In a prosecution for violating the local option law, a response to the jury on a particular question of agency was not objectionable, in failing to state what constituted defendant an agent, when that subject was covered in the main charge.

9. In a prosecution for violating the local option law, a charge that, in determining whether defendant acted as agent in making the sale, the jury would consider all testimony tending to show the business relation existing between defendant and the alleged principal, and testimony as to the number of orders accepted and sent by defendant to such principal, except the one in the case, was erroneous, as bearing on the weight of the evidence.

10. The charge was also erroneous in excluding from the jury the very fact in issue.

Brooks, J., dissenting.

On Rehearing.

11. In a prosecution for violating the local option law, where the evidence showed that the liquor was paid for before shipment, and that the sale was not made by defendant on solicitation of the purchaser, it was error to charge, in accordance with Acts 26th Leg. c. 96, which provides that C. O. D. sales of liquor shall be construed as sales at the point of delivery and payment, and that the place of soliciting an order shall be construed as the place of sale, and to give no proper instruction as to the determination of the locus of the sale.

Appeal from Red River County Court; J. R. Kennedy, Judge.

J. T. Sinclair was convicted of violating the local option law, and appeals. Reversed.

J. C. Hodges, for appellant. H. S. Moran, W. S. Thomas, and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail.

Appellant reserved a number of exceptions to the introduction of the orders of the commissioners' court declaring the result, and putting local option into effect in said county. But said orders seem to be in proper form, and in accordance with the law on the subject. The fact that the order authorizing the publication in some newspaper did not specify any particular newspaper did not invalidate the order. The law authorizes the county judge to designate a newspaper. Presumably, the Clarksville News was designated by the judge, as the proceedings show that the publication was made in said newspaper, and subsequently embodied in the records of the commissioners' court. Nor

does it matter that the order did not show that the court opened the polls and counted the votes. It does sufficiently show that the commissioners counted and tabulated the votes. Of course, they must have opened the polls, in order to have counted and tabulated the votes. The judge explains that the entry to the effect that the foregoing order was published in the Clarksville News for four consecutive weeks, under date of June 16, 1902, when it could not have occurred at said date, was error; that the publication was finished in July, when local option went into effect.

The court did not err in receiving in evidence the memorandums kept by the telephone company at Detroit, Tex., of calls made by defendant to talk with L. C. Clark at Paris. The bill does not show what these telephone memorandums were. Nor does the objection stated to the introduction of the same constitute a certificate on the part of the trial judge that the facts on which the objections were predicated existed. The bill is not sufficient in these respects. Yet, as explained by the judge, the evidence was admissible. The proof showed that these phone calls were placed with said company by defendant for L. C. Clark at Paris, and were made at the time the calls were placed with said company, and were paid for by defendant. So the connection of defendant with said telephone messages was sufficiently shown to authorize their introduction.

Nor did the court err in refusing to receive certain testimony offered by appellant, through John Dodd, to the effect that it was the custom of the people, or part of those who resided in Red River county, to phone orders for whisky to Paris; that such orders were often phoned by one person for a number of others; that the orders sent were filled, and the goods sent to the parties as directed by the phone message. We fail to see, from the bill, how such testimony could have any bearing upon this case. What was customary by others it does not occur to us would serve to solve any issue here presented. Besides, the parties—appellant and Clark—were not shown to have any knowledge of any such custom. They appeared to have acted on business principles of their own, and, in our opinion, it did not require any custom in order to indicate what was done, or the relation of the parties to the alleged sale.

It is shown by bill of exceptions that after the jury had retired, and had been out several hours, they came into court and propounded to the judge the following question: "Is it necessary, under the law, for one to solicit orders, or use his influence in the sale of an article, to become an agent?" To which the court responded in a charge: "It is not necessary for one to solicit orders for any article of merchandise, to become the agent of any party selling the same. On the question of agency in this case, it is one of

fact, and you will be governed by the rules heretofore given in determining the fact." This was objected to because it erroneously informed the jury that the question of agency was one of fact, whereas it is one of law and fact. As we understand the charge of the court, he told the jury that the question of agency was one of fact, to be determined by the jury under the rules given in charge by the court, which evidently referred to the general charge which the jury already had. It was further objected that said instruction failed to inform the jury what constituted defendant the agent of Clark. If the court's charge on the subject of agency was correct, the jury had this question already in the main charge, and it was only necessary for the court to respond to the question asked.

In motion for new trial, appellant objected to the court's charge with reference to agency, and the collation by the charge of the evidence concerning agency, and telling the jury, if they believed this to be true, they would regard appellant as the agent of L. C. Clark in the sale of said liquor. The charge complained of is as follows: "Where there is no evidence of a written appointment of an agent, the fact of such agency must be determined by what he does; also by the act of his principal in acting upon and recognizing his contract. In determining whether the defendant was the agent and acting for L. C. Clark in making the sale, as charged in the indictment, if any such sale was made, or was interested in such sale, either directly or indirectly, you will consider any and all testimony which shows or tends to show—if there be any such testimony—the business relation existing between the defendant and L. C. Clark, and all testimony as to the number of orders for intoxicating liquors accepted and sent by the defendant to L. C. Clark, except the one in this case, if any has been shown." This charge was objected to because it instructed the jury that defendant's agency might be shown by the acts of others than the parties to the contract involved in this case, and that it further instructed the jury to disregard acts connected with the sale in question in determining the issue as to whether appellant was the agent of L. C. Clark. As we understand, the testimony with reference to other sales was merely to illustrate appellant's method of doing business, to aid the jury to determine the question of agency, and whether or not, as to the sale alleged in the indictment, appellant acted as the agent of said Clark, and made the sale of said whisky in Red River county.

It is also complained that the charge of the court failed to instruct the jury that, in order to constitute a sale, either for cash or credit, the goods must be delivered to the buyer. A critical examination of the charge in question bears out the contention that it is a charge on the weight of the testimony, and, besides, it excludes from the jury the *factum proban-*

dum involved in this case. No matter what the other sales admitted in evidence tended to show with reference to the question of agency, the real issue in this case was whether or not, in the particular sale for which appellant was indicted, he acted as the agent of Clark in making the sale in Red River county, and all the other sales were merely admitted in order to shed light on this transaction; yet the court appears to have excluded this transaction from the consideration of the jury in determining the question of agency. In this we think the court was in error.

The court was also in error in not furnishing the jury with a proper test in order to determine whether or not appellant acted as the agent of Clark in Red River county, and actually made the sale there. As we understand the rule of law as established by the decisions on this subject, appellant must have acted as the agent of Clark in the sale of the liquor in Red River county; and it was also necessary, in accordance with the terms of the sale, that it should be consummated in Red River county. The court, as we understand the charge in paragraph 5 thereof, instructed the jury, in effect, that if appellant acted as the agent for Clark, and made the sale of the intoxicating liquors in Red River county (that is, if he took or accepted an order therein for intoxicating liquors), and the goods, in pursuance of said order, were shipped and received by the purchaser within the county in which the local option law was in force, then appellant would be guilty. This is undoubtedly in accord with Acts 27th Leg. p. 262, c. 96. In *Davidson v. State* (Tex. Cr. App.) 73 S. W. 808, while the question was not decided, we expressed the opinion that the Legislature could not change the rules of law with reference to what it took to constitute a sale, or to fix the locus of such sales. In *Bruce v. State*, 36 Tex. Cr. R. 53, 39 S. W. 683, this court discussed what it required, under the rules of law, to constitute a sale; and it was there held "that parties who are competent to trade can make their own contracts, stipulate as to terms, and can make such terms as are not illegal; that the locus of a sale (that is, where it was consummated) is to be determined by the known rules of commercial law on the subject." The effect of that decision was to hold that the place of the sale was to be determined by actual delivery and parting by the seller with the property in the thing sold to the purchaser. Wherever this occurs, there the sale is consummated. See *Northcutt v. State*, 35 Tex. Cr. R. 584, 34 S. W. 946; *Bogel v. State* (Tex. Cr. App.) 55 S. W. 830. And see *Specialty Furniture Co. v. Kingsbury* (Tex. Cr. App.) 60 S. W. 1030; 24 Amer. & Eng. Ency. of Law, p. 1071. Tested by these rules, if appellant, as the agent of Clark, made a sale of the whisky in question to the prosecutor in Red River county, and the actual delivery of the same was to take place in Lamar county, and neither

appellant nor Clark were to have anything further to do with the goods, then we fail to see how appellant could be convicted of a consummated sale of the goods in Red River county. Appellant might never bring them into Red River county. In such case there would be no violation of the law. The purchaser might himself, or through his own agents, bring said goods into Red River county. In such case there would be no violation of the law, because there was never a consummated sale of the goods in question in Red River county. The charge of the court ignored this principle, and simply instructed the jury, as the recent act on the subject provides, if defendant made a sale of the goods as agent of Clark in Red River county, he would be guilty, regardless of the place of delivery, and regardless of the consummation of the sale in that county. As we understand the Constitution on this subject, the Legislature was authorized to permit localities, by a majority vote, to determine from time to time whether the sale of intoxicating liquors should be prohibited within prescribed limits. The sale evidently here refers to sales of liquors within the prohibited territory. The evil which the Constitution sought to provide against was the passing of title within local option territory to intoxicating liquors, and this, it seems to us, involves a delivery of the goods within such territory. We are not holding here that the evidence is not ample to have authorized the conviction of appellant for selling and delivering said liquor within the prohibited territory. The evidence shows that he received the money, sent all the phone messages, and the expressage on the liquors was paid by his principal, into the prohibited territory. In other words, the evidence here amply shows that he carried on the business of selling liquors within the prohibited territory as the agent of Clark. However, he denies this. As we understand the charge of the court, his denial was ignored, and the court gave the jury an improper measure in order to determine the locus in quo of the sale. For this error, the judgment is reversed, and the cause remanded.

BROOKS, J., dissents.

On Rehearing.

(Dec. 16, 1903.)

HENDERSON, J. This case was reversed at a previous day of this term, and now comes before us on rehearing. We do not understand the state to seriously contend that the case should be affirmed, inasmuch as it appears to be conceded that the court's charge on the question of agency—especially in applying the law to the facts—is erroneous. However, the state does insist that the court's discussion of the act of the Twenty-Seventh Legislature (page 262, c. 96) is dicta. On a review of the case, we are inclined to agree with this contention, inasmuch

as the facts of the case do not bring it either under the head of a C. O. D. sale, or a sale by solicitation. The act prescribes, substantially, that in all contracts of sale and shipment of intoxicating liquor from any point in the state to any place within the state subject to local option, where the terms of such contract are C. O. D., or collect on delivery, the same is and shall be a sale at the point where said goods are delivered and paid for, and, further, that where any order is solicited for intoxicating liquors in local option territory, and such order is subsequently filled, the sale shall be at the place where said order was solicited. Here, as stated, the record shows that the liquor was paid for before shipment, and the shipment was not made C. O. D. Consequently it cannot be regarded as a C. O. D. shipment. The record further shows that appellant did not solicit the purchaser to buy the whisky, but that the purchaser applied to him. Accordingly it was not a sale on solicitation. So that in neither event does the act of the Legislature apply here. However, the court, in its charge, appears to have treated the sale as one or the other, or possibly as a combination of both; and the effort to apply this law to the facts of the case, without any qualification or suggestion to the jury as to how they were to determine the locus of this sale, constitutes, in our opinion, the error in the court's charge on this subject. For instance, he tells the jury that "A party assisting the seller to make a sale of intoxicating liquors in a local option territory in this state, where such sale has been prohibited and is prohibited by law, violates the local option law, and even though he may so assist the seller with or without compensation." And "any person who is agent for, or who is acting for, or who is assisting a principal whose place of business is located outside a county in which the local option law is in force, makes a sale of intoxicating liquors in such county in which said law is in force when he takes or accepts an order therein for intoxicating liquors, and the goods are shipped by his principal and received by the purchaser within such county in which the local option law is in force in pursuance of such order." And the court then proceeds to group the facts as he culled them from the evidence in the case; instructing the jury, if they should find such facts to exist, to find defendant guilty. If the court, in connection with these charges, had instructed the jury, in effect, that they must find that the sale was made within the local option territory (that is, by the terms thereof the seller was to ship and deliver the same to the purchaser within the local option territory), and that it did not become the property of the purchaser until he received it in the local option territory, according to the terms of the contract, express or implied, then the sale would be within the local option territory; that is, that the sale was where the title to the property passed, and, as test of this, if the goods were

lost in transit, and before delivery, it would be the loss of the seller, and not of the purchaser, then the sale would be within the local option territory; otherwise not. But this was not done. And as was said in the original opinion, the charge of the court ignored this principle, and made appellant guilty if he acted as the agent of Clark in the sale of the goods in Red River county, regardless of the place of delivery, and regardless of the consummation of the sale in that county. The state, in this connection, refers us to *Bogle v. State* (Tex. Cr. App.) 55 S. W. 830, cited in the original opinion, as sustaining its contention. The charges of the court were not discussed in that opinion, nor did the case turn on the charge. Nor did we say in the original opinion that the conviction could not be sustained on the facts.

We desire here to make a few observations with reference to our views on this question. The Constitution of 1876 (article 16, § 20) authorized the Legislature to enact a law whereby the qualified voters of any county, etc., "may determine by a majority vote whether the sale of intoxicating liquors shall be prohibited within the prescribed limits." This section as amended in 1891 was only changed with reference to subdivisions, leaving the other parts unchanged. So we see that the framers of the Constitution only authorized the Legislature to pass a law prohibiting the sale of intoxicating liquors within the prescribed territory. We must presume they knew what a sale meant, and referred to the same as commonly understood and as decided by the courts. As early as *Holley v. State* (decided in 1883) 14 Tex. App. 505, it was held that the Legislature was circumscribed to a sale within the prohibited territory, and could not prohibit a gift. Long before that the Supreme Court of this state had decided what constituted a sale; and in *Woods & Co. v. Half, Weis & Co.*, 44 Tex. 683, the court held "that, as to the sale of chattels, the intent of the parties, when clearly ascertained, is of controlling force in determining when the sale of chattels has been executed, and every sale transfers the property. That is not a sale which does not transfer the property in the thing sold." And in speaking as to the facts of that case they say "that goods boxed up, marked in the name of the buyer, and on a dray on the way to the wharf for delivery to the carrier, are not subject to levy as the goods of the buyer." But they hold it would have been different if the goods had reached the common carrier. This case arose before the adoption of the Constitution of 1876. And in *Rohrbough et al. v. Leopold*, 68 Tex. 254, 4 S. W. 460, it was held that, without regard to the character of negotiations which preceded a sale of chattels, no sale is finally consummated until both parties agree to their delivery. "The place of a sale of goods is the place of delivery where the sale is completed by delivery." 22 Amer. & Eng. Ency. of Law, p. 1389, and authorities cited in note

4. And again it is said: "Ordinarily, and in the absence of an agreement to the contrary, the seller is under no obligation to send or carry to the buyer the goods sold. His duty is fulfilled by so placing them at the disposal of the buyer, that they can be removed by him." 24 Amer. & Eng. Ency. of Law, p. 1068. "Where the place of delivery is fixed by the contract, that, of course, controls, and the seller need not make a tender at any other place, and, if tendered at another place, the buyer need not accept; but, where nothing is said upon the subject, it is taken for granted that the goods are to be delivered or placed at the buyer's disposal at the place where they are when sold, unless some other place is regarded by the nature of the article, or by the usage of trade, or by the previous course of dealing between the parties, or is to be inferred from the circumstances of the case." Id. p. 1069. "Where the duty of the seller is to send goods to the buyer, the general rule is that delivery to a common carrier is equivalent to a delivery to the buyer himself. Particularly is this so if the carrier to whom the delivery is made has been designated by the buyer. The carrier is deemed the agent of the buyer, and not the agent of the seller. Such delivery affects the transfer of title, and is a sufficient performance of the contract to enable the seller to maintain an action for the goods sold and delivered, even though the seller pays the freight, though in controverted cases the payment of freight may have an important bearing in determining whose agent the carrier is." Id. p. 1071. And see *Tennant, Walker & Co. v. Skinner*, 1 White & W. Civ. Cas. Ct. App. § 78; *Specialty Furn. Co. v. Kingsbury* (Tex. Civ. App.) 60 S. W. 1030.

As stated above, no doubt, when the Constitution was adopted, on the subject of local option, by the people, it was adopted with reference to the well-known definitions of "sale," and of what constituted a completed sale. In *Bruce v. State*, 38 Tex. Cr. R. 53, 39 S. W. 683, the question of C. O. D. sales was discussed, and it was there said that the authorities were both ways as to the locus of the sale; but we followed that class of decisions which held that the sale was completed when the property was delivered to the common carrier by the seller. *Freshman v. State* (Tex. Cr. App.) 38 S. W. 1007; *Weathered v. State*, 60 S. W. 876, 1 Tex. Ct. Rep. 655; *Treadaway v. State*, 42 Tex. Cr. R. 466, 62 S. W. 574. In the latter case, summarizing, the court stated: "This court has heretofore held that, when whisky is shipped to a party C. O. D., the moment it is placed in the express office it becomes the property of the consignee; and this is clearly true the moment the consignee receipts the express company for the same, and pays the C. O. D. charges thereon." So it would appear that the question of sale and the locus thereof, both generally and as relating to C. O. D. packages, has been well settled by the de-

cisions of this court. However, the Legislature has seen fit to pass an act regarding C. O. D. packages at variance with the rule heretofore adopted and followed by this court. Whenever a case is brought before this court with no other facts or circumstances to characterize the sale, as to the place where the seller parts with title to the property than a simple C. O. D. package, we will meet and decide the question. However, as stated before, we do not believe the Legislature, or any other department of the government, has authority to make contracts for parties, and that parties are authorized to make their own contracts, when not in violation of some law of the land. We are disposed to doubt the authority of any department of the government to make that a completed contract at a place where it is not completed—the seller not there parting with title to the property—or to visit a penalty upon any citizen for doing some act preliminary to a sale which does not evidence a completed sale in territory where, under the Constitution, the Legislature is only authorized to punish a sale within the prohibited territory. As stated before, this sale does not come under the act of the Twenty-Seventh Legislature.

The charge of the court which attempted to involve this act in defining a sale was erroneous, and, for this and other errors pointed out, the motion for rehearing is overruled.

SAN ANTONIO & A. P. RY. CO. v. TURNHAM.

(Court of Civil Appeals of Texas. Dec. 16, 1903.)

APPEAL—FAILURE TO FILE BRIEF IN COURT BELOW—EFFECT—WAIVER.

1. Where the appellee's attorney stipulates in writing with appellant's attorney for the postponement of the submission of a case on appeal to enable appellant to file his briefs, appellee waives appellant's failure to file his brief in the court below within the time required by the statute.

Appeal from District Court, Milam County; J. C. Scott, Judge.

Action between the San Antonio & Arkansas Pass Railway Company and R. C. Turnham. From a judgment for the latter, the former appeals. On motion to dismiss appeal. Motion overruled.

Duncan, Walters & Lane, for appellant.

FISHER, C. J. The appellee, on the 2d day of December, 1903, filed his motion to dismiss the appeal on the ground that the appellant had not filed its brief in the court below within the time required by the statute, and that notice of such filing was not served on appellee. The facts stated in the motion are sufficient to entitle appellee to have the case dismissed for the reasons stated; but we are of the opinion that he waived his right to insist upon the motion by reason of an agreement we find filed among the

papers in this cause, which was acted upon by this court on the 25th of November, 1903, the day upon which this case was originally set for submission. The effect of that agreement is to postpone the submission to the 9th day of December, 1903, in order that appellee may have time within which to file his briefs. This agreement is signed by the attorneys for the appellant and appellee.

The motion is overruled.

RYLIE v. STAMMIRE.

(Court of Civil Appeals of Texas. Dec. 12, 1903.)

DESCENT AND DISTRIBUTION—ACTIONS TO RECOVER PROPERTY—ADMINISTRATORS—RIGHT OF HEIRS TO BRING ACTION—NECESSARY FACTS—PLEADING—SUFFICIENCY OF—CONCLUSIONS OF PLEADER—IMPROPER ALLEGATIONS.

1. The general rule that a suit to recover property belonging to the estate of a deceased person must be brought by the administrator is subject to the exception that where there is no administrator, and no necessity therefor, suit may be brought by the heirs.

2. To authorize the bringing of a suit by heirs to recover property belonging to the estate of a deceased person, they must allege and prove that there is no administration pending, and no necessity for one.

3. Where the petition showed that the property sued for was the community property of plaintiff and her deceased husband, but failed to show whether or not administration had issued on his estate, there being no allegation that it had not issued, and that there were no debts and no necessity for administration, it was insufficient.

4. In a suit to recover for certain property alleged to have been taken by defendants, where no exemplary damages were asked, an allegation that "the conduct and manner of defendants in taking possession of said property was done in a coarse and brutal manner, calculated to injure, intimidate, and humiliate your petitioner, and that your petitioner was humiliated and intimidated by the conduct of said defendants," etc., was improper, and subject to the exception that it was a conclusion of the pleader.

Appeal from Dallas County Court; E. S. Lauderdale, Judge.

Action by M. C. Stammire against James Rylie and another. Judgment for plaintiff, and defendant Rylie appeals. Reversed.

M. L. Dye, for appellant.

BOOKHOUT, J. The following statement is contained in the appellant's brief, and, as it is substantially correct, is adopted: "Appellee, M. C. Stammire, sued appellant, James Rylie, and one Will White, alleging that said Rylie and White on or about the 23d day of January, 1901, unlawfully and forcibly took from the possession of plaintiff two horses and forty bushels of corn and thirteen bales of hay; that one horse was worth \$150, and the other \$75; that the corn was worth \$20, and the hay \$4. Plaintiff also sued for the value of the use of said horses, alleged to be worth \$2.50 per day; also for \$75.00, alleged to be damage done to said horses. Plaintiff

also alleged that 'the conduct and manner of defendants in taking possession of said property was done in a coarse and brutal manner, calculated to injure, intimidate, and humiliate your petitioner, and that your petitioners were humiliated and intimidated by the conduct of said defendants.' That plaintiffs, 'by reason of the premises above stated, have been damaged in the amount of five hundred dollars.' Plaintiff prayed for judgment against defendants for the amount of her damages, above set out, and for the possession of the property sued for. The defendants Rylie and White filed a general demurrer and general denial; Rylie also adopting the answer of White; stating that, in the fall of the year 1900, Rylie leased or rented to plaintiff's husband, — Stammire, and to defendant White, sixty acres of land for the year 1901, and that said husband of plaintiff agreed to furnish the two horses, the corn, and hay sued for, with which to make the crops on said sixty acres; that in pursuance of such agreement said husband, in his lifetime, delivered in said fall of 1900 to defendants said horses, corn, and hay, with which to make said crops for the year 1901, and that defendants obtained and were holding possession of said property by virtue of said contract, and for the purposes of making said crops with same, and did not obtain and hold possession of same by force, as alleged by plaintiff. Defendants alleged that they had returned said horses to plaintiff before the filing of this suit. Plaintiff prayed, in the alternative, that, if defendants showed they held said property by virtue of said contract, she have judgment for her interest in the crops grown on said premises, which interest she alleged was of the value of \$200. There was a verdict for the plaintiff against both defendants for \$100. The court, of its own motion, reduced the amount of said verdict to \$24, by requiring plaintiff to remit all of said \$100 except \$24, as a condition on which the court overruled defendants' motion for new trial. Judgment was rendered for plaintiff against defendants, and defendant Rylie duly perfected his appeal to this court."

The first assignment of error complains of the action of the court in overruling the special exception challenging the right of plaintiff to maintain this suit under the allegations contained in the petition. As a general rule, a suit to recover property belonging to the estate of a deceased person must be brought by the administrator. To this rule there is an exception, that where there is no administrator, and no necessity therefor, suit may be brought by the heirs; but, to authorize a suit by them, they must allege and prove that there is no administration pending, and no necessity for one. *Richardson v. Vaughan*, 86 Tex. 94, 23 S. W. 640. The petition in the case at bar shows that the property sued for was the community property of plaintiff and her husband, who died

December 29, 1900, leaving plaintiff, M. O. Stammire, his surviving wife, and one son, Albert Stammire. The pleadings do not show whether or not any administration has been taken out on the estate of her deceased husband. There is no allegation that administration has not been taken out thereon, and that there are no debts and no necessity for administration. The contract out of which the litigation arose was made during her husband's lifetime. This suit was filed June 24, 1901, less than six months after her husband's death. In this condition of the pleading, the court should have sustained the special exception of defendants challenging the right of plaintiff to maintain the suit.

We are of the opinion that the statement in the petition that "the conduct and manner of defendants in taking possession of said property was done in a coarse and brutal manner, calculated to injure, intimidate, and humiliate your petitioner, and that your petitioner was humiliated and intimidated by the conduct of said defendants," was also subject to the special exception in which complaint is made that the same is a conclusion of the pleader. The petition did not seek to recover exemplary damages, and the excerpt quoted could only have the effect of inflaming the minds of the jury. It was an unnecessary allegation in a suit for the value of the property.

The other errors assigned show no reversible error. For the error pointed out in the first assignment, the judgment is reversed, and the cause remanded.

ZACHARIAE et al. v. SWANSON.

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

ATTACHMENT—BOND—AMOUNT—FINDINGS OF FACT—ABSENCE OF EFFECT—CONCLUSIONS OF LAW—PROVINCE OF ERROR.

1. Where an attachment bond was not in double the amount sued for, as required by statute, the court erred in denying a motion to quash the writ of attachment.

2. Where there was no finding of fact that a conveyance of land by defendant to his daughter was fraudulent as to plaintiff, an attaching creditor; that the purchase was not made by defendant in good faith for the benefit of his daughter, for the purpose of reimbursing her for funds of hers used by him; or that it was made with her individual funds—a conclusion of law that the conveyance was in fraud of plaintiff, and that the daughter acquired no title, was error.

3. A conclusion of law does not take the place of a finding of fact, except where the law gives a conclusive effect to the fact established, or where the evidence is of such a conclusive character that the minds of men of ordinary intelligence will not differ as to its effect.

Appeal from District Court, Llano County; Clarence Martin, Judge.

Action by J. A. Swanson against A. F. Zachariae and another. Judgment for plain-

tiff, and defendant Zachariae appeals. Reversed.

Flack & Dalrymple and Chas. L. Lauderdale, for appellant.

FISHER, C. J. This is a suit by Swanson against Zachariae on two promissory notes, each for \$866.66, with 8 per cent. interest. An attachment was, at the time of the institution of the suit, issued and levied upon the land in controversy, which the plaintiff, by an amended petition, alleged that one Mrs. Charlotte Holtzer was claiming an interest in. The defendant Zachariae filed a motion to quash and vacate the attachment on the ground that the bond was not in double the amount sued for. It appears that Mrs. Charlotte Holtzer is the daughter of the appellant Zachariae, and prior to the levy of the writ of attachment he conveyed by deed the land in controversy to her. The questions are whether that deed was for a valuable consideration, and whether it was executed in fraud of the appellee and other creditors of Zachariae. The court found in favor of the plaintiff, and foreclosed the attachment lien.

The findings of the trial court are as follows:

"(1) Defendant A. F. Zachariae executed and delivered the two notes set out in plaintiff's second amended original petition. That they are past due, and no part of same has been paid. That suit was brought on same, and plaintiff is the legal and equitable owner and holder thereof.

"(2) That at the time of filing of the original petition herein, on February 4, 1903, plaintiff filed his affidavit and bond in attachment, and on the same day a writ of attachment issued to the sheriff or any constable of Llano county, commanding him to attach so much of the property of defendant A. F. Zachariae as shall be of value sufficient to make the principal of said notes and interest thereon, and on the same date said writ was levied on lot 7 in Block R of the Llano Improvement & Furnace Company Re-subdivision to the town of Llano, in Llano county, Texas, as the property of the defendant A. F. Zachariae.

"(3) Said lot was purchased and paid for by defendant, A. F. Zachariae, and said title taken in the name of his daughter Charlotte Holtzer. That the purchase price thereof and cost of improvements upon said lot were paid with money belonging to the defendant A. F. Zachariae.

"Conclusions of Law.

"Plaintiff is entitled to recover of defendant A. F. Zachariae principal, interest, and attorney's fees due on said notes.

"(3) The taking of title to said lot in the name of Charlotte Holtzer was in fraud of plaintiff, and she acquired no title thereby, but title is held by her for the use and benefit of defendant A. F. Zachariae.

"(4) That plaintiff has a valid and subsisting attachment lien on said lot, and is entitled to a decree of foreclosure to the extent of the principal and interest on said notes, and attorney's fees on the first of said notes."

There is some evidence in the record which tends to show that the land was purchased by the appellant, Zachariae, for his daughter Mrs. Holtzer; and there is some evidence to the effect that he purchased it with his funds, but intended it for her, he at the time being indebted to her.

We are of the opinion that the court erred in not sustaining the motion to quash the writ of attachment, and that it erred in foreclosing the attachment lien on the property in question. The law requires the attachment bond to be double the amount sued for. The attachment bond is only for \$2,300, and therefore is not in double the amount sued for.

The court, in its conclusions of law, states that the title or conveyance executed by Zachariae to his daughter Charlotte Holtzer was in fraud of the plaintiff, and for that reason she acquired no title to the property in controversy, but held it for the use and benefit of defendant A. F. Zachariae. The evidence is not of such a conclusive and convincing character that the court could, as a matter of law, determine the invalidity of the conveyance on the ground of fraud, as stated by the trial court in its conclusions of law. There is no finding of fact of the trial court upon this subject. It does not find as a fact that the conveyance was executed in fraud of the rights of the appellee, nor does it find as a fact that the purchase was not made by Zachariae in good faith for the benefit of his daughter, for the purpose of reimbursing her for funds of hers used by him, or that the purchase was made with her individual funds. A conclusion of law does not supply or take the place of a finding of fact, except in cases where the law gives a conclusive effect to the fact established, or where the evidence is of such a certain and conclusive character that the minds of men of ordinary intelligence will not differ as to its effect. *Edwards v. Chisholm* (Tex. Sup.) 6 S. W. 558; *West End Town Co. v. Grigg*, 93 Tex. 457, 56 S. W. 49.

We do not undertake to discuss the evidence in the record, nor the effect to be given to it, and dispose of the remaining assignments with the views just expressed.

Reversed and remanded.

DELAWARE WESTERN CONSTRUCTION
CO. et al. v. FARMERS' & MERCHANTS'
NAT. BANK OF GILMER.

(Court of Civil Appeals of Texas. Dec. 5,
1903.)

PROCESS—CITATION—CONTENTS—NAMES OF
PARTIES—NATURE OF DEMAND—
JUDGMENT—DEFAULT.

1. Where suit was brought against defendants on a joint note, and the citation did not

state the names of both defendants, as required by statute, it was fatally defective, and insufficient to support a judgment for default.

2. Batts' Ann. Civ. St. art. 1215, requiring a certified copy of the petition to accompany the citation, where the defendant does not live in the county where the suit is brought, did not change the statutory requirement that a citation should contain a statement of the nature of plaintiff's demand.

3. Where the only statement of plaintiff's demand in a citation as required by statute was a reference to "the certified copy of the petition hereto attached," the citation was insufficient to support a judgment for default.

Error from Upshur County Court; M. B. Briggs, Judge.

Action by the Farmers' & Merchants' National Bank of Gilmer against the Delaware Western Construction Company and others. From a judgment in favor of plaintiff, defendants bring error. Reversed.

Barnwell & Eberhart, for plaintiffs in error. Warren & Briggs, for defendant in error.

BOOKHOUT, J. This suit was filed by the defendant in error in the county court of Upshur county, Tex., against the plaintiffs in error, on the 30th day of October, 1902, on a joint note alleged to have been given by them to said bank on the 24th day of January, 1902; said note being for \$1,000 and becoming due and payable 60 days after date. Citations issued to defendants to Harrison county, and were served on the 6th day of October. Defendants did not answer in said cause, and on the 18th day of November, 1902, judgment was rendered by default against both of them. Defendants have prosecuted a writ of error.

The first assignment of error reads: "The court erred by rendering judgment by default against these defendants, because it affirmatively appears from the record herein that the citations served upon them are fatally defective, and will not support a judgment by default, for the following reasons: (1) Because said citations served upon defendants did not contain the names of both of these defendants, but named only the Delaware Construction Company as defendant. (2) Because said citations wholly failed to state the nature of plaintiff's demand, but simply referred to plaintiff's petition for such statement; the only attempt to comply with the requirement in said citations being in words as follows: 'For cause of action, reference is here made to the certified copy of plaintiff's original petition hereto attached.'" Omitting the formal parts, the citation served on the construction company reads as follows: "You are hereby commanded to summon the Delaware Western Construction Company, by delivering to its president, L. E. Walker, a copy of this citation, to be and appear before the honorable county court of Upshur county, Texas, at the next regular term thereof, to be holden at the courthouse in Gilmer, Texas, on the third Monday in November, A.

D. 1902, then and there to answer the plaintiff's petition filed in a suit in said court on the 30th day of October, 1902, wherein the Farmers' & Merchants' National Bank of Gilmer is plaintiff, and the Delaware Western Construction Company is defendant; file number of said suit being No. 547. The nature of plaintiff's demand is as follows, to wit: For cause of action, reference is here made to the certified copy of plaintiff's original petition hereto attached." The citation served on L. E. Walker (omitting formal parts) reads as follows: "You are hereby commanded to summon L. E. Walker to be and appear before the honorable county court of Upshur county, Texas, at the next regular term thereof, to be holden at the courthouse in Gilmer, Texas, on the third Monday in November, A. D. 1902, then and there to answer the plaintiff's petition filed in a suit in said court on the 30th day of October, 1902, wherein the Farmers' & Merchants' National Bank of Gilmer is plaintiff, and the Delaware Western Construction Company is defendant; file number of said suit being No. 547. For cause of action, reference is here made to the certified copy of plaintiff's original petition hereto attached." A copy of plaintiff's petition was served on each of the defendants. L. E. Walker is not named as a defendant in either citation, but in both the Delaware Western Construction Company is named as the only defendant.

The first question presented is, will a citation which does not comply with the statute, in that it does not state the names of the parties to the suit, support a judgment by default? It has been repeatedly held that such a citation is fatally defective, and will not authorize a judgment by default. *Burleson v. Henderson*, 4 Tex. 49; *Norvell v. Garthwaite*, 25 Tex. 584; *Battle v. Eddy*, 31 Tex. 368; *Crosby v. Lum*, 35 Tex. 41; *Rodgers v. Green*, 33 Tex. 662; *Anderson v. Brown*, 16 Tex. 555; *Owsley v. Bank*, 1 Posey, Unrep. Cas. 95-97; *Heath v. Fraley*, 50 Tex. 200; *Durham v. Betterton*, 79 Tex. 223, 14 S. W. 1060; *Pruitt v. State*, 92 Tex. 434, 49 S. W. 366.

The next question raised is, were the citations defective in failing to state the nature of plaintiff's demand? The statute names this as one of the requirements of a citation. *Batts' Ann. Civ. St. art. 1214*. It is held that the provisions of the statute in this respect are mandatory, and there must be a substantial compliance therewith. *Pruitt v. State*, 92 Tex. 435, 49 S. W. 366. The citation in question makes no statement whatever of the nature of plaintiff's demand, but refers to "the certified copy of the petition hereto attached." The copy of the petition accompanying the citation is no part of the citation. Where the defendant, as in this case, lives out of the county, the statute requires a certified copy of the petition to accompany the citation, and it was to comply with this statute that the copy of the petition was attach-

ed to the citation. *Batts' Ann. Civ. St. art. 1215*. This statute does not, and was not intended to, change the statutory requirements of a citation.

Defendant in error insists that, as the certified copy of the petition attached to the citation was referred to in the citation for a statement of the nature of plaintiff's demand, such reference was a compliance with the statute. If this argument is sound, it would also apply to a citation which fails to name the parties to the suit. The courts have uniformly held a citation defective when the parties to the suit are not named therein, even in cases where a copy of the petition accompanies the citation. *Battle v. Eddy*; *Anderson v. Brown*; *Norvell v. Garthwaite*, supra. We are of the opinion that the citation in this case, in failing to state the names of the parties to the suit, or to make any statement therein of the nature of plaintiff's demand, but referring to the copy of the petition attached thereto for such statement, did not comply with the provisions of the statute, and is not sufficient to support a judgment by default.

The judgment is reversed, and the cause remanded.

ALEXANDER & KNEELAND v. VON KOEHRING.*

(Court of Civil Appeals of Texas. Dec. 2, 1903.)

VENDOR AND PURCHASER — RECOVERY OF PAYMENT MADE—DIRECTING VERDICT—NEW TRIAL.

1. In an action by a prospective vendee of real estate to recover a sum of money deposited by him with persons negotiating the transaction to bind the sale, which he refused to consummate, the question whether there was a contract, and whether it was broken by plaintiff, was for the jury.

2. A peremptory charge is properly refused where there is a conflict in the evidence on material issues.

3. The refusal of the trial court to grant a new trial on a motion therefor disclosing a disqualification of a juror by failure to pay his poll tax affords no ground for reversal of the judgment on appeal.

Appeal from Bexar County Court: Robt. B. Green, Judge.

Action by Dr. H. Von Koehring against Alexander & Kneeland. From a judgment for plaintiff, defendants appeal. Affirmed.

W. P. Lobban, for appellants. A. E. Heilbron, for appellee.

NEILL, J. Dr. Von Koehring sued appellants as partners, and Mary Chabot, joined by her husband, George Chabot, to recover \$50, the money of plaintiff, which was received from him by appellants. The appellants, Alexander & Kneeland, answered that as real estate brokers the money was received by them to bind the sale of certain real

*Rehearing denied December 23, 1903.

¶ 2. See Appeal and Error, vol. 3, Cent. Dig. § 3367.

property they were negotiating as agents of Mrs. Chabot with the appellee; that, after the terms of sale had been agreed upon by all the parties, appellee failed to consummate it by performing his part of the agreement; that thereby they were deprived of their commissions, amounting to \$125, which they would have made had the sale been consummated, which sum they plead in reconvention against the plaintiff. As the suit was dismissed as to the Chabots, it is unnecessary to state their pleadings. Upon the trial in the justice's court, where the suit was instituted, the plaintiff recovered judgment against appellants both for the money and on their plea in reconvention. They appealed to the county court, where, upon a trial before a jury, judgment was rendered against them as in the justice's court. From that judgment they have appealed here.

By disposing of this case upon the issues made by the parties in the lower courts we do not wish to be understood as intimating that an agent of a vendor can recover commissions from a vendee who, in the absence of any fraud on his part, has failed to consummate his purchase, for we know of no such principle of law. An agent of the seller cannot at the same time be the agent of the buyer, and must, ordinarily, look to his principal for compensation for his services, and has no recourse against any one else. Upon the issues made by the pleadings and evidence there was a sharp conflict of testimony, and, should it be conceded that appellants could recover commissions of appellee for negotiating, as agents of Mrs. Chabot, a contract for the sale of her property to appellee, it was for the jury to determine from the evidence whether such a contract was ever made by the agents, with authority from their principal, between the parties, and, if made, whether it was broken by the appellee. These issues of fact were submitted to the jury by a charge of which appellants have no right to complain. It would have been error for the court, in view of the conflict in the testimony upon these issues, to have withdrawn them from the jury by peremptorily instructing them, as requested by appellants, to find in their favor.

That the juror George Battaglia was not a qualified juror in Bexar county by reason of his failure to pay his poll tax, affords appellants no ground for the reversal of the judgment because of the failure of the trial court to grant a new trial upon appellants' motion disclosing the disqualification of said juror. *Schuster v. La Londe*, 57 Tex. 28. Cases are uniform that after the jury is sworn, a new trial will not be granted because of the want of qualification of a juror propter defectum. *Hamilton v. State* (Tenn.) 47 S. W. 695. It is not shown that appellants' rights were in any way prejudiced by the disqualification of the juror (*Ency. Plead. & Prac.* 520, Note 2), and it was a matter resting within the sound discretion of the

court as to whether the new trial should be granted upon such ground, and, that court having ruled against appellants on it, it is not for this court to disturb its ruling.

There is no error which requires a reversal of the judgment, and it is affirmed.

GUERGUIN v. BOONE.*

(Court of Civil Appeals of Texas. Dec. 2, 1903.)

NOTES—SURETY—DEFENSE—EXTENSION OF TIME—INSTRUCTIONS—HARMLESS ERROR—BURDEN OF PROOF—PRESUMPTION OF FACT.

1. In an action on a joint and several note executed by two persons as principals and a surety the principals defaulted. The surety pleaded his suretyship, and alleged that his relation to the note was known to the plaintiff, and that the latter, without the surety's knowledge or consent, extended the note, after its maturity, for a definite period. Before announcement of ready the surety filed the statutory admission. *Held* that a refusal to grant the surety's prayer for the right to open and close the evidence and argument was not error.

2. A forbearance to sue on a note, in the absence of an agreement by the payee not to do so, does not amount to an extension of time for payment of the note.

3. A charge requested, containing nothing more than that which has substantially been given, and more favorably to the complaining party, is properly refused.

4. In an action against a surety on a note, where the defense was an extension of time for payment without defendant's knowledge, objection was made to a charge placing on defendant the burden of proof to show by a preponderance of the evidence that an agreement to extend the note existed. The ground of the objection was that proof of payment in advance is prima facie evidence of an agreement to extend to the time for which the interest is so paid, and, defendant having shown such a payment by one of the makers, the burden devolved on plaintiff to show that no agreement to extend was made. *Held* that, since there was other evidence pro and con on the issue of the existence of an agreement, the objection was without merit.

5. The presumption of an agreement to extend the time for payment of a note, arising from the payment of interest in advance, is a presumption of fact, not of law.

6. A charge, in an action against a surety on a note, where the defense is an extension of time without knowledge of the defendant, that payment in advance of interest is prima facie, and not conclusive, evidence of an agreement to extend the note, is harmless error.

7. In an action against a surety on a note, where the defense was an extension without knowledge of the defendant, an instruction that payment of interest in advance is prima facie, and not conclusive, evidence of an agreement to extend the note, was not objectionable as requiring defendant to make conclusive proof of an extension.

On Rehearing.

8. Where it does not appear that, in consideration of the payment of a quarter year's interest in advance, without knowledge of the surety, the payee contracted to extend the note to the end of the quarter, the surety is not discharged, it appearing also that there was no court open to the payee until after the quarter for which interest was paid.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

*Writ of error denied by Supreme Court.

Action by W. W. Boone against Charles Guerguin and others. From a judgment for plaintiff, defendant Guerguin appeals. Affirmed.

Paschal & Ryan, for appellant. Thos. Haynes, Perry J. Lewis, and H. C. Carter, for appellee.

JAMES, C. J. The note sued on was joint and several, and executed by Thad W. Smith, A. P. Rivas, and Charles Guerguin for \$1,000, with certain attorney's fee and interest. Rivas did not answer. Defendant Smith filed only a general denial, and, as the judgment recites, "came not." Defendant Guerguin pleaded that he was surety for his codefendants, that his relation was known to plaintiff, Boone, and that the latter, without his knowledge or consent, after the maturity of the note, extended it for a definite period for a valuable consideration paid by defendant Smith. Before announcement of ready, Guerguin filed a statutory admission, and prayed for the right to open and conclude in adducing the evidence and in the argument. This was refused. We overrule the first assignment, presenting this ruling as error, on the authority of the opinion in *Hittson v. State Natl. Bank* (Tex. Sup.) 14 S. W. 780.

The portion of the charge complained of by the second assignment is as follows: "You are further instructed that if you find from the testimony that the plaintiff, without the consent of defendant Guerguin, agreed with defendant Smith to extend the time for the payment of the note herein sued upon for a definite length of time, then you are instructed that said defendant Guerguin was thereby released from such obligation, and you will return your verdict for said defendant Guerguin; but in this connection you are further charged that a mere forbearance upon the part of plaintiff to enforce collection of said note would not amount in law to an extension of the time for the payment of the note." The propositions in support of the complaint are that a forbearance to enforce collection for a definite time upon sufficient consideration amounts in law to a legal extension, and payment of interest is a sufficient consideration therefor; and that the charge was, in effect, that, while an extension will release, a forbearance to sue does not do so under any circumstances. The criticisms are not well founded. There was no dispute in the evidence as to the fact that on one occasion after the note had matured Boone received from Smith a quarter's interest in advance, and the court assumed in its charge and in this very paragraph that, if an agreement to extend was made, it was a valid contract, thereby assuming that it was supported by sufficient consideration. The issue submitted was whether or not there had been an agreement for such an extension. The in-

struction in question told the jury to find for Guerguin if an agreement was had as to extension; but that a mere forbearance on plaintiff's part to sue (by which any jury of ordinary intelligence must have understood forbearance to sue, in the absence of an agreement by plaintiff not to do so) would not amount to an extension. Besides, in a charge requested by defendant, and given, the jury were told to find for Guerguin if Boone agreed with Smith to forbear enforcing collection or payment of the note for a definite length of time in consideration of interest.

We may dispose of the third assignment of error by stating that comparison of the refused charge with the paragraph in the court's charge above quoted and with defendant's special charge that was given will show that this refused charge contained nothing more than what was substantially given, and more favorably to defendant.

The fourth assignment complains of the placing upon Guerguin the burden of proof "to show by a preponderance of the evidence" that an agreement to extend the note existed. The proposition is that payment of interest in advance is *prima facie* evidence of an agreement to extend to the time for which the interest is so paid, and, Guerguin having shown such a payment in advance by Smith, the burden devolved on Boone to show that no agreement to extend was made. If there had been no testimony on the issue of the existence of an agreement, except the fact that Boone had taken a quarter's interest in advance, the case would have presented itself very differently. But there was other testimony pro and con on the issue, and the burden of the whole issue was on defendant. The presumption arising from interest being accepted in advance is a presumption of fact, not of law, and no reference whatever ought to be made to it in the charge where there is other evidence to consider on the issue. Its mention in such a situation is apt to confuse and mislead, and, besides, it is to some extent on the weight of evidence. *Heldt v. Webster*, 60 Tex. 207; *Stooksbury v. Swan*, 85 Tex. 563, 22 S. W. 963.

The fifth assignment complains of plaintiff's special charge No. 3, given, wherein it told the jury that payment in advance of interest upon a note is *prima facie*, and not conclusive, evidence of an agreement to extend the note. From the discussion of the preceding assignment the instruction, in so far as it stated the presumption, was improper. But this was manifestly not prejudicial to defendant. Of this there could be no doubt had it merely stated that it was *prima facie* evidence of the fact. The difficulty, if any, arises from the expression "*prima facie*, and not conclusive, evidence." If there be anything in this charge of which the defendant could complain, it would be the statement that payment of interest in

advance was not conclusive evidence of an agreement to extend. His proposition is "that a charge that certain evidence is prima facie, but not conclusive, proof, is upon the weight of evidence." In the first place, we think the additional words were only designed and can only be understood as explanatory of "prima facie" evidence; and a charge that the fact of such payment was prima facie evidence of an extension was advantageous to defendant, rather than otherwise. In the second place, inasmuch as the jury might naturally have formed the idea that payment of interest in advance was tantamount of an agreement to extend, it was not improper for the court to explain to them that such was not the case. This would not be a charge on the weight of evidence, unless in some aspect of the case the jury might have been warranted in considering such fact alone as conclusive. This was not stating the effect of such evidence, but simply that it was not conclusive of the issue. When the court stated that it was prima facie evidence, this was giving it weight and effect; but the court did not do this by stating that it was not conclusive evidence.

A contention appearing in appellant's brief that this particular charge required defendant to make conclusive proof of an extension cannot be sustained. The nature of the charge was not to that effect at all, and the jury were instructed that he had only to show it by a preponderance of the evidence.

We overrule the sixth assignment. The charges were not contradictory.

We overrule the seventh assignment also, as we find the evidence supports the verdict, and was not such as to demand the granting of a new trial.

Affirmed.

On Rehearing.

(Dec. 23, 1903.)

It will be seen that the terms for holding district court in Bexar county (where all the parties resided) bring this case within the terms of the opinion in *Maddox v. Lewis*, 12 Tex. Civ. App. 424, 34 S. W. 647. Boone testified that the only time Smith ever paid interest before it was due was by the payment on June 8, 1901, for the quarter which ran until August 2, 1901. As to Smith having previously paid other installments before they became due, and extensions then made, this was disposed of by the above denial of Boone, if accepted as true. The payment of interest before the expiration of the quarter on June 8, 1901, is conceded. Boone's version of the transaction shows that nothing was said, and no agreement made, about an extension. As the matter stood on June 8th, a current quarter's interest was not yet due. At that time Smith was unable to pay the note, and for that matter was unable to pay it at the end of the quarter. Boone

was not in a position to enforce payment by that time, as no court was open to him until after the quarter. The note was as good as extended by force of these circumstances. Both knew that it would not be paid during that quarter. If, under these circumstances, Boone received the interest before the end of the quarter, the surety ought not to be held discharged by that fact alone, unless it be made to appear that in consideration of the advance interest Boone contracted to extend the note to the end of the quarter.

The motion is overruled.

VON DIEST v. SAN ANTONIO TRACTION CO.*

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

STREET RAILROADS—EQUIPMENT OF CARS—ORDINANCE—CONSTRUCTION—ACTIONS—EVIDENCE—INSTRUCTIONS.

1. Statutes and ordinances must be reasonably construed, and in a manner not repugnant to common sense.

2. An ordinance making it unlawful to operate a street car unprovided with a fender of the most improved design and construction, and providing that every electric street car shall have a conductor and motorman, requires a fender and motorman only on motor cars, and not on trailers.

3. In an action against a street railroad for injuries to one attempting to board the car, a question as to whether the conductor could have stopped the car, and prevented injury, had he been on the rear platform of the motor car, or front platform of the trailer, called for an opinion, and was properly excluded.

4. In an action against a street railroad for injuries to one attempting to board a car, the court properly refused to present a case to the jury not made by the pleadings or evidence.

Appeal from District Court, Bexar County: S. J. Brooks, Judge.

Action by H. W. G. Von Diest against the San Antonio Traction Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Jas. Routledge, Selig Deutschman, and Harry Wurzbach, for appellant. Houston Bros. and R. J. Boyle, for appellee.

FLY, J. This is a personal injury suit instituted by appellant to recover damages alleged to have accrued through the negligence of appellee in suddenly starting its car when appellant was attempting to get on the same, and the failure of appellee to have a fender and a conductor and a motorman on the trailer, as required by ordinance of the city. The verdict and judgment were in favor of appellee. By a strong preponderance of the evidence, it was shown that appellant was injured by attempting to board a car while it was moving. The car which he attempted to get on was a motor car, to which was attached a car without a motor, known as a

*Rehearing denied December 23, 1903, and writ of error denied by Supreme Court.

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 275.

"trailer." Appellant missed his hold on the motor car, and fell in the rear of it, and his arm was run over and crushed by the trailer. No negligence was shown upon the part of appellee.

There was an allegation in the petition that appellee was negligent in not having a fender and a conductor and motorman on the trailer, which, it is contended, is required by the ordinances of the city of San Antonio. The court sustained exceptions to that portion of the petition. The ordinances referred to are as follows:

"Sec. 59. It shall be unlawful for any person, firm or corporation, or for any officer or employé of a corporation to operate or run upon any public street, avenue, plaza or square, of the city of San Antonio, any street car unprovided with a car fender of the most improved design and construction."

"Sec. 15. Hereafter no electric car shall be propelled or operated within the limits of the city of San Antonio, without having one conductor and one motorman thereon."

It is the contention of appellant that language of the ordinances support the allegations of the petition, and that it is the duty of the street railway company to have fenders and conductors and motormen not only on motor cars, but on cars thereto attached that have no motors, and that are dependent upon the motor car for power and motion. It may be that a literal construction of the ordinances would give support to the contention, but statutes and ordinances must have a reasonable construction upon them, and not one repugnant to common sense. In the case of *Russell v. Farquhar*, 55 Tex. 355, the statute was under consideration which provides that no judgment or decree for the title to land or for the partition of land shall be received in evidence unless recorded in the county in which the land is situated, and it was held that the statute was intended for the protection of bona fide purchasers and creditors, and had no reference to others. The Supreme Court said: "If courts were in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they are couched, it might well be admitted that appellant's objection was well taken. But such is not the case. To be thus controlled, as has often been held, would be for courts, in a blind effort to refrain from an interference with legislative authority, by their failure to apply well-established rules of construction, to in fact abdicate their own power, and usurp that of the Legislature, and cause the law to be held directly the contrary of that which the Legislature had in fact intended to enact. While it is for the Legislature to make the law, it is the duty of the courts to 'try out the right indentment' of statutes upon which they are called to pass, and by their proper construction to ascertain and enforce them according to their true intent. For it is this intent which constitutes and is in fact the law, and

not the mere verbiage used by inadvertence or otherwise by the Legislature to express its intent, and to follow which would pervert that intent." This language is quoted and approved in *McInery v. Galveston*, 58 Tex. 334, and *Edwards v. Morton*, 92 Tex. 152, 46 S. W. 792. The city council, in passing the ordinance as to fenders, had in view the protection of citizens from injury by cars propelled by electricity, and could not have contemplated that fenders should be placed on a car without the powers of locomotion within itself, and which could only be carried along the street railway tracks by being coupled to a car provided with motive power. The object in having a conductor and motorman on a car, it is clear, was to procure the undivided attention of one man to the propulsion of the car, in order that the safety of passengers and those using the street might not be endangered. To hold that the ordinance intended that a motorman should be put on a car that had no motor would be to render it absurd and ridiculous, and is a fine example of what positions courts would be led into by a literal construction of statutes in every instance. Whenever literalism becomes antagonistic to common sense and reason, it must be set aside in judicial construction. If it cannot be reasonably held that it was intended that a motorman should be placed on a car coupled on behind a motor car, why should it be held that it was intended that such car should be provided with a fender? In the very nature of things, the trailer could not be the car that would strike any person or other obstruction on the track, and there could be no object in having it provided with a fender to protect against dangers which could not arise. It will not be seriously contended that a fender was demanded by the ordinance to protect people who might fall down between the trailer and the motor. We think that, within the spirit of the ordinance, the two cars coupled constituted one car, and a fender on the front car and one conductor and motorman were all that was required by the ordinance. In a trial amendment, appellant alleged that, if a fender had been provided for the trailer, it would have prevented his injury, and, if there had been a motorman and conductor on the second car, that the cars could have been stopped in time to have prevented his injury. This pleading was not excepted to, but no evidence was introduced tending to show that appellant would not have sustained the same injuries, had there been a fender and a conductor and motorman on the trailer. The question as to whether the conductor could have stopped the car and prevented the injury if he had been on the rear platform of the motor car, or the front platform of the trailer, could have been answered only by an opinion on the part of appellant, and was properly excluded. The conductor swore that he tried to catch appellant as he fell, and at once gave the signal for an immediate stop,

and then applied the brake on the trailer. He swore that the car was stopped within 15 feet. The whole testimony united to show that the conductor was on the front platform of the "traifer," and that he did all in his power to stop the car and prevent the accident. Appellant did not swear that the conductor was not on the platform of the trailer, but simply that he did not see a conductor on either car.

The fourth and fifth assignments of error are without merit. The court correctly presented every issue in the case, and did not err in refusing to give the special instructions asked by appellant. The only case presented by the pleadings and evidence of appellant was that the car stopped in answer to his signal, and that, while he was in the act of getting on, it was suddenly started, and he was thrown to the ground and injured. Appellee met the issue by pleading and proof that, when the appellant attempted to get on the car, it was moving, and that he was precipitated, through his own negligence, to the ground between the cars. The court fully presented the case made out by the appellant, and then, in effect, told the jury that, if they did not find that the facts sustained appellant's case, they would find for appellee. Appellant desired another phase of the case than that made by his pleadings and evidence presented to the jury, and the court properly refused to present it. There was no evidence tending to prove that the car was moving slowly at the time he attempted to board it. He swore it had come to a full stop. The others swore that it did not "slow down" at all, but was moving at the rate of from three to five miles an hour.

The verdict is sustained by the evidence, and the judgment is affirmed.

DRUMM-FLATO COMMISSION CO. v. UNION MEAT CO.*

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

FACTORS—SALE OF CATTLE—DUTIES—EVIDENCE—IMPEACHING.

1. Where defendant's agent exercised ordinary care, skill, and diligence to obtain the fair market value of plaintiff's cattle shipped to defendant, as a factor, for sale, defendant was not liable in damages to plaintiff, although the cattle were sold for less than their market value.

2. Evidence wholly irrelevant to any issue in a case, drawn out on cross-examination, cannot be impeached by evidence to the contrary.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by the Union Meat Company against the Drumm-Flato Commission Company. Judgment for plaintiff, and defendant appeals. Reversed.

Ball & Ingram, for appellant. J. E. Webb, for appellee.

NEILL, J. Appellee, plaintiff below, sued appellant, defendant below, to recover damages alleged to have been caused by defendant's negligence in classifying below their grade and in selling for less than their market value 298 head of cattle shipped from San Antonio, Tex., and consigned by plaintiff to defendant, as a factor, for sale at East St. Louis, Ill. The plaintiff alleged that the cattle were fat and marketable, but that defendant negligently classified them as thin, rough, and common cattle, and sold them below their market value at East St. Louis on certain days of March, 1902, to plaintiff's damage in the sum of \$746.61. The defendant answered by a general denial, and the case was tried before a jury, and the trial resulted in a judgment in favor of plaintiff for the sum of \$500.

The conclusions we have formed from reading and carefully considering all the evidence, in our view, render it unnecessary, to a proper disposition of this appeal, to consider all of appellant's assignments of error. There is not a scintilla of evidence tending to show that the animals, or any of them, were classified by the defendant, or sold by it, as thin, rough, or common cattle. On the contrary, the undisputed evidence shows that it is not customary for factors to classify and sell cattle in the market at East St. Louis by classification. The invariable custom is for the factors to whom they are consigned to exhibit them in the market for sale, and sell them for the highest price that can be obtained. The great preponderance of evidence shows that this method of sale was adopted by the defendant, the cattle exhibited to the buyers, due care and diligence taken, and good faith exercised, by the defendant to sell them at the highest market price obtainable, and after the exercise of such care and diligence they were sold at the best price that could be obtained. It may be that it could be found from the evidence that other cattle of the same or of no higher grade or quality were sold in the market there at the same time for better prices. If this should be conceded, it is not sufficient evidence, even if it tends in that direction, to show that the defendant was guilty of negligence in selling the cattle below their market value. For, as the court instructed the jury, "If defendant's agent exercised ordinary care, skill, and diligence to obtain the fair market value of the cattle," defendant was entitled to a verdict, "although the jury may have believed from the evidence that the cattle were sold for less than their market value." As is said by Judge Cooley: "Whoever bargains to render service for another undertakes for good faith and integrity, but he does not agree that he will commit no errors. For negligence, bad faith, or dishonesty he would be liable to his employer; but if he is guilty of neither of these, the master or employer must submit to such incidental losses as may occur in the course of the employment, because

*Rehearing denied December 23, 1903.

these are incidents to all avocations, and no one, by any implication of law, ever undertakes to protect another against them." Page v. Wells, 37 Mich. 415.

The testimony of defendant's witness, Joe Berry, in regard to a sale of Mr. Butler's cattle in April, 1901, which was drawn out on cross-examination by plaintiff's counsel, was wholly irrelevant and immaterial to any issue in this case, and could not therefore be impeached by introducing evidence to the contrary, as was done in this case by the testimony of Mr. Butler, which gave an entirely different version of the transaction. *Smye v. Groesbeck* (Tex. Civ. App.) 73 S. W. 972. Besides, the testimony of Butler was extremely prejudicial to the defendant, and we can account for the verdict being against the overwhelming weight of the testimony only upon the hypothesis that its consideration influenced the jury.

Because the verdict upon the question of negligence finds no support in the evidence, the judgment is reversed and the cause remanded.

LITTLE et al. v. GRIFFIN.*

(Court of Civil Appeals of Texas. Nov. 14, 1903.)

VENUE—SUIT AGAINST COUNTY—INJUNCTION.

1. While actions against counties are governed generally by Laws 1846, p. 321 (Rev. St. 1895, art. 1194, subd. 19), providing that suits against a county shall be instituted in a court within the county, a suit for an injunction restraining sale under execution in favor of a county was properly commenced, not in that county, but in the one in which the sheriff having charge of the sale, and on whom the writ was served, had his domicile; Rev. St. 1895, art. 2906, providing that an injunction shall be returnable to the court of that county in which the party against whom it is directed has his domicile.

Appeal from District Court, Bosque County; W. Poindexter, Judge.

Suit by Z. T. Griffin against H. L. Little and others. From a decree in favor of complainant, defendants appeal. Affirmed.

J. G. Browning, O. S. Lattimore, and Capps & Canty, for appellants. Lockett & Cureton, J. A. Gillette, and Robertson & Robertson, for appellee.

STEPHENS, J. Execution was issued on a judgment rendered in the district court of Tarrant county in favor of Tarrant county, and was levied by the sheriff of Bosque county on a tract of land situated in that county. Appellee, who was the owner of the land, and a stranger to the judgment and execution, obtained an injunction against said sheriff and Tarrant county, restraining the sale of the land. This injunction was made returnable to, and was tried in, the district court of Bosque county, where the sheriff resided. Tarrant county sought to avoid a trial of the issue thus raised upon the

ground that suits against a county can only be "commenced in some court of competent jurisdiction within such county," and, being unsuccessful in the issue, has brought the case here by appeal.

It was held by this court in the case of *Montague County v. Meadows*, 31 S. W. 694, in which writ of error was denied, that section 1 of the original act to regulate proceedings in the district courts, prescribing the venue of suits, approved May 13, 1846 (Laws 1846, p. 363), was inapplicable to suits against counties, which were governed by section 4 of an act passed May 11, 1846 (Laws 1846, p. 321), providing "that all suits against a county shall be instituted and prosecuted to final judgment in some court of competent jurisdiction within such county," and that the incorporation of this section in the Revised Statutes of 1895 as subdivision 19 of article 1194 did not change the law as originally enacted; and this case is relied on by appellant to sustain the appeal. We are of opinion, however, that, as this was a proceeding by injunction, we should look to the special provisions on that subject, as contained in section 152 of the original act, and as now embodied in article 2906 of the Revised Statutes of 1895, rather than to the provision elsewhere found affecting venue of suits generally against counties. Turning to the injunction statute referred to, we find that a writ of injunction like this is made returnable to the proper court of the county in which the party against whom it is granted has his domicile, and if "there be more than one party against whom any writ is granted it may be returned and tried in the proper court of the county where either party may have his domicile." *Leachman v. Capps & Cantey* (Tex. Sup.) 36 S. W. 250. Inasmuch, then, as the sheriff of Bosque county had his domicile in that county, and was a party against whom the writ was granted, it was, by the very terms of the statute above quoted, made returnable to the district court of Bosque county. To hold otherwise would be to allow a general provision in one statute to control a special one in another, when the well-settled rule of construction is to the contrary. *Erwin v. Blanks*, 60 Tex. 583, and succeeding cases.

The judgment is therefore affirmed.

GALVESTON, H. & S. A. RY. CO. v. APPEL.*

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—BRAKEMAN—PLEADING—UNNECESSARY AVERMENTS—DAMAGES—EXCESSIVENESS—EARNING CAPACITY—REVIEW.

1. In an action for injuries to a brakeman, allegations in the petition that defendant owed plaintiff the duty to see that a trapdoor by which plaintiff was thrown from a car was se-

*Rehearing denied December 23, 1903, and writ of error denied by Supreme Court.

*Writ of error denied by Supreme Court.

curely and properly fastened, and that its negligent failure to have the same so secured was the direct and proximate cause of plaintiff's injuries, and that defendant's negligent failure to properly secure and fasten the door made it perilous and dangerous for plaintiff while in the discharge of his duties, which negligence was calculated to produce the calamity which befell plaintiff, were not demurrable as unnecessary, denunciatory, and inflammatory, though the petition would have been sufficient without them.

2. Where, in an action for injuries to a brakeman, the court gave a requested charge directing the jury to find for defendant if they found that plaintiff's condition was not caused by the accident, but was the result of his constitutional syphilitic condition, it was immaterial that such issue was not submitted to the jury in the court's general charge.

3. A verdict charged to be excessive will be reviewed on appeal, notwithstanding the assignment of error objecting thereto is general and multifarious.

4. Plaintiff was so injured by reason of defendant's negligence that he became crippled and paralyzed, rendering him a total wreck for life. At the time of his injury he was about 27 years of age, and though he had syphilis it was curable, and he was a strong, active man, able to do work incident to his vocation. *Held*, that a verdict awarding plaintiff \$16,000 damages was not excessive.

5. In an action for permanent injuries to a servant, the amount of his earning capacity at the time of the injury is not conclusive as to his earning capacity as an element of damages.

Appeal from District Court, Medina County; I. L. Martin, Judge.

Action by W. J. Appel against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

Baker, Botts, Baker & Lovett and Ellis & Love, for appellant. Ed De Montel, Perry J. Lewis, and H. C. Carter, for appellee.

JAMES, C. J. This is an action for damages for personal injuries. Plaintiff Appel alleged that he was brakeman on one of defendant's freight trains, and while he was on top of a stock car in discharge of his duties, and while the train was in motion, he stepped upon a trapdoor which constituted a part of the roof of the car, which defendant had negligently left insecure, and which tipped and caused plaintiff to be thrown to the ground with great force, a distance of some 15 feet, whereby he was seriously and permanently injured. The verdict was for plaintiff for \$16,000.

We do not sustain the first and second assignments of error, which complain of the presence in the petition of an allegation that defendant owed plaintiff the duty to see to it that said trapdoor was securely and properly fastened, and its negligent failure to have same securely and properly fastened was the direct and proximate cause of plaintiff's injuries. Also of an allegation that the defendant's negligent failure to properly secure and fasten said trapdoor made it perilous and dangerous for plaintiff while in the discharge of his duty, and that such negligence was calculated to produce just such a calamity as befell plaintiff. Defendant com-

plained of these allegations by special demurrers, which the trial judge overruled. The petition would probably have been sufficient without these allegations. The objection is that they were irrelevant—were unnecessary, denunciatory, and inflammatory allegations—not intended by the pleader to state a cause of action, and in their tendency calculated to prejudice the jury against the defendant. While they may have been unnecessary in stating a case of negligence, in view of the remainder of the petition, they were not in any sense denunciatory or inflammatory, nor calculated to have the effect charged to them.

The third and fourth assignments are criticisms of the general charge, in that it did not present a single phase of the case whereby the jury might find for the defendant, and because the third paragraph of the charge requires the jury to find for plaintiff, regardless of defendant's plea to the effect that plaintiff's condition was not caused by this accident, but was the result of his constitutional syphilitic condition. The general charge of the court presented the case correctly, but without reference to said plea, except indirectly, in that it authorized the jury to find for plaintiff only in the event his injuries were the result of falling from the car. But by a charge requested by defendant the issue indicated in the plea was directly submitted, and the jury directed to find for defendant if they found according to the plea.

The fifth assignment is that the court erred "in overruling defendant's motion for new trial, for the reasons therein set out, and particularly for the reason that the verdict was excessive, and contrary to and against the great preponderance of the evidence." Appellee objects to this assignment as multifarious and too general. This court has never failed to consider the verdict as to amount, in the light of the evidence, when an assignment charges that it is excessive. We find as a fact in this case that the testimony was sufficient to authorize finding that plaintiff fell from the car, and that his injuries were thereby caused. As to the verdict being excessive in amount, we find nothing to warrant our interference with the conclusion of the jury on the subject. Plaintiff, when hurt, was about 27 years of age, and there was ample testimony to the effect that, notwithstanding he had syphilis, he was a strong, active man, able to work, and did work. He testified he had been working for defendant about four years; that it takes a pretty good man to be a brakeman, that is, a man physically able to do any kind of work that came to hand; that when this accident occurred he was in perfect health, but was suffering a little bit from the disease. There was testimony that his disease was curable, that in his case it was confined to the skin and did not involve any of the inner structures, and that persons with

syphilis live as long as other people, do the same kind of work as other people, and that plaintiff had practically gotten well of it. The results of the fall have been paralysis of the right side and leg, spinal affection, and other afflictions, which may be summed up in the expression used by the company's physician: "Whatever may be the cause, he is now badly crippled, paralyzed, and in a pitiable condition; there can be no doubt about it." As to the earning capacity of a young man of active habits and ability to work, the amount he was earning at the precise time of his injury is not the exclusive criterion of what it was, or would have been thereafter. This was peculiarly a matter for the jury. Considering the condition of the man before he was hurt, his occupation, his prospects for preferment, his terrible injuries and suffering, rendering him a total wreck for life, we do not believe the amount found by the jury is unsupported.

Affirmed.

DE BERRERA v. FROST et al.*

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

RECEIVERS—APPOINTMENT—ADEQUATE LEGAL REMEDY—SEQUESTRATION—ACTIONS AT LAW—MORTGAGES—ASSIGNMENT OF RENTS—RIGHTS OF MORTGAGEE—MARRIED WOMEN—SEPARATE ESTATE.

1. Sequestration proceedings, in which, by Rev. St. 1895, art. 4873, defendant can retain possession of the sequestered property by giving a bond, in which case he is not required, under article 4882, to account for the rents or revenue thereof, are not an adequate legal remedy to save and collect for a mortgage creditor the rents of the property, and apply them to the discharge of his debts, and keep the property in such repair as to be rented annually, and the appointment of a receiver for such purpose was not, therefore, unnecessary.

2. The fact that a creditor whose mortgage gave him the right to the rents of property had given notice to the tenant to pay the same to him, and could maintain an action against the tenant for such rents, does not show an adequate remedy at law, rendering a receivership to collect and apply the rents to his debt superfluous.

3. The right of a mortgage creditor to sue and collect rents from a tenant is not an adequate remedy, preventing the appointment of a receiver to collect and apply the same and keep the property in repair, where the creditor is entitled to such rents until the payment of his entire debt, and the rents to accrue under the outstanding lease will be insufficient to extinguish his claim.

4. Under Rev. St. 1895, art. 1465, § 2, providing that receivers may be appointed in all cases where receivers have heretofore been appointed by the usages of the court of equity, a receiver may be appointed, pending suit, at the instance of a mortgage creditor, who is entitled by the mortgage to the rents and profits of the mortgaged property after default.

5. The rents of a married woman's separate estate are community property, and, where assigned as security by husband and wife for the former's debt, are not discharged by an extension of time of payment given to the husband.

6. The fact that a lease of property is void is

no answer to an application of a mortgage creditor for the appointment of a receiver to collect and apply to his debts the rents and profits thereof.

7. The appointment, for an indefinite time, of a receiver of the rents of a married woman's separate property, mortgaged to secure a debt of her husband, and in the assignment of which rents she joined, did not deprive her of her property without her consent and without due process of law.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by Julia C. De Berrera against T. C. Frost and another. From a judgment appointing a receiver, plaintiff appeals. Affirmed.

Geo. C. Altgelt, for appellant. Ball & Ingram, for appellees.

NEILL, J. This suit was brought by Julia C. De Berrera, a married woman, whose husband refused to join her in it, against T. C. Frost and J. T. Woodhull, to cancel a certain deed of trust upon certain real estate of her separate property. She alleged, in substance, that on December 1, 1899, her husband, Juan E. Berrera, became indebted to T. C. Frost in the sum of \$5,000, evidenced by his note of that date, bearing interest, and falling due on February 11, 1901. That to secure the payment of the note she joined with her husband in the execution of said deed of trust sought to be canceled. That after the maturity of the note her husband and Frost, by their several agreements to that effect, to none of which she consented or of which she had knowledge, extended the time of the payment of the note for a valuable consideration paid by her husband to Frost, and that by reason of such agreements of extension her separate estate, upon which the deed of trust was given, became released and no longer liable for the debt. J. T. Woodhull entered a disclaimer, and Frost, after filing an answer to the merits, in which he denied and plead matters in avoidance of the alleged release of said security given by plaintiff, filed a cross-action against plaintiff and her husband, in which the latter accepted service and became a party defendant thereto, alleging the note due which the deed of trust was given to secure, and asked for a foreclosure of the lien created thereby. Frost also filed an application for a receiver to collect the rents and revenues of the property upon which the deed of trust was given. In this application it was alleged that Juan Berrera was insolvent, and that, in addition to the lien created upon the land in the deed of trust, plaintiff and her husband in the same instrument transferred and assigned unto defendant all lease contracts on the property, together with any and all rent or rents or lease money that might thereafter accrue or become due or payable upon said property. And it was provided in the instrument that the right of the transfer and the assignment

*Rehearing denied December 23, 1903.

of such rents or lease money should be exercised only upon the maturity of the note by the collection of the same by defendant or the legal owner and holder of said note, or their agents and representatives. That, in default of payment of the note upon its maturity, defendant, or the legal owner and holder, should have the right to collect and receive all such rents and lease money until the whole of the indebtedness specified in the deed of trust should be paid off and discharged, and that if defendant, or such owner and holder of the note, should desire to collect and receive such rents and lease money under the terms of the instrument, they should notify and advise the tenants and lessees of the property, as well as the mortgagors, and that thereupon such tenants or lessees should be bound and obligated to pay the rents and lease money to defendant or the legal owner and holder of the note. That the indebtedness evidenced by the note is due and wholly unpaid, except \$800, which is indorsed as a credit thereon, and that defendant is still the legal owner and holder of the same. That defendant on the 17th day of October, 1902, said debt being past due, notified plaintiff and her husband, as well as John Dolan, the occupant of the property, and the San Antonio Brewing Association, which claimed some interest in the lease of the property, that he desired and elected to collect and receive the rents of the property in accordance with the terms of the deed of trust. That subsequently, on the 22d day of April, 1903, he again gave all of said parties, as well as C. Baumberger, who was claiming some interest in the lease, notice of the same kind; but that plaintiff and her husband, as well as the tenants and lessees of the property, failed and neglected and refused to pay the rents and lease money thereof to him. That, even though the real property covered by said deed of trust should be held to be the separate property of plaintiff, the rents and lease money thereof would be the community of herself and husband, and such transfer and assignment thereof, made by them in the deed of trust to defendant for the purpose of securing the indebtedness, were legal and valid, and remain a continuous security for the debt until it is fully paid off and discharged, not affected or invalidated, though it should be held that the lien created by the deed of trust upon the property was relinquished or released, by reason of any extension of the time for the payment of said indebtedness. The defendant prayed for the appointment of a receiver for the purpose of collecting and receiving the rents of said property, and that such receiver be directed to receive, collect, and pay the same to defendant from time to time, after paying reasonable expenses incident to the receivership, and of such repairs on the property as might be directed by the court, until the debt should be fully paid off and discharged. To defendant's applica-

tion for a receiver the plaintiff interposed a general demurrer and a number of special exceptions, and answered that, if the San Antonio Brewing Association or any other person was in possession of the property or claiming the right of possession thereof, she was not a party to such lease, and the same is not binding on her; that when the deed of trust was executed, the property was her separate estate, and is now; that by reason of the various extensions of the time of payment, as averred in her original petition, her property was discharged from any further liability under said deed of trust. After plaintiff's demurrers to the application for the receivership were overruled, the court, after hearing the evidence thereon, entered an interlocutory order appointing T. J. Mc-Minn receiver of the property upon which the deed of trust was given, authorizing, empowering, and directing him to take possession thereof upon qualifying as such receiver, rent the same, collect the money therefor, with general authority to look after and care for the property, and, if deemed advisable, to make repairs thereon, and keep the same insured; to continue the rental contract existing upon the property, should he deem advisable to do so, and receive and collect the rents from the tenant or lessees thereof under the terms and conditions of the rental contract now in force. The order further provided that the receiver should have such other and further rights, authority, and powers in the premises as the court may from time to time deem proper to give and grant. It is from this interlocutory order (the main suit between plaintiff and defendant being still pending and otherwise undisposed of) this appeal is prosecuted.

Conclusions of Fact.

The evidence introduced upon the application for a receivership shows that the real property described in the pleadings of the several parties is, and was when the deed of trust was executed by the parties, plaintiff's separate property. The deed of trust, among other things, contains the following stipulation and agreement: "We the said Juan E. Berrera and Julia C. De Berrera hereby transfer and assign unto the said T. C. Frost or the legal owner and holder of said note, any and all lease contracts, together with any and all rent or rents or lease money that may hereafter accrue or become due and payable upon said above described property; this said transfer and assignment of said rents and lease money collected, by the said T. C. Frost or the legal owner and holder of said note, or their agent or representative, only upon maturity of said note, or in default of the payment of premium upon insurance or in the payment of taxes, assessments or charges upon or against said property or failure to make proper repairs; and after all such said amounts, together with interest thereon, have been paid, then the said mort-

gagors herein shall again have the right to collect and receive the said rent and lease money until some other or further default upon the part of the said Juan E. Berrera and Julia C. De Berrera in the payment of said sum or sums or any of them, as hereinabove specified; provided further, that after the maturity of said above described note, either as per its face or by reason of the same having been declared due by the said T. C. Frost or the legal owner or holder of said note, as per the terms and provisions hereinabove set forth, then and in such event the said T. C. Frost or the legal owner and holder of said note shall have the right and privilege to collect and receive all such said rents and lease money until all of the indebtedness, acts and obligations hereinabove specified shall have been fully paid, discharged and complied with; but when the said T. C. Frost or the legal owner and holder of said note, or their agent or representative desire to collect and receive the said rents under the terms hereof, they shall notify the tenants and lessees of said property and also the mortgagors herein, and thereafter and thereupon, the said tenants and lessees shall be bound and obligated to pay all rents and lease money to the said T. C. Frost or the legal owner and holder of said note, or their agent and representative until otherwise advised and instructed by the said T. C. Frost or the legal owner and holder of said note." The notices provided for in the stipulation recited were given to plaintiff and her husband and the tenants of the property, as alleged in defendant's application for the appointment of a receiver. It was also proved that Juan Berrera is, as was alleged in said application, insolvent. The evidence tends to show that the time of payment of the note secured by the deed of trust was extended for a consideration paid by Juan Berrera to the defendant, without plaintiff's knowledge or consent, as alleged in her petition. The land described in plaintiff's petition was leased by Juan E. Berrera to the San Antonio Brewing Association on the 28th day of April, 1902, for 24 consecutive months, at a monthly rental of \$83.35. Said lease began on the 28th day of April, 1902, and is to continue for 24 months thereafter. It does not appear that the plaintiff was a party to such lease.

Conclusions of Law.

1. We cannot sustain appellant's contention, made under the first and second assignments, that appellee was not entitled to have a receiver appointed, "because it did not appear from his application that he had no adequate remedy at law; but, on the contrary, it appeared that the law furnished him an adequate remedy, which he could exercise by suing out a writ of sequestration." The evident purpose of the receivership was to save the rents accruing under the lease in esse, rent the property upon the termination

of such lease, keep the property in such repair and condition as it could be rented continually, and to collect such rents and bring them into court so they could be applied to the discharge of the debt which they were assigned by plaintiff and her husband to secure. That this purpose could not be accomplished by sequestration proceedings is clear. Had the property been sequestered, the appellant would have had the right to remain in possession of the same by executing a bond, as is provided by article 4873, Rev. St. 1895; and, in that event, would "not be required to account for * * * the revenue or rent of the same." Article 4882, Rev. St. 1895. Though, under the express contract of appellant and her husband with the appellee, the latter was entitled to rents that might become due and payable upon the property, such rents could, by the very terms of the statute, have been withheld from him had he invoked the legal remedy of sequestration.

2. But it is insisted by appellant under her third assignment that appellee had another adequate legal remedy, in that it appears from the application he had given notice to the tenant of his rights, under the terms of the mortgage, to pay the rents, and therefore could recover such rents by a suit at law against the tenant. It may be conceded that he had the right to collect by suit the rents accruing from the lease of the San Antonio Brewing Association, the tenant in possession. Yet this would be far from an adequate remedy. To protect itself against the claim of the plaintiff that the lease is void as against her, the association might force appellee to sue for every monthly installment of the rent as it fell due under the terms of its lease, thus requiring a multiplicity of suits, with the attendant costs, expense, and vexation, to accomplish the purpose that can be obtained in a single suit by invoking the equitable remedy that is sought in this case.

But this is not all that goes to show the inadequacy of such legal remedy. If it is true, as plaintiff alleges in her petition, that the mortgage on her separate estate from which the rents ensue is void—her husband being insolvent, and she not being personally liable—the only security appellee has for the payment of his debt is the rents accruing from the corpus of the mortgaged estate. This right to collect and appropriate the rents to the payment of the debt, by the very terms of the assignment, is continued in the appellee until the entire debt, principal, interest, and attorney's fees, is fully paid off and discharged. The aggregate rents that will accrue under the lease of the brewing association during the time of its existence will fall far short of a sufficient sum to extinguish the indebtedness. If, then, it should be conceded that during the term of the lease the remedy of collecting the rents from the brewing association by suit or suits at law is adequate, this remedy expires with the lease, leaving only a fraction of the debt paid, with

the right of plaintiff to resume possession, control, and disposition of her property, unless appellee has some other remedy. He cannot, then, without invoking the aid of a court of equity, lease the property, or keep it in repair so that it may be rented. Without such aid, he is left completely at the mercy of the plaintiff. Such mercy is not apt to be tempered with justice or equity. It is not mercy, but justice, that appellee seeks and shows himself entitled to.

3. Neither do we think the court erred in overruling the exception taken to the application that it does not allege the mortgaged property is probably insufficient to discharge the debt, there being an absence of a direct allegation that the property has been released from the mortgage. It is expressly provided by statute that a receiver may be appointed, in an action by a mortgagee for the foreclosure of his mortgage and the sale of the mortgaged property, when it appears that the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt. Article 1465, § 2, Rev. St. 1895. It is apparent from the allegations in the application that the "condition of the mortgage has not been performed," and we think equally apparent, if the allegations in appellant's petition may be taken in connection with those in appellee's application, that the property mortgaged is probably "insufficient to discharge the mortgage debt." Such "probable insufficiency" certainly exists if there is any probability of plaintiff maintaining her allegation that the mortgage has been discharged and the property released from its operation. To hold that there is no such probability would be to prejudice her case, and would, under the view of the law taken by her counsel, defeat appellee's right to the receivership by showing she had no cause of action herself. But however this may be as to the sufficiency of the allegations of appellee's application to bring his right to the appointment of a receiver within the terms of the statute cited, his right to a receiver is not limited by its provisions, for section 4 of the same article provides that a receiver may be appointed "in all other cases where receivers have heretofore been appointed by the usages of the court of equity." By the usages of courts of equity, receivers have ever been appointed pendente lite, when it is provided by the mortgage that the mortgagee shall have the rents and profits after a default; for otherwise, since the owner of the equity of redemption, where the mortgagee's right of entry upon the happening of a default is taken away, or, as in this state, does not exist unless expressly given by the mortgagor, is entitled to the rents and profits, until sale under decree and possession given to the purchaser, the holder of the mortgage would be deprived of a valuable part of his security. Jones on Mortgages, § 1516, and authorities cited in note; Smith on Receiverships, § 172a; Beach on Re-

ceivers, § 84. But "in all cases where the rents of the property are not specifically pledged as security for the debt, to entitle a mortgagee to a receiver of the mortgaged premises, and of the rents and profits, he must show, first, that the property is an inadequate security for the debt, with interest and costs of suit; and, second, that the mortgagor or other person who is personally liable for the payment is insolvent, or beyond the jurisdiction of the court, or of such doubtful responsibility that an execution against him for the deficiency would prove unavailing." High on Receivers, § 666.

4. The fifth assignment of error complains of the court's appointing a receiver, because it appears from the undisputed testimony that plaintiff's property is discharged from appellee's debt by reason of the extension of time granted Juan E. Berrera for the payment of the mortgage debt. The insistence under the assignment is that, as appellant was not personally liable for the debt, the mortgage given on her separate estate, being only collateral security for its payment, was released by the extension of the time of payment, given without her knowledge, or consent. If it be conceded that appellant is correct in her contention that the mortgaged property was released, it would show that a greater necessity for the appointment of a receiver is presented. In event of such release, the principal obligor for the debt being insolvent, the only security appellee would have is that afforded by the transfer and assignment of the rents of the estate; for such rents are community property (Hayden v. McMillan, 4 Tex. Civ. App. 479, 23 S. W. 430), and, by virtue of the assignment, can, by the express agreement of plaintiff and her husband, be subjected to the payment of the debt. We have demonstrated under previous assignments that appellee has no adequate remedy at law for enforcing the agreement, and must resort to equitable relief, which can be obtained by the appointment of a receiver.

5. Suppose the undisputed evidence does show, as is contended by appellant, that the lease to the San Antonio Brewing Association is void because she is not a party to it, what answer does it furnish to appellee's right to have a receiver appointed? If void, in the sense that it is not binding on the lessee, the greater the reason for having a receiver, authorized to make a valid lease so that the rents may be collected according to its terms. Again, if appellant, having recognized the lease in the deed of trust by assigning the "lease money," can be heard to say it is void, the occupant of the premises is liable for the reasonable value of its use and occupation, and this value, being assigned to appellee, can, by a court of equity, by means of a receiver, be collected and appropriated towards the discharge of the indebtedness.

6. Again, it is contended that the court erred in appointing a receiver with authority

to collect the rents of appellant's separate estate for an indefinite period of time, because she is thereby deprived of the use and benefit of her property without her consent and without due course of law. The period for which the receiver is appointed cannot extend beyond the time the debt is paid. The assignment of the rents is until then. In this assignment the appellant joined with her husband. It cannot, then, be said she did not consent to the terms of the assignment, nor can it be said "due course of law" will not permit a court of equity to enforce the terms of a valid contract where the law furnishes no adequate remedy. As long as the relation of husband and wife exists between Juan B. Berrera and appellant, the rents of the mortgaged property can, by virtue of the assignment, be subjected to the payment of the debt until it is fully satisfied and discharged; and so long, if a court of equity deem it necessary, may the receivership be continued.

There is no error in the judgment, and it is affirmed.

HETTICH v. HILLJE et al.*

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

MASTER AND SERVANT—DUTY OF MASTER—SAFE PLACE TO WORK—SUFFICIENT NUMBER OF SERVANTS—INSTRUCTION AS TO DANGER—ASSUMPTION OF RISK—ACTIONS FOR INJURIES—CONTRIBUTORY NEGLIGENCE—APPEAL—ERRORS AVAILABLE.

1. The question of a master's negligence in failing to provide his servant with a reasonably safe place to work does not arise where it is clearly shown that the servant himself selected the place at which he performed the work for convenience's sake, and without any order or suggestion from his foreman, whereas the work could have been done elsewhere without incurring the danger incident to the performance of the work in the place chosen.

2. A servant who was aware of the fact that a conveyor box was open, and of the danger in working with the hammer just above the revolving screw, and who was not so working under the pressure of a peremptory order from the foreman, assumed the risk, and any negligence in having the conveyor uncovered was immaterial.

3. There was no negligence in failing to furnish a servant with a reasonably safe hammer, where the hammer furnished was ordinarily as safe as any other for doing the work, could have been used without danger at any other place, and was rendered dangerous solely by the act of the servant in using it, without necessity therefor, at a place where it could readily be caught in the machinery.

4. A servant, who had worked for five or six weeks about the premises and machinery in repairing which he was injured, a part of whose duties had been oiling the machinery, and who knew the manner of repairing the same, having repaired similar parts before, could not be considered an inexperienced workman in the sense of imposing on his employer the duty of instructing him, or warning him in such a way as to save him from exposure to the danger which brought about his injury.

5. An employé assumes the risk of injury from known danger if he undertakes or con-

tinues to expose himself thereto, except where he acts under peremptory orders from the master under circumstances not admitting of delay or reflection.

6. The fact that the work in the performance of which a servant was injured was outside of his duties does not affect the doctrine of assumed risk, where there was no danger involved in the work itself, and the danger to which the servant became exposed was created by himself in selecting the place he did for its performance, whereas there were other safe places practicable for the purpose, though possibly not so convenient.

7. In an action for servant's injuries, where it is evident that the risk was one assumed by plaintiff, there is no necessity for a submission of issues of contributory negligence.

8. A servant assumes the risk in performing work alone in a place where the conditions are such that he must necessarily know that he is exposed to danger, whereas the work could be done elsewhere without any such exposure; and he cannot count on the negligence of the master in failing to provide two men to do the work.

9. Negligence of a master in failing to provide a sufficient number of men to do the work in which a servant was injured is not available on appeal by such servant from a judgment for the master in an action for the injuries, where there is no allegation of negligence in that respect, and no assignment of error or proposition is presented thereon.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by Roman Hettich against L. J. and F. G. Hillje. From a judgment for defendants, plaintiff appeals. Affirmed.

Plaintiff was employed by defendants as a laborer to work in their seedhouse, which was connected with their cotton seed oil mill. One of plaintiff's duties was to keep the hopper filled with seed, and the other to repair belts by which the machinery in the seedhouse was run.

For proceedings on former appeals, see 65 S. W. 491; 67 S. W. 90.

Jas. Routledge, for appellant. C. W. Ogden and Denman, Franklin & McGown, for appellees.

JAMES, C. J. The case was once before tried and appealed, the issue upon which it was submitted having been that of insufficient light furnished by appellees for appellant to do the work of repairing a belt with safety, after a promise by appellees to have this matter remedied. There were other issues in the petition not submitted. The judgment was reversed, and the cause remanded. Hillje v. Hettich, 95 Tex. 324, 67 S. W. 90. For an explanation of the general nature of the case we refer to that opinion. At the recent trial plaintiff pleaded additionally, as he states it, that he was ordered to repair the belt, which work was outside of the course of his regular employment, and in which work he was inexperienced, and that while so doing the handle of the hammer he was using became caught in a conveyor, with the result that the claws of the hammer caught his hand, drawing it into the conveyor, whereby that member was injured. Appellees state it thus: "That he

*Rehearing denied December 23, 1903, and writ of error denied by Supreme Court.

alleged that he was ignorant of the dangers incident to the work he was ordered to do, and that appellees directed him to do the work without warning him of the dangers which were known to them." The court, after hearing the evidence, directed the jury to find for the defendants.

We think a proper way of disposing of the appeal is to state the grounds of negligence alleged, and to consider separately the several assignments in which error is alleged. Plaintiff alleged that defendants were negligent in ordering plaintiff to repair the belt, in not warning plaintiff of the danger, in not instructing plaintiff, in not stopping the machinery, in not providing sufficient light, in not having the conveyor box upon which plaintiff undertook to do the work properly covered, in not providing plaintiff with a safe place to work, and in providing a claw hammer with which to do the work.

The second assignment is that the evidence showed that defendant was negligent in failing to provide plaintiff with a reasonably safe place to work, and that this was the proximate cause of his injury. If, as we shall explain hereafter, the only danger that proved to be connected with repairing this belt was in doing it upon a strip just over and in close proximity to the revolving screw or spiral inside the uncovered conveyor box, and the evidence showing clearly that it was not necessary to do it there, but it could have been done elsewhere without incurring that danger, and he himself selected such place at which to do it, for convenience, without any order or suggestion from his foreman, the issue of negligence in not providing safe premises was not in the case.

The third assignment is that there was negligence in not having the conveyor covered. If, as his evidence shows, plaintiff was aware of this fact that the conveyor box was open, and of the danger in working as he did with the hammer just above the revolving screw, and was not so acting under the pressure of a peremptory order from the foreman, he assumed the risk, and negligence, if any, in having the conveyor uncovered, was immaterial.

The fifth assignment is that negligence appears in the fact that the claw hammer which defendants provided to do this work with was unsafe and unsuitable for the work, and in failing to furnish him with a reasonably safe hammer. In reference to this, he was not ordered to use the top of the conveyor for the purpose, and there is no testimony that it had ever been so used in his presence or otherwise. No danger whatever, at least not the danger which caused his injury, was incident to the work of punching holes in belts elsewhere than where plaintiff undertook to do the work. The hammer had been used by plaintiff before, and was ordinarily as safe as any other hammer for doing this character of work. At any other place it could have been used without danger from its peculiar

construction, and was dangerous in this instance only by reason of its handle being allowed to be caught in the conveyor. We should probably assume that the foreman, on giving plaintiff the punch and telling him to repair the belt, meant for him to use this hammer, it being the one kept for use at the place where the work was to be done. But the foreman did not tell him to do the punching on top of the conveyor. Plaintiff's testimony on final cross-examination, in explanation of his previous testimony on the subject, was that he did not mean to say that he could not have taken the belt to any other place, but that the top of the conveyor was the only convenient place for him to do the work. His testimony is that he could have done this work on the platform, or on the side of the conveyor, though not so conveniently. The hammer being suitable and safe for the work, and, it being rendered unsafe, if at all, only by the act of plaintiff himself in using it where it could readily be caught in the machinery, the fact of negligence in furnishing this hammer did not appear.

The fourth, sixth, and seventh assignments are founded upon the theory that plaintiff was inexperienced in the work of repairing belts the size of this one. Plaintiff, as he testifies, was ordered to repair the belt, was handed a punch, and knew where to get the hammer. He knew the manner of repairing it, having, he says, repaired smaller ones. The nature of the work, punching the holes, and fastening the bands did not, of itself, involve any danger whatever. So the work he was set to do was not dangerous. He knew the premises and the machinery. For five or six weeks he had worked there, oiling the machinery being a part of his duty. He had been told by his master about the dangerous nature of the conveyor, and, independently of this warning, which he admits, he could not have been working about the place as he testifies he had been without being familiar with its surroundings, operations, and obvious dangers. Under these circumstances the position could not be sustained that he was an inexperienced workman in the sense that it was negligence on the part of his employers not to instruct him, nor warn him in such a way as to save him from exposure to the danger which brought about his injury. The danger was known to him, and in such a case the employe invariably assumes the risk of injury therefrom if he undertakes or continues to expose himself to it, unless in those exceptional cases where he acts by force of a peremptory order from the master, under circumstances not admitting of delay or reflection. No such state of facts exists in this record. The foreman was not present when this work was done. He had not even directed it to be done where it was done, and it clearly appears that plaintiff chose the place himself in preference to other places, where it might have been done safely.

The fact that this work of repairing belts

was outside of his duties makes no difference, where it appears that there was no danger involved in the work itself. To this fact plaintiff testifies himself. The danger to which plaintiff became exposed was created by himself in selecting the particular place for doing it, when other and safe places were present and practicable for the purpose, though perhaps not so convenient. Inexperience in respect to such machinery or premises might be so extreme as to relieve a case like this from the features of contributory negligence or assumed risk, but plaintiff was a person of mature age (48 years), and knew and understood these premises and machinery, and particularly the danger of contact with the inside of this conveyor. In this connection we refer also to the eighth assignment, which alleges that it was negligence to order plaintiff to repair the belt in the midst of moving machinery, and in failing to stop same while plaintiff was doing the work. What has been said practically disposes of this contention. Plaintiff had not been ordered to work at a place where there was danger, and, as it was, the only moving machinery that he became exposed to was the conveyor, and he knew the screw was in motion.

The ninth assignment refers to the matter of insufficiency of light. This question is disposed of by the opinion of the Supreme Court in this case. The argument appellant makes in the brief is that plaintiff had complained about the light, and the master had promised to remedy it. This point is not mentioned in the assignment, nor in any proposition. If it were, the testimony is not materially different from that stated in the opinion of the Supreme Court, and the condition of the light was there held not to be the proximate cause.

Where it is evident that the risk was one assumed by plaintiff, it would be idle to submit any issue of contributory negligence. Hence there is nothing in the tenth assignment. And, further, for the same reason, the matters alleged in the eleventh and twelfth assignments are of no consequence in the case.

Mention is made in appellant's brief of the testimony that to do this work safely required the services of two men. It is probable that, if plaintiff had had an assistant, the misfortune would not have occurred. But still there was no danger involved in the work itself when done by one man or more. The danger was, as already stated, in plaintiff attempting to do it close to the moving screw, and the conditions were such that he must have necessarily known that this was an exposure to danger; hence in doing this work alone at that place he must be held to have assumed the risk. In addition to this, the point, if any, was not available to plaintiff, as he nowhere alleged negligence in not furnishing a sufficient number of men to do the work, and no assignment of error or proposition is presented on the subject.

What has been said disposes of the first assignment of error, in which the contention is

made generally that the pleadings and evidence were such as entitled plaintiff to have the case submitted to the jury.

The judgment is affirmed.

TEXAS & P. RY. CO. v. BARROW.*

(Court of Civil Appeals of Texas. Nov. 28, 1903.)

RAILROADS—FAILURE TO FURNISH CARS—DEMAND FOR CARS—SUFFICIENCY—WAIVER.

1. Sayles' Civ. St. 1897, art. 4497 et seq., imposes a penalty on any railroad which fails to furnish cars to a shipper after written application by him, stating the number of cars and the place at which they are desired, etc. *Held* that, where one applied for stable cars for the shipment of cattle, the railroad was not required to furnish such cars; it not appearing that they were the only suitable and proper kind of cars for the transportation of cattle.

2. Though a shipper made a binding contract with a railroad for stable cars, its failure to deliver them did not entitle the shipper to recover the statutory penalty.

3. Where, after a written demand for stable cars for a shipment of cattle, the shipper made an oral demand for any kind of suitable cars, failure to comply with such demand was not a violation of the statute, since it did not amount to a written demand.

4. Where a shipper demanded stable cars for a shipment of cattle, such cars not being the only suitable ones for shipment of cattle, the railroad was not required to furnish other suitable cars.

Appeal from District Court, Nolan County; James L. Shepherd, Judge.

Action by W. E. Barrow against the Texas & Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and rendered.

J. M. Wagstaff, for appellant. Rogland & Crane, for respondent.

SPEER, J. On the morning of December 1, 1902, appellee delivered to one W. E. Feaster, agent for the appellant at Sweetwater, Tex., the following requisition for cars, viz.: "The T. & P. Ry. Co., W. E. Feaster, Agent at Sweetwater, Texas: On Nov. 20th I put in requisition for 12 cattle cars to be delivered to me at Sweetwater, Texas, on your road, on November 28th, for about the last week I have made almost daily inquiries about the delivery of these cars, and they have not been forthcoming. I now formally repeat that requisition for 10 stable cars to be delivered at Sweetwater, Texas station, for my use on Wednesday, Dec. 3, to be used by me for the shipment of cattle within 48 hours of their delivery, and which cars are to be routed over your line to Fort Worth, and from Fort Worth via the M., K. & T. Ry. of Texas and the M., K. & T. Ry. to Kansas City, Mo., and St. Louis, Mo. I herewith tender to you ¼ or 25% of the estimated freight rate for said cars as quoted by you to wit: the sum of \$21.50 per car, and you are notified that I shall expect to insist on

*Rehearing denied December 19, 1903, and writ of error denied by Supreme Court.

my legal rights and damages in case of non-compliance with this request. Respectfully, W. E. Barrow." At the time of making this demand, appellee had on hand, ready to be shipped, a sufficient number of cattle to load the cars ordered, but the cars were not furnished to him until December 12th, and only then after he had made a trip to Ft. Worth in his search for cars, and had, on December 3d, notified appellant's agent that he would accept any kind of suitable cars, to be routed over any road, and that such cars could be had from the Chicago, Rock Island & Texas Railway Company at Ft. Worth. It was to recover a penalty under the statute for this delay that this suit was instituted. The trial, which was before the district judge without the intervention of a jury, resulted in a judgment for appellee in the sum of \$2,000.

Appellant insists that its general and special exceptions to the petition should have been sustained, because the same showed on its face that stable cars were ordered, and the law does not require railway companies to furnish stable cars, and does not authorize the recovery of a penalty for a failure to furnish stable cars. We would sustain the assignments presenting this question, were it not for the further allegations in appellee's pleadings that the stable cars, as required by his demand, were and are the only suitable and proper kind of cars for the transportation of cattle, and are the only kind ordinarily used by appellant for such purpose. For we are of the opinion that railway companies are not required, by the terms of the statute, to furnish any particular kind of cars to a shipper of cattle, simply because such shipper may demand it. The statutes bearing upon the question are as follows: "When the owner, manager or shipper of any freight of any kind shall make application in writing to any superintendent, agent or other person in charge of transportation, to any railway company, receiver or trustee operating a line of railway at the point the cars are desired upon which to ship any freight, it shall be the duty of such railway company, receiver, trustee or other person in charge thereof, to supply the number of cars so required, at the point indicated in the application within a reasonable time thereafter, not to exceed six days from the receipt of such application, and shall supply such cars to the persons so applying therefor, in the order in which such applications are made, without giving preference to any person: provided, if the application be for ten cars or less, the same shall be furnished in three days; and provided further, that if the application be for fifty cars or more, the railway company may have ten full days in which to supply the cars." *Sayles' Civ. St.* 1897, art. 4497. "Said application for cars shall state the number of cars desired, the place at which they are desired and the time they are desired: provided, that the place designated shall be at some station or switch on the railroad." *Id.* art. 4498. "When

cars are applied for under the provisions of this chapter, if they are not furnished the railway company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of twenty five dollars per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages that such applicant may sustain." *Id.* art. 4499. "Such applicant shall, at the time of applying for such car or cars, deposit with the agent of such company one fourth of the amount of the freight charge for the use of such cars, unless the said road shall agree to deliver said cars without such deposit. And such applicant shall, within forty eight hours after such car or cars have been delivered and placed as hereinbefore provided, fully load the same, and upon failure to do so, he shall forfeit and pay to the company the sum of twenty five dollars for each car not used: provided, that where applications are made on several days, all of which are filled upon the same day, the applicant shall have forty eight hours to load the car or cars furnished on the first application, and the next forty eight hours to load the car or cars furnished on the next application, and so on; and the penalty prescribed shall not accrue as to any car or lot of cars applied for on any one day, until the period within which they may be loaded has expired. And if the said applicant shall not use such cars so ordered by him, and shall so notify the said company or its agent, he shall forfeit and pay to the said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the applicant to use said cars." *Id.* art. 4500. It will thus be seen that no particular kind of cars is prescribed by the statute, and we think the only requirement in this respect that can be lawfully imposed by a shipper is that the cars furnished should be reasonably suited to the purposes intended. But when appellee demanded of appellant stable cars, he required of it a duty not imposed by the statute, for a violation of which he must look for redress to an action upon his contract, and not to one for the recovery of the penalty denounced above, unless he shows affirmatively that no other cars would be proper or suitable for the transportation of such freight as he desired to ship. *Austin & N. Ry. Co. v. Slater*, 7 Tex. Civ. App. 344, 26 S. W. 233. It has often been held that statutes of the character of the one under consideration should receive a strict construction, and that, before a party can avail himself of their benefits, he must bring himself clearly within their terms. *Houston E. & W. T. Ry. Co. v. Campbell* (Tex. Sup.) 45 S. W. 2, 43 L. R. A. 225.

Recurring to the issue made by appellee's allegations that stable cars are the only suitable and proper kind of cars for the transportation of cattle, we find that the evidence wholly fails to establish such allegation, but,

on the contrary, shows that there were other cars which were used and were suitable for the shipment of cattle.

If it be contended, though disavowed by counsel for appellee in his oral presentation of the case, that appellant made a binding contract to deliver to appellee stable cars, the right to recover the penalty is imposed for a violation of the statute, and not for the violation of a contract. If a special contract should operate in this manner upon one feature of the statute, no reason is apparent why it should not do so upon any or all. So that if a railway company were to contract to deliver 100 stable cars, at a point other than required by law, within 24 hours, it would be liable in a penalty for breach of such contract—a result clearly not within the statute, and evidently not contemplated by it.

The fact that appellee modified his written demand by agreeing with appellant's agent to accept any kind of suitable cars cannot help his case, because the demand, a disobedience of which brings upon a company the penalty, must be a written demand, and an oral agreement modifying a written demand is not itself a written demand. Such agreement upon the part of appellee rather accentuates the view that he understood that stable cars only could be furnished to him under his former demand, and is contrary to his contention here that appellant could and should have supplied him with any other cars that were suitable. But we do not believe such duty devolved upon the company. The company was not called upon to furnish any suitable cars, but a particular kind of suitable cars, and, by the terms of the demand, had no right to expect that any other kind than those demanded would be received. The parties are at liberty to make any contract they see fit to make respecting the kind of cars to be used in shipping, but they cannot make one imposing duties different from those imposed by statute, and then for a breach of it claim the penalty prescribed for a breach of the statutory defined duties.

We are of opinion the judgment should be reversed and here rendered for the appellee, and it is accordingly so ordered.

YARBOROUGH v. CREAGER.*

(Court of Civil Appeals of Texas. Nov. 7, 1903.)

REAL ESTATE BROKER—SUIT FOR COMMISSIONS—SUFFICIENCY OF PETITION—FACT OF ADVERTISING LAND—COMPETENCY OF EVIDENCE—CONTRACTS WITH OTHER AGENTS—INSTRUCTIONS.

1. A petition alleging that plaintiff contracted with defendant to sell certain land of defendant's; that plaintiff was to have the exclusive right to do so until a certain date; that he was to receive a certain commission; and that on a day before the expiration of the time limited the property, through his efforts, was sold, and defendant executed a deed therefor—is

sufficient, though the acts done by plaintiff constituting the effort resulting in the sale are not specifically stated.

2. A real estate broker suing for commissions may testify that he advertised the land in a certain newspaper, no effort being made to prove in this manner the terms or contents of the advertisement.

3. Where a landowner contracts with a real estate broker to sell his land, and to have the exclusive right to do so until a certain date, contracts made by the landowner with other agents are immaterial, and to submit their existence to the jury, or include them in the enumeration of circumstances warranting a recovery, is error.

4. Where a real estate broker suing for commissions alleges that through his efforts the land was sold, an instruction that if the jury believe the plaintiff was trying to sell the land, etc., they should find for him, is not warranted by the pleading.

Appeal from Grayson County Court; J. D. Woods, Judge.

Action by A. Y. Creager against Peter Yarbrough. Judgment for plaintiff, and defendant appeals. Reversed.

E. C. McLean, for appellant. G. P. Brown, Culver & Hay, and Galloway & Heflin, for appellee.

TALBOT, J. This action was instituted in the county court of Grayson county, by appellee against appellant, to recover commissions claimed to be due on a contract employing appellee to sell certain land owned by appellant.

Appellee alleged, substantially, that on or about February 1, 1901, he and appellant entered into a contract whereby appellee was to sell a certain tract of land owned by appellant, containing about 273 acres, and situated in Grayson county, Tex., about two miles northwest of the city of Sherman. That appellee was to have the exclusive right, until the 1st day of January, 1902, to sell the land, and was to do everything that he considered advantageous in making the sale. That he was not to sell for less than \$13,500 without the consent of appellant, and, if said land sold for as much as \$13,500, appellee was to receive 3 per cent. commissions for making such sale. He further alleged that on or about the 25th day of September, 1901, said property, through his efforts, was sold for the sum of \$13,750, and that appellant executed a deed to William Elliott therefor. That appellant had refused to pay his commission, to his damage in the sum of \$500.

The appellant answered by general demurrer, special exceptions, general denial, and special answer, setting up in substance, among other things, that in the contract with appellee he (appellant) reserved the right to sell the land himself, and that in case he sold it appellee was not to receive any commissions whatever for the efforts he made to sell; that he, appellant, sold the land to William Elliott, and that appellee did not find said Elliott as a probable purchaser, and did not offer to sell the same to him.

*Rehearing denied December 19, 1903.

There was no error in overruling appellant's exceptions to appellee's complaint. If the contract was entered into between him and appellee as alleged, and the land sold through the efforts of appellee, then we believe a cause of action was sufficiently stated, and appellee was not required to set out specifically the acts and things done constituting the effort resulting in the sale of the land.

The objection urged to the action of the court in permitting the appellee to testify that he had advertised the property for sale in the Dallas News, two or three times, is untenable. The case of *Prather v. Wilkens*, 68 Tex. 187, 4 S. W. 252, cited in support of appellant's contention here, is not in point. There it was held that "testimony to establish the contents of a telegram is not admissible, in the absence of evidence showing its loss or destruction." Other authorities cited are to the same effect. No effort, as we understand, was made to prove by the witness in this case the terms or contents of the advertisement published by appellee in the Dallas News. The only thing sought to be proved by the question objected to was the simple fact that an advertisement of the property for sale had been made in the Dallas News.

Appellant's third and fourth assignments will be overruled, for the reason that the evidence sought to be introduced was irrelevant, immaterial, and inadmissible as against appellee. He was in no way bound by the contract of appellant with other parties relative to the sale of the land, but his rights were to be measured and determined by the terms of his own contract. As the case appears from the record before us, all evidence of appellant's contracts with real estate agents, other than appellee, was inadmissible, and should have been on objection excluded. Neither the rights of appellant nor of appellee, involved in the contract set out in plaintiff's petition, could be affected by such contracts, and the question whether or not the land was placed in the hands of other agents for sale, with the understanding that the agent who sold it should be entitled to the 3 per cent. commission on the amount of the sale, should not have been submitted to the jury in any form, and hence we believe the third paragraph of the court's charge is subject to the criticism contained in appellant's seventh assignment of error.

The appellee based his right of recovery upon the proposition that the exclusive right had been given him to sell the land, and that it had been sold through his efforts. There was no allegation that he did in fact sell it. The court, in the first paragraph of its charge, told the jury that if the contract was made between the appellee and appellant as alleged, and they believed that in pursuance of said contract appellee was trying to sell the land, and undertook to and did sell the same to William Elliott during the time he

had charge of it under the contract, then to find for plaintiff. The second paragraph of the court's charge in effect instructed the jury to find for plaintiff if they believed from the evidence that the property had been placed in plaintiff's hands for sale, and at the same time placed in the hands of other agents for sale, and that through the efforts of plaintiff he was a procuring cause of the sale of said property, and that by reason of such efforts the property was sold to Elliott. These paragraphs of the court's charge are conflicting, and the first is not warranted by the pleadings, for that the plaintiff rested his right to recover upon the ground that the property was sold through his efforts, and not that the property had been placed in his hands for sale, and that he had been, and was at the time of the execution of the deed to Elliott, endeavoring to sell it. There is quite a material difference between trying to sell and having consummated sale by trying. In the one case the efforts and exertion have not yet met with success, whilst in the other the efforts put forth and means employed have accomplished the purpose and end in view.

The second paragraph of the charge, in our opinion, is incorrect, in that the court, in grouping the facts or stating the condition upon which plaintiff would be entitled to recover, includes, as one such fact, the "placing of the property in the hands of other agents" for sale at the same time the same was placed in plaintiff's hands for that purpose. If plaintiff's efforts were the procuring cause of the sale of the land, then his right to recover was in no manner whatever dependent upon any contract defendant may have had with other agents relative to the sale thereof. We conclude that because of the errors in the charge the case should be reversed and remanded.

Reversed and remanded.

EAST v. HOUSTON & T. OENT. R. CO.*
(Court of Civil Appeals of Texas. Nov. 28, 1903.)

PERCOLATING WATERS—WELLS—REASONABLE USE—APPEAL—CONCLUSIONS OF FACT.

1. Conclusions of fact found by the trial court are conclusive on appeal, in the absence of a statement of facts.

2. A railroad company sunk a large well on its own land which was fed by percolating waters, and drew therefrom 25,000 gallons of water per day for the use of its locomotives and machine shops, the effect of which was to destroy plaintiff's well previously constructed on his property and used for domestic purposes. *Held*, that the railroad's right to use its well was limited to a reasonable use of the same in connection with the use of its land, as land, and, the trial court having found that its use thereof was unreasonable, it was liable to plaintiff for the damages sustained by him.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

*Rehearing denied December 19, 1903.

Action by W. A. East against the Houston & Texas Central Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and rendered.

Moseley & Eppstein and Perry Morris, for appellant. Baker, Botts, Baker & Lovett and Head & Dillard, for appellee.

BOOKHOUT, J. This is a suit by W. A. East against the Houston & Texas Central Railroad Company for damages growing out of the alleged destruction by defendant of plaintiff's well. The case was tried before the court without a jury, and resulted in a judgment for defendant, and plaintiff appealed.

The trial court filed conclusions of fact, which, in the absence of a statement of facts, are to be taken as the facts of the case. Said conclusions are as follows: "(1) The defendant, the Houston & Texas Central Railroad Company, was the owner in fee simple of six (6) lots in the city of Denison, Grayson county, Tex., at the time mentioned in plaintiff's petition, and dug thereon a well twenty (20) feet in diameter and sixty-six (66) feet deep. It put therein a steam pump of sufficient strength to supply a three-inch pipe, and with the exception of three or four days since August, 1901, has daily taken from said well, by means of said pump, about twenty-five thousand (25,000) gallons of water. This water was taken from said well and used by it in its locomotives and machine shops operated by it in the city of Denison, in which said land is situated. Said well is supplied entirely by water percolating through its soil and that of adjacent lands, and not by any underground or other stream of any kind. Before digging said well, defendant made an examination of its surroundings, including the well of the plaintiff, and made test holes with a view of obtaining the desired supply of fifty thousand (50,000) gallons of water per day. Plaintiff was present when such examinations were being made, and consented for his well to be examined by defendant, and had no further conversation or communication with the defendant upon the subject. From the examination made by it, defendant became satisfied that it could procure the desired supply of water upon the land as aforesaid, and dug said well for the purpose of obtaining the same for the uses hereinbefore set out. The wells were dug without any intention on the part of defendant of injuring the property of either of the plaintiffs, and did not know that such would be the effect. The water percolated into defendant's well at different depths, some of it coming into the bottom thereof. The well of plaintiff is about five feet in diameter and about thirty-three feet in depth; is on land owned by plaintiff in fee simple, and is used as a homestead by plaintiff; was dug prior to defendant's well, and had always been used

by plaintiff, up to the time defendant's well was dug, for household purposes, and prior to that time had always supplied an adequate supply of water for such uses; that this well has been dried up by the digging and use to which defendant has put its well; that the damage that plaintiff and his land has sustained by the drying up of his well is the sum of two hundred and six dollars and twenty-five cents (\$206.25), including both past and possessive injury to himself and the lots described in his petition. (2) I further find that the use to which defendant puts its well was not a reasonable use of their property as land, but was an artificial use of their property, and if the doctrine of reasonable use, as applicable to defined streams to such cases, this was unreasonable."

In *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179, it is held, in effect, that the right of a landowner to draw from his land all water found percolating underground was not absolute, but qualified and limited to the amount necessary for the reasonable use of the land, as land. That the rights of adjoining landowners are correlative, and, from the necessity of the case, the rights of each is only to a reasonable use. The court goes into an exhaustive discussion of the question, and, in the very able opinion delivered, arrives at the conclusion above stated. The rule as announced therein was approved in the later case of *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276.

In a late case decided by the Court of Appeals of New York, in which "the plaintiff was a lessee of certain farming lands situated near Spring Creek, within the county of Kings, he used a portion of the lands in question for the purpose of growing celery and water cresses. The city of Brooklyn constructed a pumping station in the borough of Queens, city of New York, on the conduit line near the Kings county boundary line, and early in 1885, and in 1894, sunk additional wells and made an additional pumping station. The effect of pumping at these stations was to lower the underground water table on this land, and thus made it unfit for the cultivation of celery or water cresses, and the crops failed for many years prior to the commencement of the action, in 1898." The court, in treating of the right of the landowner to the use of underground percolating water, in that case uses the following language: "In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized. In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not un-

reasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land, as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land, as land, may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others, whose lands are thus clandestinely sapped and their value impaired." *Forbell v. New York*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 686. The court treated the act of the city in extracting the percolating waters from the land of plaintiff, in the manner and by use of the appliances adopted by it, as a trespass. It further held that a trespass may be produced by the employment of such material, agencies, or instruments as become effective by the co-operation of the forces of nature. See, also, *Smith v. Brooklyn*, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664; 27 Am. & Eng. Enc. Law (1st Ed.) p. 429.

In the case at bar the trial court found that the defendant was not making a reasonable use of its property as land, but that the use was an artificial one. Before defendant dug its well it made an examination of its surroundings, examined plaintiff's well, dug test holes, and calculated that it could, from the waters percolating underground its land and the surrounding land, including plaintiff's, cause to be extracted therefrom as much as 50,000 gallons per day. To accomplish this purpose it dug its well 20 feet in diameter and 66 feet deep, and fitted the same with a steam pump and other suitable appliances for forcing that amount of water therefrom. It has, since August, 1901, with the exception of three or four days, forced 25,000 gallons of water daily from said well, which it has used in operating its locomotives and machine shops in the city of Denison. The plaintiff's well was 33 feet deep and 5 feet in diameter, and was on his own land, occupied by him as his resident homestead. It was dug prior to that of defendant, and had always been used by plaintiff for supplying water for his household purposes, for which purpose it furnished an adequate supply until the defendant dug and installed its well and began pumping therefrom, since which time, and as a result thereof, the plaintiff's well has dried up. The trial court found that the plaintiff and his land have sustained damage by these acts of defendant in the sum of \$206.25. We are of the

opinion that under the facts the plaintiff was entitled to recover this sum.

It is true that in the case of *Acton v. Blundell*, 12 Mees. & W. 824, the doctrine was laid down in England that, "if a man digs a well on his own field and thereby drains his neighbor's, he may do so unless he does it maliciously." It is further true that this rule has been adopted in some of the American states. Gould on Waters (4th Ed.) § 280; *Miller v. Blackrock Springs Imp. Co.* (Va.) 40 S. E. 27, 86 Am. St. Rep. 924. It is by reason of the rule laid down in *Acton v. Blundell* that the appellee claims immunity from liability in this case. To apply that rule under the facts here shown would shock our sense of justice. So far as we can ascertain, the question has not been passed upon by any of the appellate courts of this state. Believing, as we do, that the rule adopted by the Court of Appeals of New Hampshire, and followed by the Court of Appeals of New York, is just and sustained by reason, we hold in accordance therewith.

We conclude that the judgment of the trial court should be reversed and here rendered for appellant for \$206.25, the amount of damage sustained by plaintiff and his land, as shown by the facts. Reversed and rendered.

GULF, C. & S. F. RY. CO. v. JOHNSON.*
(Court of Civil Appeals of Texas. Nov. 11, 1903.)

WITNESSES—FELONS—DISQUALIFICATION—
SENTENCE—NECESSITY OF PRODUCTION.

1. Where a witness had been convicted and sentenced for a felony, an objection to his being permitted to testify was properly sustained under the statute excluding evidence of all persons convicted of a felony, though the sentence of the court was not produced.

Appeal from District Court, Bell County; Marshall Surratt, Special Judge.

Action by Alice Johnson and another against the Gulf, Colorado & Santa Fé Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

J. W. Terry and A. H. Culwell, for appellant. J. W. Moffatt and A. M. Monteith, for appellees.

KEY, J. This is a suit by Alice and Rogers Johnson to recover damages against the Gulf, Colorado & Santa Fé Railway Company on account of personal injuries inflicted upon Rogers Johnson, who is a minor child of his coplaintiff, Alice Johnson. The case has been on appeal twice before, and will be found reported in 42 S. W. 584, 43 S. W. 583, 44 S. W. 1067, and 67 S. W. 1040. At the last trial in the court below, verdict and judgment were rendered for Rogers Johnson for \$4,000, and Alice Johnson for \$2,000. The defendant has appealed, and presents the case in this court

*Rehearing denied December 23 1903.

under numerous assignments of error. It would protract this opinion beyond reasonable limit to consider in detail the many questions presented, and we content ourselves with the following statement of our conclusions:

1. We hold that the verdict is supported by testimony, and that the latter supports findings which were made by the jury to the effect that the defendant was guilty of negligence, as charged in the plaintiffs' petition, and that the plaintiffs were not guilty of contributory negligence, and that, as a direct and proximate result of the defendant's negligence, the plaintiffs sustained injury to the extent allowed by the verdict.

2. That the trial court's charge is not subject to the criticisms urged against it, and that no error was committed in refusing requested instructions.

3. No error was committed in excluding the testimony of Jesse Mangone; it being made to appear that the jury had found him guilty of a felony, and judgment of conviction had been entered upon the verdict adjudging him to be guilty of a felony. We hold that it was not necessary to produce the sentence of the court, in order to disqualify the witness. The statute excludes the evidence of all persons convicted of a felony, and the reason upon which the statute is founded is that the judgment of conviction is but the evidence of such moral depravity as renders such persons too corrupt to be permitted to testify. 1 Greenl. on Ev. 372, 373. It is not the sentence of the court directing that the penalty be enforced which establishes the ground of disqualification upon which the statute is based. That fact is established by the verdict of the jury and the judgment of conviction; and, when it has been so established, the case is brought within the spirit, if not within the letter, of the statute, and the witness is disqualified.

On all the other questions of law, most of which have already been settled in former appeals in this case, we rule against the appellant.

Judgment affirmed.

NOYES v. SMITH.*

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

MATERIALMAN'S LIEN — FORECLOSURE — AMOUNT DUE — DISCOUNT — MISTAKE IN CREDITS — JURISDICTION — EVIDENCE.

1. The district court of a county in which real estate is situated has jurisdiction to foreclose a materialman's lien thereon.

2. In an action to foreclose a materialman's lien on certain real estate, the fact that plaintiff in his affidavit had credited defendant a discount of 12 per cent. on the material by mistake, for which discount there was no consideration, did not preclude him from asserting his right to recover the value of the materials, disregarding the discount.

On Rehearing.

3. In a suit to foreclose a materialman's lien, evidence held to warrant a finding that the lum-

ber, the price of which was sued for, was used in the construction and erection of the building on which the lien was sought to be enforced.

Appeal from District Court, Runnels County; John W. Goodwin, Judge.

Action by Cicero Smith against Gus Noyes. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. R. Spencer and M. C. Smith, for appellant. R. B. Truly and John I. Guion, for appellee.

FISHER, O. J. This is a suit by appellee against Noyes for the sum of \$419.98, alleged to be due for material furnished by Smith to Noyes, and which was used in the erection and construction of a building situated on a lot in the town of Ballinger, described in the plaintiff's petition. Plaintiff also sought to foreclose a materialman's lien on the building and property described in his petition, as authorized by the statute. The defendant in his answer presented demurrers, questioning the jurisdiction of the court, general denial, and denied that the lumber and material furnished was purchased and used in the construction of the building upon which the lien was sought to be foreclosed, denied the contract alleged by the plaintiff, and claimed that he was entitled to a 12 per cent. discount on the price of the material as claimed by the plaintiff, and pleaded, in reconvention, damages growing out of the breach of the contract to furnish the material. The verdict of the jury was a finding in favor of the plaintiff for \$190.82, with 6 per cent. interest thereon from January 1, 1902, and foreclosing a materialman's lien on the property described in the plaintiff's petition, and finding in favor of the plaintiff for the sum of \$150.39, and for the defendant on his cross-action for \$75 damages. Judgment was rendered in accordance with this verdict, foreclosing the lien only to the extent of the sum of \$190.82, with interest. No lien was foreclosed on the property in question for the sum of \$150.39.

We find the facts substantially as pleaded by the plaintiff. We also find that the property in question, upon which the lien is sought to be foreclosed, is real property, situated in the town of Ballinger, Runnels county, and that plaintiff took the necessary steps required by law to fix his lien for the material described in the account found in the statement of facts; that the affidavit made by the plaintiff is in accord with the terms of the statute, and sufficient; and we find that the evidence supports the verdict of the jury.

There is no merit in appellant's assignments of errors questioning the jurisdiction of the court. That court had jurisdiction to foreclose the lien on the property in question, and also had jurisdiction to render judgment upon the verdict of the jury.

There is no merit in appellant's fourth assignment of error. The charge that he there complains of is in his favor, and the matter complained of does not constitute a variance.

*Writ of error denied by Supreme Court.

We cannot agree with appellant in his contention as presented under his sixth assignment of error. It appears, which is explained by the plaintiff's testimony, that the 12 per cent. discount was allowed the defendant by mistake. For this amount claimed as discount, the jury did not in their verdict authorize a foreclosure of the lien. The fact that the plaintiff in his affidavit allowed this as a credit in favor of the defendant did not preclude plaintiff from establishing the fact that this discount was allowed under a mistake. According to the plaintiff's theory, under the facts as found in the record, there was no consideration for the waiver of this sum; therefore he had the right to assert his demand for it in the suit brought by him.

There is no merit in appellant's fifth and sixth assignments of error. The facts in the record authorized the charge given by the court.

The seventh assignment is too general to be considered; but, however, the views expressed practically dispose of all the questions raised by the assignments.

We find no error in the record, and the judgment is affirmed.

Opinion on Rehearing.

(Dec. 23, 1903.)

Appellant, on the first page of his motion for rehearing, states that the evidence in the record conclusively shows, and states that it is in fact admitted by appellee in his testimony, that all of the lumber set out and described in the itemized bill of particulars was not used in the erection and construction of the building described in appellee's petition, but that a large portion of the same was purchased to be used in Menard county, and which was so used, and which fact was known to the appellee at the time of the sale and delivery of the last-mentioned items of lumber; and states that, notwithstanding this fact, this court in its findings of fact found that all of said lumber was used in the erection and construction of said building. What we stated was to the effect that the lumber, the price of which is sued for, was used in the construction and erection of the building, upon which the lien is sought to be enforced, located in Ballinger, Tex. Upon this subject, witness Umphries, for the plaintiff, testified as follows: That he and defendant entered into the contract in question, he representing the plaintiff, by the terms of which plaintiff was to furnish defendant lumber charged in the account sued upon at the prices therein charged for the same, less 12 per cent. for cash; that the discount was to be made in consideration of the defendant's trade and for cash, and for lumber bought by him; that the defendant paid for all the lumber that went to Menardville; that the credit of \$39 was for lumber sent to Menardville, and that the \$612.81 credit was, by direction of defendant, first applied to paying for all lumber

and material that was sent to Menardville, Tex.; and that as a fact the lumber sent to Menardville was paid for out of the \$39 and the \$612.81 payments, and that he (witness) applied same to payments of the lumber sent to Menardville, Tex.; and that the balance of the lumber charged in the account went into the storehouse at Ballinger. This evidence justified the finding of the court.

We have considered all the questions raised in appellant's motion for rehearing, and overrule the same. Motion overruled.

FINKS v. ABEEL et al.*

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

VENDOR'S LIEN—ACTION ON NOTE—LIMITATIONS—RIGHT TO RECOVER LAND.

1. Where the grantee in a conveyance of land which retained a vendor's lien secured by note conveyed the land, and his grantees assumed payment of the note, but nothing was paid on the note, and one claiming under a conveyance from the original grantor sued on the note, and the defense of limitations was made, plaintiff was entitled to recover the land.

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Suit by Alfred Abeel against Frank F. Finks and others. From a judgment in favor of plaintiff, defendant Frank F. Finks appeals. Affirmed.

Clark & Bolinger, for appellant. Sleeper & Kendall, for appellees.

KEY, J. Appellee brought this suit against John H. Finks, F. F. Finks, and W. K. Finks upon a promissory note executed by W. C. Kellum, payable to the order of E. E. Dismuke, and secured by a vendor's lien expressly retained on certain real estate in the city of Waco. The defendant F. F. Finks denied liability on his part; asserted that the note had been paid, and, if not, that it was barred by limitation. In reply to the answer of F. F. Finks, the plaintiff alleged that he had acquired the superior title to the land by purchase from Dismuke, and prayed in the alternative for a recovery of the land. The trial court rendered judgment for the plaintiff for the land, and F. F. Finks has appealed.

The trial judge did not file separate findings of fact and conclusions of law, but incorporated in the judgment the following conclusions: "That the plaintiff is the owner of the note sued on; that same has never been paid; that, to secure payment of said note, the vendor's lien was expressly retained in deed from E. E. Dismuke to W. C. Kellum; that the defendants assumed and agreed to pay off said note, as recited in the deed from Kellum to the defendants, as set out in plaintiff's petition, and the plaintiff holds the superior title to said land by conveyance from E. E. Dismuke, as set out in his first supplemental petition; and that the right of plain-

*Rehearing denied December 23, 1903, and writ of error denied by Supreme Court.

tiff to recover on the note sued on is barred by the statute of limitation." There is testimony in the record which sustains all of these findings, and we therefore adopt them as correct. Such being the facts, the trial court rendered the proper judgment. The defendant having pleaded limitation against the note, and the plaintiff having acquired from Dismuke the superior title, he was entitled to recover the land. *White v. Cole*, 9 Tex. Civ. App. 277, 29 S. W. 1148, and the cases there cited. It is strenuously contended on behalf of appellant that the note had been paid, and the lien thereby extinguished, before the note came into the possession of the appellee, but we think the testimony supports the trial judge's finding that the note had not been paid.

All the assignments of error have been considered, and, no grounds for reversal being shown, the judgment is affirmed. Affirmed.

MARTIN et al. v. TEXAS BRIQUETTE & COAL CO. et al.*

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

MECHANICS' LIENS—CONTRACTS FOR MATERIALS—MORTGAGED PROPERTY—PRIORITY OF LIENS—EVIDENCE—CONCLUSIONS.

1. Testimony that particular improvements to defendant's property, into which material furnished entered, were intended to be provided for by a deed of trust executed by defendant, was a mere opinion or conclusion of the witness.

2. Where a contract was entered into by which one party was to furnish lumber for the other during the following year at a specified price, an agreement at the expiration of that year to "continue" the contract "to complete the purpose" for which the lumber was purchased, as the purchaser desired "a little more lumber than the contract contemplated," was a new contract, and did not operate to continue the old contract, so as to accord the seller's lien for the lumber furnished under the new contract any priority which the lien for lumber sold under the original contract might have had over a deed of trust of the purchaser's property given during the life of the old contract.

3. A contract whereby the seller agreed for a period of a year to sell lumber to the buyer at a specified price for use in the construction of improvements to the latter's plant—there being no contract for the improvements at the time the contract was entered into, and the parties not knowing precisely what improvements would be needed—was not sufficient to give a lien to the seller on the buyer's property superior to that obtained by a deed of trust covering the same, and executed subsequent to the contract, but before any improvements were made.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by M. Halff & Bro. against the Texas Briquette & Coal Company and others, in which Hattie A. Martin and others intervened. From the judgment rendered, certain interveners appeal. Reversed and rendered for appellants.

Shook & Vander Hoeven, Frank A. Helmer, Chas. W. Ogden, Terrell & Terrell, and W. H. Lipscomb, for appellants. Wm. Aubrey, A. W. Seeligson, F. H. Waah, and C. A. Goeth, for appellees.

FLY, J. This case, under the style of *Sullivan & Co. et al. v. Texas Briquette & Coal Co. et al.*, was before this court on a former appeal, and the decision therein is reported in 60 S. W. 330. A writ of error was granted, and the judgment of this court was reversed, and the cause remanded for another trial. 94 Tex. 541, 63 S. W. 307.

The following statement of the case is taken from the first opinion in this case: "The Texas Briquette & Coal Company owned certain land, upon which was a plant erected for the purpose of mining lignite, and manufacturing briquettes and other products from lignite. On or about August 24, 1896, it negotiated a loan of a large sum of money, and issued to the Farmers' Loan & Trust Company, as trustee, or bearer, its bonds, secured by a deed of trust on all its property then on hand or thereafter to be acquired. The deed of trust was recorded in September, 1896, and contained a recitation as follows: 'And whereas, for the purpose of completing its plant for the manufacture of briquettes and other products of lignite coal, and for the purpose of developing its coal mines and increasing its output and capacity and supplying necessary machinery therefor, it has become desirable to borrow money, and for the party of the first part to mortgage its lands, machinery, plants, improvements, and franchise.' Plaintiffs in error own these bonds. The plant appears to have been completed, although the date of the actual commencement of the work does not appear. In the progress of the work, certain claims for coal cars for use in the mines, plumbers' material, machinery, lumber, and the like, arose, which were ordered or purchased by the company, and which went into the improvement. These were not paid for, and the judgment now here on review gives these claims a lien on all property superior to that of the deed of trust. The history of the suit is that a receiver was appointed for the Texas Briquette & Coal Company in the district court for the Forty-Fifth District, in a suit brought by M. Halff & Bro. upon an account. D. Sullivan & Co., Hattie A. Martin, and others, as owners of said bonds, intervened, asking that their debt be allowed, and adjudicated a first lien upon the property. There were sundry other interveners—among them, the Watt Mining Car Wheel Company, for twenty-four small cars furnished for use in mines; the F. F. Collins Manufacturing Company, for certain plumbers' material furnished; the Erie City Ironworks, for a boiler and attachments furnished; and H. Lockwood, for certain lumber and building material furnished. All these were adjudged entitled to a lien prior to that of the bonds; also Walter Tips and

*Rehearing denied December 23, 1903.

A. G. Francis were adjudged to hold prior liens."

Speaking of the evidence on the former appeal, the Supreme Court said: "There is no evidence that we have been able to discover in this record—and none has been pointed out by the able attorney for the defendants in error—which shows that, at the time the mortgage was executed, any contract had been let, or that the particular improvements were intended to be provided for by the making of that mortgage."

The bonds and deed of trust upon which are based the claims of appellants were executed on August 24, 1896, were negotiated about September 1st, and the deed of trust was recorded on September 7, 1896. To show that the lien for material had its inception before the time the bonds and deed of trust were negotiated, and the latter recorded, appellees introduced the evidence of L. S. Berg and Geo. C. Vaughan. The former testified: "The Texas Briquette & Coal Company did purchase from the Vaughan Lumber Company lumber during the year 1897 for the purpose of erecting buildings on the property of the Texas Briquette & Coal Company, and some of the lumber was used in the mine of the Texas Briquette & Coal Company. The Texas Briquette & Coal Company did purchase from the Watt Mining Car Wheel Company certain mining cars during the latter part of the year 1897, or the early part of the year 1898, and, after these cars were purchased, same were used by the Texas Briquette & Coal Company for the purpose of bringing out coal from its mine. This lumber and cars were installed and placed in position on real estate owned by Texas Briquette & Coal Company, and described in the deed of trust to Farmers' Loan & Trust Company, dated July 1, 1896. The lumber purchased from the Vaughan Lumber Company and the mining cars purchased from the Watt Mining Car Wheel Company were absolutely necessary to complete the mining plant of said Briquette & Coal Company as a going concern." Vaughan testified: "To the best of my recollection, about the last of May or first of June, 1896, A. O. Schryver, the president of defendant company, telephoned over to our office, requesting that one of the members of our firm come down and see him, which I did. He stated that he was in the market for a very heavy amount of material for use in building and constructing the briquette plant; that they wanted it delivered during the succeeding twelve months, and wished a price list, that would be good for one year from said date of our talk, on from 200,000 to 300,000 feet of lumber, and I contracted with him for that amount. The contract was not in writing. I agreed verbally to sell him that material at a certain price, to hold good for twelve months thereafter; and he, in return, was to give us his business for twelve months. In a few weeks thereafter Schryver sent up orders for us to commence

shipment of the first of the material needed. My recollection is that the first car of lumber went out about September 2, 1896. Our books show one car shipped in April, 1896, but that was shipped prior to this contract. From September 2, 1896, I began shipments of that lumber, and continued from the fall of 1896, on through 1897. I know what Schryver told me he ordered the lumber for, and I know some of the material purchased from us must have been for the construction, because no man could use 300,000 feet of lumber and material of that kind without it was for construction purposes. The first car that I think was shipped under this contract was shipped September 2, 1896, and the second car was shipped about September 5, 1896, on which we prepaid the freight September 14, 1896. On November 11, 1896, we shipped another car, and so on through to January 12, 1899, when the last car was shipped defendant. Some of the items were shipped after the expiration of the twelve months from the date of our agreement with Schryver. The reason for this was that some time in June or July, 1897, Schryver said he would want a little more lumber than the contract contemplated, and asked me if I had any objections to continuing it to complete the purpose he was wanting it for, to which I replied it would be satisfactory if ordered soon; and about July, 1897, he gave me orders for the rest of the lumber. The price list I gave Schryver was not for every single item, but a basis of the price. There were a dozen items that governed the price of the whole list. Mr. Schryver was a former lumberman, understood the arrangement, accepted my prices, and agreed to order the lumber inside of the twelve months—between 200,000 and 300,000 feet. He did not know exactly how much he would need, but he agreed to give us the entire bill of what he did need. We delivered approximately 300,000 feet of lumber. I do not know, of my own knowledge, whether or not, at the time these bills of lumber were being shipped by us to defendant, the plant of defendant was completed. All I know is that Mr. Schryver said he would need a heavy amount of lumber for the briquette plant at Rockdale."

This testimony is relied upon to give the lien contended for by appellees, and which, it is claimed, brings this case within the scope of the opinion in *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 33 S. W. 652, 30 L. R. A. 765, 53 Am. St. Rep. 790. In the case of *Oriental Hotel Co. v. Griffiths*, the construction of the building had commenced; and Griffiths, the contractor, had entered into a contract with the hotel company to erect and construct the building, and soon thereafter began its construction. When Griffiths made the contract, he knew that negotiations were pending for the sale of bonds issued by the company. The bonds were afterwards sold, and, in the deed of trust securing their payment, it was provided that

the money for the bonds was to be paid for the construction of the building. The facts of the case could not have been stronger in favor of the lien for material and labor furnished, and the Supreme Court properly declared that lien to be superior to the one created by the mortgage. The Supreme Court said: "The proposition made by the hotel company to the trust company, the deed of trust, and the bond given by the hotel company to the trust company, show that the erection of the hotel building had been begun, and its continuance to completion was fully contemplated by the parties. Specifications of the work to be done accompanied by the proposition, and the proposition upon which the deed of trust itself was based provided that the money received from sale of the bonds should remain in the hands of the trust company, to be paid out by it to persons who might furnish material or perform labor in the prosecution of the work; and the bond given by the hotel company to the trust company provided that, in case any liens created upon the said building should not be discharged within sixty days after the expenditure of the \$250,000 procured by the sale of the bonds, then the hotel company should furnish sufficient funds to discharge such liens. The facts clearly indicate that the parties at the time of making the trust deed understood that liens superior to the lien of that instrument might accrue thereafter, and carefully provided for protection against them. The law in force in Texas at that time gave to all persons who might furnish material, fixtures, or tools, or who might labor in the construction of the said building, a lien upon the lands and the building to secure payment therefor. The parties contracted with reference to and in view of the law as it then existed, and must be charged with notice of such rights as might accrue in the course of constructing the building, even if they had been actually contemplated by the parties. *Brooks v. Railway*, 101 U. S. 451 [25 L. Ed. 1057]. When a building or other improvement is in course of construction, and any person takes a mortgage on the land upon which such building or improvement is situated, or on the improvement itself, he does so with the knowledge that it may be necessary for the completion of the building that other contracts should be made for labor and material; and it is clearly the policy of this state, as shown by its statute law, that an intervening mortgage shall not destroy the statutory rights of persons that may be acquired thereafter in the course of constructing such building. The deed of trust in this case expressly reserved a lien upon the building thereafter to be constructed, and it is evident from the facts that the principal security for the bonds which were being sold was to be created by the completion of the contemplated hotel building." It will be noted that it is emphasized and reiterated that the building was in course of erection, and that the parties at

the time of executing the deed of trust provided for superior liens that might arise. Again, in the same opinion, after a discussion of what is meant in the statute by the word "inception," it was said: "When the building has been projected, and construction of it entered upon, that is contracted for, the circumstances exist out of which all future contracts for labor and material necessary to its completion may arise, and for all such labor and material a common lien is given by the statute; and in this state of circumstances the lien to secure each has its inception." In another connection the court repeats "that, when the erection of any building or construction is begun, that constitutes the inception of all subsequent liens," and asserts that the decision in the case is based on that doctrine.

On the former appeal of this case the Supreme Court held that the language used in the deed of trust to the effect that the money realized from the sale of the bonds was to be used to improve the property was no evidence of recognition upon the part of the mortgagees of the existence of prior liens, and that there was no evidence in the record that showed "that, at the time the mortgage was executed, any contract for this improvement had been let, or that the particular improvements were intended to be provided for by the making of that mortgage." The only additional evidence upon which it is sought to sustain the judgment is that above copied, and there is nothing in it to indicate that any contract for improvements had been let, or that the mortgage was executed to provide money to pay for those identical improvements. It is true that Berg swore that the briquette company had agreed to pay the Vaughan Lumber Company certain prices for lumber necessary to complete its plant, and that the lumber was purchased to erect buildings and for use in the mines on the real estate described in the deed of trust; but neither he nor Vaughan, nor any one else, swore to the existence of a contract for making the improvements. It was not even known by the parties what improvements were to be made, nor what material would be needed to make them. The contract had reference to additions to a concern then in existence, whose improvements were totally destroyed by fire before the delivery of any of the material that was used in rebuilding. Neither Berg nor Vaughan knew anything, except from hearsay, concerning the contemplated improvements. There was other testimony to the effect that the plant was complete until destroyed by fire in October, 1896. The construction of the new plant began immediately after the fire, and none of the material whose price is sued for herein was furnished until after the fire. Berg swore that the particular improvements to the mining property and plant into which the material furnished by appellees entered were intended to be provided for by the deed of trust, but it

is apparent that this is a mere opinion or conclusion of the witness, that should not have been admitted in evidence, and which opinion, if permissible, was contradicted by facts that rendered it an impossibility for the parties to have known what improvements would be made in the plant. It was, in effect, swearing that the parties contemplated in September that the plant would be destroyed by fire in October, and new improvements on a larger scale would be erected.

The claims of all the interveners to a superior lien for material furnished is based on the contract made by the Texas Briquette Company with the Vaughan Lumber Company in May or June, 1896. That contract is based on a request by Schryver, the president of the briquette company, to the lumber company, to furnish him a price list for an indefinite amount of lumber—some 200,000 or 300,000 feet—which, it seems, was to be furnished as it might be desired by Schryver, for one year from date of contract. It is not pretended that any contract for improvements had been made, or that any one knew the character or extent of the improvements. No certain kind of lumber was contracted for, but it was simply an arrangement by which Schryver, for one year, was to get lumber of all kinds at certain prices, as he might desire. The Vaughan Lumber Company did not know what the lumber was to be used for. If the Vaughan Lumber Company did make a contract with the Texas Briquette & Coal Company in May or June, 1896, which constituted a superior lien to the one created by the mortgage, that contract expired by its terms in June, 1897, and any subsequent contract would certainly not create a lien superior to the lien evidenced by the mortgage. The claim of the Vaughan Lumber Company is based upon certain drafts drawn by it on Texas Briquette & Coal Company on April 4, 1898, which were accepted by the last-named company; and the witness Vaughan swore that "the acceptances herein sued upon are made up entirely of the July, 1897, shipments, and those made subsequently." The only effort to connect these shipments with the original contract is that the contract made in July, 1897, was a continuation of the old contract. Vaughan said: "Some of the items were shipped after the expiration of the twelve months from the date of our agreement with Schryver. The reason for this was that some time in June or July, 1897, Schryver said he would want a little more lumber than the contract contemplated, and asked me if I had any objections to continuing it to complete the purpose he was wanting it for, to which I replied it would be satisfactory, if ordered soon; and about July, 1897, he gave me orders for the rest of the lumber." That was a new contract, pure and simple. To hold otherwise would be to hold that, when a lien for material to be furnished in a certain period has been obtained, it can, by continuing the contract, be made to hold supe-

riority over other contracts forever. We are clearly of the opinion that the original contract was not sufficient to give a lien on the property superior to that given by the mortgage, and, if it had been, it would apply alone to material furnished during the period named in the contract.

The Watt Mining Car Wheel Company furnished its material in December, 1897; the F. F. Collins Manufacturing Company furnished its material in 1897; the material of the Erie City Ironworks was furnished on March 15, 1898; that of Walter Tips on September 28, 1897, and thereafter; and that of A. G. Francis on July 31, 1897. None of them pretends that his contract antedates the mortgage under which appellants claim, and the only ground upon which either of them can claim a lien superior to that of the mortgage is based on the contract with the Vaughan Lumber Company, and that thereby a lien was created on all material afterwards furnished by anybody. The Oriental Hotel Co.—Griffiths Case is relied on as sustaining that theory, but that case cannot be expanded and distorted so as to support such doctrine. As before stated, there was a contract with Griffiths to build the hotel, and the Supreme Court held that a lien would arise for all material that was necessary to finish the house in compliance with the contract. It was never contemplated by the learned judge who rendered that opinion that it could be authority for fixing a lien on premises through an uncertain contract to furnish lumber to make improvements for which no contract had ever been let—concerning which there was no certainty that it would ever be let. In other words, a contract for lumber to be used, or not, during a year's time, would not form the basis for a lien, superior to that arising from an antedating mortgage, for cars, tanks, rams, boilers, pipes, and other property furnished by other persons, even during the life of the lumber contract—much less, when the property was furnished after the lumber contract had expired.

Under our view of the case, the points raised in the various assignments of error become of little importance, and need not be discussed.

The judgment of the district court is reversed, and judgment here rendered in favor of appellants.

ROTAN v. HAYS et al.

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

DEEDS—CONSTRUCTION—COVENANTS AGAINST INCUMBRANCES.

1. Batts' Ann. Civ. St. 1895, art. 633, provides that any conveyance using the words "grant or convey" carries with it an implied warranty that the estate conveyed is free from incumbrances, unless restrained by express terms in the conveyance. *Held*, that where a deed provided that the grantor granted, bargained, sold, and conveyed the premises in ques-

tion to the grantee, and bound his heirs, executors, and administrators to warrant and defend the premises unto the grantee, his heirs and assigns, against every person whomsoever lawfully claiming any part thereof by or through the grantor, the deed contained an implied covenant against incumbrances, since the special warranty did not purport to bind the grantor himself, but only his heirs, executors, and administrators.

Error from District Court, McLennan County; M. Surratt, Judge.

Action by T. D. Hays and others against E. Rotan and others. From a judgment in favor of plaintiffs, defendant Rotan brings error. Affirmed.

Sleeper & Kendall, for plaintiff in error. Clark & Bolinger, for defendants in error.

KEY, J. This suit was instituted by the city of Waco to recover certain taxes due upon certain real estate. The original defendants, Chas. S. and S. D. Curtis, impleaded T. D. Hays and E. Rotan upon covenants contained in deeds of warranty executed by the latter. Hays pleaded over against his codefendant Rotan, alleging that the latter, in conveying the property to him, had warranted the title as against prior incumbrances. The defendant Rotan denied the existence of such covenant of warranty. The trial resulted in a judgment in favor of the plaintiff against S. D. and Chas. S. Curtis, foreclosing the tax lien, and over against Hays in favor of the Curtis, and over against Rotan in favor of Hays, and Rotan has appealed.

The appeal involves but one question, and that is the liability of Rotan on a deed executed by him, which contained no general covenant of warranty, but contained these clauses: "Have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said T. D. Hays. . . . And I hereby bind my heirs, executors and administrators to warrant and defend all and singular the premises unto the said T. D. Hays, heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by or through me." By force of statute law in this state, any conveyance using the words "grant or convey" carries with it an implied warranty that the estate conveyed is, at the time of the execution of such conveyance, free from incumbrances, unless restrained by express terms contained in such conveyance. Batts' Ann. Civ. St. 1895, art. 633; Taylor v. Lane (Tex. Civ. App.) 45 S. W. 317. It is argued on behalf of plaintiff in error that the special warranty clause in the conveyance under consideration restricts the implied warranty, which otherwise would exist against the prior incumbrances shown by the testimony in this case. This argument is not regarded as sound, because the special warranty referred to does not purport to bind the grantor himself, but only his heirs, executors, and administrators. The statute seems to have been carefully pre-

pared, and it declares that the implied warranty shall exist, unless restrained by express terms contained in such conveyance. As to Rotan himself, we find no such express terms in the deed, and therefore hold that he is bound by the implied warranties referred to in the statute.

Judgment affirmed.

CITY OF VAN ALSTYNE v. MORRISON.

(Court of Civil Appeals of Texas. Dec. 5, 1903.)

MUNICIPAL CORPORATIONS—WATER SUPPLY—CONTRACT WITH CITIZENS—BREACH—JUSTIFICATION—DAMAGES—BURDEN OF PROOF—JUSTICE'S COURT—APPEALS—AMENDMENT OF PLEADINGS.

1. In an action against a city for breach of contract to supply water, plaintiff may, on appeal from a justice's judgment against him, amend his pleadings so as to specify more particularly the items of damage and enlarge the amount thereof.

2. The action of a city in violating its contract to furnish a citizen with water and shutting off his supply is not justified by the fact that the citizen drained his water into the street, and thereby created a nuisance.

3. The fact that a citizen was using water for a bath tub without paying an extra charge therefor did not justify the city in shutting off his water supply without notice to him and giving him an opportunity to pay such extra charge, where such extra rate was not authorized by ordinance, and the failure to provide for such extra charge was due to an oversight of the chairman of the waterworks committee, and not to any misrepresentation of the citizen.

4. The action of a city in shutting off a citizen's water supply was not justifiable on the ground that the rate he was paying was for a family of five, and his family consisted of six persons, where his family consisted of himself, his wife, three small children, and a baby, and only one rate had been established for residence purposes, and no questions were asked as to his family when he applied for water.

5. In an action against a city for breach of contract to supply water, where the issue was the value of water of which plaintiff was deprived for the unexpired portion of the contractual year, the burden was on plaintiff to establish "with reasonable certainty" such value.

Appeal from Grayson County Court; G. P. Webb, Judge.

Action by M. M. Morrison against the city of Van Alstyne. From a judgment for plaintiff on appeal from the justice's court, defendant appeals. Reversed.

Smith, Templeton & Tolbert, for appellant. Don. A. Bliss, for appellee.

TALBOT, J. Appellant, in 1901, was a municipal corporation, duly incorporated under the laws of Texas, as a city of 1,000 inhabitants or more, and engaged in operating a system of waterworks and selling and supplying water to the citizens thereof. Appellee resided in said city with his family, and made application to appellant to be supplied with water on his premises for residence pur-

¶ 1. See Justices of the Peace, vol. 21, Cent. Dig. § 672.

poses and for two horses and one cow. The application was granted, the necessary connections made, and hydrants put in by the city plumber on or about the 27th day of May, 1901. Annual water rates had been fixed by appellant, which, among others, were \$12 for a residence, \$1.50 for a cow, \$2 for a horse, and \$1 for each additional horse, payable quarterly in advance. Appellee also had placed in his house a bath tub, which was connected and supplied with water from appellant's waterworks, for family bathing purposes. Appellee paid the first quarterly installment of the annual water rate, and the water was turned on and used by him under this contract until the 1st day of December, 1901, when the water was cut off from appellee's residence by appellant. The appellee paid or tendered the second quarterly installment of the annual water rates, and demanded that he be supplied with water as appellant had agreed to do. This was refused, and thereupon appellee filed suit in the justice's court of Precinct No. 4 of Grayson county against appellant to recover the sum of \$95, alleged to be the amount of damages sustained by him for failure on the part of appellant to perform water contract. Upon a trial in the justice's court appellee failed to recover, and appealed to the county court, where he amended his pleadings, still setting up the breach of said water contract on the part of appellant as his cause of action, but itemizing in part the damages claimed, and increasing the total damages sued for to the sum of \$200. Appellant answered by general and special exceptions, general denial, and special answer, in which it alleged in substance that appellee had placed in his residence a bath tub, and was using the water furnished him for bathing purposes, without having applied for the same, and without its knowledge, and without having paid anything for the same; that by ordinance or resolution of its waterworks committee a rate of \$3 per annum had been fixed for water to be supplied for bathing purposes in a residence, and that appellee knew of such rate at the time he applied for water to be supplied his residence; that the rate of \$12 for residence purposes was limited to a family of five in number, and that appellee's family consisted of six persons; that appellee had drained and emptied the waste water from his residence on the streets of said city, and thereby created a nuisance endangering the health of the inhabitants of the city, and that appellant was authorized to abate said nuisance, and the only practical way it had of doing so was by cutting off the water from appellee's residence. A trial was had in the county court, which resulted in a judgment for appellee in the sum of \$150, from which judgment this appeal is prosecuted.

Appellant excepted to appellee's amended pleadings filed in the county court, and sought to strike out the same upon the ground that another and different cause of

action from that pleaded in the justice's court had been presented. The court overruled this exception, and in this action, we believe, there was no error. It has been repeatedly held by the courts of this state, under our statute on this subject, that new matter may be pleaded in the county court which was not pleaded in the justice's court, but no new cause of action can be asserted. The amendment may go to the extent of increasing the amount of damages sought to be recovered, and adding an additional item of damage involved in the same transaction, but not alleged below. *City of Dallas v. McAllister* (Tex. Civ. App.) 30 S. W. 452; *Von Boeckmann v. Loepp* (Civ. App.) 78 S. W. 849, 7 Tex. Ct. Rep. 448. The cause of action in this case was the same in the justice's and county court. In both courts a recovery was sought to be had upon an alleged breach of contract on the part of appellant to supply appellee with water. The allegations in the county court simply specified more particularly the items of damage and enlarged the amount thereof. We believe the law is clearly settled against this contention of appellant in the authorities cited and other authorities of this state.

By various assignments of error complaint is made and urged against the action of the trial court in refusing to allow appellant to show that appellee was the city health officer of appellant; that it was his duty to report to the city council of appellant all nuisances discovered by him in the city; that he had drained and emptied the waste water from his residence on the streets of appellant, and that the same collected and stood in said streets, and became and was a nuisance obnoxious to the citizens of said city and dangerous to their health—all of which was known to appellee; that the streets of appellant in the vicinity of appellee's residence were not graded, and that the city had no sewerage system, and that the only practical way it had of abating the nuisance thus created, short of constructing a sewerage system, was to cut off and stop appellee's water supply, etc. We are of the opinion that there was no error in excluding this and other evidence offered upon this phase of the case. The appellee had entered into a contract with appellant by the terms of which appellant was to furnish him water at the rates fixed and established for a period of one year. If not so expressed in terms, this was the fair and reasonable implication from the nature and purposes of the transaction, and evidently was so understood by the appellant. That appellee drained the waste water from his residence, and emptied it on the streets, and thereby created a nuisance, did not, in our opinion, justify the appellant in violating its contract with appellee by cutting off the supply of water agreed to be furnished. It may be true that one of the functions of the police powers of a city is to regulate and abate nuisances, but this power should

be exercised in a proper manner. We regard the cutting off of appellee's entire water supply, under the facts disclosed by the record before us, unnecessarily harsh and oppressive, and, no matter what the general rule may be with regard to the power of municipal corporations to summarily abate nuisances detrimental to public health, was unwarranted. There was no such emergency shown as justified such summary action. The ordinary method by which a municipal corporation abates a public nuisance, at least in many jurisdictions, is by criminal proceedings. *Georgetown v. Alexandria Canal Co.*, 12 Pet. 95, 9 L. Ed. 1012; *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Shepard v. People*, 40 Mich. 487. An application of this remedy in this case would probably have resulted in a prompt abatement of the nuisance complained of by appellant. If not, unquestionably the appellant had a prompt, adequate, and efficacious remedy through a court of equity by injunction. *City of Llano v. County of Llano* (Tex. Civ. App.) 23 S. W. 1008; *State v. Goodnight*, 70 Tex. 686, 11 S. W. 119; *Dunn v. City of Austin*, 77 Tex. 143, 11 S. W. 1125; *Smith on Mun. Cor.* vol. 2, § 1094. A resort to this remedy would have preserved the rights of appellee under his contract, and afforded the appellant and its inhabitants prompt relief from the annoyance and dangers of the alleged nuisance. The appellant chose the more summary remedy, without legal notice to appellee of its intended purpose, and we believe it is liable to appellee for whatever damage, if any, he has sustained by reason thereof.

We deem it unnecessary to discuss the numerous assignments of error complaining of the charge of the court and the refusal to give certain special charges requested. The main charge was substantially correct, and as favorable to appellant as it could reasonably ask. Many of the questions raised by these assignments have been disposed of by what has already been said, and under the evidence as it appears in the record before us appellant was not entitled to have the jury instructed to the effect that, if appellant's waterworks committee had prescribed and fixed a special rate for bath tubs in addition to the rate for general residence purposes, and appellee had failed to obtain a permit to use water for such bath tub, and failed to pay such additional rate, then appellant had the right to shut off his water supply without notice to him. The extra charge for water to be used in family bath tubs is not found in the ordinance fixing water rates. This rate seems to have been prescribed by the waterworks committee without express authority to do so, and not adopted or confirmed by any affirmative action on the part of the city council. Besides, it seems that the failure to provide for this extra charge for bath tub was an oversight or mistake of Thompson, the chairman of the waterworks committee, and not due

to any misrepresentation of appellee. This rate was unknown to appellee and peculiarly within the knowledge of Thompson, agent of appellant, who issued the permit to appellee to use the water. When appellant discovered that appellee was using water in his bath tub for bathing purposes, notice should have been given him to the effect that an extra charge was demanded for such use, and an opportunity afforded him to pay it, before cutting off the entire water supply. Under the circumstances he had not forfeited his right to the use of all the water. There is no merit in the contention that appellant had the right to cut off the water because the rate established and being paid by appellee was for a family of five or less, and appellee's family consisted of six in number. His family consisted of himself, wife, three small children, and a baby in arms. He applied to Thompson for water for general residence purposes and for two horses and one cow. No questions were asked about the size of his family, and nothing said or thought about it, according to Thompson's testimony. Appellant had established but one rate for the use of water in a family residence, and there is no pretense that the water was shut off because of the number of appellee's family, or for the reason that he was using it in a bath tub. The undisputed evidence shows that the water was cut off solely for the reason that appellee was emptying his waste water into the streets. In view of the evidence, the propriety of submitting the issues raised about the use of the bath tub and the number of appellee's family may be doubted, but, however that may be, it is safe to say we believe that the error, if error, was favorable to appellant.

Appellant's twenty-sixth assignment of error attacks the evidence as not being sufficient to authorize the submission of the value of the water that appellant was bound to furnish appellee for the unexpired term after the water was cut off, and which it failed to furnish, and as being insufficient to warrant the verdict of the jury. This question is not entirely free from difficulty, but, after a careful consideration of the evidence as it appears in the record, the conclusion is reached that this contention is correct, and requires a reversal of the case. Appellee's cause of action is based upon an alleged breach of contract, and not upon a tort. He avers, in substance, that the reasonable, fair value of the supply of water that the defendant agreed and became bound to furnish to plaintiff for the unexpired term after the water was shut off and not furnished was and is the sum of \$150, and that it would reasonably cost plaintiff said amount over and above the amount he would have had to pay to defendant under the terms of said contract, whereby he says that he has been damaged by breach of said contract by defendant in the sum of \$150. We are aware of the established rule that under gen-

eral allegations of damages plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of; and that in this state it has been held in suits to recover for the lost services of a wife or small child the question of the value of such services is not confined to any exact mathematical calculation, and, where the amount of damage is not susceptible of direct proof, the assessment of reasonable compensation must necessarily be referred to the sound discretion and judgment of the jury. *Brunswig et al. v. White*, 70 Tex. 504, 8 S. W. 85; *Railway Co. v. Lacy*, 86 Tex. 244, 24 S. W. 269.

It has also been held, however, that, even where the law implies damages such as necessarily result from a wrongful act, proof is required to show the extent and amount of damages. *Davis v. T. & P. Ry. Co.* (Tex. Civ. App.) 42 S. W. 1008; *I. & G. N. Ry. Co. v. Simcock*, 81 Tex. 503, 17 S. W. 47. *T. & P. Ry. Co. v. Curry*, 64 Tex. 87; *Sutherland on Damages*, vol. 1, p. 917. The value of the water of which plaintiff was deprived for the unexpired portion of the alleged contractual year was the issue submitted to the jury, and the burden of proof was upon the appellee to show with reasonable certainty such value. The rule discussed is based upon the principle of necessity, and should be restricted to that class of cases which, from their nature, are not susceptible of more satisfactory proof. We have scrutinized the record, and are of the opinion that this case does not fall within the class mentioned, and that the facts proved are insufficient to form the basis for an intelligent estimate of the damages claimed. Other assignments not mentioned or discussed have been considered, and no serious error found.

Because of the insufficiency of the evidence to support the verdict the cause is reversed and remanded.

RALEY et al. v. HANCOCK.

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

ATTORNEYS — LIEN — GARNISHMENT — SERVICE OF WRIT—PREMATURE ISSUANCE OF WRIT.

1. Attorneys whose services secured a judgment had no lien for their agreed compensation on a fund recovered from a bank in garnishment based on such judgment, the services leading to judgment against the garnishee having been performed by another attorney.

2. An attorney whose services brought about a judgment in garnishment has no lien on the fund for an amount due him from his clients under a contract made after the clients' right had attached by virtue of the garnishment.

3. Where a judgment against a garnishee was appealed to the Court of Civil Appeals, and after affirmance, but prior to the time in which a motion for rehearing could have been filed, a writ of garnishment was sued out, and the garnishee's answer was filed after the time had expired in which a motion for rehearing could have been filed, a contention that the serv-

ice of the garnishment was premature, on the ground that the judgment of the Court of Civil Appeals was not final, was of no merit.

4. Where a judgment, as affirmed by the Court of Civil Appeals, was a fixed demand, in the nature of an indebtedness, it was sufficient to form the basis for a writ of garnishment, though the time within which a petition for rehearing in the Court of Civil Appeals might have been filed had not expired when the writ was issued.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Suit in garnishment by Susan E. Hancock against the Frost National Bank; James Raley and others intervening. From a judgment in favor of plaintiff and intervener Raley, certain other interveners appeal. Affirmed.

Jas. Raley, for appellants. Ed. Haltom, for appellee.

FISHER, C. J. This is a suit in garnishment against the Frost National Bank, garnishee. The garnishment was based upon a judgment owned by the appellee against John W. Maddox and others; said judgment being in the district court of Travis county, Twenty-Sixth Judicial District. The garnishee answered that it had in its possession \$1,948.74, which had been adjudged by the district court of the Forty-Fifth Judicial District, Bexar county, Tex., to belong to J. W. Maddox and T. L. Wren. Said judgment had been affirmed by the Court of Civil Appeals of the Fourth Supreme Judicial District (66 S. W. 319), and was then a final judgment. On April 5th James Raley filed a petition of intervention, claiming a part of the money in the bank; and on August 7, 1902, Raley filed an amended plea, and pleaded in abatement that Maddox & Wren were partners, and that the writ of garnishment had been prematurely issued, and then claimed 30 per cent. of the fund in the bank, and \$175 in addition thereto, to cover certain expenses he (Raley) had borne in endeavoring to collect a certain judgment against G. W. Angle & Co. On April 5, 1902, Floyd McGown, Duval West, and R. G. West filed a plea in intervention, averring that they, as attorneys at law, were employed in 1892 by Maddox & Wren to recover a judgment against G. W. Angle and others, and that they recovered a judgment in the Forty-Fifth District Court, Bexar county, in 1892, in favor of Maddox & Wren, partners, against G. W. Angle, R. L. Summerlin, and others, for \$3,596.99; that by agreement they were to have as their fee 10 per cent. of the amount collected; that the \$1,948.74 in garnishee bank is the fruit of said judgment, etc.; and pray for judgment for \$194.87 of the money in said bank. On June 22, 1903, John Campbell, Nat Lewis, Josephine McCall, executrix of T. P. McCall, deceased, Henry Umscheid, and the witnesses and notaries and others, filed what they or their attorneys named "Petition to Intervene," and "First Amended Petition of In-

terveners," and averred that Maddox & Wren, in obtaining and endeavoring to collect their judgment against Angle & Co., had incurred costs to the extent of \$129, which was due to them and the witnesses and notaries, who are too numerous to be named; and they pray for an order "that the sum of \$129 be ordered paid to them out of the fund in bank to be distributed among the various claimants." On June 22, 1903, the plaintiff appellee filed a supplemental petition consisting of a general demurrer to all pleas of intervention, and denying under oath that Maddox & Wren were partners, and averring that, if they were partners, the partnership had been dissolved before the institution of this suit, and that Maddox had assigned to plaintiff appellee all of his interest in the fund in bank, for which she prayed judgment. Wren and wife disclaimed any interest in the fund in bank. On June 22, 1903, the case was tried before the court, and the court overruled the exceptions of plaintiff appellee to the interventions of James Raley and West & McGown and Duval West, and sustained the exceptions to the intervention of J. P. Campbell, Nat Lewis, McCall, Umscheid, and the numerous others, and gave judgment in favor of Raley for \$292.31, and in favor of plaintiff for \$682.06, and rendered judgment against the other interveners.

The facts are as follows: The plaintiff had a judgment against Maddox, as set out in the application for writ of garnishment, upon which execution had been issued in one year, and returned nulla bona. December 6, 1892, John W. Maddox, a defendant in the above judgment, and who was liable to the appellee thereon, and one T. L. Wren, recovered a judgment in the Forty-Fifth District Court of Bexar county against R. L. Summerlin and others for \$3,596.99, upon which execution was issued within the year, and was returned unsatisfied. In 1897 Wren sold his interest in the above judgment to Mrs. Wren. On May 27, 1902, Maddox assigned his interest in the fund in bank of the garnishee to the appellee. On June 21, 1901, John W. Maddox and T. L. Wren recovered a judgment against the Frost National Bank for \$1,948.74, as garnishee, for money then in its hands belonging to R. L. Summerlin, a defendant in the original judgment recovered by Maddox and Wren on December 6, 1892. In this garnishment suit against the Frost National Bank by Maddox and Wren, one J. R. Norton intervened and claimed the money. Judgment was rendered in the district court of Bexar county on June 21, 1901, against the Frost National Bank, as garnishee, in favor of Maddox & Wren, for \$1,948.74. There was an appeal in this case to the Court of Civil Appeals at San Antonio, and judgment was affirmed on January 8, 1902. 66 S. W. 319. In that appeal Maddox and Wren made a cross-assignment of error in allowing the garnishee \$75 attorney's fee for answering the garnishment. The writ of garnishment

in this case was issued on the 17th day of January, 1902, and served on the 18th day of January, 1902. No motion for rehearing was made in the Court of Civil Appeals in the garnishment proceeding of Norton against Maddox & Wren, and mandate was issued on that judgment February 17, 1902. The garnishee, the Frost National Bank, filed its answer in this case on March 29, 1902. West & McGown and Duval West were the attorneys for Maddox & Wren in procuring the judgment of 1892 in favor of Maddox & Wren against R. L. Summerlin and others, and for their services they were to be paid 10 per cent. on \$2,500, which amount has not been paid. They did not collect the judgment. Thereafter, on July 7th, 1897, Jas. Raley was employed by J. W. Maddox and T. L. Wren to recover the sum for which they procured judgment against the garnishee, the Frost National Bank, and agreed to pay him for his services 30 per cent. of the amount recovered; and this contract with James Raley was the procuring cause of the judgment against the Frost National Bank in favor of Maddox & Wren for the sum of \$1,948.74. There is evidence to authorize the conclusion that this sum so recovered was not the partnership funds of Maddox & Wren, but was owned by each individually, each being entitled to a half interest thereof.

It is clear that those appellants who intervened, claiming an interest in the funds recovered by Wren and Maddox against the Frost National Bank, on account of costs paid out in the original suit of Maddox & Wren v. Summerlin and others, had no lien or interest in this fund, and were therefore not entitled to recover. Under the doctrine announced in *Casey v. March*, 30 Tex. 184, in view of the facts as stated, West & McGown had no lien or contract interest in the fund recovered from the Frost National Bank by the judgment in favor of Maddox & Wren. The procuring cause of this recovery was through the employment of Raley. The court allowed Raley all that he was entitled to. The items of costs and expenses claimed by him, and which were disallowed, were based upon a contract, it seems, made after the appellee's right had attached by virtue of the writ of garnishment. The trial court correctly excluded the evidence offered by Raley and the other interveners. The declarations and statements of Maddox were not admissible subsequent to the time that the plaintiff's rights were acquired, by virtue of the levy of the garnishment process.

We are of the opinion that there is no merit in the contention that the issuance and service of the garnishment process was premature, for the reason, as contended by appellants, that the judgment of the Court of Civil Appeals was not final. It is true that the writ of garnishment was sued out subsequent to the time that the judgment was rendered in the Court of Civil Appeals, but prior to the time in which a motion for rehearing

could have been filed. But the garnishee's answer was filed after the time had expired in which a motion for rehearing could have been filed, and after the mandate had issued. And we are of the opinion that the existence of an indebtedness at the time that the answer was filed cures the objection urged by the appellants. But if we are mistaken in this view, we are of the opinion that the judgment of the district court, as affirmed by the Court of Civil Appeals, was a fixed and certain demand in the nature of an indebtedness, sufficient to form the basis for a writ of garnishment. This judgment was predicated upon a certain demand, and it is not like the cases cited by appellants, where the judgments were based upon causes of action which were not liquidated, and in which the judgments were recovered in actions of tort.

We find no error in the record, and the judgment is affirmed. Affirmed.

WATSON et al. v. MARKHAM & REESE.*
(Court of Civil Appeals of Texas. Nov. 11, 1903.)

VENDORS' LIENS—MECHANIC'S LIEN—PRIORITY—APPEAL—FINDINGS—CONCLUSIVENESS:

1. Where permanent improvements are placed on real estate subject to a vendor's lien, and there is nothing to indicate that it was the intention of the parties that the improvements should be treated as personalty, they are subject to the vendor's lien, and the same is superior to a subsequent mechanic's lien for such improvements.

2. Where the trial court finds that certain permanent improvements placed on real estate were personalty, when there was nothing in the record to show that it was the intent of the parties that it should be so treated, the court on appeal is not bound to treat the conclusion as binding upon it.

Appeal from District Court, Falls County; Sam R. Scott, Judge.

Suit by J. L. Markham and another against F. M. Watson and others on an account and to foreclose a mechanic's lien. From a judgment in favor of complainants, defendants the Falls County Gin Company and another appeal. Reversed in part and in part affirmed and rendered.

J. W. Spivey, for appellants. Rice & Bartlett, for appellees.

FISHER, C. J. This is a suit brought on the 29th day of March, 1900, by J. L. Markham and M. A. Reese, composing the firm of Markham & Reese, against F. M. Watson, on an account for building material, amounting to \$146.30, and to foreclose an alleged mechanic's lien as against F. M. Watson and the other defendants on a certain lot of land and improvements in the town of Lott, Falls county, Tex. Plaintiffs alleged, in substance, that during the year 1899 the defendant Wat-

son was the owner and in possession of a portion of block No. 215 in the said town of Lott, describing it, upon which was then and is now situated a certain gin and outhouses known as the "Watson Gin Property"; that during said time, to wit, from the 29th day of July, 1899, to the 13th of September, 1899, said Watson purchased certain items of lumber, brick, cement, and other building material, which were used in making improvements on said lot, and amounting to \$152.06, less a credit of \$4.07, and which balance Watson failed and refused to pay; that plaintiffs hold a valid lien on said lot and improvements by reason of the fact that on September 27, 1899, they delivered to the county clerk a correct itemized account of said material, which was duly verified and recorded as required by law; that the Falls County Gin Company and T. L. Hollingsworth, defendants, were in possession, or claimed some interest in said premises, which was alleged to be inferior to the lien asserted by them; and plaintiffs prayed "that on final hearing it have judgment for its debt, damages, and interest, with establishment and foreclosure of its lien against each and all of the defendants, for order of sale and writ of possession, for costs of suit, and for general and special relief." The defendants T. L. Hollingsworth and the Falls County Gin Company answered by general and special exceptions, general denial, and by special answer alleged that said Watson was not in fact the owner of the premises at the time alleged, in this: that said T. L. Hollingsworth, prior thereto, being the owner of said property, did convey the same to said Watson for the consideration of \$6,000 to be paid by said Watson, as evidenced by five promissory notes, each for the sum of \$1,200, bearing 10 per cent. interest from date, and due, respectively, on the 1st of October of the years 1898, 1899, 1900, 1901, and 1902, and that the vendor's lien was reserved in said conveyance and in said notes to secure the payment of same; that, no part of said notes or interest thereon being paid, the said Watson thereafter conveyed said property to said Hollingsworth in consideration of the cancellation of said notes and vendor's lien, and said Hollingsworth, without any knowledge of the pretended claims of the plaintiffs herein, thereafter conveyed said property to defendant the Falls County Gin Company. And, further, defendants answered that at the time it is alleged that plaintiffs furnished the material for the improvement of the premises in controversy the said defendant Watson was the head of a family, was living on said premises with his family, consisting of a wife and children, and the same constituted his homestead, and was exempt from any character of forced sale; that the said Watson nor his wife ever gave any lien in writing upon said premises, nor executed and acknowledged any written instrument contemplated by the Constitution and laws in

*Rehearing denied December 23, 1903.

¶ 1. See Mechanics' Liens, vol. 34, Cent. Dig. § 371.

order to fix a lien thereon. And defendants further alleged that on the 1st day of November, 1900, defendant Hollingsworth instituted suit in the district court of Falls county, Tex., against said Watson for his said debt as evidenced by said notes, and for foreclosure of said vendor's lien, and that thereafter judgment was obtained on said notes, together with foreclosure of said lien as it existed on the date of said notes, by reason of which all rights or interest of plaintiffs in said premises were extinguished. Trial was had before the court without a jury on the 26th of February, 1903, when judgment by default was rendered against defendant Watson for said debt, interest, and costs, together with foreclosure of a materialman's lien, as it existed on the 1st day of January, 1900, on the "ginhouse and cotton seed flues and lint cotton flues" situated on said premises, as against said Falls County Gin Company and T. L. Hollingsworth; said judgment further directing that order of sale shall issue to the proper officer, directing him to seize and sell said property as under execution, and that the officer shall place the purchaser in possession thereof, and that said purchaser shall have 60 days in which to remove said property from said lot; that said plaintiffs recover of said Falls County Gin Company and T. L. Hollingsworth all costs incurred herein; and that, if the property ordered to be sold shall not be sold for enough to pay said debt, costs of court, and expenses of sale, the balance shall be made by execution against said defendants. To which judgment of the court the defendants the Falls County Gin Company and T. L. Hollingsworth in open court excepted, and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

We find that the appellees furnished the material to Watson as described in their petition, which was used in the betterment and improvement of the property in controversy, and that they established their lien for material in the form and manner prescribed by statute. We find that the property in controversy is real property, and that prior to and at the time the material was furnished and appellees' lien established F. M. Watson had purchased the property in question from appellant Hollingsworth, and had executed to him therefor his promissory notes, with 10 per cent. interest, in the sum of \$6,000; that Watson, upon the maturity of some of the notes, was unable to pay the same, and that the defendant Hollingsworth foreclosed his vendor's lien on said property in the district court of Falls county, and obtained a judgment against Watson for the full purchase price of the property. We find that this lien was an existing and superior lien to that of the appellees, and that after the improvements were put upon the property the value of the same did not exceed \$2,500, and was not of a greater value than that at the time

of the trial of this case; and the evidence justifies the conclusion that the judgment foreclosed by the appellant Hollingsworth against Watson on the property described is now subsisting and unsatisfied, except in so far as satisfaction and payment results from an application of the property in question to his judgment lien.

The findings of fact bring this case strictly within the rule of law decided in *Citizens' National Bank v. Strauss* (Tex. Civ. App.) 69 S. W. 86, in which a writ of error was refused. It is true that the trial court, in rendering its judgment, treated the property in question as personal property; but the facts in the record clearly indicate that the improvements were permanent, and should be treated as real property. *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286; *Jones v. Buell*, 85 Tex. 137, 19 S. W. 1031; 13 Amer. & Eng. Ency. Law, pp. 604, 605, 608, 609, 612-614. There is nothing in the record to indicate that the intention of the parties was to treat this property, which was apparently part of the realty, as personal property; and the vendor's lien of the appellant Hollingsworth applied to all of the property in question as a part of the real estate upon which it was situated and located. Where the facts on this subject are in the condition shown by the record, we are not bound to treat the conclusion of the trial court in its judgment that this was personal property, as conclusive and binding upon this court. *West End Town Co. v. Gregg*, 93 Tex. 451, 56 S. W. 49.

The judgment of the trial court will be affirmed in so far as it awards the appellees a recovery against the defendant Watson, but is reversed and rendered here in favor of the other appellants against the appellees, that the latter take nothing as against them by their suit, and that they be denied a foreclosure of their lien on the property in question.

As said before, the facts bring this case within the rule announced in *Citizens' National Bank v. Strauss*, supra, and the same reasons there given for the disposition of that case will apply to this.

Affirmed in part, and reversed and rendered in part.

SUPREME LODGE UNITED BENEV. ASS'N v. JOHNSON.

(Court of Civil Appeals of Texas. Nov. 14, 1903.)

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—SPECIAL PRIVILEGES—CLASSIFICATION OF INSURANCE COMPANIES—ACTS VOID IN PART.

1. Act May 12, 1899 (Supp. Sayles' Civ. St. 1899-1900, tit. 49a) § 11, which exempts benefits to be paid by fraternal beneficiary associations from garnishment or other process, is not repugnant to Const. U. S. Amend. 14, providing that no state shall deny equal protection of its laws to persons within its jurisdiction, or Const. Tex. § 3, art. 1, prohibiting exclusive

privileges, on the ground that such special benefits are not conferred on other insurance companies, which are separately classified in the statutes; such classification not being an arbitrary one, but based on sufficient reason.

2. Act May 12, 1899 (Supp. Sayles' Civ. St. 1899-1900, tit. 49a), relative to fraternal benefit associations, section 16 of which excludes from its provisions certain designated orders which issue policies of insurance or benefit certificates to their members, and are, as to their insurance provisions, substantially fraternal benefit orders, is repugnant to Const. U. S. Amend. 14, guarantying equal protection of the laws, and Const. Tex. § 3, art. 1, in that it imposes on fraternal benefit associations generally certain conditions for the transaction of business, and grants certain privileges, such as exemption from garnishment, from both of which the designated orders are excluded.

3. Act May 12, 1899 (Supp. Sayles' Civ. St. 1899-1900, tit. 49a), imposing certain restrictions on and granting certain privileges to fraternal benefit orders generally, from which, by section 16, designated orders are excluded, must be regarded as an entirety, and section 16 cannot be expunged, but all must fall as repugnant to U. S. Const. Amend. 14, and Const. Tex. art. 1, § 3, guarantying equal protection of the laws.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Action by J. E. Johnson against Mrs. W. F. Walker, the Supreme Lodge United Benevolent Association, garnishee. From a judgment for plaintiff, garnishee appeals. Affirmed.

W. R. Booth, for appellant. Q. T. Moreland, for appellee.

CONNER, C. J. The facts in this case are as shown by the trial court's conclusions. Therefrom it appears that appellant is a duly incorporated fraternal insurance organization under the laws of Texas, with its chief place of business in Tarrant county; that its business is conducted for the sole benefit of its members and beneficiaries, and not for profit; that it has a lodge system, with ritualistic form of work and elective representative form of government; and that the fund from which it pays its beneficiaries is derived from a monthly assessment against its members, and that in all other respects it conforms to our laws relating to fraternal beneficiary associations, as set forth in title 49a, Supp. Sayles' Civ. St. 1899-1900. It further appears that one W. F. Walker died on the 26th day of March, 1902, holding a certificate of the appellant association for the sum of \$1,000, payable to his wife, Mrs. W. F. Walker, by virtue of which appellant is now indebted in the sum of \$500; that after the death of her husband Mrs. Walker became justly indebted to the appellee in this case, who sued her upon such indebtedness in the justice court, and at the same time duly sued out garnishee process, which was served on the appellant association. Appellant pleaded that the fund due on the certificate mentioned was exempt from such process, and from the judgment of the justice court against this contention an appeal

to the county court was taken, where a like judgment was rendered, and hence this appeal.

The exemption claimed in the justice and county courts rests upon section 11 of the act relating to fraternal beneficiary associations, approved May 12, 1899 (title 49a, Supp. Sayles' Civ. St. 1899-1900; Gen. Laws 1899, p. 199, c. 115), which is as follows: "Sec. 11. The money or other benefits, charity, relief or aid to be paid, provided or rendered by any association authorized to do business under the provisions of this act, shall not be liable for the debts of the beneficiary or holder of any certificate, and shall not be subject to garnishment or other process at the suit of any creditor, nor shall it be taken, seized, appropriated or applied by any legal or equitable process or by operation of law to the debts of the certificate holder or any beneficiary named in such certificate or any person who may have any rights thereunder." Appellee's contention, with which the trial courts agreed, is that said section conflicts with section 1 of the fourteenth amendment to the Constitution of the United States, providing that no state shall deny the equal protection of its laws to persons within its jurisdiction; and also with section 3, art. 1, of the Constitution of Texas, providing that no man or set of men is entitled to exclusive, separate, public emoluments or privileges but in consideration of public services. Delicate as it undoubtedly is to declare an act of the co-ordinate legislative branch of our state government void for violation of constitutional principles, it is nevertheless the duty of the courts to unhesitatingly do so when such act is clearly within the prohibition of the fundamental law of the land. And this we conceive to be the condition of the act of the Legislature we are now called upon to consider. The principles upon which such conclusion is based are so fully stated and discussed in the cases hereinafter named and in the authorities therein cited that we will attempt to be as brief as possible. An Ohio law relating to fraternal associations containing exemption in substantially the same terms as those from our own law hereinbefore quoted was declared to be unconstitutional and void in the case of *Williams v. Donough*, 65 Ohio St. 499, 63 N. E. 84, 56 L. R. A. 766, which counsel for appellee presses upon us as in point in this case. Appellant insists, however, that insuring fraternal beneficiary associations were classed by the Ohio law together with insurance companies generally, and hence that is inapplicable. But, however this may be, it seems clear that in our insurance laws the Legislature has very plainly distinguished insurance companies generally from fraternal beneficiary associations such as appellant. By our laws they are evidently given distinct and different classification. See Sayles' Civ. St. 1899-90, tit. 53, c. 3, relating to insurance companies

generally; title 49a, Supp. Sayles' Civ. St. 1899-1900, relating alone to fraternal beneficiary associations; and *Ins. Co. v. Parker* (Tex. Sup.) 72 S. W. 168-620; *Life Association v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922. And in our judgment such differing classification is not a mere arbitrary one, resting on insufficient reason. As said by the Supreme Court of the United States in construing Texas insurance statutes: "The ground for placing life and health insurance companies in a different class from fire, marine, and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations of the character mentioned in the Texas statutes is not an arbitrary classification, but rests on sufficient reason." See *Life Association v. Mettler*, supra. From which it follows, as we conclude adversely to appellee's contention, that the law under consideration cannot be declared unconstitutional for the reason that special benefits and privileges are conferred upon fraternal beneficiary associations that are not conferred upon other classes of insurance organizations. For it is well settled that legislation is not open to the constitutional objections urged "if all persons or associations brought under its influence are treated alike under the same conditions." *Campbell v. Cook* (Tex. Sup.) 26 S. W. 486, 40 Am. St. Rep. 878; *Ins. Co. v. Chowning* (Tex. Sup.) 26 S. W. 982, and authorities therein cited. The converse of the proposition, however, is as firmly and plainly maintained by the authorities, and it is upon this ground that we think the law under consideration invalid. Section 16 of the same act is as follows, viz.: "Sec. 16. The provisions of this act shall not apply to nor include the Order of Railway Conductors, Order of Locomotive Engineers, Order of Locomotive Firemen or Brotherhood of Railway Trainmen or Order of Railway Telegraphers, which issue policies of insurance or benefit certificates only to members of their respective organizations, and said organizations shall be exempt from the provisions of this act." There is nothing in the record to show that the orders named in section 16 may reasonably receive a different classification from associations such as appellant. For aught that appears, such orders may now have every characteristic essential to bring them within the definition of fraternal beneficiary associations as defined in the first section of the act. We think it apparent from the section itself that in the feature of insurance, at least, such orders are substantially fraternal beneficiary associations, although the method of deriving the benefit fund and other immaterial features may be different. In other words, it appears, as we think, from the whole law, that the orders named in section 16 now are, or at least may hereafter by voluntary action become, in all substantial features fraternal beneficiary as-

sociations, and that the law as a whole, therefore, is invalid as discriminative in the matter of privileges conferred and burdens devolved between designated associations and other associations of the same general classification.

The act under consideration in the public interest requires fraternal beneficiary associations, as conditions to their right to engage and continue in the business of insurance, to make certain reports, to pay valid final judgments against them within 60 days, to pay certain fees of office, to obtain certificate of authority from the commissioner of insurance, etc. These are all burdens from which the orders named in section 16 are expressly relieved whatever be their present or future character, while, on the other hand, the associations doing business under the act and their certificate holders have conferred upon them the important privilege of an insurance fund entirely freed from the claims of creditors; a privilege not conferred upon the orders designated in section 16, or upon insurance beneficiaries thereof. Such discrimination, in our judgment, plainly violates the fundamental doctrine of equal rights to all and special privileges to none. Nor do we think that we can dispose of the objections to the act by rejecting section 16, which alone seems subject to constitutional conflict. The rule, briefly, is that where the unconstitutional portion is essentially and inseparably connected in substance with that which is constitutional, the whole must be rejected. See *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, followed by our Supreme Court in the case of *State v. Compress Co.*, 95 Tex. 611, 69 S. W. 53. In the case first cited the court held in effect that an exemption of "agricultural products and live stock while in the hands of the producer or raiser" in the anti-trust law of the state of Illinois invalidated the act. And in the case cited from our Supreme Court the Texas anti-trust law of 1895 (Laws 1895, p. 112, c. 83), exempting from its operation, among other things, labor organizations, was, in obedience to the *Connolly Case*, in effect held (save as therein limited) violative of constitutional safeguards. The exemptions indicated in the anti-trust laws named were, in effect, held to be so interwoven and inseparably connected with other portions as to taint the whole. Say the court in disposing of the *Connolly Case*: "The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces

by its terms all persons, firms, corporations, or associations of persons who combine their capital, skill, or acts for any of the purposes specified, while the twelfth section declares that the statute shall not apply to agriculturists or live-stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturists and live-stock dealers. Those classes would in that way be reached and fined, when evidently the Legislature intended that they should not be regarded as offending against the law, even if they did combine their capital, skill, or acts in respect of their products or stock in hand. Looking, then, at all the sections together, we must hold that the Legislature would not have entered upon or continued the policy indicated by the statute unless agriculturists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional, as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the twelfth section." So in the law before us a sweeping exception of the orders named in section 16 is made. It certainly was not the legislative intention that any one or more of the specified orders should ever be subject to the restrictions of the act. Such, however, would be the necessary effect of a mere rejection of section 16 in event said orders either now have or should hereafter assume the substantial characteristics of fraternal benefit associations, and it is by no means clear that the Legislature would have enacted the law without the exceptions noted.

We conclude that the trial courts reached the proper conclusion, and it is accordingly ordered that the conclusions of fact and law shown by the record be adopted, and the judgment affirmed.

MCKELVEY v. MCKELVEY et al.

(Supreme Court of Tennessee. Nov. 14, 1903.)
PARENT AND CHILD—PERSONAL INJURIES TO
MINOR CHILD—RIGHT TO DAMAGES.

1. A minor child cannot recover from its father and stepmother civil damages for personal injuries inflicted on it by the latter.

Appeal from Circuit Court, Marion County; M. M. Allison, Judge.

Action by Nellie McKelvey, by her next friend, against W. J. McKelvey and another. Judgment for defendants, and plaintiff appeals. Affirmed.

B. A. Heard and C. C. Moore, for appellant.
B. Pope, J. Bright, and Tatum Thach, for appellees.

HEARD, C. J. This is a suit instituted by a minor child, by next friend, against her father and stepmother, seeking to recover dam-

ages for cruel and inhuman treatment alleged to have been inflicted upon her by the latter at the instance and with the consent of the father. Upon demurrer the suit was dismissed, and, the case being properly brought to this court, error is assigned upon this action of the trial judge.

We think there was no error in this dismissal. At common law the right of the father to the control and custody of his infant child grew out of the corresponding duty on his part to maintain, protect, and educate it. These rights could only be forfeited by gross misconduct on his part. The right to control involved the subordinate right to restrain and inflict moderate chastisement upon the child. In case parental power was abused, the child had no civil remedy against the father for the personal injuries inflicted. Whatever redress was afforded in such case was to be found in an appeal to the criminal law and in the remedy furnished by the writ of habeas corpus. So far as we can discover, this rule of the common law has never been questioned in any of the courts of this country, and certainly no such action as the present has been maintained in these courts. It is true that no less celebrated an authority than Judge Cooley, in the second edition of his work on Torts, at page 171, observes that "in principle there seems to be no reason it should not be sustained." No case, however, is cited in support of this text. In fact, the only case which the diligence of counsel has been able to find in which this particular question has been discussed is that of Hewlett v. George, Ex'r, reported in 68 Miss. 703, 9 South. 885, 13 L. R. A. 682. It is there said: "So long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and of a sound public policy designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor children protection from parental violence and wrongdoing, and this is all the child can be heard to demand."

The fact that the cruel treatment in this case was inflicted by a stepmother can make no difference, for, whether inflicted in the presence of the father or not, if the action could be maintained at all, he would be responsible for the tort. If inflicted in his presence, he alone would be responsible, nothing appearing to repel the presumption that it was the result of his coercion; if out of his presence, then he and she would be jointly liable for the wrong. So at last it comes back to the question as to the right of a minor child to institute a civil action against the father for wrongs inflicted upon it.

¶ 1. See Parent and Child, vol. 37, Cent. Dig. § 140.

An analogy is furnished in the relation of husband and wife. It has been held that neither husband nor wife can maintain an action against the other for wrongs committed during coverture. This holding rests in part upon their unity by virtue of the marriage relation, which would preclude the one from suing the other at law, and in part upon the respective rights and duties involved in that relation. In *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27, it was held that a wife could not, even after being divorced from her husband, maintain an action against him for an assault committed upon her during coverture, nor against persons who assisted him in making the assault. As was said by the court, at common law the husband was the guardian of the wife, and was bound to protect and maintain her, and on that ground "the law gave him a reasonable superiority and control over her person, authorizing him to put gentle restraints upon her liberty if her conduct were such as to require it." 2 Kent's Com. 180. In view of the evolution of the law in the amelioration of the married woman's condition and the comparative independence that was now secured to her, it was insisted in that case that the action should be maintained. To this, however, the court replied: "We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically the married woman has remedy enough. She has the privilege of the writ of habeas corpus if lawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce."

In *Phillips v. Barnett*, First Q. B. D. 436, the same rule is announced, although it was insisted there, as in the case from Maine, that the marriage relation having ceased by divorce, the wife should be let in to her action for damages against the former husband for personal injuries inflicted upon her during coverture; the argument being that the relation simply suspended the right of action, and, this relation having been terminated, the right was then in a condition to be enforced. But it was there said, as in the first case, that the error in this insistence was in supposing that a right of action ever existed; that there was no civil remedy either during or after coverture, because there was no civil right to be redressed.

We think that the circuit judge acted in obedience to a well-settled rule controlling the relation of father and child, and in furtherance of a sound public policy, in sustaining the demurrer to the declaration in this case, and his judgment is affirmed.

KNOXVILLE TRACTION CO. v. McMILLAN.

(Supreme Court of Tennessee. Nov. 20, 1903.)

PRIVILEGE TAX—DUE PROCESS.

1. The provision of Acts 1903, p. 599, c. 257, imposing a privilege tax on the business of ad-

vertising in cars, that the street car or railroad company leasing or selling the advertising privileges shall be liable for the payment of the tax, is a deprivation of property without a hearing or due process of law, in contravention of Const. art. 1, § 8, and Const. U. S. Amend. 14.

Appeal from Chancery Court, Knox County; Joseph W. Sneed, Chancellor.

Suit by the Knoxville Traction Company against John E. McMillan. Bill dismissed, and complainant appeals. Reversed.

Shields & Mountcastle, for appellant. Charles T. Cates, Jr., Atty. Gen., and Reuben L. Cates, for appellee.

SHIELDS, J. This suit involves the constitutionality of the provision of chapter 257, p. 599, of the Acts of 1903, the general revenue law enacted by the present General Assembly, making street and commercial railroad companies liable for the privilege tax imposed upon advertising companies conducting the business of advertising in the cars and stations of such companies.

The portions of the statute in question, and necessary to show the connection, are these:

"That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege; and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk, as provided by law for the collection of revenue.

All persons, companies, or corporations owning, controlling or conducting the business of advertising in street cars in counties of 60,000 inhabitants or over, each per annum.....	\$100 00
All persons, companies, or corporations owning, controlling or conducting the business of advertising in dummy cars or railroad cars in counties of 50,000 inhabitants or over, each, per annum	50 00
All persons, companies, or corporations owning, controlling, or conducting the business of advertising in railroad depots in each county in which business is done, each, per annum.....	10 00

"Provided that the street car company or railroad company who leases or sells such advertising privileges shall be liable for the payment of the above privileges."

The complainant, a street railway company, owning and controlling a street railway in Knox county, leased the exclusive privilege of advertising in its cars to the Consolidated Railway Advertising Company for a term of years, for a fixed rental, to be paid at stated intervals; and the latter company has been, and is now, exercising this privilege, and liable for the tax.

The defendant, John E. McMillan, clerk of the county court of Knox county, demanded of complainant payment of the privilege tax due from the Consolidated Railway Advertising Company, and, upon complainant's refusing payment, issued a distress warrant against complainant therefor, which was

about to be levied upon its property, when it paid the tax under protest, and now brings this suit to recover the same; insisting that the provision of the statute making it liable for said tax deprives it of its property without due process of law, and consequently contravenes article 1, § 8, of the Constitution of Tennessee, providing that no man shall be taken or imprisoned or disselsed of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land, and also the fourteenth amendment of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law, and is therefore void.

These contentions are sound, and must be sustained.

The traction company and the advertising company are distinct and independent corporations, owing each other no duty or obligation, and having no interest in common. The former is engaged solely in operating a street railway, and the latter in the advertising business. The tax is imposed upon the business of advertising in street cars—a privilege exercised by the advertising company, and not by the traction company. It is not a liability of the traction company, but one of the advertising company. The only relation of the two companies is that the former is the creditor of the latter for the rent due it for the use of its cars for advertising purposes. The statute arbitrarily imposes upon the traction company liability for this debt of the advertising company, and requires it to pay it with its own means. This is a deprivation of property without a hearing or due process of law, clearly within the prohibition of the constitutional provisions relied upon. This is too obvious for argument, and the property of one citizen can no more be taken to pay a tax or public debt due from another than the private debt of such other person.

The cases of *First National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701, *Bells Gap R. Co. v. Pennsylvania*, 134 U. S. 239, 10 Sup. Ct. 533, 33 L. Ed. 892, and *First National Bank v. Chehalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069, in which stat-

utes requiring corporations to pay taxes due from bondholders and shareholders are held valid, are cited and relied upon to sustain this statute. They are not in point. These statutes apply to corporations having assets of their bondholders and shareholders, in the way of interest and dividends, in their hands, which they can apply to the payment of the taxes, and it is upon this ground that they are sustained.

This is made clear in the case of *Stapylton v. Thaggard* (decided by the Circuit Court of Appeals of the United States) 91 Fed. 93-95, 33 C. C. A. 353, where a recovery against the receiver of an insolvent bank on account of the taxes assessed against the shareholders was denied because the receiver did not have funds due them in his hands.

It is there said: "As we construe the cases, from *First Nat. Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701, to *First Nat. Bank v. Chehalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069, the bank is made to pay the taxes assessed by the state against its shareholders, when the state statutes lay such duty upon the bank, upon the theory that the shares are valuable, and that the bank has assets in its hands belonging to the shareholders from which it can recoup. Where a bank is insolvent and has passed into the hands of a receiver, the shares are generally worse than worthless, and the receiver has no assets belonging to the shareholders which can be applied to the payment of taxes assessed on shares. In such case, we are of opinion that the tax assessed against the shares of the bank cannot be collected from the receiver, or from assets in his hands."

The complainant is not the debtor of the advertising company, and at no time, in due course of business, will have any of its assets in its hands or under its control, which it can apply to the payment of the tax imposed upon it. If required to pay this tax, it must do so out of its own property, without any provision for its reimbursement.

The provision of the statute requiring these companies to pay the tax imposed upon advertising companies is therefore clearly unconstitutional and void, and complainant is entitled to recover from the defendant the taxes which it has been unlawfully required to pay.

The decree of the chancellor dismissing complainant's bill will be reversed, and a decree here rendered in accordance with this opinion.

STATE ex rel. REED v. THOMAS.

(Supreme Court of Tennessee. Nov. 28, 1903.)

APPEAL—FAILURE TO PERFECT BELOW—
PRESENTATION OF RECORD FOR
AFFIRMANCE.

1. Where the losing party is granted an appeal on condition that he execute a bond, or otherwise comply with the law, he being allowed 10 days in which to file his bill of exceptions, but he makes no attempt to execute a bond or take the pauper oath, and fails to file a bill, the judgment below remains in full force, and the presentation of the record to the Supreme Court for affirmance is unnecessary.

Appeal from Circuit Court, Knox County; Joseph W. Sneed, Judge.

Habeas corpus by the state of Tennessee, on the relation of Etta Reed, against A. R. Thomas. Judgment for relatrix, and respondent having prayed an appeal, which he failed to perfect, relatrix files the record for affirmance in the Supreme Court. Petition dismissed.

D. D. Anderson, for appellee.

NEIL, J. The plaintiff has filed this record for affirmance of the judgment of the court below.

It appears from the record that a petition for habeas corpus was filed by Etta Reed against the defendant to get possession of her child; that the circuit judge rendered a judgment in her favor; that the defendant prayed an appeal, which was granted on condition that he should execute an appeal bond or otherwise comply with the law, and he was allowed 10 days in which to file his bill of exceptions. The record fails to show that any bill of exceptions was filed; also that any bond was executed or pauper oath taken, or that an attempt was made to execute either.

These facts show that the appeal was abandoned. In such a case (that is, where the appealing party has failed to file either bond or oath) the judgment of the court below is not suspended, and stands in full force. Hence there is no need of bringing the case to this court for affirmance of the judgment. There is some apparent confusion in our cases upon the subject, but an examination of them will show that in most of them it appears, where a motion was made for affirmance, that the appealing party had either executed a bond or taken the pauper oath in the court below, and had failed to have the transcript filed, and in that way had failed to prosecute his appeal. See *Furber v. Carter*, 2 Sneed, 1; *Pyett v. Hatfield*, 15 Lea, 473, 475. In the case of *Spalding v.*

Kincald, 1 Tenn. Cas. 81, it does not appear whether bond had been given or not, but, as the statement of facts sets out that an appeal was prayed and granted, we assume that all proper steps were taken in the court below to perfect the appeal, and that nothing was lacking but the filing of the transcript in this court. In *Morgan v. Hannah's Lessee*, 1 Tenn. Cas. 28, it appeared that three tenants in common had been proceeded against in the court below, and that judgment had been rendered against all of them; that all three appealed; and that two of them perfected their appeal by taking the proper oath, while the third failed either to give bond or to take the oath. The opinion is not reported in the volume referred to, but a mere statement of the judgment that was rendered. It is stated by the reporter that the plaintiff entered a motion to dismiss the appeal, and that this court dismissed the appeal as to the one who had not complied with the law, but decided that the other two were properly in court, and overruled the motion as to them. It is said by the reporter that the clerk entered the judgment generally against the defendant as to whom the appeal had been dismissed, but that the court, on motion, ordered it to be changed, and awarded a procedendo and writ of possession to put the plaintiff in possession, "to the same extent and in the same manner as the same was held by defendant at the commencement of the suit." We have not before us sufficiently the facts in that case to accurately judge of the effect of that decision as it bears upon the question now before the court. There was, no doubt, some peculiarity in that case that rendered necessary the awarding of a procedendo and a writ of possession upon dismissal of the appeal. Probably the distinguishing fact was that the three defendants were tenants in common, and the judgment was entered in the form indicated to negative any presumption that might arise to the effect that the appeal of the two other co-tenants operated to the benefit of the third, and thereby to prevent any embarrassment of the title adjudged to the plaintiff in the court below as to the third co-tenant.

Recurring to the facts of the present case, we do not think that there was any necessity for bringing the record up to this court to obtain an affirmance of the judgment of the court below; furthermore, that the practice of presenting the record for affirmance does not apply to such a state of facts.

On the grounds stated, the petition will be dismissed.

HALL v. HALL.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

DIVORCE—ABANDONMENT—EVIDENCE—CUSTODY OF CHILDREN—SUPPORT—ALIMONY.

1. Under Ky. St. 1903, § 2117, providing that abandonment of a wife by her husband for one year without her fault is ground for divorce, proof that plaintiff's husband, without fault on her part, sent her away from his home, and avowed that he would not in the future live with her or recognize her as his wife, entitled her to a divorce.

2. Where a husband abandoned his wife under such circumstances as to entitle her to a divorce on that ground, she was entitled to the custody of their infant daughter on such divorce being decreed.

3. Where a wife was decreed a divorce from her husband on the ground of abandonment, and was given the custody of their infant daughter, she was entitled to be allowed a sufficient sum to enable her to maintain, educate, and provide for the infant, and, in addition, such a sum by way of alimony as the defendant's pecuniary circumstances and their condition in life justified.

Appeal from Circuit Court, Harlan County.
"Not to be officially reported."

Action by Sallie Hall against William Hall. From a judgment in favor of defendant, plaintiff appeals. Reversed.

J. G. & J. S. Forester, for appellant. W. A. Brock, for appellee.

BURNAM, C. J. The appellant, Sallie Hall, brought this suit against her husband, the appellee, Wm. Hall, for a divorce, upon the ground that he had abandoned her without fault on her part, and that she had been living apart from him for more than one year. She also alleges that as a result of their marriage there had been born to them a girl baby, named Edna Hall, and she asked that the custody of the baby should be awarded to her, and that the defendant should be required to contribute a sufficient sum to enable her to maintain, educate, and provide for the child, and that she be adjudged a reasonable sum by way of alimony. In support of the prayer of her petition, she introduced as witnesses J. C. Clem and Robert Farley, who testified that they were well acquainted with both the plaintiff and defendant; that they were married in Harlan county, Ky., about three years before; that they had been living separate and apart for more than one year; that they had on several occasions heard the defendant, Wm. Hall, say that he had sent plaintiff away from his home, and that he would not live with her any more. Both testify that plaintiff was entirely without fault. The circuit judge dismissed plaintiff's petition, and she has appealed.

Abandonment by the husband of his wife for one year without fault on her part is ground for divorce. See section 2117, Ky. St. 1903. And where a husband, without fault on the part of the wife, sends her away from his home, and avows that he will not

in the future live with or recognize her as his wife, this is abandonment, in legal contemplation. See *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605. Under the testimony, plaintiff is clearly entitled to a decree divorcing her from the bonds of matrimony with the defendant, and should be adjudged the custody of their infant daughter, and a sufficient sum to enable her to maintain, educate, and provide for the infant; and, in addition to this, the defendant should be adjudged to pay her such a sum by way of alimony as his pecuniary circumstances and their condition in life seem to justify.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

MORAN v. VICROY.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

JUDGMENTS—CONCLUSIVENESS—MATTERS OF ISSUE.

1. Where plaintiff sued defendant for trespass on certain land, which suit involved the title to the land, and at the same time brought a suit in equity to restrain defendant from repeating his trespasses on the identical land in controversy in the action at law, a judgment in favor of plaintiff in the action for trespass was res judicata as to plaintiff's title, and estopped defendant from relitigating such question in the injunction suit.

2. A judgment of a court of competent jurisdiction on the merits of a cause is conclusive between the parties in a subsequent action on the same cause, not only as to the matters actually litigated and determined in the former action, but as to every ground of recovery or defense which might have been presented or determined therein, either at law or in equity.

Appeal from Circuit Court, Mason County.
"To be officially reported."

Action by Wesley Vicroy against W. L. Moran. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. L. Chamberlain, W. D. Cochran, and E. L. Worthington, for appellant. Thos. R. Pister, for appellee.

BURNAM, C. J. Appellant and appellee were the owners of adjoining farms, and for several years a controversy has existed between them as to the ownership of a strip of land about 10 or 12 feet wide and 73 poles long. On August 2, 1898, the appellee, Vicroy, brought an action against the appellant, alleging in three separate paragraphs that appellant had on three separate occasions torn down the division fence which he had erected upon his own land between their respective farms for the protection of his stock. The appellant filed an answer to each paragraph of the petition, denying that appellee was the owner or in possession of the land on which the alleged trespass was committed. In a second paragraph he alleged that he was the owner and in possession of the land at the places at which the alleged trespasses were

¶ 1. See Divorce, vol. 17, Cent. Dig. §§ 131, 132.

¶ 2. See Judgment, vol. 30, Cent. Dig. §§ 1132, 1241.

committed. On the same day that appellee brought his action of trespass, he brought this action in equity, reciting the same acts of trespass, and alleged that, unless the defendant was restrained, he would continue to repeat his trespasses upon the land and against his rights and property, and would inflict other wrongs upon him, to his great and irreparable injury, and prayed that appellant should be restrained from removing his fence or landmarks, or from interfering with his use and occupation of his property. Appellant's answer in this suit was also a plea of *liberum tenementum*. The common-law case was tried out before a jury, who found a verdict for the appellee, Vicroy, fixing his damages at one cent. Thereupon appellee, by amended petition, pleaded the judgment in the common-law action as an estoppel against appellant's claim to any part of the strip of land on which the alleged trespasses were committed. The appellant demurred to this plea, which the court overruled. He thereupon filed a rejoinder, in which he denied that the verdict rendered in the common-law action was upon the issue joined as to the first and third of the alleged trespasses. The circuit judge sustained appellee's demurrer to this rejoinder, and, on appellant's declining to plead further, rendered a judgment in favor of appellee, enjoining appellant from trespassing on any portion of the strip of land claimed by appellee. From this judgment, appellant prosecutes this appeal.

The only question upon this appeal is the sufficiency of appellant's rejoinder, as a defense to the plea of *res adjudicata*. Appellant insists that as the appellee in his common-law suit sought to recover upon several distinct causes of action, on any of which the jury might have found in his favor, that the general judgment rendered pursuant thereto was not an estoppel against him in a subsequent action, unless it be shown by extrinsic evidence that each separate cause of action was decided in his favor by the jury. And in support of this contention he refers to several authorities—among others, to the case of *Stillwell v. Duncan* (Ky.) 62 S. W. 898. In that case *Stillwell* brought a suit for trespass, alleging that he was the owner and in possession at the time of *Duncan's* inclosure. This was denied by *Duncan*, and a jury trial resulted in a verdict in favor of *Stillwell*, which was not appealed from. *Stillwell* then retook possession of the land and rebuilt his fence, but, as *Duncan* claims, extended it beyond the line where the original fence stood, taking in some of his land. *Duncan* brought his suit for trespass. Upon the trial of that case, *Stillwell* asked an instruction to the effect that, if the jury believed that the last fence was within the line of the original fence, the law was for him. This was refused, and upon appeal it was decided that the exact position of the old fence did not absolutely determine whether the erection of *Stillwell's* new fence was a trespass upon *Duncan's*

land, as the proof showed that it had been extended beyond the point where the old fence stood. There is no uncertainty in this case of what was the issue in the common-law action, or what was decided by the verdict of the jury. There is no contention that the fence torn down by appellant was not the identical fence and upon the identical line as that sued for in the common-law action. The only real question which was involved in the common-law suit and also in this suit is the title to the strip of land in controversy. And as it was decided in the common-law suit that appellee was the owner of the land, and as the question of title to the same land is involved in this case, we are of the opinion that the judgment in the former case is conclusive of the issue in this case. The rule is well settled that a judgment of a court of competent jurisdiction upon the merits of a cause is final and conclusive between the parties in a subsequent action upon the same cause, not only as to the matters actually litigated and determined in the former action, but also as to every ground of recovery or defense which might have been presented and determined therein. This rule is applied both in law and equity. —See *Carlisle v. Howes* (Ky.) 48 S. W. 191, and 24 A. & E. En. of Law (2d Ed.) p. 780.

Judgment affirmed.

BOYD et al. v. BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

CITIES — ORDINANCES — CONSTITUTIONALITY
—BUILDING PERMIT—ARBITRARY POWER OF
COUNCIL—NUISANCES—UNSAFE STRUCTURES
—POLICE COURT—JUDGMENT—INJUNCTION—
JURISDICTION—RES JUDICATA.

1. A city ordinance declaring that if any person shall erect any structure within the city limits without the consent of the common council, which would be greatly injurious to adjacent property, and destroy the comfort, convenience, peace, and reasonable enjoyment of life of adjacent residents, the same shall constitute a nuisance, and he shall be punished, etc., is unconstitutional, because giving arbitrary power to the city council.

2. The discriminatory execution of an ordinance giving the common council of a city power to issue building permits, etc., is unconstitutional.

3. Under Ky. St. 1899, § 3290, subsecs. 24-26, giving cities of the third class power to regulate and prohibit the erection of wooden buildings and to regulate the construction of all buildings in the city, and prevent the construction of unsafe buildings, etc., a city has no authority to prohibit the erection of a brick church building with a slate roof, made as nearly fire proof as practicable.

4. Under Ky. St. § 3290, subsecs. 14, 16, empowering cities of the third class to regulate, restrain, and prevent the establishment of any business offensive to the public or dangerous to health, and to make all police regulations to secure and protect the general health, comfort, convenience, morals, and safety of the public, and to define, declare, prevent, and suppress and remove nuisances, a city has no authority to declare a church building to be erected by a

colored congregation to be a nuisance on the ground that the method of worship employed by the congregation in the building then occupied was so noisy as to be disagreeable to residents in the vicinity.

5. Where a city ordinance affects a large number of people, one of the number affected is entitled to prosecute a suit for injunction to prevent its enforcement.

6. Where a suit was brought to enjoin a judgment of a police court under an ordinance alleged to be unconstitutional, the main purpose of the action being to attack the ordinance, the circuit court had jurisdiction thereof.

7. A contractor employed to erect a building sued to enjoin judgment against him in a prosecution before the police judge under an ordinance prohibiting such building on the ground that the ordinance was invalid. The action was dismissed on the ground that the police judge before whom the prosecution was pending would determine the question of the validity of the ordinance. Pending this determination another ordinance of the same general purport was passed, and after the termination of the prosecution against the contractor plaintiffs sued to enjoin prosecutions against them under the second ordinance. *Held*, that the first suit did not render the question of the validity of the second ordinance *res judicata*, since the parties were not the same, and the validity of the second ordinance was not involved in the first suit.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Suit by M. E. Boyd and others against the board of councilmen of the city of Frankfort. From a judgment for defendants, plaintiffs appeal. Reversed.

Hazlerigg & Chenault and James A. Scott, for appellants. Ira Julian, for appellees.

SETTLE, J. This action was instituted and an injunction obtained by the appellants for the purpose of preventing the enforcement by the appellees, city of Frankfort, its officers and agents, of an alleged void ordinance, and incidentally for the further purpose of restraining certain prosecutions then pending in the police court against the appellants, as well as others of a like kind with which they were threatened, all for alleged violations of the ordinance in question. It is, in substance, averred in the petition: That the appellants are residents and citizens of the state of Kentucky and of the United States, and belong to the negro race. That they are trustees of the First (Colored) Baptist Church in the city of Frankfort, which church is a voluntary association, composed of a congregation of the negro race, whose purpose has been and is to engage in the worship of Almighty God according to the dictates of their own consciences. That there are several hundred members of this church, all having a common interest with the appellants, for which reason, and because of its being impracticable to make them all parties, the action was instituted by the appellants for themselves and the other members of the church, and also as trustees of and for the church. That the appellants are owners, as trustees of the First Baptist Church, of a certain lot of ground in the city of Frankfort

situated on the northeast corner of Clinton and High streets, of which lot they became the owners for the purpose of erecting a church thereon for the use of the First (Colored) Baptist Church, which was and is to be of brick, with slate roof, and as nearly fireproof as practicable. That, after purchasing the necessary materials, and entering into the necessary contracts with certain persons for the erection of the church building, but before beginning its erection, the appellants, acting upon advice and according to custom, applied to the common council of the city of Frankfort for permission to erect their church building, but were arbitrarily and illegally refused the right to do so, and when appellants, through their contractors and employes, went upon the lot where the church building was to be erected, and were about to tear down an old building thereon preparatory to the erection of the church, and were engaged in the work of constructing the foundation therefor, the appellee city, through its mayor, swore out a warrant of arrest for the appellants, its contractors and employes, which warrant, when issued by the police judge, was executed by a police officer of the appellee city by arresting the appellants and their workmen, and taking them before the police judge, who tried them under the warrant upon the charge of violating an alleged ordinance of the city which required them and all others to obtain a building permit before erecting any building in the city of Frankfort. It is further averred that after the trial of appellants and their workmen by the police judge, he, without then rendering his decision, took the case under advisement, but subsequently rendered a judgment to the effect that it was not a valid or enforceable ordinance; consequently the appellants and other defendants in that prosecution were held not guilty, and were therefore discharged. It is also averred that during the time the police judge had the case mentioned under consideration, and before its decision by him, the following ordinance was enacted by the common council and approved by the mayor, viz.:

"An ordinance to provide for the punishment of persons erecting or maintaining nuisances, and for the removal of same.

"Be it enacted by the Common Council of the City of Frankfort:

"Section 1. That if any person or persons shall proceed to erect any structure or building, within the city limits, without the consent of the common council, and said structure or building (where used for the purpose for which it is designed and intended) would be greatly injurious to adjacent property, and destroy the comfort, convenience, peace and reasonable enjoyment of life of adjacent residents, the same shall be deemed to be and constitute a nuisance, and they shall be punished by a fine not less than \$5.00, nor more than \$20.00, and each day they may proceed with the erection of said structure or

building, shall be deemed a separate offense, and upon conviction, it shall be the duty of the police officers to remove said structure, or any part thereof, at the expense of the owner.

"Sec. 2. This ordinance to take effect and be in force from and after its passage, and all ordinances or parts of ordinances in conflict herewith are hereby repealed."

The further averment is made in the petition that the appellants and their employees were, by the procurement of the appellees, again arrested under warrants issued by the same police judge, and served by the same police officers, upon the charge of violating the ordinance *supra*, because they were attempting to proceed with the work of erecting their church building, and upon being tried therefor they were fined \$5 each, and each adjudged to pay \$5.80 costs; that they are threatened with further prosecutions from the same source and for the same cause, and, as the maximum fine prescribed by the ordinance is \$20, which is less than an amount from which an appeal is allowable under the law, their only remedy is the writ of injunction. It is also averred by the appellants that the ordinance complained of was adopted by the common council of the appellee city pending the decision of the police judge in the cases arising out of the warrants first issued, and that it was adopted for the express purpose of preventing the appellants from erecting their church building, and solely because the church membership is composed of negroes; that by its enforcement the appellants and their co-church members are and will be deprived of the equal protection of the laws, and are being discriminated against in the enjoyment of their civil and religious rights under the Constitution of the state and United States, and that the ordinance, if upheld, will deprive them of their liberty and property, and the use of the latter, without due process of law, and will deny them equal protection under the law, contrary to the fourteenth amendment of the Constitution of the United States, and especially to the Bill of Rights, section 2 of the Constitution of this state, wherein it is declared that "absolute and arbitrary power over the lives, liberty and property of free men exist nowhere in a republic, not even in the largest majority." The additional averment is made in the petition that the ordinance in question is inadequate, uncertain of meaning, and ambiguous; that it is likewise oppressive, unreasonable, arbitrary, and void.

The appellee board of councilmen filed separate answer to the petition, in which they fail to deny the arrests and trials of the appellants set forth in the petition, or that they have been interfered with as alleged in the work of erecting their church building; nor do they deny that the ordinance complained of was adopted by them after the arrest and trial of appellants under the first warrants, and before the judgment of the

police judge was rendered, acquitting them of the charge in those warrants. But the answer does deny all the averments of the petition in regard to the alleged purpose of the enactment of the ordinance, or that it is open to the constitutional or other objections urged against its validity by the appellants. It also denies that the refusal of the common council to grant appellants permission to erect the church was arbitrary, and avers that the refusal was made in the exercise of a sound discretion, and because appellants did not have the written consent of a majority, or, in fact, of any, of the citizens and property owners residing within 200 yards of the place of the proposed building to its erection, as required by an ordinance of the city; and, further, that the church proposed to be erected by the appellants will constitute a nuisance, because the mode of worship practiced by its members is and will be so boisterous, loud, and unseemly as to interfere with the peace and quietude of the citizens and property owners residing adjacent to the church. The answer also interposes the plea of *res judicata*, as it is therein averred that the same matters and issues involved in this action were litigated and tried in a previous suit between the same parties before a special judge, whose decision was adverse to the appellants, and the judgment in the alleged former action is pleaded in bar of this one. The appellees mayor, police judge, chief of police, and city marshal also filed an answer to the petition, in which they adopted the averments of the answer of the board of councilmen, and in addition set out the facts with reference to the second arrest and trial of the appellants.

Demurrers were filed by the appellants to the answers, and each paragraph thereof, which were overruled by the lower court. Thereupon the appellants filed reply controverting the material averments of the answers. By mutual consent of the parties the evidence was all taken in the form of affidavits, and, the cause having been submitted upon the pleadings and affidavits, judgment was rendered by the lower court dismissing the petition, and allowing the appellees their costs; the temporary restraining order having theretofore been dissolved by the court on appellees' motion.

The case being before this court on the appeal, we will consider first the objection urged to the constitutionality of the ordinance by virtue of which it is contended by the appellees that the common council of the city of Frankfort had the right to refuse appellants permission to erect the church upon the lot owned by them. A careful reading of the ordinance will show that it fixes no standard by which the action of the city council in granting or refusing its consent is to be controlled. The consent of the council can be given or withheld at its own arbitrary pleasure. This ordinance, though far more arbitrary, is very similar to those

mentioned in the case of *Yick Wo v. Hopkins*, etc., 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. The ordinance in that case contained provisions to the effect that it shall be unlawful for any person or persons to carry on a laundry within the limits of the city of San Francisco without first having obtained the consent of the municipal authorities, except the same be located in a building constructed either of brick or stone; and unlawful to erect scaffolding over or upon the roof of any building without first obtaining such consent. In commenting upon the arbitrary provisions indicated, the Supreme Court said: "There is nothing in the ordinance which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them the authority to withhold their assent without reason, and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint. * * * No reason for it is shown, and the conclusion cannot be resisted that no reason for it existed except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the Constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged." The very fact that the ordinance complained of in this case confers upon the council the absolute right to refuse its consent to the erection of any building, no matter out of what material it is to be constructed, where it is to be erected, or how necessary and useful to the public it might be, demonstrates the danger of intrusting any body of men with such arbitrary and despotic power. The circumstances surrounding its adoption by the council, and the fact that its aid was immediately invoked to justify the refusal of a building permit to the appellants, would seem to indicate that the enactment of the ordinance was and is a mere pretext for the arbitrary and unreasonable refusal of appellees to

permit this building to be erected. If such was the purpose of its enactment, as well said by counsel for appellants, their imprisonment in satisfaction of the fines imposed upon them for the violation of its provisions would be as arbitrary and unjust as was the arrest of the Chinamen in the *Yick Wo-Hopkins Case*. It must not be overlooked that, even if the ordinance on its face is valid, a discriminatory execution of it would be violative of both the federal and state Constitutions, and subversive of justice as well.

The refusal of the common council of a building permit to the appellants in this case is attempted to be justified upon the ground that the erection of the church and the holding of worship therein by the congregation would constitute a nuisance, and therefore that the council, under the "police power" that may lawfully be exercised by the municipality for the welfare of the public, has the legal right to abate or prevent nuisances. The only provisions of the charter of cities of the third class on the subject of buildings are found in subsections 24-26 of section 3290, Ky. St. 1899. These confer the following powers:

"24. Wooden Buildings—To Prevent Erecting and Provide for Removal of. To regulate or prohibit and prevent the erection of wooden buildings in such parts of said city as may be deemed proper, and to provide for the removal of the same at the cost of the owners, when erected or continued contrary to ordinance.

"25. Buildings—Regulating Construction of. To regulate the construction of all buildings in the city, to prohibit and prevent the construction of unsafe buildings, or buildings without adequate means of escape in case of fire, and to provide for the inspection of buildings and the construction of fire escapes.

"26. Removal of Dangerous Structures. To impose penalties upon the owner, occupant or agent of any house, wall, side walk, or other structures which may be considered dangerous or detrimental to the public, unless, after due notice, to be fixed by ordinance, same to be remedied or repaired; and to remove or repair same at the owner's expense when suffered to remain contrary to ordinance."

It will hardly be claimed that a church building to be constructed of brick, with a slate roof, and as nearly fireproof as practicable, like that of the appellants, can be dangerous or detrimental to the public health or safety. The powers conferred on cities of the third class on the subject of nuisances are found in subsections 14 and 16, § 3290, of the Statutes, supra, which read as follows:

"14. Nuisances, Restraining and Preventing. To regulate, restrain or prevent the establishment or continuance in or near said city of any trade, or occupation, business or manufacturing, offensive to the public, or dangerous to health, or in causing or producing fire; and to regulate the sale of fire

arms, and to prevent the carrying of concealed deadly weapons."

"16. Police Regulations, Health, Comfort and Safety. To make all police regulations to secure and protect the general health, comfort, convenience, morals and safety of the public; and to define, declare, prevent, suppress and remove nuisances, either within the city, or within one mile thereof."

The term "nuisance" has a well-defined legal meaning. A thing cannot be declared a nuisance which is in fact not a nuisance. In Brannon's treatise on the Fourteenth Amendment, it is said that "a municipal corporation cannot treat as a business that which cannot be such" (page 174), and that "a city or town cannot, by its mere declaration that a thing is a public nuisance, make a nuisance of that which is not essentially such. The question of nuisance or no nuisance is one for judicial review."

In the case at bar it is contended for appellees that the ordinance, which manifestly was passed to prevent the erecting of the appellants' church building, confers upon the common council the power to declare that a church building not yet erected, and which, when erected, will not be a nuisance, is a nuisance. If it be possible that the colored Baptist people can hold their church services in an orderly way, then the building of their church cannot be held to be a nuisance. In *Pfingst v. Senn*, 94 Ky. 556, 23 S. W. 358, 21 L. R. A. 569, this court held that: "Injunction against a threatened nuisance will not be granted when the thing complained of is not per se a nuisance, but may or not become so according to circumstances, and when it is uncertain, indefinite or contingent, or productive of only possible injury. The opening of a beer garden, dancing hall, and bowling alley in a city will not be enjoined, although the same place of amusement, as formerly conducted, may have been a nuisance." It would be strange, indeed, to find it announced in the law books, or authoritatively declared by any court of final resort, that a beer garden or dancing hall may exist in a city, yet a brick, fire-proof church may not be erected or maintained therein; and, as argued by counsel, is the fact that the members of the First (Colored) Baptist Church sang louder in their old and dilapidated building than was agreeable to some of the contiguous residents any evidence that such would be their manner of singing in the new one? In *Albany Christian Church v. Wilburn*, 66 S. W. 285, this court, in discussing whether a stable was a nuisance, quoted with approval from *St. James Church v. Arrington*, 36 Ala. 546, 76 Am. Dec. 332, wherein it is said: "Whenever it is legally ascertained that it has become a nuisance, a court of equity will protect by injunction the party injured thereby. But as, in the present case, it is yet uncertain, and remains to be ascertained from future events, whether or not the erection will become a nuisance,

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there is no ground for injunction arresting the further progress of the building, or its appropriation to the use intended." In view of these authorities, the police judge was without power to hold, and the common council of the city of Frankfort in rejecting appellants' request for a permit to erect the church building, was without authority to declare, a house to be erected and dedicated to the worship of God a nuisance.

There can be no doubt of the right of appellants to maintain this action. The law authorizing it has been repeatedly declared by this court. Thus, in *City of Newport v. Newport, etc., Bridge Co.*, 90 Ky. 193, 13 S. W. 720, 8 L. R. A. 484, it was held that: "If a city ordinance is invalid, one who is affected by it has the right, in order to prevent irreparable injury and a multiplicity of prosecutions, to go into a court of equity for relief." The court also said in the same case: "The chancellor often interferes to prevent an illegal use of power by municipal authorities, and, where such consequences follow the enforcement of an ordinance, as will result in this instance, a proper case is presented for equitable relief if the ordinance be invalid." To the same effect is the rule announced in *South Covington, etc., v. Barry, etc.*, 93 Ky. 43, 18 S. W. 1026, 15 L. R. A. 604, 40 Am. St. Rep. 161, wherein the court said: "The appellees, the mayor and chief of police of the city, being about to enforce an ordinance by having the company's officers arrested and its cars returned to the stable, this action was brought enjoining it. If the ordinance was invalid, then, to prevent a multiplicity of prosecutions, and such consequences as would necessarily result from its enforcement, the company had the right to ask the preventive equitable relief. This is often done to prevent the illegal exercise of power by municipal authorities." It is, however, contended for appellees that this action is only to enjoin a judgment of the police court, and such an action under the Civil Code can be brought only in the court which rendered the judgment sought to be enjoined. Manifestly, that rule cannot apply here, as the police judge in cities of the third class is wholly without civil jurisdiction. But, in any event, the main purpose of this action is to attack the validity and constitutionality of the ordinance under which the appellants' property rights have been arbitrarily interfered with—in fact, denied them—in contravention of both the federal and state Constitutions. The enjoining of the judgment of the police court is therefore only an incident—a side issue growing out of the principal transaction complained of in the petition.

It is further insisted for appellees that the issues presented in this action are res adjudicata: that is, that they were determined in the first suit tried by the special judge. It is averred in the reply, which does not appear to be controverted, that the first or old suit,

which was brought by Buckley, contractor to erect the church building, and others, to enjoin the city from enforcing an ordinance of older date than the one now complained of, was tried by the special judge, who seems to have dismissed that action upon demurrer to the petition, and because he assumed that the police judge before whom were then pending the prosecutions against Buckley and others, involving the validity of that ordinance, would determine that question. It appears, however, that the first suit did not embrace some of the parties to this action. It also involved the validity of a different ordinance, and the police court had not then passed on the validity of the old ordinance. That court did subsequently hold it invalid. In the meantime the present ordinance, the validity of which is attacked, in this action, was adopted by the council pending the decision of the police judge on the validity of the old one. We are of the opinion, therefore, that the defense of *res adjudicata* is not available.

We have reached the conclusion that permission to erect the church building was denied the appellants for no other reason than that the worship therein, and thereafter to be conducted, was and is objectionable to the immediate neighbors; and the further fact is not to be disguised that this objection to the erection of the building is largely based upon race prejudice. However natural this prejudice may be, when it superinduces unjust discrimination in the adjustment of mere legal rights, it becomes obnoxious to the law.

The questions arising upon this record present no disturbing social problem. The matters to be adjudicated are purely legal in character. Undoubtedly, it can be shown that the presence in a neighborhood of a church for colored people is not desirable to the surrounding property holders of the white race, but it cannot be more disagreeable than the near presence to one's residence of a noisy manufactory, beer garden, dancing hall, or other obnoxious trades, which are so generally tolerated in all cities. "One living in a city must necessarily submit to the annoyances which are incidental to city life. It is a difficult matter at all times to strike the true medium between the conflicting interests and tastes of people in a densely populated city. It requires the merchant, mechanic, manufacturer, baker, butcher, and laborer, as well as the wealthy employed or unemployed citizen, to constitute a city. They all have rights, and the only requirement of the law is that each shall so exercise and enjoy them as to do no injury in that enjoyment to others, or the rights of others." *Pfingst v. Senn, etc.*, 84 Ky. 563, 23 S. W. 358, 21 L. R. A. 569.

Being of the opinion that the ordinance complained of is unconstitutional for the reasons hereinbefore stated, and that the prosecution of the appellants in the police court, as well as the refusal of the council to permit them to erect their church building attempted to be justified under such ordinance, were un-

authorized by law, the judgment of the lower court is reversed, and cause remanded, with directions to that court to grant appellants the relief asked, to perpetuate the injunction, and for such other proceedings as may not be inconsistent with this opinion.

DIEBOLD v. KENTUCKY TRACTION CO. (Court of Appeals of Kentucky. Dec. 17, 1903.) TRUNK RAILROAD—MEANING OF TERM—MUNICIPAL CORPORATIONS—FRANCHISES.

1. An electric railroad company authorized to perform the duties of a carrier of freight and passengers between two cities in different states and all intermediate points is a trunk railway within Const. § 164, declaring that no city shall grant any franchise to street railways, gas, water, or certain other corporations, except to the highest and best bidder therefor, but that the section shall not apply to a trunk railway.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"To be officially reported."

Suit for an injunction by John Diebold against the Kentucky Traction Company. From a judgment dismissing the bill, complainant appeals. Affirmed.

O. H. Shield, for appellant. W. B. Thomas, Helm, Bruce & Helm, D. W. Sanders, and J. G. Sachs, for appellee.

BARKER, J. The appellant, John Diebold, is a citizen of Louisville, Ky., and owns real property fronting on Sixteenth street, which is one of the highways of that city. The appellee, the Kentucky Traction Company of Louisville, is a railroad corporation organized under the general statutes of Kentucky, having power and authority, under its charter, to construct and operate an electric line from Louisville, Ky., to Nashville, Tenn., and to be a common carrier of both passengers and freight, when in operation. As a necessary prerequisite to the building of the proposed line, appellee secured, from the general council of the city of Louisville, an ordinance granting to it a right of way from a point on its southern boundary, along and over parts of certain named streets and alleys, to Center and Jefferson streets. One of the highways over which the franchise granted by the municipality extends is that part of Sixteenth street upon which appellant's property fronts. Conceiving that the franchise granted to appellee was void, as being violative of the provisions of section 164 of the Constitution, which requires that all franchises included within its language be sold to the highest bidder, appellant instituted this action for an injunction to prohibit the building of the proposed line along Sixteenth street in front of his property.

The pleading in this case aptly raises the one question involved in the record, whether or not the proposed road is a trunk railroad within the meaning of section 164. If it is, appellant has no cause of action; if it is not,

the injunction prayed for should have been awarded. Trunk railroads are specifically excepted from the provisions of section 164. The opinion of the learned chancellor below fully meets our views upon the question for adjudication, and it is adopted as the opinion of the court, and is as follows: To decide the questions of law which arise on this motion, two sections of the Constitution of Kentucky have to be considered, to wit, sections 163 and 164. Section 163 is as follows: "No street railway, gas, water, steam heating, telephone or electric light company within a city or town shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus, along, over or across the streets, alleys or public grounds of a city or town without the consent of the proper legislative bodies or boards of such cities or towns being first obtained; but when charters have been heretofore granted conferring such rights and work in good faith been begun thereunder, the provisions of this section shall not apply." Section 164: "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege or make any contract in reference thereto for a term exceeding twenty years. Before granting such franchise or privilege for a term of years such municipality shall first after due advertisement receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

The question to be decided sharply on this motion is whether the appellee, having its terminus in Louisville and Nashville, under its original and amended charter, is a street railway, and therefore within the constitutional prohibition against such a grant as that contained in the ordinance referred to, or a trunk railway, and thereby expressly excluded by section 164 from the prohibitory operation of the two sections of the state Constitution above quoted. Whether a railway is a street railway or a trunk railway, it will not be contended, we apprehend, depends on the motor power employed by it in propelling its rolling stock over and along its tracks. It certainly can make no difference whether the cars of a railroad company are propelled by the agency of steam, or of gasoline, or of electricity, compressed air, liquified air, or any other agency which science and the inventive genius of man may in the future bring into use. Rather the character of a railroad company is determined by the nature and extent and limits put upon its operation by law or otherwise, and by the character and object of its corporate creation as shown by its charter. By the original charter of the Louisville & Nashville Railroad, it was authorized and empowered to lay its tracks and propel its cars thereon between Louisville and Nashville, and was authorized and empowered, just as the appellee in this case is author-

ized and empowered, to transport passengers, freight, and express matter to all immediate points, towns, cities, and counties between Louisville and Nashville, and to erect its depots to accomplish its corporate purposes, just as the appellee here is authorized and empowered to do. The only difference in character, legal or otherwise, between the appellee and the Louisville & Nashville Railroad, under its charter, is that one has steam for a motor power, and the other has electricity; both are interurban and interstate railroad corporations. It is difficult to understand what the phrase "a trunk railway" clearly means, if it does not mean an interurban and an interstate railway for commercial purposes.

Appellant insists that appellee is a street railway within the meaning of section 163 of the state Constitution, above quoted. It will be observed at a glance that the framers of section 163 of the state Constitution intended that the restricted character of the street railway, as a strictly local intramural street car company, should be understood as such by the classification and association of the street railway referred to in that section with gas companies, water companies, steam heating companies, telephone companies, and electric light companies, all of which are strictly intramural, and essentially and exclusively local, in their scope and operation in cities, towns, and other municipalities. The fact that a railroad company, whether operated by electricity or steam, such as the Chesapeake & Ohio Railroad Company, Illinois Central Railroad Company, the Louisville & Nashville Railroad Company, or an interurban or interstate railroad company, all having the same corporate purposes, and performing the same important public functions for the convenience and good of the public, in transporting passengers, freight, and express matter, for the advancement of commerce between towns and cities within a state, or between towns and cities within different states, is obliged, in order to accomplish the corporate purposes of its creation, to have terminal points, as passenger or freight depots, to reach which it is necessary to lay its tracks along the streets within a city or town, does not make such railroad company a street railway, and impress upon it a local, intramural character, such as is possessed by gas, water, steam heating, and electric light companies, enumerated in section 163 of the state Constitution, above quoted. If a railroad company, whether operated by steam or electricity as a motor power, which lays its tracks and connects in commercial relationship different towns, cities, counties, and other municipalities within a state, or cities of different states, be not a trunk railway, then it is difficult to understand what a trunk railway is. We have examined all the recognized authorities upon railroads and railways, and have been unable to find, in any text-book or decision, the phrase

"trunk railway," or anything that approaches the same. In *Elizabeth & Big Sandy R. R. v. Ashland, etc., Street Railway Company*, 96 Ky. 355, 28 S. W. 181, the court said: "It is urged, however, that the appellee [the street railway company] is not a railroad company in the meaning of the section of the Constitution quoted. We think, whatever may be said of street railways in general, that the charter of this company puts it in the class indicated by that section. The railway was to connect two cities. It might use steam, horse, or other propelling power on said road in the transportation of freight and passengers."

In the case under consideration, the appellee was organized under the general railroad laws of this state, just as a railroad corporation extending its line from the city of Louisville to any distant point in the state of Kentucky, or to any city or point in a distant state (assuming that the foreign states accorded the right or privilege to the Kentucky corporation in or across their territory), would have to be organized. And unless the agency of propulsion adopted by a railroad determines its legal character as a street railway or a railroad trunk line, it is impossible to conceive of any distinction between the two. It seems to us that it is the charter of a company which places it in the class to which it belongs, whether street railway or trunk railway, and not the character of the motor power which it employs. If, in order to be a trunk railway, the railroad company must have a main line, with branches or feeders branching off from the main stem to adjacent towns, cities, or counties, then the record in this case shows that the defendant electric railroad corporation meets this requirement, because it has branches to Owensboro, Russellville, and other points off from its main line between Louisville and Nashville. We think there can be no doubt that, giving the phrase "a trunk railway" a rational interpretation, it means, and can mean nothing else but, a commercial railway or railroad connecting different cities within a state, and facilitating commerce between them, or between cities in different states. And to such commercial railroads, of course, it is not pretended that section 163 of the state Constitution applies. The term "street railway," as used in section 163 of the state Constitution, means, and can only mean, applying to it a common-sense interpretation, those street railroads which, before the introduction of electricity, used mules and horses as motor power for drawing the street cars over its street car tracks, for the use and convenience of the local public in a municipality—those street cars that run along the streets of a city, picking up passengers here and there, and putting them off at street crossings, and at the termini of the street car companies' tracks within the municipality. They were created and organized and operated, and such was their character, as defined in their char-

ters, strictly and exclusively for the local convenience of those persons or passengers whose pleasure or business prompted them to go from point to point within the city. They were never organized or intended for commercial purposes between different cities within a state, or between different cities in different states. In the case of the *Louisville & Portland Railroad Company v. Louisville City Railway Company*, 2 Duv. 175, Judge Robertson, after holding that the amended charter of a railroad company was as efficient in establishing its character as its original charter, said: "A railroad is for the use of the universal public in the transportation of all persons, baggage, and other freight. A street railway is dedicated to the more limited use of the local public for the more transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad. And we presume that, in this contradistinctive sense, the term 'railroad' was used in the appellant's charter, as amended in 1860. A railroad and a street railroad are, in both their technical and popular import, as distinct and different as a road and a street, or as a bridge and a railroad bridge, and it has been adjudged that the simple term 'bridge' means a viaduct in a road dedicated to common use, and that the qualified phrase 'railroad bridge' means a viaduct constructed for the exclusive use of railroad transportation."

Lewis, in his work on *Eminent Domain*, vol. 1, § 110a, says: "Railroads now exist in great variety as regards motors and motive power, the size and style of cars and coaches, and the methods of operating and construction. It is probable that these variations will be multiplied in the coming years. It is doubtful whether any permanent and satisfactory classification can now be made. There has been a general concurrence, however, in embracing all railroads in two divisions or classes: (1) Commercial railroads; (2) street railroads. Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another, or between one place and another. They are usually not constructed upon the public streets or highways, except for short distances. Street railroads embrace all such as are constructed and are operated in the public streets, for the purpose of conveying passengers, with their ordinary hand luggage, from one point to another on the street."

In the case of *Zehren v. Milwaukee Electric Railway Co.*, 99 Wis. 83, 74 N. W. 538, 87 Am. St. Rep. 850, 41 L. R. A. 575, the court said: "A street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city from one part of the municipality to another, and thus relieve the sidewalk of foot passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly a city conveyance, for

the use of the city, by people living or stopping therein, and fully under the control of the municipal authorities, who have been endowed with ample power for that purpose. This strictly urban character of a street railway remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of improving the street, and rather as a help to the street than as a burden thereon." The learned court, after speaking of the introduction of the new motor power, and the enlargement of street cars, and the extension of distances, for their operation, even connecting separated cities and villages, said: "Thus the urban railway has developed into the interurban railway, and threatens soon to develop [as in the case at bar] into the interstate railway. The small car which took up passengers at one corner and dropped them at another has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country, from one city to another, bearing its load of passengers, ticketed through with an occasional passenger picked up on the highways. The purely city purposes which the urban railway subserves have developed into and are being supplanted by an entirely different purpose, namely, the transportation of passengers from city to city, over long distances and stretches of intervening country. It is built and operated mainly to obtain through travel from city to city, and only incidentally to pick up a passenger in the country towns. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam road, and would not use the highway at all."

In the case of *Street Railway Company v. Doyle*, 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100, 17 Am. St. Rep. 933, that distinguished and learned jurist, Judge Lurton, said: "The distinction between the use of the commercial railway and that by a horse railway is so wide and plain that it needs no further comment or illustration. Confessedly, the railway involved in this case [which was an electric railway] is on a line between the two, the equivalent of neither, but partaking largely of the nature of both." The electric railway, in the case Judge Lurton decided, transported passengers only, and this feature Judge Lurton lays emphasis on as distinguishing it from a commercial railway, which carries both passengers and freight, receiving and discharging the same at regular depots or stations established for that purpose.

In the case of *Marlott v. Collinsville, C. E. Electric Railway Company*, 108 Fed. 313, 47 C. C. A. 345, Judge Grosscup said: "It [referring to the Collinsville Electric Railway Company] was incorporated under the law of March 1, 1872 [Laws 1871-72, p. 625], relating to the incorporating of railroad companies. Its articles of incorporation are on

file in the office of the Secretary of State of Illinois, in the Book of Railroad Records. It took, and unquestionably intended to take, under its charter, the powers of a railroad corporation, and among them the railroad corporation right of eminent domain. The fact that its trains are to be operated by electricity, instead of steam, does not affect its place in the laws of the state as a railroad company. There is nothing in the acts of 1872 [Laws 1871-72, p. 625] and 1889 [Laws 1889, p. 223] that restricts railroads therein mentioned to the use of steam as a motive power, or prevents existing steam roads from changing their motive power to that of electricity. There is nothing in these acts that necessarily or fairly excludes its application to electrical roads as they now exist; indeed, these electrical roads, in the speed of their trains, in the distance traveled, and in their capabilities for transportation, are well within the field of public utilities hitherto occupied by the steam railroads alone. We cannot conceive that these acts, so far, at least, as they are reasonably applicable, were not meant to cover every form of railroad that, in the march of events, answers the purpose of general transportation; nor do their incidental functions as street railways, in the towns or cities traveled, lift them out of the railroad statute, for it has been held that an elevated road, while intramural in its creation and in its powers, is within the contemplation of the railroad statute, and exercises its right of eminent domain by virtue of these statutes. *Lieberman v. Railroad Company*, 141 Ill. 140, 80 N. E. 544. Indeed, if appellee be not a railroad within the meaning of the act of March 1, 1872, as modified by the act of May 27, 1889, and other acts relating thereto, we can find no authority for its existence as a corporation, or for its exercise of the right of eminent domain. See, also, to the same effect, the very interesting and instructing case of *Mass. Loan & Trust Company v. Hamilton*, 88 Fed. 589 [32 C. C. A. 46]; *Williams v. City Electric Street Railway Company* [C. C.] 41 Fed. 156; *Chicago R. R. Co. v. Milwaukee R. R. Co.* [(Wis.) 70 N. W. 678, 37 L. R. A. 856], 60 Am. St. Rep. 136, 813."

The foregoing authorities conclusively demonstrate that the defendant electric corporation is not a street railway within the meaning of sections 163 and 164 of the present Constitution of Kentucky, but that it is an interurban and interstate commercial railroad, with all the incidental corporate rights and powers of railroad corporations in this state, whether operated by steam or electricity or any other motive power. For a very thorough examination of the authorities, both text writers and decisions on railroads or railways, while the court has been unable to find a legal definition of the phrase "trunk railway" formulated in any precise words, it is believed that the following is the correct definition of the phrase: "A trunk railway is a commercial railway, whose main line, wheth-

er operated by steam, electricity, or any other motive power, connects towns, cities, counties, or other points within the state or in different states, and which railroad company, under its charter, or under the general law, has the legal capacity of constructing, purchasing, and operating branch lines or feeders connecting with its main stem or trunk, the main or trunk line bearing the same relation to its branches that the trunk of a tree bears to its branches, or the main stream of a river bears to its tributaries."

Under section 842a, Ky. St. 1903, it is provided that an interurban electric railroad company, in order to be under the same responsibilities, and to have the same rights, powers, and privileges as railroad corporations existing under the laws of this commonwealth, must, under its charter, be authorized to construct a railroad 10 or more miles in length. The statutory requisite must, of necessity, be incorporated into the above definition of a trunk railway when applied to interurban electric railroad companies in this state. No reason can be suggested, and none in fact exists, why the phrase "trunk railway," found in section 164 of the state Constitution, should be applied to steam railroad corporations, and not to electric railroad corporations, or to electric railroad companies, interurban or interstate. Manifestly, it is equally applicable to both. The phrases "trunk railway" and "main line," whether applied to steam railroad corporations or electric railroad corporations, are essentially synonymous, else both phrases are without meaning. It is a misconception of the general statutory railroad law of this state, as embodied in article 5, c. 32, Ky. St., to suppose that the grant or regulation contained in the ordinance of the city, defining the streets along and over which the defendant company is authorized to run in order to reach its terminal depot at Green and Center streets of the city of Louisville, is a grant of a franchise or privilege to a street railway, which would be void unless duly advertised for public bids, and accordingly awarded to the highest and best bidder.

The defendant interurban electric railway company was created and organized, as we have seen, under the general statutory railroad laws of this state contained in article 5, c. 32, of the Kentucky Statutes. It derives its corporate franchises, rights, and powers from the state of Kentucky. It does not, and cannot, derive any of its corporate rights, franchises, and powers from the city of Louisville. By subsection 5 of section 768 of article 5 of the Kentucky Statutes, it is provided that all railroad companies created under that act shall, among other things, have the power to construct its road upon or across any water course, private or plank road, highway, street, lane, or alley, and across any railroad or canal; and, in case the road is constructed upon any street or alley, the same shall be upon such terms and con-

ditions as shall be agreed upon between the corporation and the authorities of any city in which the same may be. Thus it will be seen that the right of the defendant company to lay its tracks along the streets of the city of Louisville is granted by the Legislature of Kentucky subject only to the provision—a most reasonable one—that the city shall have the power of regulating the mode or manner in which the defendant railroad corporation may or shall exercise its corporate franchises, privilege, and right of constructing its road upon and along the streets of the city. The city of Louisville has exercised its supervisory power over the mode or manner in which the defendant railroad corporation should exercise its statutory corporate franchise of constructing its road upon and along the public streets of the city, by defining and prescribing the streets and the route along which the defendant may construct its railroad. This is all the city has done in the ordinance. It has granted to the defendant no franchise or privilege which it did not already possess under subsection 5, § 768, art. 5, c. 32, Ky. St. The city of Louisville, by said ordinance, has simply exercised its power of regulating the mode and manner in which the defendant corporation may exercise its franchise, derived from the state, of entering with its tracks within the limits of the city, and laying the same along the public streets, in order to reach its terminal depot in the city.

The judgment is affirmed.

NOBLE v. WHITE.

(Court of Appeals of Kentucky. Dec. 17, 1903.)

SCHOOLS—CREATION OF DISTRICTS—VALIDITY
—TEACHER—RIGHT TO COMPENSATION.

1. Under Ky. St. 1899, § 4427, providing that no change in the boundary of any district shall be made to take effect during the current or the following year, nor unless "ten days' notice in writing shall be first given to the trustees" to be affected thereby, the creation of a new school district by changing the boundaries of an existing district without giving written notice to the trustees of the district is ineffectual.

2. A teacher, who was employed by a person acting as trustee of a district after the latter's alleged removal by the county superintendent, and while he continued to perform his duties as such trustee, and who taught the school in strict compliance with law and without objection by any one claiming to act as trustee, was entitled to the compensation provided for.

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

Action by Hattie Lee White against Henry B. Noble, county superintendent. From a judgment for plaintiff, defendant appeals. Affirmed.

R. F. Peak and Jno. L. Noble, for appellant. J. J. O. Bach, Jno. E. Patrick, Kelley Kash, and Pollard & Redwine, for appellee.

¶ 2. See Schools and School Districts, vol. 43, Cent. Dig. § 130.

BURNAM, C. J. On the 5th day of July, 1902, the appellee, Hattie Lee White, contracted in writing with J. S. Cope and R. J. Fulkerson, alleged trustees of district No. 1, in the county of Breathitt, which at that time embraced the town of Jackson, to teach the common school of the district for the term of five months, beginning on the 14th of July, 1902, in accordance with the common school laws, and the rules and regulations prescribed in pursuance thereto, by the state board of education, for the amount of the public funds allotted to the district. On the 2d day of January, 1903, she brought this action against the appellant, H. B. Noble, the county superintendent, in which she alleged that she had fully complied with her contract with the district trustees in every particular; that the defendant had in his possession the public funds allotted for the payment of the teacher of the public school in that district, amounting to \$1,325.04; and that she had repeatedly demanded of him to pay to her the amount due her, but that he had refused to pay any part thereof, and asked for a mandamus requiring him to perform his duty, and pay the amount coming to her. She also files as exhibits her contract with the trustees, and her monthly report as a teacher made to the county superintendent, and the trustees' certificate of the time she had taught. The defendant, H. B. Noble, in his answer denies that either J. S. Cope or R. J. Fulkerson were trustees of the district on the 5th of July, 1902, or had any power or authority to contract with plaintiff as teacher of the school district for the school year, or that plaintiff was entitled to a judgment for the public funds set apart to pay the teacher of the district in his hands. He admits that he had in his hands public funds for district No. 1 of Breathitt county to the amount of \$447.48, and alleges that he also had in his hands \$411.32 for district No. 93 of Breathitt county, making in the aggregate \$858.80. He alleges that on the 21st of March, 1902, he divided the district into two districts, numbering one of them district No. 93, and that R. J. Fulkerson was a resident of district No. 93, and for this reason was disqualified from acting as trustee of district No. 1, and that on the 9th day of June, 1902, he had removed J. S. Cope as trustee on the grounds of immoral conduct, and asked that the plaintiff's petition be dismissed. The circuit judge, after the pleadings were made up and proof taken, decided that the attempted division by defendant of school district No. 1 in Breathitt county into two districts was illegal and void, and adjudged that defendant should pay to the plaintiff \$858.80, the amount of public funds which he admitted he held for the teacher of the district school for that year, and defendant has appealed.

It appears from the testimony that the defendant, H. B. Noble, was elected county superintendent of public schools for Breathitt county at the November election, 1901, and

that his term of office began on the 1st day of January, 1902; that at this time common school district No. 1 was coextensive with the boundary lines of the village of Jackson; and that Thomas Cope, D. B. Cox, and J. S. Cope were the duly and regularly acting school trustees for the district. In October, 1901, R. J. Fulkerson was elected trustee for the district to succeed Thomas T. Cope, but his term of office did not begin until July 1, 1902. On the 21st day of March the defendant, Noble, undertook to divide the district into two districts, making Court street the dividing line. All that part of the town north of this street was to remain in district No. 1, and all of that part south was to be the new district No. 93. By this attempted division, Cox and Fulkerson became residents of district No. 93. Appellant testifies that he gave the trustees of the district no notice of his intention to divide it, except that he verbally informed Thomas T. Cope of his purpose; that immediately after the creation of the new district he appointed Charles Haddon, R. T. Davis, and Morton Forbs as trustees of district No. 93, and J. E. Lang, Elbert Hargis, and his brother, John L. Noble, trustees of district No. 1, thus attempting to legislate out of office both Cox and Fulkerson. Cox died in April thereafter, and the defendant undertook to appoint J. E. Lang in his place. In the June following the defendant, Noble, as county superintendent, entered an order upon his records removing J. S. Cope from office as trustee on the ground of immoral conduct. No steps were taken by any of the trustees appointed by defendant in either district to perform any of their duties as trustees. The appellee, Hattie Lee White, took possession of the public school house, and she and the assistant employed by her taught the public school in strict conformity with law and her contract. After the expiration of the five months the trustees of district No. 93, who had been appointed by the defendant, employed a brother of his to teach the public school in district No. 93, but, so far as this record shows, the trustees of district No. 1 never attempted to furnish a school for that portion of district No. 1 north of the river.

Under this state of fact, the first question for decision is the power of the defendant to divide school district No. 1. Section 4427 of the Kentucky Statutes of 1899 provides that "no change in the boundary of any district shall be made to take effect during the current year or the following school year, unless made previous to taking the census for the school year. Nor shall the boundary of any school district be changed unless ten days' notice in writing shall be first given to the trustees of the districts to be affected thereby."

It was held in *Howard v. Forester* (Ky.) 59 S. W. 10, that under this section of the statute, before a county superintendent of schools was authorized to change a boundary

of a district, he must give 10 days' notice in writing of the proposed change to the trustees of the district to be affected, and, unless this requirement of the statute was complied with, his action in establishing a new district by changing the boundaries of the old was invalid and ineffectual for any purpose. It therefore follows that defendant's action in the creation of district No. 93 out of a portion of district No. 1 was void, and the appointments of trustees for the new district were ineffectual and also void.

The testimony is conflicting as to whether J. S. Cope was notified of defendant's purpose to remove him from his office as trustee. He testifies positively that no notice of his proposed removal was ever given him. Defendant, on the other hand, proves by a deputy sheriff that he read a notice to Cope, when he was under the influence of liquor, giving him notice of such proposed action. However this may be, it is incontestable from the testimony that J. S. Cope continued to discharge the duties of his place subsequent to the date of his alleged removal, and that no one assuming or claiming to be trustee of the district objected or interposed any obstacle to plaintiff's discharging her duty under the contract. No one else has any valid or legal claim to the public funds of the district set aside for the payment of the teacher of the school district.

It therefore follows that the judgment must be affirmed.

BRYANT et al. v. MAIN.

(Court of Appeals of Kentucky. Dec. 15, 1903.)

VACANT LAND—ACQUISITION—POSSESSION—NOTICE TO PURCHASER—SURVEYS—CONFLICT—PLEADING—DEFECTIVE ALLEGATIONS—CURED BY JUDGMENT AND PROOF.

1. Possession of land is sufficient to put a purchaser thereof on inquiry as to the possessor's rights.

2. In a controverted answer in an action to recover damages for cutting timber on certain land, alleging that plaintiffs were estopped from claiming the land, as they, without giving any notice of their rights to the land, allowed defendant to survey the same and take it up as vacant land, the defect, if any, in failing to aver that defendant did not know that the land had been previously appropriated, or that the representations made by plaintiffs were made with knowledge of the facts, and with the intention that they would be acted on by defendant, was cured by judgment for defendant on proof that two of the plaintiffs represented to defendant that the land was vacant, and that the other plaintiff was present when the two plaintiffs made the survey for defendant, but made no claim to the land, though he knew that defendant was taking it up as vacant land.

3. Plaintiffs' surveys called for the Knox and Bell county line, the corner of Knox and Whitley county, and the Knox and Whitley county line, and the M. and S. lines. Defendant's 10-acre survey called for a pine on the Knox and Whitley county line, and thence with the line to land owned by him. Defendant's 140-acre survey called for the county line, thence with the county line to his line. The three surveys called for the S. and M. surveys. The county line mentioned was described by witnesses as

being on the top of a mountain. *Held*, that the conflict between plaintiffs' and defendant's surveys was so great as to charge the plaintiffs, a surveyor who made defendant's survey about a month after the making of the first survey, and residents in the vicinity with notice thereof.

Appeal from Circuit Court, Knox County.

"Not to be officially reported."

Action by Pleasant Bryant and others against James Main. From a judgment for defendant, plaintiffs appeal. Affirmed.

Pitzer D. Black and Jas. D. Black, for appellants. S. B. Dishman, for appellee.

HOBSON, J. Pursuant to two land warrants issued by the Knox county court to appellee, James Main, J. C. Sprouls, the county surveyor of Knox county, on December 13, 1889, laid off and surveyed to Main one tract of 140 acres, and another near by, but distinct from it, of 10 acres. Pleasant Bryant and Hugh Foley were the chain carriers. Main had understood that Sprouls had been surveying in the neighborhood, and, after telling Sprouls what land he wanted to run off, asked him if he had ever run it for any one else. Sprouls said he had not, that it was vacant land, and told Main to run it. Main told him what he had heard about his running some land previous to that, and that he wanted him to tell him if the land was not vacant, and Sprouls replied that he had not run it. Bryant, who was present, said that Main was very fortunate in having the warrants and running it that day, and if Main had not done so it was their business that day to have run the land. Main paid Bryant his fees as chain carrier, he also paid Sprouls his fees for surveying, and in addition the register's fees for obtaining a patent, and Sprouls agreed to send the surveys into the register and get the patent. The patent did not come, and finally Main saw Sprouls, and told him if he was not going to send up the papers to give him a copy and he would send them up. Sprouls promised to do this. Some time thereafter Sprouls sent Main what purported to be a copy of his surveys made on December 13, 1889, but the paper so sent was a survey of 150 acres in one body, and embraced different land from that which Main had in fact taken up. About this time Bryant and William T. Golden produced a patent from the commonwealth issued on August 30, 1890, on a survey made by Sprouls of date November 1, 1889, for 100 acres, covering the greater part of the land surveyed by Main on December 13, 1889. While this patent was issued to Golden and Bryant, Sprouls was in fact the owner of one-third of it, and they afterwards executed to him a title bond or deed transferring this interest to him. Golden also transferred an interest in the land to appellant H. B. Lewallen, but none of the transfers to Sprouls or Lewallen are copied in the record. Sprouls then offered to pay back to Main the money that he had paid him in December, 1889, for making the survey and for the registra-

ter's fees for the patent, but Main refused to accept it. Main had entered on the land after it was laid off to him, and inclosed a part of it, claiming to the extent of his boundaries. This action was brought by Bryant, Lewallen, and Sprouls against Main to recover damages for timber cut by Main from the land. Main, by his answer, denied that their survey was made on November¹, 1889, or before his survey. He also pleaded an estoppel on the ground that Sprouls, Bryant, and Golden had allowed him to make his survey under the circumstances above stated, Golden also being present when it was made, and giving him no notice of their claim. The defendants replied, denying the facts alleged to make out the estoppel, and, the case being submitted, the circuit judge gave judgment in favor of Main. From this judgment Lewallen, Bryant, and Sprouls appeal.

While the evidence was conflicting, on the whole it sustains the conclusion of the chancellor. There is neither pleading nor proof in the record that Lewallen was a bona fide purchaser without notice. On the contrary, Main's possession was sufficient to put him on notice. It is earnestly insisted that the answer of Main pleading the estoppel is insufficient, in that it does not show that Main did not know at the time he made his surveys that the land had been previously surveyed with a view to its appropriation, or that the representations then made to him by the appellants were made with knowledge, actual or virtual, of the facts, or that they were made with the intention that Main should act upon them. But there was no demurrer to the answer. Its allegations were controverted, and if it was defective it was cured by the proof and judgment. The proof shows that the representations as above stated were made by Sprouls and Bryant, and, while it is not clear that Golden heard them, he was present at the survey, and, knowing the purpose for which it was made, he could not remain silent, and allow Main to survey the land, without notice of his claim, when he knew that one of his partners, Sprouls, was making the survey, and the other, Bryant, was acting as chain carrier, both receiving from Main their pay for doing so; for he knew that Main was taking up the land as vacant, and that his partners, Sprouls and Bryant, were helping him to do so, and he was bound to understand that this was calculated to mislead Main into the belief that they had no claim to the land. The plaintiffs undertook to show that they did not know at the time where their survey was, and that Bryant and Sprouls, in effect, told Main this, or told him that they did not know whether the land was vacant; but the great weight of the evidence is against them in this, and we agree with the chancellor that they were charged with notice that the land Main was surveying is the same as that embraced in their patent. The subsequent conduct of Sprouls is inconsistent with any other conclusion, and so is the long delay of the plain-

tiffs to claim the land. Main was an old man, and had nothing in his hands to show his right to the land, while they had a patent for it. The calls of the survey, as given in their patents, are as follows: "Beginning at a white oak and hickory, standing on Harp's creek side, it being a corner of a one hundred acre survey made in the name of Levi Goin and beginning corner of a hundred acre survey made in the name of James Lee, thence 79 E. 28 poles to a poplar, Goin corner, thence S. 59 E. 36 poles to a black oak, locust and white oak, the beginning corner of said Goin, standing on the top of the ridge between Harp's and Greasy creeks and on the Knox and Bell county line, thence with the Knox and Bell line and top of ridge S. 10 E. 300 poles to the corner of Knox and Whitley county, thence with said Knox and Whitley county line N. 87 W. 100 poles, Mack Lee line, thence with said lines to Lewis Sears lines, thence with said Sears lines to a survey made for James Lee, thence with said Lee lines to the beginning." The calls of Main's two surveys are as follows: "(1) 140 acres. Beginning at a beech, a corner of a hundred acre survey made in the name of Lewis Sears; thence N. 53 W. 80 poles to a poplar and dogwood, corner of same; thence S. 60 E. 80 poles to a stake; thence S. 15 E. 100 poles to a stake on the county line; thence with the county line to said Main's old line; thence with same to the beginning. (2) 10-acre tract. Beginning at a stake, hickory and chestnut oak, a corner of a one hundred acre survey made in the name of Lewis Sears, and a corner of a survey made in the name of Mack Lee; thence with said line S. 15 W. 40 poles to a pine on the Knox and Whitley county line; thence with said line N. 65 W. 70 poles to a stake on said Main's line; thence with the same to the beginning."

It is incredible that a surveyor on the ground making the last two surveys could have been ignorant of a survey made by him only about a month before, or that he could have failed to know that the last two boundaries conflicted with the first. The surveys call for natural objects notorious and about which there could be no mistake. Plaintiffs' survey calls for the Knox and Bell county line, the corner of Knox and Whitley county, and the Knox and Whitley county line. It also calls for Mack Lee's line and Lewis Sears' line. The defendant's 10-acre survey calls for a pine on the Knox and Whitley county line, and runs thence with the line to the tract of land then owned by Main. His other survey calls for the county line, and to run thence with the county line to his line. All the surveys call for the Lewis Sears survey and the Mack Lee survey. The conflict between plaintiffs' survey and the defendant's survey is so great that, with these natural objects before him, a surveyor, on the ground, could not reasonably be ignorant of the conflict; at least he should be charged with notice of it, in view of the natural objects called for. The same is

true of Bryant and Golden, for they lived in the vicinity, and hold another patent near by. While the county line is called for in the survey as being "on the top of the ridge," it is spoken of by the witnesses as on top of the mountain, and a natural object as this must have been patent to parties on the ground. All of the surveys call for the land lying between the Lewis Sears 100-acre survey and the county line.

Judgment affirmed.

MILLER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 11, 1908.)

GAMING—INDICTMENT—DUPLICITY—EVIDENCE—INSTRUCTIONS—REMARKS OF PROSECUTING ATTORNEY—PREJUDICE—APPEAL—MATTERS REVIEWABLE.

1. Under Cr. Code Prac. § 124, providing that an indictment must correctly and certainly describe the party, offense, county, and circumstances, an indictment charging defendant with setting up a faro bank, and specifying the setting up of a faro bank, and "other machines and contrivances" for betting, was not bad for duplicity, the setting up of a faro bank being the only offense charged, and the only one on which a conviction could be had, and the allegations as to other machines and contrivances being surplusage.

2. Ky. St. 1899, § 1960, makes it a crime to carry on a faro bank or other contrivance used in betting, whereby money may be won or lost. Section 1961 provides that a change of name of the games specified in section 1960 shall not prevent a conviction. Section 459 provides that there shall be no distinction between the construction of civil or penal statutes, but all shall be construed to carry out the intention of the legislature, and, by section 460, to promote their object. In a prosecution for setting up a faro bank the court instructed that a game played according to the rules of faro is faro unless so modified as to be "generally known or called by some other name than faro." *Held*, that as defendant could have been convicted, though the game played was baccarat, if that game is substantially the same as faro, and the court should have charged that the game was faro if played according to its rules, though modified in an immaterial particular, the charge given was more favorable to defendant than warranted, and he could not complain.

3. In a prosecution for setting up a faro bank, the commonwealth attorney was precluded from asking defendant's witness if he had not testified before the grand jury that defendant was the dealer at a faro game, whereupon the attorney remarked to the court that witness had so testified. The court ruled that the attorney should have made no such statement. Defendant himself testified that he had been the dealer, and the only real question was whether the game was faro or baccarat. *Held*, that defendant was not prejudiced by the statement of the attorney.

4. Under Cr. Code Prac. § 281, providing that the decisions of the court on a motion for new trial are not subject to exception, and section 282, providing that exceptions shall be shown on the record by a bill of exceptions, objections to the closing argument of the commonwealth attorney, shown only by affidavit on motion for a new trial, cannot be considered on appeal.

5. In a prosecution for setting up a faro bank, evidence as to what witnesses saw going on in

the room, and as to what a game of faro is, is admissible.

Paynter and Nunn, JJ., dissenting.

Appeal from Circuit Court, Fayette County.

"To be officially reported."

George Miller was convicted of setting up a faro bank, and appeals. Affirmed.

Chas. J. Bronston, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

HOBSON, J. The first question made in this case is as to the sufficiency of the indictment, which is as follows: "The grand jury of Fayette county, in the name and by the authority of the commonwealth of Kentucky, accuse George Miller and Tim McCauliffe of the crime of setting up a faro bank, committed as follows, viz.: That said George Miller and Tim McCauliffe on the 23d day of December, 1902, in the county aforesaid, did unlawfully and willfully in rooms in a building on Limestone street, between Main and Short, and over what is known as Heintz's Saloon, set up, and carry on, keep, manage, conduct, and operate, a faro bank and other machines and contrivances commonly used in betting, whereby money and property might be won and lost, and at which money and property, and checks representing money and property, were won and lost, against the peace and dignity of the commonwealth of Kentucky."

The indictment is based on the following statutory provisions:

"That whoever, with or without compensation, shall set up, carry on, keep, manage, operate or conduct, or shall aid or assist in setting up, carrying on, keeping, managing, operating or conducting a keno bank, faro bank, or other machine or contrivance used in betting, whereby money or other thing may be won or lost; or whoever shall, for compensation, percentage or commission, set up, carry on, manage, operate or conduct a game of cards, contz or craps, whereby money or other thing may be won or lost, or shall, with or without compensation, percentage or commission, aid, assist, or abet in setting up, carrying on, managing, operating or conducting any game so set up, carried on, managed, operated or conducted, for compensation, percentage or commission, shall be fined five hundred dollars and costs, and confined in the penitentiary not less than one nor more than three years; shall be deemed infamous after conviction, and be forever thereafter disqualified from exercising the right of suffrage, and from holding any office of honor, trust or profit, whether it be state, county, city or municipal. The judgment of conviction in each case shall recite such infamy and disqualification, and shall not be valid without such recital. The provisions of this section shall not include nor be applicable to persons who play at such

games, tables, banks, or with such machine or contrivance, unless they take other part in setting up, conducting, keeping, managing, operating or carrying on such tables, banks, games, machine or contrivance, or aid or assist in setting up, keeping, conducting, managing or operating such game, bank, tables, machine or contrivance." Ky. St. 1899, § 1960.

"The change of name of any of the games, banks, tables, machines or contrivances mentioned or included in the preceding section, shall not prevent the conviction of any person violating the provisions thereof; but no prosecution shall be commenced under said section later than five years after the commission of the offense, nor shall its provisions apply to persons who sell combination or French pools on any regular race track during the races thereon. An indictment for a violation of the preceding section may charge the accused in one count with any or all of the offenses mentioned or included therein." Ky. St. 1899, § 1961.

The defendants demurred to the indictment for duplicity. The demurrer was overruled. A separate trial was awarded, and on the trial of the appellant, Miller, the court limited the evidence to the setting up of a faro bank. By section 124, Cr. Code Prac., the indictment must be direct and certain as regards (1) the party charged, (2) the offense charged, (3) the county in which the offense was committed, (4) the particular circumstances of the offense charged, if they be necessary to constitute a complete offense. Under this section it has been held that the indictment in the part of it naming the offense charged must correctly designate the offense. *Brooks v. Commonwealth*, 98 Ky. 143, 32 S. W. 403; *Commonwealth v. Tupman* (Ky.) 30 S. W. 661. The indictment before us in this part of it specifies the offense with which the defendants were charged as the crime of setting up a faro bank. This was the only offense charged, although in the accusative part of the indictment it is stated that he had not only set up a faro bank, but other machines and contrivances commonly used in betting; for the latter words must be rejected as surplusage, as only the offense of setting up a faro bank is charged against the defendants in the part naming the offense. Under this indictment no conviction could be had except for setting up or carrying on a faro bank, and the court properly so ruled, excluding all evidence except that relating to this offense.

The proof leaves no doubt that the defendant Miller set up and carried on a game at which money and property was won and lost. He rented the rooms and was the dealer in the game; but it is insisted that the game was not faro, but baccarat. Faro is played with a pack of 52 cards dealt from a box, with a layout of 13 cards spread out on the table, or fastened to the table, or painted

on it, or on the cloth over it. The dealer deals out the cards from the box. The players bet against the bank or dealer, placing their money on some card on the table, and winning or losing according as the cards come out of the box. In baccarat a similar box is used. The cards are dealt in the same way, except there are no sevens in the deck; the pack therefore consisting of forty-eight cards. The betting is done in the same way, and there seems to be no difference between the game of baccarat and faro, according to the evidence, except that in baccarat the sevens are not in the deck, and there is no seven in the layout on the table; and from the absence of the seven, as explained by the witness, "If you put a bet on the corner, the five next to the six, it is not a bet—it don't take the next card, because there is no next card there, but in faro it would involve the five or seven." Except for the absence of sevens, the game of baccarat, as shown by the evidence, is precisely the same as a game of faro in the way the game is played, the way the bets are made, and in every other respect. In illustration of this, it may be added that some of the witnesses for the Commonwealth, who had more or less experience in playing faro, took the game dealt by appellant to be a game of faro. On these facts the court instructed the jury as follows:

"(1) If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, George Miller, in Fayette county, Kentucky, between the 23d day of December, 1897, and the 23d day of December, 1902, in a room in a building on Limestone street between Main and Short streets, in Lexington, Kentucky, and over what is known as Heini's Saloon, conducted or operated a faro bank, which was commonly used in betting, and that money, or checks representing money, was then and there bet, won, and lost upon games played upon said faro bank, the jury should find the defendant guilty, and, unless the jury do so believe from the evidence beyond a reasonable doubt, they should find the defendant not guilty.

"(2) If the defendant did conduct or operate a machine or contrivance commonly used in betting, and if, upon said machine or contrivance, money or checks representing money were bet, won, and lost, yet the jury should find the defendant not guilty unless they believe from the evidence beyond a reasonable doubt that such machine or contrivance was a faro bank.

"(3) A game of cards played according to the rules of what is generally known as faro is a game of faro, and, even if the game so played is modified or changed in some immaterial particular, it is still a game of faro, provided the game as played is played in accordance with the rules and principles by which a game of faro is played, unless the game as so modified or changed is generally

known and called by some other name than faro. Any game not played in accordance with the rules and principles of faro is not a game of faro, and any game not played in strict accordance with the rules and principles of faro, if the game as played has a commonly known and distinctive name not that of faro, is not a game of faro."

The appellant complains of so much of the charge of the court as required the game to be "generally known and called by some name other than faro," and asked the court to charge the jury to find for him if the game had a distinctive name other than that of faro, commonly given to it by persons participating in it and familiar with it. It is earnestly insisted for him that the majority of people may never have heard of the game of baccarat, and that it was erroneous to require that the game should be generally known and called by that name. But it will be observed that this qualification made in instruction 3 more favorable to the defendant than the instruction would have been without it. But for it the jury would have been authorized to convict the defendant if the game as played was played in accordance with the rules and principles of faro, although modified or changed in some immaterial particular. Not only so, but by the last clause of the instruction, if the game as played has a commonly known and distinctive name other than faro, there could be no conviction unless it was played in strict accordance with the rules and principles of faro.

These instructions were more favorable to the defendant than the law warranted; for by section 1961, Ky. St. 1899, above quoted, the change of the name of any of the games mentioned in section 1960 shall not prevent the conviction of any person violating its provisions. By section 459, Ky. St. 1899, there shall be no distinction in the construction of statutes between civil or criminal and penal enactments. All statutes shall be construed with a view to carry out the intention of the Legislature, and, by section 460, are to be construed liberally, with a view to promote their objects. The purpose of the provision in section 1960 that the change of name shall not prevent a conviction is to avoid the confusion arising from the fact that games frequently have in the sporting world names not generally known among the class of people constituting the grand juries.

The rule is well settled that only the substance of the issue need be proved. 1 Bishop on Crim. Pro. § 488b; Jones v. Com., 2 Ky. Law Rep. 68; Williams v. Com., 78 Ky. 93; Sutton v. Com., 97 Ky. 308, 30 S. W. 661; Boyd v. Com. (Ky.) 59 S. W. 518. The defendant was informed by the indictment that he was charged with carrying on a faro bank in a certain house on a certain street in Lexington. He was therefore not misled as to the nature of the accusation against him, and if the game he carried on there was, in substance, a game of faro, although called

baccarat, the substance of the issue was proved, and the defendant was properly convicted. In lieu of instruction 3 the court should have simply told the jury that if the game was played in accordance with the rules and principles of the game of faro it was a game of faro within the meaning of the instructions, although it was modified and changed in some immaterial particular.

When the witness Ed Oder was on the stand for the commonwealth, and testified to seeing some games going on in the room, he was asked who was the dealer, and said he did not know. Being then asked if he knew the defendant Miller, he said he did. He was then asked if he was the dealer, and answered he did not think he was. Being then asked if he testified before the grand jury a month or six weeks before, he said he did. Then this occurred: "Q. Didn't you testify that Mr. Miller was the dealer? (Defendant objects, which objection is sustained by the court.) In argument upon said objection the commonwealth attorney made, in substance, the following statement: 'I do not intend to be trifled with in this manner, when I know that the witness testified before the grand jury that he played at a game of faro with Miller dealing, and that we sent out for Charley Oldham, and fixed the date and time.' The attorney for defendant moved the court to set aside the swearing of the jury because of the prejudice this statement by an attorney for the commonwealth would make. Motion overruled. Defendant excepts." It appears from appellant's affidavit that the court ruled the commonwealth attorney should make no such statement, but it is urged that for this the swearing of the jury should have been set aside. The remark was addressed to the court, and it must be presumed that the jury would try the case according to the evidence, as they were sworn to do, and not be governed by what one of the attorneys might improperly say in argument to the court. While the commonwealth attorney, so far as appears, should not have used such words in the presence of the jury, we do not see that the defendant was prejudiced in any way by the remark, for when he came on the stand in his own behalf he admitted being the dealer in the game, and the only question, in effect, made, was whether it was faro or baccarat, and the exact facts on this question were proved by the witnesses which he himself introduced, there being no substantial contradiction in the evidence as to them.

Appellant also relies on misconduct in the commonwealth's attorney in his concluding argument to the jury. But there is nothing in the record to show this except the affidavit of the defendant Miller filed on the motion for new trial. The decisions of the court upon the motion for new trial are not subject to exception. Cr. Code Prac. § 231. The exceptions of a party shall be shown upon the record by a bill of exceptions pre-

pared, settled, and signed as provided in the Code of Practice in civil cases. Cr. Code Prac. § 282. None of the matters complained of as to the concluding argument of the commonwealth's attorney are shown by the bill of exceptions. They cannot, therefore, be considered in this court. Neither can the objections to the panel of the jury. *Curtis v. Commonwealth* (Ky.) 62 S. W. 886, and cases cited; *Knoxville Nursery Co. v. Com.* (Ky.) 55 S. W. 691.

The rulings of the court were more favorable to the defendant in the admission of evidence than they should have been. In a case like this the court may properly allow the witnesses to testify to what they saw going on in the room, and also allow proof to be made as to what a game of faro is, and then, on all the evidence, the jury should determine whether or not the defendant set up or carried on a faro bank.

On the whole case we see no error to the substantial prejudice of the defendant, and the judgment complained of is therefore affirmed.

PAYNTER and NUNN, JJ., dissent.

BARRICKMAN'S ADM'R v. BARRICKMAN et ux.

(Court of Appeals of Kentucky. Dec. 17, 1903.)

NOTES—CREDITS—EVIDENCE—SUFFICIENCY —INDORSEMENT.

1. In an action on a note, the maker claimed credits not indorsed, evidenced by check and receipt bearing dates 10 and 13 years, respectively, earlier than the note sued on. The maker and payee were nephew and uncle, and the course of dealing between them indicated more or less negligence by both. The note was for borrowed money, and was in renewal of previous notes antedating the receipt and check, representing the credits claimed. There was evidence that, after the execution of the note sued on, the maker claimed he should have been allowed credit for the check, and that the payee did not deny it, and it did not appear that the check was given for any other indebtedness. There were credits of interest on the notes which did not recite the specific sum of money received. Held to sustain a finding that the maker was entitled to the credits claimed.

Appeal from Circuit Court, Oldham County.
"Not to be officially reported."

Action by William Barrickman's administrator against Thomas Barrickman and wife. From a judgment allowing defendants certain credits, plaintiff appeals. Affirmed.

Elmer C. Underwood and Wirgman & Underwood, for appellant. R. F. Peak and Barrickman & Crowe, for appellees.

BURNAM, C. J. This action was brought by appellant, as administrator of William Barrickman, deceased, against the appellees, Thomas Barrickman and wife, on a note for \$480, dated February 25, 1896, secured by a mortgage on real estate. The defendant admits the execution of the note, and alleges that it was given in renewal of a note for

\$390.25, dated March 8, 1889, and that this note was given in renewal of two notes—one for \$150, and the other for \$250—which were executed by the defendant to the plaintiff's intestate for borrowed money on the 6th day of March, 1882, and that in addition to the credits indorsed upon the original notes, and the various renewals thereof, which culminated in the note sued on, he paid to William Barrickman \$25 on the 6th of September, 1883, and \$74.40 on November 1, 1886; and he files with his answer, and as part thereof, the following exhibits:

"Exhibit 1. One day after date we or either of us promise to pay to Wm. Barrickman the sum of one hundred and fifty dollars (\$150) for value received of him this the 6th day of March 1882. T. Barrickman. Elijah Barrickman.

"Cr. by interest up to March 8th, 1883. Cr. by interest up to March 6th, 1886. Cr. by interest up to March 6th, 1887. Cr. by interest up to March 8th, 1889."

"Exhibit 2. One day after date we or either of us promise to pay to Wm' Barrickman the sum of two hundred and fifty (\$250) dollars for value received of him. This 6th of March 1882. T. Barrickman. Elijah Barrickman.

"Cr. by interest up to this date March 8th, 1883. Cr. by interest up to this date March 8th, 1886. Cr. by the interest up to this date March 8, 1887. Cr. by cash, one hundred dollars, March 18, 1887. Cr. by cash \$16.00 (sixteen dollars) March 8th, 1889."

"Exhibit 3. September 6, 1883. Received of James Barrickman twenty-five dollars to be Cr. on Thomas Barrickman's two notes which I hold against him. Wm. Barrickman."

"Exhibit 4. La Grange, Ky. Nov. 1, 1886. Oldham Bank, La Grange, Ky.: Pay to William Barrickman, or order, seventy-four ⁴⁰/₁₀₀ dollars (\$74.40). Thomas Barrickman."
Indorsed: "William Barrickman."

"Pay J. T. Wilson, Cashier, or order, for collection of Farmers' & Drovers' Bank, of Louisville, Ky. J. W. Nichols, Ga."

"Exhibit 5. Feb. 15th, 1891. Sold to William Barrickman 10 head of hogs, weight nine hundred and one pound, 3 cents pr. pound, \$27.03."

"Exhibit 6. 1892. Five head of hogs, weight 480 pounds, 4 cents pr. pound, \$19.20."

"Exhibit 7. One day after date we or either of us promise to pay to Wm. Barrickman, the sum of three hundred and eighty dollars and twenty-five cents, (\$380 ²⁵/₁₀₀) for value received at the rate of 6% this the 8th day of March, 1889. T. Barrickman. Elijah Barrickman. Cole Barrickman, Witness.

"Cr. by nineteen dollars and twenty cents this March 5, 1892. Cr. by twenty-seven dollars this first day of Feb., 1891."

Plaintiff, in his reply, denied that the defendant was entitled to the additional credits set up in his answer.

Defendant, to support his contention, introduced as a witness J. T. Willson, who testified that during the year 1896 the defendant Thomas Barrickman and the deceased, Wm. Barrickman, came together to the People's Bank, in La Grange, of which he was cashier, and that the defendant handed him the check for \$74.40, dated November 1, 1886, and asked him if the bank books showed that it had been paid to Wm. Barrickman; that he informed him that they did; that Wm. Barrickman also asked about the check, and looked at it, and that the defendant then remarked that he ought to have had credit for it on the note in addition to the other credits, and that Wm. Barrickman made no response to this suggestion; that he recognized the indorsement on the check as in the handwriting of Wm. Barrickman. James Barrickman, a brother of the defendant, identified as genuine the receipt signed by Wm. Barrickman to the defendant Thomas Barrickman for \$25, dated November 8, 1883, and testified that he had paid to their uncle Wm. Barrickman the \$25 for this brother. Cole Barrickman, another brother of the defendant, testified that on the 8th of March, 1889, he had been present at the settlement between Wm. Barrickman, deceased, who was his uncle, and the defendant T. Barrickman, in which the two notes dated the 6th of March, 1882, were given up, and a new note for \$380.25 executed; that he calculated the interest at the request of the parties, and that at this settlement neither the check for \$74.40, dated November 1, 1886, nor the receipt for \$25, dated September 6, 1883, was produced by the defendant; and that no separate credits were given these two sums of money in that settlement. It was shown by the defendant that various credits of interest paid on all the preceding notes were in the handwriting of William Barrickman. Plaintiff, by way of rebuttal, took the deposition of D. H. French, a well-known attorney residing in La Grange, who testified that at the request of William Barrickman he calculated the interest on the note for \$380.25, dated the 8th of March, 1889, on the 25th of February, 1896, and also wrote the note for \$480 sued on, and the mortgage made to secure it, and that a settlement was had between the parties on that date of their mutual subsisting demands previous to the execution of the note, and that it was his best impression that the defendant Thomas Barrickman had in his possession at that settlement the check for \$74.40, and claimed that he was entitled to a credit therefor on the obligation, and that it was allowed to him; that he also claimed some other credits, aggregating about \$100, which were also allowed. The interest credited upon the original notes for \$150 and \$250, in the handwriting of William Barrickman, showed that all the interest was paid up to the execution of the note for \$380, as the last credit for interest in these notes was made on the 8th of March, 1889, which is the

exact date of the execution of the \$380 note, and a calculation of the interest on this note to the 25th of February, 1896, when the note for \$480 sued on was executed, will show that the defendant received no credits in that settlement, except for \$19.20, as of the 5th of March, 1892, and \$27.03 as of the 1st day of February, 1891, which were indorsed as credits. We think, therefore, that it must be assumed that the appellant was not credited by the items in dispute in the settlement made by Mr. French. Appellee, however, contends that as the credits of interest do not recite the specific sum of money received at these dates by William Barrickman, that it would be fair to assume, after the great lapse of time, that the credits contended for were really embraced in those given. And the contention is not without plausibility. But in view of the testimony of Willson that the defendant, after the execution of the note sued on, claimed that he should have been allowed credit for the \$74.40 check, and that deceased did not deny it, and in the absence of any evidence conducing to show that it was given in payment of any other indebtedness due by defendant to appellee, we think the presumption cannot be indulged. The course of dealings between the parties, and their relationship to each other, indicate that there was more or less negligence by both parties, and we do not, therefore, feel warranted in disturbing the judgment of the chancellor.

Judgment affirmed.

COMMONWEALTH, ex rel. LUCAS v. AYER & LORD TIE CO.

(Court of Appeals of Kentucky. Dec. 17, 1903.)

TAXATION—VESSELS ENGAGED IN INTERSTATE COMMERCE—SITUS—HOME PORT—STATUTE—REMOVAL OF CAUSE—DIVERSITY OF CITIZENSHIP—STATE.

1. Rev. St. U. S. §§ 4178, 4334 [U. S. Comp. St. 1901, pp. 2830, 2968], in reference to the port of registered and licensed vessels, as amended by Act Cong. June 26, 1884, c. 121, § 21, 23 Stat. 58 [U. S. Comp. St. 1901, p. 2831], entitled "An act to remove certain burdens on the American merchant marine," etc., provides that the word "port," as used therein, shall be construed to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built or where one or more of the owners reside. Defendant, an Illinois corporation, having its principal office in Chicago, and offices also in Paducah and other cities, operated certain steamboats, which were registered at Paducah, each of which had painted on its stern, in compliance with the statutes of the United States, the words "of Paducah, Kentucky." Held, that Paducah was the home port of the vessels so registered and marked.

2. The home port of a vessel engaged in interstate commerce is its situs for taxation, though its owner resides in a different state.

3. A state is not a citizen within the meaning of the statute authorizing the removal of causes from the state to the federal court on the ground of diversity of citizenship.

¶ 3. See Removal of Causes, vol. 48, Cent. Dig. § 84.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Proceeding by the commonwealth, on relation of the Auditor's agent, Frank A. Lucas, against the Ayer & Lord Tie Company. From a judgment for defendant, the relator appeals. Reversed.

Frank A. Lucas, for appellant. Campbell & Campbell, for appellee.

BARKER, J. This is a proceeding instituted by the Auditor's agent, Frank A. Lucas, against appellee, under the provisions of section 4241, Ky. St. 1899, to enforce the listing for taxation of certain steamboats owned by it, engaged in interstate commerce on the Ohio, Cumberland, Tennessee, and Mississippi rivers. The appellee is a corporation organized under the laws of the state of Illinois, having its principal office in Chicago; it also has offices at Paducah and other cities along the rivers upon which it engages in navigation. The steamboats in question are the Russell Lord, Pavonia, and Inverness. The years for which these vessels are sought to be listed for taxation are 1899, 1900, and 1901. They are registered in Paducah, Ky., and each of them has painted on its stern, in compliance with the statutes of the United States, the words "of Paducah, Kentucky." To the petition appellee filed an answer, admitting that the vessels sought to be taxed are registered at Paducah, Ky., and that they have the words "of Paducah, Kentucky," painted on their sterns. Their values as alleged in the petition are denied, as is also the allegation that Paducah is their home port; and it is alleged affirmatively that appellee is an Illinois corporation, having its chief office and place of business in Chicago; that its vessels are engaged in interstate commerce upon the rivers before mentioned; that they are taxed in Chicago, the domicile of their owner, and are not taxable by the state of Kentucky, in Paducah or elsewhere. The answer concludes with the following allegation: "Defendant, further answering, says that H. Baker, upon whom notice in this case was served, was, during the said years, 1899, 1900, the general manager of the transportation department of said Ayer & Lord Tie Company, of its said steamboats, Russell Lord, Pavonia, and in 1901 of steamer and its barges Inverness, and for convenience sake, and under the act of Congress, said steamers were enrolled or registered at the port of Paducah, Ky., and said Baker being a resident of the state of Kentucky, and in which ports it is proper to register or enroll said boats." To this pleading a general demurrer was interposed by appellant, which was overruled, and, in declining to plead further, its petition was dismissed, from which judgment this appeal is prayed.

The allegations of the petition, which are admitted by the answer, and the allegations

of the answer, which are admitted to be true by the demurrer, aptly raise the question as to whether or not the steamboats of appellee are taxable by the commonwealth of Kentucky. Ordinarily, the residence of the owner is the situs for taxation of personal property, but this rule is by no means without exceptions, and it often happens that personal property obtains a situs for taxation in a jurisdiction foreign to the residence of its owner. Vessels engaged in navigation upon the high seas, and upon the Great Lakes and rivers of the United States, are often separated by long distances from the residences of their owners. Such vessels, in so far as they are the property of citizens of the United States, are governed by its laws. It has been deemed wise by the general government, from the earliest period of its existence, that all vessels engaged in interstate or international commerce should have a home port, where they are registered and enrolled, enjoy certain privileges, and are subject to certain burdens and duties; and, that all who have business transactions with them may know beyond question their home port, it is required by statute that its name shall be painted in a certain way upon the stern of each vessel. By an act of Congress, which became a law December 31, 1792 (section 4141, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2808]), it is provided:

"Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection-district, which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

Section 4178 [U. S. Comp. St. 1901, p. 2830]: "The name of every registered vessel, and of the port to which she shall belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length. If any vessel of the United States shall be found without having her name and the name of the port to which she belongs so painted, the owner or owners shall be liable to a penalty of fifty dollars. * * *

Section 4334 [U. S. Comp. St. 1901, p. 2968]: "Every licensed vessel shall have her name, and the port to which she belongs, painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting, the owner thereof shall be liable to a penalty of twenty dollars."

It will be observed that by the foregoing statutes the home port of vessels belonging to citizens of the United States was the residence of the owner, if there was but one, or that of the residence of the vessel's husband, if there were more than one owner; and the name of this home port was to be painted on the stern of the vessel. Thus stood the law regulating this subject, until the year 1884,

when, by an act of Congress, entitled "An act to remove certain burdens on the American merchant marine, and to encourage the American foreign carrying trade, and for other purposes," it was provided that "the word 'port,' as used in sections 4178 and 4834 of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of said vessels, shall be construed to mean, either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built; or where one or more of the owners reside." Act June 26, 1884, c. 121, § 21, 23 Stat. 58 [U. S. Comp. St. 1901, p. 2831]. Thus changing the requirement that the home port should be the residence of the owner, and granting the option of selecting one of three places as a home port, to wit, the port of registry, the place in the same district where the vessel was built, or where one or more of the owners reside.

In 1891 and 1897, section 4178 was amended so as to read as follows: "The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be marked upon the stern. Those names shall be painted or gilded, or consist of cut or carved or cast Roman letters, in light color on a dark ground, or in a dark color on a light ground, secured in place, and to be distinctly visible. The smallest letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked, the owner or owners shall be liable to a penalty of ten dollars for each name omitted. * * * U. S. Comp. St. 1901, p. 2830.

Appellee had a right to cause its boats to be registered at Paducah, although that was not the place nearest to the port where it resided; and it fully complied with the law regulating the subject, by painting the words "of Paducah, Kentucky," on the stern thereof; and by the amendment of 1884, Paducah became the home port of the vessels so registered and marked.

The question, then, for adjudication, is whether or not the home port of a vessel is the situs for its taxation, although its owner may reside in a foreign country or state, as in the case under consideration. Judson in his work on Taxation (section 186) says: "Steamboats and vessels navigating the public or navigable waters of the United States are taxable as property, irrespective of the residence of the owner, in the home port of the vessels, which is said to be their situs for taxation." And in Cooley on Taxation (3d Ed.) vol. 1, p. 651: "Vessels are commonly taxable only at the port of registry, although the place of enrollment or registration does not necessarily fix the situs for taxation, which may be at the owner's domicile, or in a state where the owner does not reside, if the vessel's business is wholly in such state for an indefinite period." In the case of Hays

v. Pacific Mail Steamship Company, 17 How. 596, 15 L. Ed. 254, the Supreme Court of the United States said: "The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another state, is familiar in the admiralty law. She is subjected in many cases to the application of a different set of principles. [Peyroux v. Howard] 7 Pet. 324 [8 L. Ed. 700]; [The General Smith] 4 Wheat. 438 [4 L. Ed. 609]. We are satisfied that the state of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the state; they were there but temporarily, engaged in lawful trade and commerce, with their situs at the home port where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid." In the case of Moran v. New Orleans, 112 U. S. 653, 5 Sup. Ct. 40, 23 L. Ed. 653, it was said: "And it is undoubtedly true, as it has often been judicially declared, that vessels engaged in foreign or interstate commerce, and duly enrolled and licensed under the acts of Congress, may be taxed by state authority as property; provided the tax be not a tonnage duty, is levied only at the port of registry, and is valued as other property in the state, without unfavorable discrimination on account of its employment. Transportation Co. v. Wheeling, 99 U. S. 273 [23 L. Ed. 412]; Morgan v. Parham, 16 Wall. 471 [21 L. Ed. 303]; Hays v. Steamship Co., 17 How. 596 [15 L. Ed. 254]; Ferry Co. v. East St. Louis, 107 U. S. 365 [2 Sup. Ct. 257, 27 L. Ed. 419]." See, also, Battle v. Mobile, 9 Ala. 234, 44 Am. Dec. 438; Irvin v. St. Louis & C. R. R. Co., 94 Ill. 105, 34 Am. Rep. 208; People v. Com'rs, etc., 58 N. Y. 242; City of Newport v. Berry (Ky.) 19 S. W. 238.

The steamboats involved in this litigation are separated from the residence of their owner by a long distance, in both geography and time; in fact, they can never visit the port at which their owner resides; they are, so far as their actual situs is concerned, permanently confined to the rivers over which they float. If their home port had to be Chicago, because that is the residence of their owner, as under the law prior to 1884, then they would have a home port from which they could derive no advantage or protection, because they could never reach it. It was to obviate this hardship, with others, that the act of 1884 was passed by Congress, permitting their owners to select for them a home port in the field of their operations, which is for them a home port in fact, as well as in law and name. Property, such as that under consideration, ought, logically, to be taxed at its home port; there it can be seen and properly valued for assessment by the fiscal officers; whereas, at the residence of its owner (Chicago), the officers, of necessity, must rely on the statements of the latter for both its existence and its value. At its home port it enjoys

the protection of the laws of the jurisdiction in which it is located, and both justice and reason would seem to require that property thus permanently located, both in legal contemplation and in fact, within a jurisdiction foreign to that of its owner, should contribute its fair share to the support of that government whose protection it enjoys.

We conclude, therefore, that as Paducah, Ky., is the home port of the vessels in question, that place is their situs for taxation, and the demurrer to the answer should have been sustained.

There is no pretense in this case that appellee's property is sought to be taxed in a manner different from that in which all other property in Kentucky is taxed, or that there is any unjust or invidious discrimination between it and property of the citizens of Kentucky.

There was a petition and bond tendered in the county court where this proceeding originated, and a motion to remove it to the federal court on the ground of diversity of citizenship between appellee and the commonwealth of Kentucky. This motion was overruled, and correctly so. The commonwealth of Kentucky is not a citizen within the meaning of the statute authorizing the removal of causes from the state to the federal court on the ground of diversity of citizenship. *Chicago, St. Louis & New Orleans R. R. Co. v. Commonwealth*, 72 S. W. 1119.

For the reasons indicated, the judgment is reversed for proceedings consistent with this opinion.

KING v. CREEKMORE.

(Court of Appeals of Kentucky. Dec. 17, 1903.)

NEGLIGENCE—LIABILITY OF LESSOR FOR INJURY TO EMPLOYÉ OF LESSEE—ALLEGATIONS—SUFFICIENCY.

1. A lessor of a mill, who gives possession and control thereof to the lessee, is not liable to an employé of the lessee for failing to inspect and keep the same in a reasonably safe condition.

2. An allegation that a lessor of a boiler knew of the defective condition thereof, or, by the exercise of ordinary care, could have known of it at the time it was leased, merely charged that the lessor was negligent in failing to exercise ordinary care to discover the defect in the boiler, and did not render the lessor liable to an employé of the lessee for injuries sustained by reason of the explosion of the boiler.

Appeal from Circuit Court, Whitley County.

"To be officially reported."

Action by John King against W. B. Creekmore. From a judgment for defendant, plaintiff appeals. Affirmed.

Tye & Denham and Sharp & Siler, for appellant. O. H. Waddle and K. D. Perkins, for appellee.

PAYNTER, J. The appellee, Creekmore, owned a sawmill, and he leased it to Hiram Warren, who operated it as lessee. The appellant was an employé of Warren in running the mill, and while in the line of his duty the boiler exploded, inflicting serious injury upon him, and to recover damages this action was brought against Creekmore alone. In addition to the above facts, it is averred in the petition that the boiler was defective, and was known by the defendant to be so, or he, by the exercise of ordinary care, could have known of its dangerous and defective condition; and that it was his duty to inspect the boiler, and keep it in a reasonably safe condition. The court sustained a demurrer to the petition. An amended petition was filed, in which it is averred that the plaintiff was injured on the 14th day of March, 1902; that the mill was leased to Warren to enable him to at once manufacture lumber; that, after the mill was leased to him, he moved it from defendant's premises, and used it about two weeks before the explosion occurred; that at the time the mill was delivered to Warren defendant knew of the defective and dangerous condition of the boiler, or by the exercise of ordinary care could have known of it, and that it was his duty to inspect and keep it in a reasonably safe condition, did not state a cause of action. The mill was removed from defendant's premises and his control. He had nothing to do with the employment of the plaintiff, nor had he control of him in the performance of his duties. The relation of master and servant did not exist. If it did not, then the defendant certainly was not under a duty to inspect the boiler and keep it in a reasonably safe condition. *Central Coal & Iron Co. v. Grider's Adm'r* (Ky.) 74 S. W. 1058. That was the duty of Warren, the master, who employed the plaintiff. The original petition was based upon the theory that, as defendant owned the mill, though he had leased it, and given possession and control of it to Warren, he was under the same responsibility as he would have been had he retained and operated it, and employed plaintiff. There is no rule of law upon which to base a recovery on such a state of facts. In some cases a recovery may be had by a servant against one between whom and himself the relation of master and servant does not exist. There is a variety of such cases. It may be profitable to call attention here to some of them. In *Bright v. Barnett & Record* (Wis.) 60 N. W. 418, 26 L. R. A. 524, the defendant was engaged in building an elevator for grain, and contracted with a fire extinguishing company to construct a fire extinguishing apparatus. The defendant was to furnish the staging that the men employed by the fire extinguishing company would need in perform-

¶ 1. See *Landlord and Tenant*, vol. 22, Cent. Dig. § 440.

ing the work. The staging was defective, and it broke, resulting in the death of one of the men engaged in the work. In that case the defendant undertook to furnish the staging necessary to be used by the contractor and employes. A recovery was allowed, *inter alia*, upon the ground that the defendant had impliedly invited deceased to walk on the staging while he was doing his work. In *Mulchey v. Methodist Religious Society, etc.*, 125 Mass. 487, on an analogous state of facts, the court held there could be a recovery, because the society had in effect invited and induced the injured party, an employe of one who had contracted to do certain painting on its church, to go upon dangerous and defective staging which it had procured to be erected for the use of the contractor and his employes in performing the work under the contract. In *Ford v. Origler, etc.* (Ky.) 74 S. W. 661, it appeared that the defendant owned a building the top floor of which was used for storage purposes. An elevator was in use in the building for their customers and their employes in storing and removing property therefrom. It was defective, and as a consequence an employe of an expressman, while loading goods in the elevator, was injured. The court, in effect, held that defendants were in the possession and control of the building; that the employe was there by defendant's invitation, express or implied; that it was their duty to keep the premises in a reasonably safe condition; and, if the injury resulted from the failure to exercise such care, they were liable in damages therefor. The principle of law upon which that case rested does not apply to the facts of this case. The amended petition supplements the original petition with the averment that the defendant knew of the defective and dangerous condition of the boiler, or by the exercise of ordinary care could have known of it at the time it was leased. It will be observed that it is not averred that defendant knew (without the alternative statement that by the exercise of ordinary care he could have known) of the defective and dangerous condition of the boiler when leased to Warren; therefore there is no charge that he was guilty of acting in bad faith. Taking the alternative averments, in the light of the rule that a pleading must be construed strongly against the pleader, the only charge is that defendant was guilty of negligence in failing to exercise ordinary care to discover the defect in the boiler. Can that averment be the foundation of a cause of action? It would certainly not show a breach of the defendant's contract of lease. He did not guaranty that he had exercised care to discover a defect in the boiler, and that he had failed to find it. If he made no false representations as to the condition of the boiler, no cause of action would exist in favor of the lessee on the contract. If a cause of action could only arise on the contract in favor of the lessee

for a breach of it by reason of fraudulent representations as to the condition of the boiler, certainly nothing less than a fraudulent representation to the lessee could give a cause of action to an employe who was neither a party nor privy to the contract. In *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638, it was held that the manufacturer of a steam boiler is answerable only to his employer for any want of care or skill in the construction thereof; that, after the boiler had been completed and accepted by the employer, who had the exclusive ownership, management, and conduct of it, the manufacturer is not liable for an injury done to a third person by an explosion occurring in consequence of the defective construction of the boiler. To the same effect are the cases of *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503. Had there been fraudulent representations as to the condition of the boiler, then the question would have arisen that was involved in *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146. In that case it was held that when one sells or furnishes an article which is actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries resulting from the defective or unsafe condition to a person who was neither a party to the contract with him nor one for whose benefit the contract was made. But the court also held that one who sells an article which he knows to be dangerous because of concealed defects, without notice of its nature and qualities, commits a wrong independent of the contract, and is liable under the law of torts to any other person who is not himself at fault, though not in privity of contract with him, for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom. If the latter doctrine is correct—and we do not express any opinion on the question—the facts of this case do not authorize its application. What the court means by fraudulent representations are such statements as a party makes with a knowledge that they are not true.

The judgment is affirmed.

CUMBERLAND & O. V. R. CO. v. SHELBYVILLE, B. & O. R. CO. et al.

(Court of Appeals of Kentucky. Dec. 16, 1903.)

STATUTE OF FRAUDS—CONTRACT FOR SALE OF REAL ESTATE—VALIDITY.

1. An option agreement for the sale of the shares of capital stock by the individual stockholders of a railroad corporation, and a subsequent agreement for the sale of the roadbed, rolling stock, and other property of the corporation, are independent transactions.

2. A parol agreement for the sale by a railroad corporation of its roadbed, rolling stock, and other property, being an agreement for the

sale of real estate, is void, within the statute of frauds.

3. A resolution adopted by the directors and stockholders of a railroad corporation declaring their willingness to sell the roadbed, rolling stock, and the other corporate property at a fixed price, and empowering the president of the corporation to consummate the sale, though entered on the records of the corporation, did not constitute a valid contract for the sale of real estate, within the statute of frauds.

Appeal from Circuit Court, Spencer County.
"To be officially reported."

Bill for specific performance by the Cumberland & Ohio Valley Railroad Company against the Shelbyville, Bloomfield & Ohio Railroad Company and another. From a judgment dismissing the bill, plaintiff appeals. Affirmed.

W. W. Thum, Gordon & Gordon, and Dallam, Farnsley & Means, for appellant. Helm, Bruce & Helm, Chas. N. Burch, and L. C. Willis, for appellees.

O'REAR, J. This is a suit by the Cumberland & Ohio Valley Railroad Company, a railroad corporation, against the Shelbyville, Bloomfield & Ohio Railroad Company and the Louisville & Nashville Railroad Company for the specific performance of an alleged contract of sale, by which plaintiff claims that the Shelbyville, Bloomfield & Ohio Railroad Company undertook to sell to it (the Cumberland & Ohio Valley Railroad Company) the railroad running from Shelbyville to Bloomfield, formerly known as the Northern Division of the Cumberland & Ohio Railroad, and later known as the Shelbyville, Bloomfield & Ohio Railroad. The Louisville & Nashville Railroad Company is made a party defendant because it is now the owner of the property, and plaintiff claims that it purchased same with notice of the existing contract between plaintiff and the Shelbyville, Bloomfield & Ohio Railroad Company. The above-named railroad had recently been purchased at a foreclosure sale by a certain syndicate of its bondholders, of whom P. B. Reed, J. Stone Walker, A. L. Schmidt, and others were members. The purchasers organized themselves into the corporation, the Shelbyville, Bloomfield & Ohio Railroad Company, and apportioned to themselves shares of stock in proportion to their respective interests as former bondholders. Peter Arlund, a promoter and broker, conceived the scheme of selling this property, or combining it, with other properties, into a more extensive and profitable railroad system. He, with certain associates, organized a corporation called the Southern Finance & Development Company, which they caused to be incorporated under the laws of West Virginia. This last-named corporation took an option upon the capital stock of about all of the stockholders of the Shelbyville, Bloomfield & Ohio Railroad Company. The option provided that it was to continue for 30 days from its date, July 1, 1901, but that it might be

extended 15 days longer upon the payment of \$500 to P. B. Reed for the stockholders, but it must be accepted in writing and signed by the development company within the time allowed by the contract, "otherwise it is considered withdrawn." It provided for the payment of certain claims against the railroad company, and for the payment to the stockholders for their shares of stock at the rate of \$600 per share. This made the total consideration a little over \$126,000, which was to be paid in cash upon the acceptance of the option. Arlund and his associates organized the appellant, Cumberland & Ohio Valley Railroad Company, with a view to ultimately taking over the railroad properties under the option named, when it should be accepted. The option was never accepted. Nor did the Southern Finance & Development Company, or any one else for it, pay or tender to the stockholders of the Shelbyville, Bloomfield & Ohio Railroad Company, the purchase money, or any of it. A few days before the expiration of the option period it was discovered that at least one of the interests represented by the option could not be transferred within the time covered by the option. At least, it was so considered by the parties. It was then attempted to execute the agreement by an actual conveyance of the corporeal property (that is, the railroad and its rolling stock and other properties, instead of the transfer of the capital stock), the consideration to be the same as would have been paid for the capital stock; leaving the purchase price to be distributed among the original stockholders according to their interests. This agreement was in parol. Arlund's companies had arranged (so he claims) to raise the purchase money upon mortgage bonds to be issued upon the property, and to be negotiated in Philadelphia. The stockholders of the Shelbyville, Bloomfield & Ohio Railroad Company, at a called meeting, adopted a resolution authorizing and empowering their board of directors to execute a deed to all of the company's property to the appellant railroad company upon the payment of \$126,878.67. This resolution was spread upon the records of the company, and signed by the chairman of the meeting and the secretary. Immediately the board of directors of appellee company adopted a resolution authorizing and empowering their president, P. B. Reed, to execute and deliver the deed referred to upon the payment in cash of the consideration named. This resolution was adopted at a meeting of the board of directors at which a quorum was present, and was spread upon the minutes of the board's meetings, signed by the president and secretary. The deed was drawn, signed, and acknowledged by the president and secretary of the grantor corporation, but retained in the possession of its president, and not delivered. It was so prepared that if the purchase price was paid on the 15th of August, 1901, in Philadelphia, where the representatives of

the corporations were to meet, it could be delivered and the transaction closed without delay. The board of directors of appellant, Cumberland & Ohio Valley Railroad Company, by a resolution adopted, authorized the acceptance of the deed mentioned, and empowered its president, Arlund, to negotiate necessary loans to pay the purchase price. Arlund failed in his negotiations. The purchase price was not paid, nor has it ever been tendered.

The question is whether these resolutions altogether satisfy the requirements of the statute of frauds and perjuries, that a contract respecting the sale of real estate, or some memorandum thereof, must be in writing, and signed by the parties to be charged. The court is of the opinion that the option agreement for the sale of the shares of capital stock by the individual stockholder of the Shelbyville, Bloomfield & Ohio Railroad Company was an entirely independent transaction from the proposal to sell the railroad, so far as the corporation was concerned. It could have no effect whatever upon the title of the corporation to its property. The subsequent agreement between the president of the railroad company proposing to buy the property in question (that is, the roadbed, rolling stock, etc.) and the president of the railroad company proposing to sell it, was a proposition in parol regarding the sale of real estate, and, not being in writing, was not obligatory upon either party. It was, of course, competent for the parties to have executed it by writing subsequently signed and delivered. It is claimed for the appellant that this was done, in the matter of the making of the entries upon the records of the respective corporations above referred to, and the signing and acknowledging of the deed by the vendor corporation, but which was retained in the possession of its president until such time as the purchase money should be paid. To constitute a valid contract for the sale of real estate, it is essential that the parties to it (the vendor and the vendee) should have agreed upon the terms and the property concerned; that this agreement should have been reduced to writing, and should have been signed by the party to be bound thereby; and that the contract so signed should have been delivered. A resolution adopted on the part of the directory or at a stockholders' meeting of a corporation declaring their willingness to sell the corporate property at a certain figure, and empowering the president to consummate the sale by executing and delivering the necessary deed, will not alone be a contract of sale. It is so far an unexecuted purpose or intention to sell. It is no more a contract of sale than would have been a power of attorney executed by the owner to an attorney in fact, clothing him with authority to make a conveyance of the property upon the satisfaction of certain conditions. It was only an investiture of the president of the company with legal author-

ity to make a valid contract of sale, which he otherwise did not have. The parties were left in precisely the same attitude, so far as having contracted with each other was concerned, as they were when the presidents of the two companies had respectively agreed with each other in parol upon the terms. There was no time when the Shelbyville, Bloomfield & Ohio Railroad Company was legally bound to convey its property to the Cumberland & Ohio Valley Railroad Company. All that the parties undertook to do in their effort to close that transaction was voluntary, and fell short of becoming obligatory as a contract, executed or otherwise.

The judgment of the circuit court dismissing appellant's bill for a specific execution of the alleged contract concerning the sale of the property of the appellee corporation, Shelbyville, Bloomfield & Ohio Railroad Company, must be affirmed.

BALL v. RAMSEY.

(Court of Appeals of Kentucky. Dec. 16, 1908.)

HOMESTEAD—ABANDONMENT—SUFFICIENCY OF EVIDENCE.

1. An owner of a homestead purchased other land, and took possession thereof and occupied it with his family, with the idea that he could sell it for an advance. Later the purchase was canceled by mutual consent. When he left his homestead, it was his intention to return as soon as he could dispose of the other land. He left his son-in-law in possession, and also a considerable amount of his household goods and personal property. *Held* not to show that he abandoned his homestead.

Appeal from Circuit Court, Laurel County.

"Not to be officially reported."

Action by Nicholas Ball against W. R. Ramsey. From a judgment of dismissal, plaintiff appeals. Reversed.

Jas. Sparks, for appellant. W. R. Ramsey, pro se.

BURNAM, C. J. Prior to the 10th day of March, 1900, the appellant, Nicholas Ball, had owned and occupied a tract of about 140 acres of land, of less value than \$1,000, as a homestead, for more than 30 years. On that day he contracted to purchase from Gotlieb Ryser a house and about 20 acres of land, several miles distant from his home, at the agreed price of \$300, and shortly thereafter he took possession of and occupied the place bought of Ryser with his family. On the 10th day of July, 1900, the appellee, W. R. Ramsey, as surviving partner of Randel & Ramsey, procured the sheriff of Laurel county to levy an execution in his favor on the 140-acre tract of land to satisfy an execution which issued in his favor from the circuit court clerk's office of Laurel county. The sheriff advertised the sale of the 140 acres to satisfy this execution. Thereupon appellant,

¶ 1. See Homestead, vol. 25, Cent. Dig. §§ 314, 325.

Ball, instituted this suit both against the plaintiff and L. B. McHargue, the sheriff, for an injunction restraining the sale of the property under the execution, upon the ground that it was his homestead, and exempt from levy or sale. The circuit judge dismissed plaintiff's petition, and he has appealed.

Appellant testified that he had paid nothing upon the place purchased of Ryser; that he bought it with the idea that he could "fix it up," and in a short time sell it for an advance; but that he had been disappointed in this respect, and after the levy of defendant's execution his trade with Ryser had been, by mutual consent, canceled, and he had taken his property back. He also testified that, at the time he left his homestead, it was his intention to return to it in a short time, or as soon as he could dispose of the property purchased from Ryser; that he left his son-in-law in possession, and also a considerable amount of his household goods and personal property. His testimony is corroborated both by Ryser and his son-in-law, and is uncontradicted. In our opinion, these facts do not show that plaintiff had abandoned his homestead. *Collins v. Gibson* (Ky.) 54 S. W. 945; *Summers v. Sprigg* (Ky.) 35 S. W. 1038; and *Cincinnati Warehouse Tobacco Co. v. Thompson*, 105 Ky. 627, 49 S. W. 446. The facts in this case do not bring it within the decision of *Garrison, etc., v. Penn Bros.* (Ky.) 66 S. W. 14. relied on by appellee.

For reason indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. SULLIVAN'S ADM'R.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

"Not to be officially reported."

Petition for modification of opinion. Overruled.

For former opinion, see 76 S. W. 525.

B. D. Warfield, for appellant. C. J. Wadstill and Johnson & Wickliffe, for appellee.

HOBSON, J. On the return of the case to the circuit court, the defendant may be allowed to amend its answer, if it desires to do so.

Petition for modification overruled.

RAMSEY v. KEITH'S ADM'R et al.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

INFANTS—SUIT—APPEAL INDIVIDUALLY—FAILURE TO OBJECT—WAIVER.

1. Under Code, § 35, providing that the action of a person under disability must be brought by his guardian ad litem, an appeal by an infant must be taken by such guardian, and not in his own name.

2. Civ. Code, § 92, provides that a special demurrer is an objection which shows that plain-

tiff has no legal capacity to sue. Section 118 provides that a party may, by an answer or other pleading, make the objection mentioned in section 92, the existence of which is not shown by the pleading of his adversary, and that a failure to do so is a waiver. *Held*, that where an infant improperly appealed in his own name, instead of by his guardian ad litem, but no objection was made before submission, or before a motion to affirm as a delay case, the objection was waived.

Appeal from Circuit Court, Fayette County. "Not to be officially reported."

Suit between L. J. Ramsey and Lilly Keith's administrator and others. From the judgment, the former appeals. Petition to dismiss appeal. Petition overruled.

Z. Gibbons and O. B. Ambrose, for appellant. L. J. Moore, for appellees.

HOBSON, J. The appeal in this case was prosecuted by the infant, L. J. Ramsey, in his individual name only. By section 35 of the Code, the appeal should have been prosecuted in the name of the infant by his guardian ad litem. If objection had been made before submission, the irregularity might have been corrected, for ordinarily the court will not dismiss an infant's case because of an irregularity such as this, but will allow the proper correction to be made. But no objection was made before submission or the motion to affirm as a delay case, and the case was heard on the merits on this motion. The fact that appellant had no capacity to sue was, under the Code, only matter of abatement (Civ. Code, §§ 92, 118), and this was waived by submission on the merits. After trying his fortunes on the motion to affirm as a delay case, and there losing, appellee cannot raise the question that appellant has not capacity to sue. Such defenses must be presented at the threshold, or are waived. *Warfield v. Gardner's Adm'r*, 79 Ky. 583.

The petition is overruled.

LOUISVILLE & N. R. CO. v. BROOKS et al.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

RAILROAD—FARM CROSSING—RIGHT OF LAND-OWNER—JURISDICTION—APPEAL—EVIDENCE.

1. Where evidence is conflicting, the finding of the trial court will be sustained.

2. Where a railroad company has maintained a farm crossing 35 years because its charter directed it, and successive owners have used it during that time under claim of right, and it is indispensable to the beneficial use of the land, the present owner is entitled to its maintenance as a right.

3. A circuit court has jurisdiction to compel a railroad company to replace a farm crossing to which the owner of the land is entitled, a judgment for damages not affording adequate relief.

4. A party cannot, on appeal, question the ownership of land as alleged in the petition and not denied in the answer.

5. Evidence *held* to show that complainants in an action to compel a railroad company to replace a crossing were the owners of the land.

Appeal from Circuit Court. Bullitt County.
 "Not to be officially reported."

Action by Joseph Brooks and another against the Louisville & Nashville Railroad Company to compel it to replace a farm crossing, and for damages. From a judgment in favor of complainants, defendant appeals. Affirmed.

Fairleigh, Straus & Eagles, for appellant.
 Chapeze & Halstead, for appellees.

NUNN, J. Appellant owns and operates a line of railway running through Bullitt county. The road passes through a tract of land which at the time of its construction (1833) was owned by W. S. Brooks, the father of appellees, and contained about 450 acres. In accordance with the requirements of appellant's charter, a farm crossing was made to connect the tracts thus divided. W. S. Brooks died in the year 1854, and this 450 acres of land was divided between his two sons and a daughter. The northern tract fell to W. W. Brooks, the middle tract to appellee Joseph Brooks, and the southern tract fell to appellee Anna B. Johnston. This crossing made by appellant was situated near the line between W. W. Brooks and appellee Joseph Brooks; appellant claiming that it was on the land of W. W. Brooks, and appellees contending that it was on the land of appellees. Upon this issue much proof was heard, and the lower court decided that appellees' contention was correct. The appellant in the year 1889 constructed another track, making a double track through Bullitt county; and at that time it took up or removed this farm crossing without the consent and over the objection of appellees, thereby preventing them from passing from their lands on the west side of the roads to the lands on the east side, except at times that they were permitted to pass through the farms of adjoining landowners, when they could do so without injury to crops or the lands. This condition of affairs continued until March, 1901, when appellees brought this action to compel appellant to restore this crossing and to maintain same, and for \$1,500 damages for the length of time they were deprived of the use and benefit of it. The lower court granted the prayer of the petition, and directed appellant to replace this crossing; fixing a time in the future by which the crossing was to be completed, and also adjudging that appellees recover \$300 in damages for the injury in being deprived of the use of this crossing from 1889 to the beginning of their action.

Appellant asks a reversal for several reasons: (1) Because the crossing removed by it was not on the lands of appellees. (2) The court should not have entertained jurisdiction of the case, for it had no power to adjudicate a restoration of the crossing. That appellees' only remedy was a suit for damages. (3) That appellee Joseph Brooks had

no right to a judgment for the restoration of the crossing, because he was only a tenant from year to year of his co-appellee, and was only entitled to sue for damages done to his right of possession for the first year.

Considering appellant's reasons for reversal in the order named:

The evidence was very conflicting on the question as to whether or not the crossing was on the land of appellees or W. W. Brooks. There was sufficient evidence to sustain the court's finding that it was on the land of appellees.

The court was right, under the evidence in this case, in entertaining jurisdiction and adjudging a restoration of the crossing. To deny this power would have left appellees without complete and adequate relief.

The proof shows that this crossing was made and maintained by the appellant for 35 years, not as an act of grace, but because its charter directed it, and that appellees from the year 1854 to the time of its removal, in 1889, had used this crossing, not by permission, but under a claim of right. 3 Elliott on Railroads, § 1140, says: "It seems to be well settled that a landowner may acquire a private crossing over a railroad right of way by adverse user. The right to acquire a crossing in this way has been declared in a number of cases. Thus, where a crossing was used continuously for 49 years, and no effort was made by the railroad to discontinue it, it was held that the railroad was liable for its maintenance. Twenty years' user has been held sufficient to acquire the right of a private crossing," etc. Many decisions of this court hold that 15 years' uninterrupted use of a passway under a claim of right raises the presumption of a grant. Under the facts of this case, this right of passway or crossing belonged to appellees. It was appurtenant to their land, and was indispensable to their enjoyment and beneficial use of their lands. They cannot derive any enjoyment or benefit from that which is absolutely theirs, except by the restoration of this crossing. It is true, the appellees might waive their right to the crossing, and sue for the damage, as authorized by appellant's charter. But certainly this provision of the charter does not deprive the appellees of the right to elect to sue for and recover that which belongs to them.

The appellant is not in a position to receive any benefit from its third objection to the action of the lower court, for the reason that appellees alleged in their petition that they were the owners of this land (describing it), and appellant did not deny same. But even if it had done so, the proof shows that they did own it—appellee Johnston, the fee; and Joseph Brooks, a life estate. They both swear to this. She has the legal title of record, and he testifies without any contradiction that he held a writing, given him by his sister and co-appellee, giving to him

the possession and the use of this land during his life.

For these reasons, the judgment of the lower court is affirmed.

BANK OF CUMBERLAND v. SIMPSON.

(Court of Appeals of Kentucky. Dec. 11, 1903.)

JUDGMENTS — CONCLUSIVENESS — COLLATERAL ATTACK—SCHOOL DISTRICTS — TRUSTEES—POWERS.

1. Possession of a schoolhouse having been taken from the trustees by order of court appointing a receiver therefor, the trustees had the right, and it was their duty, to rent a suitable place for conducting the school.

2. An assignee of a schoolhouse contractor sued the school-district trustees, asserting a lien against the schoolhouse, and obtained a judgment placing the property in the hands of a receiver, to be rented to pay the debt. The receiver rented the building to the trustees, who levied a tax to pay the rent. *Held* that, the court having acquired jurisdiction, its judgment was not void, and hence could not be collaterally attacked in an action by a taxpayer to enjoin enforcement of the tax so levied, on the ground that the original contract for building the schoolhouse was unconstitutional.

Appeal from Circuit Court, Cumberland County.

"Not to be officially reported."

Action by the Bank of Cumberland against B. L. Simpson. From a judgment for defendant, plaintiff appeals. Affirmed.

J. E. McMurtry, for appellant. Sandige & Sandige, for appellee.

PAYNTER, J. The appellant sought to enjoin the sale of some of its property in satisfaction of a tax levied by the school trustees of a district of Cumberland county, claiming that the levy of the tax was illegal, because the trustees were to use the tax collected, or a part of it, to pay the rent of the schoolhouse for the use of the common school district. The facts out of which the controversy arose are as follows: The schoolhouse in the district was condemned by the county superintendent of common schools. The trustees purchased a lot, and entered into a contract with one Baker to erect a schoolhouse for the district, and to make other necessary improvements connected therewith, at a cost of something over \$1,900, but the indebtedness thus incurred exceeded the income and revenue for that year, and the assent of two-thirds of the voters had not been obtained. Thereupon Frank, to whom the contractor had assigned the debt, instituted an action in the Cumberland circuit court, in which he asserted a lien upon the schoolhouse for about \$900 (the balance having been paid), and asked to have the property sold to pay his debt, and, if that could not be done, to have it placed in the hands of a receiver and rented until the income arising therefrom would pay his debt. The court

adjudged that the property should be put in the hands of a receiver, and directed him to rent it until the income derived therefrom would pay the debt. That action was against the trustees in their corporate character. The judgment was rendered in 1899, and no appeal was prosecuted from it. After this was done, the school district had no building in which to have the common school taught. Thereupon the trustees rented the school building from Frank (he having rented it under the order of court), and agreed to pay him \$250 for the use of it for a certain time. Frank agreed with the trustees that the whole amount, when paid (less \$20 which he had paid for the building at a public renting), should be applied as a credit upon the debt, which the court decided should be satisfied by the rent of the property. There is no question in the case as to the reasonableness of the rent which the trustees agreed to pay. If a stranger had rented the schoolhouse from the receiver of the court at \$250, that amount, less the cost of renting, would have been applied by the court as a credit on Frank's debt, which the court had ordered paid with the rent. The court having taken from the trustees the possession of their schoolhouse, and thus prevented them from having the school taught therein, the court is of the opinion that the trustees had the right to, and it was their duty to, rent a suitable place for conducting the school. Doubtless the new school building was the most available and desirable building in the district for that purpose. If the school building had been burned or damaged so it could not be used for school purposes, there certainly can be no doubt but what the trustees would have been authorized to procure another one temporarily.

The real question in the case is, was the judgment of the court, in placing the property in the hands of the receiver, void? If it is void, then the question would recur as to the right of the trustees to levy and collect a tax, and apply it to the payment of the debt contracted in the erection of the schoolhouse. Under the law, the trustees are a body politic and corporate, capable of suing and being sued. The creditor certainly had the right to go into court and have the question adjudged as to what rights he had against the district for the claim which he asserted for erecting the schoolhouse. The trustees of the district were the necessary and proper defendants in the action. So we have a case where the court had both jurisdiction of the parties and subject of the action, and rendered a judgment which has never been vacated, modified, or reversed. If any criticism can be made of the judgment, it is because it is erroneous. The claim in the action might have been invalid by reason of a statute or constitution, but that was a consideration which should have induced the court to have rejected it. The court adjudged that it was a valid claim.

¶ 1. See *Schools and School Districts*, vol. 43, Cent. Dig. § 176.

In the opinion of the court, the judgment is not void. In the case of *Bank of Columbia v. Taylor County* (Ky.) 65 S. W. 451, the question arose as to whether or not a judgment was void which was rendered on a debt, the creation of which, it was claimed, was forbidden by section 157 of the Constitution. The court held that the judgment was conclusive against the county, and, among other things, said: "The judgment against the county is conclusive on it as to the justice of the debt. That judgment has not been appealed from. The court had jurisdiction of the parties and the subject-matter, and no defense which should have been asserted there can be relied on in this action, for the judgment is not void." In *Hardwicke, etc., v. Young* (Ky.) 62 S. W. 10, the court held that a judgment denying the right to enjoin a tax which was claimed to have been levied in violation of section 157 of the Constitution was a bar to another action where the same relief was sought, although in the first action the constitutional question was not raised. In *Arnold, etc., v. Shields, etc.*, 5 Dana, 19, 30 Am. Dec. 669, the court said: "But if, without the enactment of 1836 (Laws Ky. 1836, p. 594, c. 419), he [the magistrate] had jurisdiction over a suit for debt on a claim not exceeding fifty dollars, the fact that there was no debt, because the statute under the sanction of which it alone could exist was void, could not either oust or translate the jurisdiction to decide whether the debt, as claimed, was due or not. If the statute be unconstitutional, he ought to have so decided, and consequently he erred in rendering a judgment for plaintiff in the warrant, and that error might have been corrected by an appeal to the circuit court. But if he had no jurisdiction, his judgment was not merely erroneous—it was void—and a ministerial officer might have been guilty of trespass in attempting to enforce it by execution. Is the judgment void? We think not, even if the act of 1836 be a nullity. A judgment, however erroneous, is not void merely because it was rendered on a void claim. It can never be void when the court which rendered it had jurisdiction over the suit brought to obtain it, and a right to decide whether the demand be legal and enforceable or not." We are of the opinion that section 184 of the Constitution has no bearing on the question under consideration. Besides, if it had, then it should have controlled the action of the court in proceeding to place the property in the hands of the receiver, and, as that judgment is conclusive of the question therein decided, the section mentioned cannot be relied upon to sustain this proceeding. For the same reason, section 157 of the Constitution is not available for that purpose. The court necessarily adjudged that that section was no barrier to the enforcement of the collection of Frank's claim through the court's receiver. If we hold that the judgment is

void by reason of the sections of the Constitution mentioned, then an anomalous condition would exist, and it is illustrated by a statement of what could transpire. Suppose this court, on an appeal from the Frank judgment, had affirmed it; if the argument of counsel be sound, it would have remained void, because the constitutional provisions would have rendered void the judgment of this court, if they did that of the circuit court. If this court had affirmed the judgment, it would have, in effect, decided that the Constitution did forbid the payment of Frank's claim in the manner adjudged by the circuit court. Suppose there was a change in the personnel of the judges of the circuit court and of this court, and the incumbent of the circuit bench should be of the opinion that the Constitution did forbid the collection of Frank's debt in the manner adjudged by his predecessor, and for that reason hold the judgment void, and this court, by reason of the change in its personnel, would affirm the judgment for the same reason which induced the circuit court to render it; the first judgment would not be declared void because the court which rendered it did not have jurisdiction of the parties and subject-matter, but because, in the opinion of the incumbents of the judicial positions, their predecessors rendered erroneous judgments. If this could be done, there would be no stability in judgments of courts. The mere statement of the supposed cases answers the argument of counsel.

The judgment is affirmed

TOWN OF BROMLEY v. BODKIN.

(Court of Appeals of Kentucky. Dec. 15, 1903.)

MUNICIPAL CORPORATIONS—SIDEWALKS—NEGLECT—MAINTENANCE—LIABILITY—ACTIONS FOR INJURIES—QUESTIONS FOR JURY—NOTICE TO CITY.

1. Where a sidewalk had been defective four or five months, the question of notice to the town authorities of the defect was one for the jury.

2. A city is liable for the negligent maintenance of a sidewalk situated in the inhabited part thereof, where its authorities had taken control of the street on which the sidewalk was, and had invited the public to use it, although the sidewalk was constructed by the owner of the abutting property without requirement of the city.

Appeal from Circuit Court, Kenton County. "Not to be officially reported."

Action by Mary Bodkin against the town of Bromley. From a judgment for plaintiff, defendant appeals. Affirmed.

Myers & Howard, for appellant. B. F. Graziani, for appellee.

HOBSON, J. Appellee recovered judgment against appellant in the sum of \$275 for a severe injury to her ankle, caused by a fall

¶ 2. See *Municipal Corporations*, vol. 28. Cent. Dig. § 1603.

which occurred in this way: Appellee was employed to solicit orders for a tea store in Ludlow, and for this purpose went to Bromley, which was not far from Ludlow. In coming out of the house of a customer on Kenton street, she undertook to step on the sidewalk, which was constructed of plank laid across scantlings that ran with the sidewalk. The planks, which were laid across the scantlings and at right angles to the direction of the sidewalk, were long enough for two people to walk upon them abreast. When appellee stepped upon the plank for the purpose of getting upon the sidewalk, it was not nailed down at the other end, and tilted up with her. By this she was thrown down, and her foot in some way was caught and severely wrenched and sprained. She was laid up for seven months. She proved that the same thing had happened to another person at the same place four or five months before, and that the plank had remained there loose from that time until she was injured, and until about a week afterwards, when the sidewalk was repaired. Bromley is a place of about 600 people. Kenton is a cross-street running between Main and Roman. It was laid off by the town about the year 1892, but the town authorities had done no work upon it except to fill some holes in the carriageway and clean out the gutters. There were gutters on each side made by a plow. There were no sidewalks on the square except the one she was hurt on, which was constructed by the owner of the property. At other points the people walked on the ground, or on planks lying on the ground. There were a church and three or four houses on the square, but the town authorities had never required the property owners to build sidewalks.

It is urged for the town that it is not responsible for appellee's injury, because no proof was made showing that it had notice of the defect in the sidewalk, and because the town authorities had not taken charge of the sidewalk on this street. As the plank had been loose for some months, it was a question for the jury whether the town authorities ought to know of the defect in the sidewalk. Where a defect has existed as long as this, the court cannot say that the town authorities might not, by the exercise of ordinary care, learn of the defect and have it remedied. The question, therefore, of notice to the town authorities was properly left to the jury. *Fordsville v. Spencer* (Ky.) 65 S. W. 132; *Wickliffe v. Moring* (Ky.) 68 S. W. 641. It is immaterial who constructed the sidewalk, if the defect was known to the city authorities, or might have been known by them, in the exercise of ordinary care, in time to have repaired it before the accident. The sidewalk was old and decayed. The city, in allowing it to remain out of repair, failed to keep the street in order, and is liable because the sidewalk, in the condition it was and had been for some time,

was, as found by the jury, dangerous. 2 *Smith on Municipal Corporations*, § 1304.

In *Henderson v. Sandefur*, 74 Ky. 550, it was held that the city must be permitted to exercise its discretion as to whether the public interest requires the improvement of the streets in the uninhabited or sparsely settled portions of it, and its decision is final. That was an action to recover for injuries to a carriage and horses, received on Eleventh street, in Henderson, outside of the inhabited portion of the city, and at a point where Eleventh street had never been used by the general public as a street, or recognized as such by the city government, and the evidence tended to show that neither the wants nor the convenience of the public required that it should be maintained as a street. The judgment below in favor of the plaintiff was reversed, but in reversing the case this court said: "If the city council had taken control of the street, and, by improving or repairing it, had invited the public to use it, the city would not be heard to say that it was not necessary as a street. Such action would show that the council did regard it as necessary, or, at least, as expedient, to have a street there for the use of the public."

In this case, the city authorities had taken control of Kenton street, and had invited the public to use it. It was within the inhabited part of the town, and was necessary for the wants and convenience of the public.

Judgment affirmed.

LEWIS et al. v. KASH.

(Court of Appeals of Kentucky. Dec. 15, 1903.)

FRAUDULENT CONVEYANCES—EVIDENCE—SUFFICIENCY.

1. In a suit by a judgment creditor to subject a half of a tract of land to the lien of the judgment, plaintiff claimed that, before the judgment, the judgment debtor and a third person jointly purchased the tract, and obtained a joint deed thereto, which was not recorded, and that after the judgment their grantor conveyed the tract by deed to the third person alone. His testimony was that the judgment debtor and the third person agreed that the judgment debtor should surrender his interest to the third person, who should make a deed thereof to the judgment debtor's wife; that both judgment debtor and the third person lived on the tract in different houses, and that they had agreed on a division thereof; and that, in a suit by the judgment debtor against the third person, the former swore that he owned a half of the tract. The third person and the judgment debtor testified that the second deed was made because the judgment debtor would be unable to pay for his share, and that the third person had paid the entire purchase price. *Held* to warrant a finding that the judgment debtor owned a half of the tract.

Appeal from Circuit Court, Clay County.

"Not to be officially reported."

Action by S. H. Kash against Thad Lewis and another. From a judgment for plaintiff, defendants appeal. Affirmed.

W. W. Rawlings, for appellants. Hazelrigg & Chenault, for appellee.

BURNAM, C. J. On the 15th day of November, 1888, Philip Fields executed his promissory note to S. H. Kash for \$35, with interest thereon until paid. In 1898 Kash sued on this note, and recovered a judgment therefor, on which execution issued, and was returned by the sheriff, "No property found." In 1899 he brought this suit, in which he alleged that, after the creation of the debt for which the judgment was rendered in his behalf, Fields and his father-in-law, Thad Lewis, had jointly purchased from N. C. Potter a tract of 300 acres of land, and that a deed therefor had been executed to them jointly; that, after the rendition of the judgment in his favor, Fields and Lewis, never having placed their deed on record, had procured the grantor, Mrs. Potter, to execute a new deed to Lewis alone, for the purpose of hindering the collection of his debt. Lewis was made a party to this suit, and filed an answer in which he admitted that Fields and himself had jointly contracted for the purchase of the land from Mrs. Potter, and that she had made to them a joint deed, but that soon after the purchase Fields became satisfied that he would not be able to pay his part of the purchase money, and had agreed that Lewis might assume the whole debt, and become the owner of the entire tract of land, and that, in accordance with this agreement, he had actually paid the entire purchase money to Mrs. Potter, and that she had executed to him alone a deed for the land. The testimony of both Fields and Lewis supports the averments of Lewis' answer. Plaintiff, on the other hand, introduced the testimony of two witnesses, Annie J. Fields and Pollie J. Little, who testified to a conversation between Lewis and Fields in which it was agreed that Fields should surrender his interest in the land to Lewis, and that Lewis was subsequently to make a deed to Fields' part to his wife, who was a daughter of Lewis. It is also shown that both Lewis and Fields lived on the tract of land in different houses, and, before the institution of plaintiff's suit, had agreed upon a division of the land between them. It also appears that, in a suit brought by Fields against a third party for trespass, he testified that he was the owner of one-half of the land. Under this showing, the trial court decided that Fields was the owner of one-half of the tract of land, and that it was liable for plaintiff's debt.

We see no reason why the judgment should not be affirmed, and it is so ordered.

BYBEE'S EX'R et al. v. POYNTER.

(Court of Appeals of Kentucky. Dec. 16, 1903.)

GUARDIAN AND WARD—GUARDIAN'S BOND—SURETIES—LIABILITY—ACTIONS—LIMITATIONS—PERSONS ENTITLED TO PLEAD—HEIRS—SUSPENSION OF STATUTE—NONRESIDENTS.

1. Where a judgment against a guardian imposed a lien on real estate, the Court of Ap-

peals had jurisdiction of an appeal therefrom, without regard to the amount of the judgment.

2. Ky. St. 1899, § 2521, provides that a ward's right of action on her guardian's official bond shall not be deemed to have accrued until the ward attains the age of 21 years; and section 2530 declares that a surety for a guardian shall be discharged when five years shall have elapsed without suit after the accruing of the cause of action. *Held* that, where no suit was brought against sureties on a guardian's bond for his defalcation until more than five years had elapsed after the ward became of age, the sureties were discharged from liability.

3. Where, at the time suit was brought on a guardian's bond, the claim was barred by limitations as against defendant's deceased father, who was a surety on the guardian's bond, defendant was entitled to interpose the plea of limitations with the same effect that his father could if he had been living, in order to relieve from liability defendant's interest in certain real estate which had descended to him from his father.

4. Ky. St. 1899, § 2531, provides that where a cause of action accrues against a resident of the state, and he, by departing therefrom, obstructs prosecution of the action, the time of the continuance of such absence from the state, or obstruction, shall not be computed as any part of the period within which the action may be commenced. *Held* that, where a defendant was not a resident of the state when plaintiff's cause of action accrued, the fact that he had previously been a resident of the state, and had removed therefrom, did not prevent the running of limitations in his favor.

Appeal from Circuit Court, Barren County.
"To be officially reported."

Action by A. E. Poynter against William Bybee's executor and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Underwood & Williams, for appellants.
Luther James, for appellee.

NUNN, J. It appears that R. D. Bybee was on the 3d of January, 1880, appointed public administrator and guardian for Barren county, Ky., and thereupon executed a bond as such, containing the usual covenants, with William Bybee, his father, and Clinton Bybee, his brother, as sureties. After the execution of this bond, and in the same year, R. D. Bybee received as such guardian \$190.13 belonging to the appellee, who was then an infant, and arrived at the age of 21 years in the month of June, 1891. She within 2 or 3 years after that married one Poynter. Her former name was Kinslow. In the month of October, 1891, her guardian made a settlement with the county court, and it was ascertained that he then was indebted to appellee in the sum of \$248. R. D. Bybee then gave her a mortgage on two mules to better secure this sum to her. Appellee enforced this mortgage lien in the year 1892, and obtained a judgment against her guardian for this sum of \$248, with interest, and enforcing the lien. The mules were sold; and, after paying the costs of the suit, she received of the proceeds \$85. She further received from her guardian in 1898 one mare at the price of

¶ 4. See Limitation of Actions, vol. 23, Cent. D. c. §§ 440, 458.

\$50. Appellee in November, 1902, instituted this action upon the guardian's bond, to secure the balance due her, against R. D. Bybee, public administrator and guardian; R. D. Bybee, executor of the will of Wm. Bybee, R. D. Bybee, Clinton Bybee, and George Bybee. William Bybee, one of the sureties on this bond, died in the year 1885. By his will he nominated his sons R. D. Bybee and Clinton Bybee his executors, and, after making provision for his wife, Anna Bybee, he directed that the remainder of his estate be divided equally between his three sons, R. D., Clinton, and George Bybee. It appears that George Bybee, under this will, secured from the executors about \$800 about the year 1888. Wm. Bybee, by his will, devised to his wife, Anne, for her life, a house and lot in the town of Glasgow, Ky., and at her death it was to go to his three sons herein named, and directed that his executors, at the death of their mother, sell this property, and divide the proceeds equally between themselves and their brother George. Their mother died in the year 1898. Appellee, in her petition, alleged the date of the death of William Bybee; the appointment of his executors in the year 1885; that George Bybee, as devisee, had received of the personal estate of his father more than \$300—and described this house and lot in Glasgow, Ky., for the purpose of obtaining a lien on it, and enforcing appellants' liability as devisees under their father's will, as provided by sections 2084, 2089, Ky. St. 1899. The appellants answered, and denied the liability of the sureties of R. D. Bybee on this bond, and interposed the plea of the statute of limitations. Appellee replied, denying that they were released by such statute, and alleged that George Bybee had, since long before her cause of action accrued, been a nonresident of the state of Kentucky; that his place of abode was out of this state; and that for this reason she was obstructed and hindered in bringing and prosecuting her action against him. The court rendered judgment against all the appellants for the debt, and adjudged that appellee had a lien on George Bybee's interest in the house and lot at Glasgow, and enforced same, and stated in the judgment that it appeared that this house and lot had been sold in an action by the executors, and the proceeds of the sale were ordered to be paid to the master commissioner. It was further ordered that the two actions be consolidated, and, when the proceeds of sale were collected, the commissioner was ordered, out of George Bybee's one-third interest, to pay appellee's debt, interest, and costs.

Appellee moved to dismiss this appeal, claiming that the principal of the judgment is less than \$200, and that for that reason this court has not jurisdiction. This appeal is from a judgment enforcing a lien on real estate, and this court has jurisdiction. See the case of *Fowler & Guy v. Pompelly* (Ky.) 76 S. W. 173, and cases therein cited. Sec-

tion 2521, Ky. St. 1899, says that the right of action upon the official bond of a guardian shall not be deemed to have accrued before the ward attains the age of 21 years. Section 2550, Ky. St. 1899, says that a surety for a guardian shall be discharged from all liability as such when five years shall have elapsed, without suit, after the accruing of the cause of action. It is agreed that appellee arrived at the age of 21 years in the month of June, 1891. Therefore her right to make the sureties of her guardian liable for this debt ceased in the month of June, 1896. Appellee does not attempt, in her reply, to allege any matter to avoid or stop the running of the statutes in favor of the sureties, but she does state that George Bybee, a devisee of Wm. Bybee, who was a surety, was a nonresident of the state, and for that reason she was hindered and obstructed in the collection of her claim by suit.

Under the statutes and the facts as they appear of record, it was error to render judgment in favor of appellee against the executors of William Bybee and Clinton Bybee, the sureties of R. D. Bybee. It appears, however, that the court did not subject any part of the interest of R. D. and Clinton Bybee in the house and lot above mentioned to the payment of appellee's judgment. This was correct with reference to the interest of Clinton Bybee, but error in not subjecting R. D. Bybee's interest, as he was the principal, and the claim was not barred as to him.

It was clearly erroneous to render judgment against George Bybee, and subject his interest in the house and lot to the payment of appellee's claim. He had not signed the guardian's bond, and had made no promise or agreement to pay this claim. His only liability thereon existed by virtue of the provisions of sections 2084, 2089, Ky. St. 1899, and the fact that he had received, as devisee, a portion of his father's estate. When this action was brought, in 1902, his father's estate was not liable. The claim was barred by the statute of limitations, and he had the same right to interpose the plea of limitation, and with the same effect that his father could, if he had then been living. The case of *Hopkins, etc., v. Stout*, 6 Bush, 377, was where Stout brought suit, on a note executed in 1849, against the administrator of Hopkins, and secured a judgment, to be levied of the assets of the estate, but for the want of personal assets no portion of the judgment was ever collected. Stout then sued the children and heirs of Hopkins to subject real estate to the payment of his claim, which had descended to them from their father. The heirs defended, and interposed the plea of limitation. The court in that case said: "The judgment against the administrator neither concluded the heirs, nor authorized execution against them. The cause of action against them was coeval with that against the obligor, and consequently the time which would have barred an action against him, if sur-

viving, would bar this suit." To the same effect is the case of *Jones, Adm'r, etc., v. Commercial Bank of Ky.*, 78 Ky. 415.

Appellee, in her reply, alleged that, long prior to the accrual of her cause of action, George Bybee was a nonresident of the state of Kentucky, and continued such until the bringing of her suit. The proof shows that he became a nonresident of this state about the year 1877, which was prior to the execution of the bond, or before any of the Bybees were liable to appellee for anything, and that he had continued to be a nonresident of this state and a resident of the state of Missouri ever since that time. Section 2531, Ky. St. 1899, in part, says: "If at the time any cause of action mentioned in the third article of this chapter accrues against a resident of this state," etc. Section 2532, Ky. St. 1899, says: "Where a cause of action mentioned in the third article of this chapter accrues against a resident of this state, and he by departing therefrom, or by absconding or concealing himself, or by any other indirect means, obstructs the prosecution of the action, the time of the continuance of such absence from the state, or obstruction, shall not be computed as any part of the period within which the action may be commenced," etc. It therefore appears that the reply of appellee was insufficient to stop the running of the statutes in favor of George Bybee, as he was not a resident of the state of Kentucky when appellee's cause of action accrued. In the case of *Selden v. Preston*, 11 Bush, 191, it was decided that, where a cause of action existed in behalf of a resident of this state against a nonresident, the mere fact of the debtor being a nonresident will not prevent the statute of limitations from running, but where the debtor is a resident of this state, and absents himself from the state by removal or otherwise, the period of his absence will be omitted in the computation of time.

For the reasons indicated, the judgment of the lower court is reversed, and cause is remanded for further proceedings consistent with this opinion.

SWANSON v. SMITH et al.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

FORCIBLE ENTRY—JUDGMENT—BAR—REVIEW —TRAVERSE—NEW TRIAL—PROCESS— SUBSTITUTED SERVICE.

1. Civ. Code, § 463, regulating proceedings after trial of writs of forcible entry, provides that if either party conceive himself aggrieved he may file a traverse within three days after the finding, and section 461 declares that if the party against whom the inquisition is found fail to file such traverse the judge shall issue execution for the costs, and, if the inquisition be in favor of the plaintiff, a warrant of restitution. *Held*, that section 463 provided the exclusive mode for reviewing proceedings of forcible entry, and that Civ. Code, § 714, authoriz-

ing the granting of a new trial on an application made within 10 days after judgment, on reasonable notice to the adverse party, had no application to such proceedings.

2. Under Ky. St. 1899, § 2284, and Civ. Code, § 625, authorizing substituted service of process by leaving a copy with a member of defendant's family over 16 years of age, a notice of a writ of forcible entry was properly served by leaving a copy with defendant's wife, who was at the time a member of his family over 16 years of age, defendant being absent and not found.

3. A judgment rendered in proceedings of forcible entry to recover possession of land is not a bar to an action in ejectment to recover the land.

Appeal from Circuit Court, Lee County.

"To be officially reported."

Action by Mitchell Smith and others against John Swanson. From a judgment in favor of plaintiffs, defendant appeals. *Affirmed*.

Gourley & Roberts and Riddell & Riddell, for appellant. H. L. Wheeler, for appellees.

SETTLE, J. Upon complaint made by the appellees to the judge of the Lee county court that the appellant had forcibly entered upon a tract of land in that county of which they were in the peaceable possession, that officer issued a writ of forcible entry in the usual form against appellant, directed to the sheriff of the county, who, after service of the writ, returned it to the county judge. The inquisition under the writ was held by the county judge, without the intervention of a jury, and the appellant found guilty of the forcible entry complained of; judgment was thereupon entered in accordance with the finding, awarding appellees restitution of the land in dispute; and, the appellant having failed to file a traverse of the inquisition on or before the third day after the finding of the inquest, the county judge duly issued a warrant of restitution in appellees' favor. The appellant thereupon filed in the Lee county court his petition for a new trial in the proceeding of forcible entry, and at the same time obtained of the county judge a temporary injunction restraining the sheriff from executing the writ of restitution. Upon the hearing, before the county judge, of the application for a new trial, it was adjudged that appellant was not entitled to a new trial, and his petition therefor, as well as the injunction to prevent the execution of the writ of restitution, was dismissed. From that judgment the appellant took an appeal to the circuit court, in which court a demurrer to the petition was sustained and the petition dismissed, and from that judgment an appeal has been prosecuted to this court.

The question presented for our consideration by the appeal has never to our knowledge been decided by this court. It is this: Can a new trial be granted in a case like the one at bar? Section 714, Civ. Code, provides that "a new trial may be granted in quarterly courts, or courts of justices of the peace upon motion made within ten days after a judg-

ment has been rendered, of which motion reasonable notice shall be given to the adverse party." Manifestly, the section, *supra*, would authorize the granting of a new trial by the county judge, upon proper grounds, in any ordinary action or proceeding that had been tried by him. But the provisions of the Code regulating the trial of writs of forcible entry, forcible detainer, or forcible entry and detainer, require the unsuccessful party, if dissatisfied with the result of the trial, to pursue a different remedy. The remedy thus provided is specific, and therefore exclusive of all other remedies. It is found in section 463, Civ. Code, which provides that, "if either party conceive himself aggrieved by the finding of the jury (or court) he may file a traverse thereof with the judge or justice within three days next after the finding aforesaid. * * * The traverse serves a twofold purpose: First, it secures to the unsuccessful party a retrial of the case in the circuit court; second, a stay of the proceedings on the inquisition until the trial in the circuit court may be had. In the meantime no serious loss could result to the opposite party from the stay of proceedings on the inquisition, as he would be protected by the bond, required by the Code, of the traversee, which must be given at the time of the filing of the traverse.

It is manifest that the granting of a new trial in this class of proceedings was never contemplated by the framers of the Code, for it is further provided, by section 461, that, "if the party against whom the inquisition is found fail to file a traverse of the inquisition with the judge or justice who presided, on or before the third day after the finding of the inquest, the judge or justice shall, on request, issue his execution for the costs; and, if the inquisition be in favor of the plaintiff, he shall also (whether requested to do so or not) issue his warrant of restitution. * * * The section of the Code, *supra*, requires that the issue of the warrant of restitution, if the inquisition be in the favor of the plaintiff, must follow the failure of the unsuccessful party to file the traverse on or before the third day after the finding of the inquest. This requirement of the Code is mandatory. A motion for a new trial, made on or before the third day after the inquisition is found, will not prevent the issue of the warrant of restitution at the end of that time. Its issue can only be prevented by the filing of the traverse on or before the third day, and, if the warrant of restitution once issues, it cannot be suspended, nor its execution delayed, by a motion or petition for a new trial, made or filed within 10 days succeeding the inquisition.

Though, as stated, the question under consideration has never been decided by this court, it seems to have been before the superior court as far back as the year 1885, in the case of *Scaggs v. Fife*, 6 Ky. Law Rep. 659, wherein it was held that, "after judgment has been entered according to the inquisition in a forcible entry and detainer, the judge or

justice who presides has no power to disturb it; the only new trial provided for is by a traverse in the circuit court, which must be taken in three days."

It is insisted for the appellant that the writ of forcible entry has not been served upon him in person, because he was, at the time of its service, absent from the county, and, further, that the inquest took place in his absence. It appears, however, from the return of the writ, that notice thereof, and of the time and place of the trial, was given to and served upon appellant's wife, as he was absent and could not be found. Section 455, Civ. Code, provides that the officer having the writ for execution "shall give to each defendant notice according to the directions of the warrant. * * * If, however, the notice have been given to a defendant, but not three days before the meeting of the jury (or court) the inquest shall, on his motion, be adjourned until the expiration of the three days." The service of the writ was properly made upon the appellant through his wife, in the manner provided by section 625, Civ. Code, and section 2204, Ky. St. 1899, she being at the time a member of his family and over 16 years of age.

It is averred in the petition for a new trial that the appellant was properly in the possession of the land in controversy as a tenant of J. A. Wallace, who had been given possession thereof under a writ of *habere facias possessionem* from the Estill circuit court, issued in the action of Crawford's Adm'r v. Elizabeth Hatton, etc., and that Bruce Smith, one of the appellees, had been deprived of the possession of the land in favor of Wallace by the same writ. Bruce Smith was at the time the tenant of his co-appellee, Mitchell Smith, who then and now claims to own the land. It is not, however, alleged in the petition that the Smiths were parties or privies to the suit in Estill county, or that they acquired possession of the land during the pendency of that action, or with knowledge thereof. It would seem, therefore, that they could not have been legally deprived of possession by the writ from the Estill circuit court. But whether they could or not, that question, as well as all other matters relied on in resistance of the writ of forcible entry in the petition for a new trial, could have been determined only in the inquisition before the county judge, or upon a traverse and trial in the circuit court. The proceedings of forcible entry only affected the matter of possession. That question could not be reopened by an application for a new trial, whether made by motion or petition. The appellant's only remedy was a traverse, which was not resorted to; consequently this court is without power to grant the relief asked.

If there is merit in the claim of Wallace to the possession of the land in controversy, it may be suggested that the proceedings of forcible entry will not bar an action in ejectment to recover the land.

Wherefore the judgment of the lower court

in sustaining the demurrer to the petition for a new trial, and in dismissing the petition, is hereby affirmed.

BASTIN TELEPHONE CO. v. RICHMOND TELEPHONE CO. et al.

(Court of Appeals of Kentucky. Dec. 16, 1903.)

**INDIVISIBLE CONTRACT—STATUTE OF FRAUDS
—CONTRACT NOT TO BE PERFORMED
WITHIN A YEAR.**

1. A parol contract between two telephone companies that each should build a line to a point halfway between two towns and there connect, the connection to be made within a year from the date of the contract, and that each should then have the use and benefit of the other's lines and connection free of charge for 20 years, is indivisible, and, both as to the provision for construction and as to that for use, void, under Ky. St. § 470, providing that no action shall be brought to charge any person on an oral agreement which is not to be performed within one year from the making thereof.

Appeal from Circuit Court, Madison County.

"To be officially reported."

Action by the Bastin Telephone Company against the Richmond and Cumberland Telephone Companies. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

J. Tevis Cobb, J. E. Robinson, and Lewis L. Walker, for appellant. Smith & Bush, for appellees.

NUNN, J. Appellant sued appellees, the Richmond and Cumberland Telephone Companies, for \$2,000 damages, for the violation of a parol contract to the effect that each party should build a telephone line, one from Richmond, Ky., the other from Lancaster, Ky., to a point halfway between the two towns, and there connect, and that each should then have the use and benefit of the other's lines and connection free of charge for a period of 20 years. The poles were to be erected by both parties, and connection made, within a year from the date of the contract. They were actually erected by appellant within the time stipulated in the contract, and appellee Richmond Telephone Company had partly erected its part of the line, when, as alleged, the appellee Cumberland Telephone Company obtained a majority of the stock in the Richmond Company, and took the control and complete management thereof, stopped the erection of this line, and refused to carry out the contract, and had abandoned same. The lower court sustained a demurrer to the petition, evidently on the ground that an action on such a contract was inhibited by the statute.

The appellant contends that because the contract stipulated that the poles were to be erected on the line between the two towns, and the connection made, within the 12 months, and that it was within the power

of the parties to the contract to complete same within the time named, therefore the contract was valid and binding. So much of section 470, Ky. St., as is applicable to the question presented, reads as follows: "No action shall be brought to charge any person * * * upon any agreement which is not to be performed within one year from the making thereof, unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith. * * *" The statute refers to such contracts as cannot be performed by either party within a year, and although it may contain various stipulations, some of which may be performed within a year, yet if any part of it cannot be so performed it is clearly within the statute.

In the case of *Halloway v. Hampton*, 4 B. Mon. 415, the plaintiff had agreed to sell and deliver to defendant his crop of hemp then on hand, as soon as prepared for manufacture, to be delivered at a certain place and at a certain price, and in like manner to deliver his crop of the two succeeding years. The suit was brought for the refusal of the defendant to receive and pay for, at the contract price, the next succeeding crop after the date of the contract. Defendant contended that the contract was not to be performed within a year, and, being verbal, was within the statute. The court, in discussing that case, said: "The question has presented itself whether, as the crop of the first year succeeding the date of the agreement might have been delivered within a year from that time, this action might not be maintained upon the stipulations relating to that crop: but upon consideration of the subject we are satisfied that the agreement, though it consists of various mutual stipulations which may be performed or violated at different periods, must, in view of the statute, be regarded as one entire contract, as indeed it is in fact, and that, although some of its stipulations might be performed within the year, yet as the agreement—that is, the entire agreement, for there is but one—is obviously not to be performed within the year, and cannot be, no action can be maintained for the breach of those stipulations which might and should have been performed within that time. The statute embraces all agreements which are to be fully performed within the year."

The agreement in that case to deliver the second and third crops of hemp was as much a part of the contract as the stipulation to deliver the first. So, here, the agreement for the use of the two telephone lines, the terms upon which each was to use the other's lines, and the length of time for which such use was to exist, constitute just as much a part and as important an element in the contract as the provision for the construction of the lines. The completion of the lines and connection of the wires would

not and could not complete this contract. It would be but the beginning of the expected beneficial part of same. An executed contract is defined as "one in which the object of the contract is performed." The violation of this verbal contract by appellees, and the statutory prohibition in the way of the enforcement of it, will work injury to appellant, but it results from the neglect of appellant in not having this contract, or some memorandum thereof, reduced to writing and signed by the parties.

For these reasons, the judgment is affirmed.

GREER v. GREER.

(Court of Appeals of Kentucky. Dec. 16, 1903.)

DIVORCE—ANNULMENT OF JUDGMENT—JURISDICTION—CONSENT.

1. Conceding that a judgment for divorce can be annulled only on petition verified by parties in person, as provided by Civ. Code, § 426, oral consent of the parties that the judgment be set aside would not confer jurisdiction to set aside such judgment.

"Not to be officially reported."

Petition for rehearing. Overruled.

For former opinion, see 76 S. W. 166.

SETTLE, J. It is incorrectly assumed in the petition for rehearing that the conclusions of law expressed by the court in its opinion in this case were bottomed wholly upon the cases of *Meyar v. Meyar*, 3 Metc. 298, and *Ficener v. Ficener* (Ky.) 3 S. W. 597. In point of fact, the opinion was based more especially upon *Ficener v. Ficener*, supra, and *Hendrix v. Hendrix* (Ky.) 76 S. W. 165. The latter case approves the rule of practice as to the setting aside of judgments of divorce by the court granting them during the term at which they are rendered, where the condition of the parties is unchanged, as expressly declared in *Ficener v. Ficener*.

It is also incorrectly assumed in the petition for rehearing that the cases of *Meyar v. Meyar* and *Ficener v. Ficener* have been "squarely overruled" by *Bristow v. Bristow* (Ky.) 51 S. W. 819. That the latter case is in conflict with *Meyar v. Meyar* must be admitted, for which reason the opinion in *Meyar v. Meyar*, to the extent of such conflict, can no longer be regarded as the law in this state; but, as the case of *Meyar v. Meyar* is not mentioned in *Bristow v. Bristow*, it cannot be said to have been "squarely overruled" by that case. *Ficener v. Ficener* is not only not overruled by *Bristow v. Bristow*, but there is in fact no conflict between the two cases. In the former it was held that while the ground for setting aside ordinary judgments at law or in equity after the expiration of the term do not apply to judgments for divorce, which become final, yet a judgment in a divorce case may be set aside during the term at which it is rendered, upon reason-

able notice to the opposite party, where the condition of the parties remains unchanged. In *Bristow v. Bristow* a judgment for divorce and alimony was granted the wife by the Kenton circuit court—which is a court of continuous session—on November 29, 1898. On December 17th thereafter, which was after the expiration of 15 days, within which a motion for a new trial in an equity case may be made in a court of continuous session, and as admitted by the petition for rehearing after the term at which the divorce was granted, the husband filed grounds and motion for a new trial, which was overruled by the court. Upon the appeal of the case to this court, the judgment of the lower court was affirmed, upon the ground that the judgment could only be set aside upon petition, as provided by section 426, Civ. Code. Obviously, the decision was correct, as the motion for a new trial came too late, and was without notice to the opposite party. But it does not conflict with the rule of practice announced in *Ficener v. Ficener*, which holds that such a judgment may be vacated upon proper notice, and before the expiration of the term, where the condition of the parties remains unchanged. In *Bentz v. Bentz* (Ky.) 54 S. W. 715, a judgment of divorce was regularly entered by the Kenton circuit court in behalf of the husband, and the case stricken from the docket. In a day or two after the judgment was entered, the husband married another woman, whereupon the judge of the court, upon his own motion, and without notice to the parties, redocketed the case and set aside the judgment of divorce, upon the ground that, in thus remarrying so soon after the entering of the judgment of divorce, the conduct of the husband evinced "an utter disregard of the obligations and sacredness of the marriage relation." The lower court having refused to set aside the order vacating the judgment, the plaintiff appealed, and upon the appeal this court reversed the judgment annulling the decree of divorce. It cannot be doubted that the reversal was proper, as the order made by the lower court vacating the decree of divorce was without notice to, and not upon the application of, the parties to the action, and was entered after the condition of the parties had been changed by the marriage again of the husband. In *McCracken v. McCracken*, 109 Ky. 766, 60 S. W. 720, the judgment was entered May 26, 1898, divorcing the plaintiff from his wife. On July 16th following, and after the expiration of the term at which the divorce was granted, the judgment of divorce was, on motion of defendant, set aside. On September 29th thereafter, the defendant filed answer, and reply was then filed by the plaintiff. On January 14, 1899, the cause was submitted, and judgment rendered by the court dismissing the petition. The plaintiff on January 21, 1899, entered motion to set aside the order of submission and judgment of January 14, 1899; also the order of July 16, 1898.

¶ 1. See *Divorce*, vol. 17, Cent. Dig. § 548.

which vacated the judgment of divorce rendered by the court in his favor on May 26, 1898. Both motions were overruled by the lower court, and upon the appeal of the case to this court it was held that the order which set aside the judgment of divorce of May 26, 1898, was unauthorized and void. This decision was also proper, for, as already stated, the judgment divorcing the plaintiff from his wife was set aside by the lower court upon her motion after the expiration of the term at which it was granted. The decision was therefore in line with *Bentz v. Bentz* and *Bristow v. Bristow*, supra, and not in conflict with *Ficener v. Ficener*. In *Hendrix v. Hendrix*, 76 S. W. 165, which was decided only two days before the case at bar, and which, though cited in the opinion, is not referred to in the petition for rehearing, this court, in discussing the jurisdiction of courts of equity over judgments in divorce cases, reaffirmed the rule stated in *Ficener v. Ficener* in practically the same language employed in that case, which is as follows: "The grounds for setting aside ordinary judgments at law or equity after the expiration of the term do not apply to judgments for divorce, which become final. During the term, however, and while the condition of the parties remains unchanged, the judgment may be set aside at the instance of one party, but not without notice to the other." In the same paragraph with the foregoing quotation, the several cases relied on by counsel in the petition for rehearing are cited, but without any intimation from the court that they are in conflict with *Ficener v. Ficener*. The quotation from *Meyar v. Meyar*, 3 Metc. 301, found in the opinion in the case at bar, was used for the purpose of showing the reasons advanced by the distinguished writer of the opinion in that case (Judge Stites) for affording to courts having jurisdiction in such cases every possible means of correcting any error or injustice committed in the judgment complained of; but inasmuch as the language of the opinion, on the page following that containing the quotation, may be construed as expressing approval of the conclusions of law announced in the opinion of Judge Stites, supra, so much of the words of approval contained in the opinion in this case as may be susceptible of such construction are hereby withdrawn. In all other respects, the opinion is adhered to.

If this court should adopt the view of the law as urged by counsel for appellant in the petition for rehearing, its decision would nevertheless have to be for the appellee. As stated in the opinion, three judgments of divorce have been rendered by the lower court in this case. The one which counsel for appellant now contends the lower court had no right to set aside was the second judgment of divorce. The first, like the third and final judgment, was rendered in favor of the appellee. The first judgment was also set aside by the court. If, as contended by coun-

sel for appellant, the lower court was without authority to set aside the second judgment, which was in favor of the appellant, except upon petition of the parties, as provided by section 428, Civ. Code, how did it acquire jurisdiction to vacate the first judgment? It is said, however, that the first judgment was set aside by oral consent of the parties. Conceding this to be true, it does not remove the difficulty, for it is well settled that, when the law expressly refuses or withholds jurisdiction, it cannot be conferred by consent. So, if, as contended by counsel for appellant, the lower court was without jurisdiction to set aside the second judgment of divorce, which is not a tenable position, consent of the parties to the setting aside of the first judgment did not confer upon the court jurisdiction to do so.

The further consideration of the questions involved in this case, to which we have been invited by the petition for rehearing, has served to confirm the views expressed in the opinion. Consequently the petition must be overruled.

LOUISVILLE & C. PACKET CO. v. MULLIGAN.

(Court of Appeals of Kentucky. Dec. 17, 1908.)

COLLISION—NEGLIGENCE—QUESTION FOR JURY—CARRIERS OF PASSENGERS—NEGLIGENCE OF CARRIER—IMPUTABLE TO PASSENGER—NEW TRIALS—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.

1. In an action by a passenger on a boat for injuries sustained in a collision between it and another boat, evidence examined, and held that whether the latter boat was negligently managed, because of the failure of those in charge thereof to give the proper signal, if the former boat carried the proper lights, or because they failed to exercise proper care, if the former boat only carried a white light, so as to merely indicate the approach of a floating craft, was for the jury.

2. The negligence of a carrier of passengers is not imputed to a passenger who is injured by the concurrent negligence of the carrier and another, and he may recover from both.

3. The court on appeal will not interfere with the discretion of the circuit court in granting or refusing new trials on account of newly discovered parol evidence unless the discretion is palpably abused.

4. The trial court did not abuse its discretion in refusing a new trial in a personal injury action on the ground of newly discovered evidence going only to the extent of plaintiff's injuries.

Appeal from Circuit Court, Oldham County.

"Not to be officially reported."

Action by E. H. Mulligan against the Louisville & Cincinnati Packet Company and another. From a judgment for plaintiff, defendant Louisville & Cincinnati Packet Company appeals. Affirmed.

D. H. French and Chas. F. Taylor, for appellant. S. E. De Haven and R. F. Peake, for appellee.

¶ 2. See Carriers, vol. 9, Cent. Dig. §§ 1132, 1240; Negligence, vol. 27, Cent. Dig. § 142.

HOBSON, J. The White Dove was a gasoline boat which ran daily from Marble Hill, Ind., to Louisville. It was about 65 feet in length, and 14 feet beam. It carried regularly freight and passengers. On the night of December 7, 1901, the appellee, Mulligan, was a passenger on the boat from Westport, Ky., to Louisville; and when the boat reached Beck's Landing, or near there, it collided with the steamer City of Cincinnati, belonging to appellant. In the collision the cabin of the White Dove was wrecked, and appellee, who was in the cabin, was thrown down, and received injuries on his arm, shoulder, and head, to recover for which he filed this action against the owners of both boats, and recovered judgment for \$250 against each of them. From this judgment the packet company appeals. The owners of the White Dove have not appealed.

It is insisted for appellant that the court should have instructed the jury peremptorily to find for it. The law of the river requires the ascending boat, when within 800 yards of the other boat, to signify by one blast of the whistle if it wishes to pass on the right, and by two blasts of the whistle if it wishes to pass on the left, the ascending boat being required first to indicate the side on which it desires to pass. If the descending boat deems it dangerous to take the side indicated, the pilot must at once sound the danger signal of three or more short blasts of the whistle, and it is the duty of the pilot of the ascending boat to answer by a similar signal of three blasts of the whistle. After this the pilot of the descending boat may indicate by his whistle the side on which he desires to pass, and the ascending boat must be governed accordingly; the descending boat being entitled to the right of way. Whenever the danger signal is given, the engines of both boats must be stopped and backed until the signals are understood, and the boats can safely pass each other. The boats are required at night to have a red light and a green light. Floating craft carry a white light. A steamboat must keep out of the way of floating craft, as these simply follow the current, and cannot be guided, as a steamboat. The White Dove was descending, and the City of Cincinnati was ascending, the river. The collision occurred a little after 6 o'clock. It was an ordinary winter night. The City of Cincinnati had up the regulation lights, and was perceived by the White Dove when a mile or more from it. The boats were both in the channel, and the White Dove was headed to pass on the Kentucky side of the Cincinnati. The White Dove had no whistle, but, contrary to law, was using a bell to give signals. The proof for the plaintiff was to the effect that the White Dove had out its red and green lights at the proper place on each side of the pilot house. It also appeared from this proof that as they approached the City of Cincinnati

the green light was burning dimly and was taken down, and a white light hung in the place of it, while the green light was handed to the captain, who was standing at the foot of the ladder, and discovered that the trouble with the lamp was that the wick had been jolted down by the jarring of the boat. He turned the wick up, and handed the lamp back at once to the man on the ladder, who replaced it where it belonged. The captain testifies that this occurred when they were a mile from the Cincinnati. There was other evidence tending to show the distance was less, but that the change was made in a few seconds is evident from the proof, and, taking the plaintiff's testimony alone, we think in ample time to be seen by the Cincinnati. The Cincinnati did not blow at 800 yards to indicate on which side she desired to pass, or give any signal until she was within a very short distance of the White Dove—not more, according to the plaintiff's proof, than 75 or 150 yards. She then gave one blast of the whistle, indicating that she desired to pass on the right side. The White Dove then changed her course from the Kentucky to the Indiana shore, and, there not being room enough, the collision ensued; the White Dove coming in contact with the side of the Cincinnati, which, according to the proof of the plaintiff, was still running at full speed. The proof for the defendant the packet company is that the White Dove had up nothing but a white light, which indicated a floating craft, and, as soon as the Cincinnati discovered what it was, the one blast of the whistle was blown, and this was immediately followed by the danger signal of three blasts, and the engines were stopped on the Cincinnati and the boat backed until the collision occurred, while the engines of the White Dove were still running, driving the boat ahead.

The White Dove was clearly negligent in not following the rules when the Cincinnati failed to give the proper signal when it reached the 800-yard limit. It should then have given the danger signal, as it knew of the presence of the other boat, and the White Dove should have been gotten under control before it was so close to the Cincinnati. Both boats were running 10 or 12 miles an hour. There was also some evidence that those in charge of the Cincinnati were negligent, for, if the lights on the White Dove were burning, as shown by the plaintiff's evidence, they were without excuse in not blowing at the 800-yard limit; and, if only the white light was burning, as proven by it, this indicated a floating craft, and the jury were warranted in concluding that more care was demanded of the boat than appears to have been exercised. The two boats passed regularly about this place, and those in charge of the Cincinnati had reason to be on the outlook for the White Dove. We therefore conclude that the case was properly

submitted to the jury, and, while the evidence was very conflicting, it is not such that we ought to disturb the verdict on the facts.

Appellee, being a passenger on the White Dove, and having no control over the boat, may recover of the Cincinnati, although those in charge of the White Dove were more negligent than those in charge of the Cincinnati. For the negligence of a carrier is not imputed to a passenger who is injured by the concurrent negligence of the carrier and another, and he may recover against both. Danville, etc., Co. v. Stewart, 59 Ky. 119; Louisville, etc., R. Co. v. Case's Adm'r, 72 Ky. 728; 7 Am. & Eng. Ency. of Law, 446, and cases cited. The court, by his instructions, told the jury that both boats were governed by the same rules and regulations; that each owed to the other the same duties, and that appellant owed appellee no higher or greater duty than it did to the boat White Dove; also that appellant was not liable to appellee unless the plaintiff was injured by reason of the negligence, in whole or in part, of the officers in charge of the Cincinnati. Negligence was also properly defined as the failure to exercise that degree of care that ordinarily prudent persons usually exercise under similar circumstances. The instructions of the court, as a whole, clearly presented the law of the case. The instructions asked by appellant, and refused, in part, presented the idea that the negligence of the White Dove was to be imputed to the plaintiff. These instructions were properly refused. The other instructions asked by it, in so far as they were proper, were embodied in those given by the court.

In support of the motion for new trial, appellant filed the affidavit of two witnesses to the effect that appellee fell from the upper deck of the White Dove some time after the collision, and thus hurt his arm and shoulder; this testimony having been discovered after the trial. Circuit courts have a wide discretion as to the granting of new trials on account of newly discovered parol evidence, and this discretion will not be interfered with by this court unless palpably abused. The newly discovered evidence only went to the extent of the plaintiff's injuries. There was no doubt that the plaintiff was injured in the collision. The question as to the extent of his injuries was not only investigated on the trial, but considerable evidence was taken on the subject. The court will rarely set aside a verdict on newly discovered parol testimony like this. Were the rule otherwise, the administration of justice would be much more uncertain and delayed than it is, and there would be less incentive to parties to exercise diligence in getting up their witnesses and preparing cases for trial.

On the whole case, we see no substantial reason for disturbing the judgment of the circuit court, and it is accordingly affirmed.

HAYS et al. v. EARLS et al.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

PUBLIC LANDS—CONFLICTING PATENTS—TITLE—EVIDENCE—STATEMENTS IN PLEADINGS.

1. In an action to recover land, statements made as to the title in the pleadings of other parties filed in a prior suit, to which plaintiff's predecessor in title was not a party, and in which no judgment was entered, were not evidence against plaintiff.
2. Where land was patented by the commonwealth, a subsequent patent issued to another, including the land, was void as to such land.
3. In a suit to try title to land, evidence held insufficient to establish plaintiff's title as against defendants, who were in possession under color of title.

Appeal from Circuit Court, Laurel County.

"Not to be officially reported."

Action by James Earls and others against James M. Hays and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

J. Smith Hays and James M. Hays, for appellants. Jas. Sparks, for appellees.

HOBSON, J. On September 14, 1824, a patent was issued by the commonwealth to William F. Sexton for 50 acres of land on Fall Branch, in Whitley county. Sexton left the state about the year 1830, and has not returned to it since. On September 4, 1841, a patent was issued, on a survey of date March 12, 1835, to Benjamin F. Herndon, Samuel Hogan, and Richardson Herndon, for 750 acres of land in Whitley county. The metes and bounds of this patent include the 50-acre survey patented to Sexton in 1824, although it is not excepted out of the grant. M. M. Wyatt, now 76 years of age, says that, when he was 12 or 14 years old, his father lived on the 50-acre survey under Ben Herndon and Sam Hogan; that Bill Fred Sexton had lived there, and after him Whitman, and after this his father came in under Herndon, and, when his father moved away, Bob Saunders took possession, also under Herndon. A written agreement is also produced, made on March 7, 1835, between Richardson Herndon, Martin Beatty, and Benjamin F. Herndon, by which they agreed to hold a lot of land entered by them in partnership, each to own one-third of it. Among other descriptions of the property referred to in this paper is the following: "The said Benjamin F. Herndon agrees on his part that a tract of land of fifty acres purchased of Whitman and fifty acres entered adjoining the same and also five hundred acres entered adjoining the above, all shall come into the firm equally as above stated." On May 29, 1845, James T. Curd filed a bill in equity in the Whitley circuit court against Benjamin Herndon to subject to a judgment for \$500 and costs the interest of Herndon in certain land owned by him. Among other lands described in

the bill is the following: "One tract of fifty acres of land. The equitable title has passed through one William Sexton to William Whitman, and he sold to Benjamin Herndon, who holds only an equitable title; the legal title being in one Archibald Sexton, which William Sexton is a nonresident of this commonwealth." Archibald Sexton and William Sexton, as well as William Whitman, were made defendants to this bill; also George Sears. In his answer to the bill, Sears, among other things, said: "As to the Whitman tract, or Fed place, he states that said tract contains, to his best recollection, fifty acres, and was entered in the name of William Sexton, and sold by him to William Whitman, and by him to Herndon; and William Sexton, to the best of respondent's recollection, gave his bond after the aforesaid sales to codefendant, Benjamin F. Herndon." Richardson Herndon filed an answer in which he showed that by a writing executed on September 17, 1839, Benjamin Herndon had transferred to him all his interest and title to the land referred to. In 1851 Hogan's one-third interest in the land was conveyed to Herndon. About the year 1872 those claiming under Richardson Herndon had a tenant living on the land, by the name of Thoms Logan. Logan did not live on the 50-acre tract, but lived on an adjoining survey owned by the Herndons, claiming to the extent of their boundaries. It does not appear that anybody has lived on the Sexton 50-acre survey since Bob Saunders, about the year 1844. Appellants claim under the Herndons, having obtained deeds from them conveying their title. Appellees claim under Jane Sears, and produced a deed made to her by William F. Sexton on August 3, 1874. Sexton's mark is made to this deed, and it is certified by the clerk to have been acknowledged before him by William F. Sexton, but the clerk testifies that the man who signed the deed was not the William F. Sexton to whom the patent was issued in 1824. The proof leaves no doubt that William F. Sexton lived in Terre Haute, Ind., and was not in Kentucky in 1874. The deed was made by a man named Hart, who made the mark to it in Sexton's name, and acknowledged it. The proof is that Hart did this pursuant to a letter which he had received from Sexton; but it is not produced, and was not recorded. Jane Sears was a sister of William F. Sexton. Before he left Kentucky, according to the proof, he gave her the original patent, and said he would make her a deed as soon as he came back, she paying him for the land 25 yards of jeans and a \$25 rifle gun; but he never came back, and in 1874 he authorized Peter Hart, by letter, to make the deed, and sign his name to it by making his mark; Peter Hart being a brother-in-law of Jane Sears, who was the wife of George Sears. After Thoms Logan, his son Joe Logan, or Jop Logan, lived in the

same house, holding the land as Herndon's tenant continuously until this controversy arose; but the proof for the appellees is to the effect that Thoms Logan did not claim to be in possession of the 50-acre Sexton survey. The statements made by James T. Curd, George Sears, and Richardson Herndon in their pleadings in the old chancery suit in the Whitley circuit court are not evidence against Jane Sears, or those claiming under her. No judgment is shown to have been rendered in the action, and William Sexton is not concluded by what was alleged in that action by the parties in their pleading; nor is he affected in any manner thereby, as it does not appear that he appeared in the action at any time. The written agreement made on March 7, 1839, between Richardson Herndon, Martin Beatty, and Benjamin F. Herndon, does not show that Whitman had any title to the 50 acres of land from W. F. Sexton; and Sexton is not a party to the contract. The proof that Wyatt lived on the land about the year 1840 as the tenant of Herndon, and after him Saunders, is insufficient to show any title in Herndon to the land, for the reason that the proof does not show that the possession was held for 15 years. The proof is that Saunders lived there for 2 or 3 years, and that Wyatt made two crops there. There is no proof of any possession by Herndon or his tenants after this until Thoms Logan entered, and he lived on a different tract, and the preponderance of the evidence shows he did not claim to be in possession of the 50-acre Sexton tract. The title passed out of the commonwealth to Sexton to the 50 acres by the patent granted in 1824, and the subsequent patent to Herndon and his associates in 1841 was void as to the 50 acres. Appellants, not connecting themselves with the patentee, Sexton, and not making out a possessory title by an adverse holding for 15 years, showed no title in themselves to the 50-acre Sexton tract. The rule that a person in possession may maintain an action against a trespasser without color of title has no application to the facts of the case. For the plaintiffs have, under the evidence, no such possession as this rule requires, and the defendants had color of title, and also claimed to be in possession. They were not, therefore, bare trespassers.

Judgment affirmed.

ROSE v. CAMPBELL et al.

(Court of Appeals of Kentucky. Dec. 16, 1903.)

"Not to be officially reported."

Supplemental opinion. For opinion, see 76 S. W. 505.

SETTLE, J. A re-reading of the opinion recently handed down in this case has resulted in the discovery by the court that it inadvertently reversed the personal judgment

rendered by the lower court in favor of the appellees against the appellant, R. W. Rose, when it was only intended to reverse so much of the judgment of that court as set aside the deed of conveyance from R. W. Rose to his wife, Nannie Rose, and subjected the land thereby conveyed to the payment of appellees' debts sued on. The personal judgment for the debts sued on by appellees will not, therefore, be disturbed, but the judgment of the lower court, in so far as it sets aside the deed from appellant, R. W. Rose, to his wife and co-appellant, Nannie Rose, and attempts to subject the land thereby conveyed to the payment of appellees' debts sued on, is hereby reversed.

We decline to consider the questions attempted to be presented by the petition for rehearing, because of its offensive and disrespectful tone and language, and for the same reason it is hereby ordered to be stricken from the file; but, as this court has no desire to deprive the appellees of their right to ask a rehearing, the time for filing a petition therefor, in respectful language, is extended 30 days from this date.

EVANS v. MAYSVILLE & B. S. R. CO. et al.
(Court of Appeals of Kentucky. Dec. 16, 1903.)

MALICIOUS PROSECUTION — FALSE IMPRISONMENT—VENUE—INSUFFICIENCY OF PETITION—CURE BY ANSWER—AMENDED PETITION—CHANGE OF CAUSE OF ACTION.

1. Plaintiff, suing a railroad company in G. county for malicious prosecution and false imprisonment, alleged an arrest in M. county and a transportation to B. county, but failed to state that on the trip he was carried through G. county. The defendant answered that none of the wrongs complained of were inflicted in G. county, and plaintiff's reply raised an issue on this averment. *Held*, that the defect in the petition was cured by the answer.

2. It did not constitute a change of the cause of action, that in an amended petition allegations were inserted bringing the venue in G. county, where the suit was instituted.

3. Civ. Code, § 73, provides that an action against a common carrier for an injury must be brought in the county in which defendant, or either of several defendants, resides, or in which plaintiff is injured, or in which he resides, if that be a county into which the carrier passes; section 72 provides that an action against a corporation for a tort may be brought in the county where the tort was committed; and section 74 provides that every other action for an injury to plaintiff's person or character must be brought in the county of defendant's residence, or where the injury was done. *Held*, that an action against a railroad company for malicious prosecution and false imprisonment was properly instituted in the county through which plaintiff was transported on defendant's railroad after his arrest, though he was not a resident thereof, and though defendant's chief office was located elsewhere.

Appeal from Circuit Court, Greenup County.

"Not to be officially reported."

Action by John T. Evans against the Maysville & Big Sandy Railroad Company and another. Judgment for defendants, and plaintiff appeals. Reversed.

W. T. Cole and A. E. Cole & Son, for appellant. W. H. Wadsworth and E. L. Worthington, for appellees.

NUNN, J. The appellant sued appellees in the Greenup circuit court, charging in one paragraph of the petition a malicious prosecution of him by the appellees; in another paragraph, false imprisonment. The appellees appeared and objected to the jurisdiction of the court, and filed the following answer: "The defendants, for joint and several answer to the petition and amended petition herein, and for objection to the jurisdiction of this court, state that at the time of the alleged commission of the wrongs in the pleadings set out and complained of, and before and since and now, the plaintiff was and is a citizen and resident of the county of Bath, state of Kentucky, and that none of the defendants were or are residents of Greenup county, Kentucky, and that none of the wrongs complained of were inflicted upon plaintiff in Greenup county, Ky. They state that at all of said times the defendants, the Chesapeake & Ohio Railway Company and Maysville & Big Sandy Railroad Company, were common carriers, and had a chief office and agent and place of business at Maysville, in Mason county, Kentucky, and at no other place. They state that the wrongs complained of herein grew out of the breaking into a car of the defendant the Chesapeake & Ohio Railway Company upon the line of the Elizabethtown, Lexington & Big Sandy Railroad Company, in Bath county, Kentucky, and was not upon the line of the Maysville & Big Sandy Railroad Company, and said last-named company had no connection whatever with said car, or the line upon which it was located when broken into, or with the arrest of the plaintiff or the parties breaking into the same, and that the said the Maysville & Big Sandy Railroad Company, at the time of the wrongs complained of, and before and since and now, had no office or place of business in Greenup county, or any chief officer or other officer or agent in said county or any other place than in Maysville, Mason county, Kentucky, as afore stated. Wherefore defendant prays that the petition and amended petition of plaintiff be dismissed," etc. To appellant's reply the court sustained a demurrer, whereupon appellant filed the following amended reply: "Now comes the plaintiff, and amends his reply, and, for amendment, denies that none of the wrongs complained of were inflicted upon plaintiff in Greenup county. He denies that the Maysville & Big Sandy had nothing to do with the arrest of plaintiff, or the wrongs done him. On the contrary, he states that it has leased its road to its codefendant, Chesapeake & Ohio Railway Company, and is responsible for its torts; that among those committed against plaintiff by defendant was the malicious abuse of the processes of the court, in publicly carrying plaintiff against his will and

consent, handcuffed, through Greenup county, in a car on a train of defendant Chesapeake & Ohio Railway Company, and exposing him to public shame and contempt in said county, in order to compel him to give false testimony to secure the conviction of parties prosecuted by it, as set out in the petition. Wherefore plaintiff prays as in his petition and amendments, and all proper relief." This amended reply was filed at the November term, 1902, and on motion of appellees the action was continued to the April term, 1903, at which term, on motion of appellees, the amended reply was stricken from the record, to which appellant excepted. Then appellant tendered an amended petition, amending the several paragraphs thereof by alleging, in substance, the same facts as stated in his amended reply, to which appellees objected, and the court sustained their objection, and refused to allow it filed, to which appellant excepted, and by order of court the proposed amendment was made a part of this record.

It is imperative that the court, in order to render a valid judgment in personam, must have jurisdiction of the subject-matter, and also of the person. Section 73 of the Civil Code provides that an action against a common carrier for an injury to a passenger or other person, etc., must be brought in the county in which the defendant, or either of several defendants, resides, or in which the plaintiff is injured, or in which he resides, if he reside in a county into which the carrier passes. Section 72 provides that an action against a corporation for a tort may be brought in the county where the tort was committed. Section 74 provides that every other action for an injury to the person of the plaintiff or his character must be brought in the county of the defendant's residence, or in which the injury was done. It matters not which of these sections of the Code is applicable to the case at bar. If the injury to appellant charged in the pleadings was done or committed in Greenup county, that court had jurisdiction of both the subject-matter and appellees. It appears that appellant was arrested in Mason county, and carried under arrest by appellees to Owingsville, Bath county. Appellant failed to state in the petition that on the trip from Mason county to Bath the appellant was under arrest and in confinement while passing through Greenup county. But the answer of appellees had the effect to cure the defect in the petition in this respect. This language is used in the answer: "And that none of the wrongs complained of were inflicted in Greenup county, Ky." The reply of appellant made an issue upon this point, and the lower court erred in striking this reply from the record.

The court also erred in refusing to allow the amended petition to be filed. There is no reason given or shown in the record why the court struck the reply from the files, or re-

fused to allow the amended petition to be filed.

Counsel for appellees contend that the amended petition was not sworn to, and for this reason it was not allowed to be filed, and that the matters alleged in the amendment changed substantially the cause of action, and for this reason the court properly refused to allow it to be filed. Appellant's cause of action was for damages for the injuries alleged to have been done or inflicted upon him by appellees. The county in which the injury was inflicted did not affect his cause of action, but only affected the venue thereof.

We have a case where the injuries and wrongs alleged to have been committed upon appellant were begun in Mason county, continued in and through Greenup, and into and ended in Bath county. It was one continued transaction. For this injury, if any, appellant has a cause of action, and he had the right to elect in which county he would institute it.

For these reasons, the judgment appealed from is reversed, and cause remanded, with directions to permit the amended petition, upon proper verification, to be filed, and for proceedings consistent with this opinion.

UNITED STATES FIDELITY & GUARANTY CO. v. BLACKLY, HURST & CO.

(Court of Appeals of Kentucky. Dec. 16, 1903.)

FIDELITY INSURANCE—UNTRUE STATEMENT BY EMPLOYER—DUE CARE TO ASCERTAIN TRUTH—RIGHT TO GO TO JURY—SPECULATION BY EMPLOYEE—EMPLOYER'S KNOWLEDGE—SPECIAL INSTRUCTIONS.

1. In an action on a fidelity bond, defended on the ground that the plaintiff, in a statement required of him prior to the issuance of the bond, asserted that, to the best of his knowledge and belief, the employee's accounts were correct, and that he was not in arrears, when, by due care in examining such accounts, a shortage could have been discovered, an instruction to find for plaintiff unless the statement was false when made, to the best of plaintiff's knowledge and belief, was erroneous, since defendant was entitled to go to the jury on the issue of plaintiff's due care to ascertain the truth before making the statement.

2. Defendant also alleged that plaintiff stated that nothing was known concerning the employee's habits affecting his title to confidence, when in fact the employee was engaged in hazardous speculation, to plaintiff's knowledge. Held, that this issue should have been submitted to the jury under special instructions applicable thereto.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

Action by Blackly, Hurst & Co. against the United States Fidelity & Guaranty Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Bodley, Baskin & Flexner, for appellant. Dodd & Dodd, for appellees.

BURNAM, J. On the 17th of November, 1900, C. M. Barnett requested the United

States Fidelity & Guaranty Company of Baltimore, Md., to go security for his honesty and fidelity as bookkeeper and cashier of the firm of Blackly, Hurst & Co., who were engaged in the tobacco business in Louisville, Ky., from the 1st day of December, 1900, to the 1st day of December, 1901. The application was made by Barnett upon one of the printed forms of the guaranty company, which provides for and requires from the employers of the applicant a statement as to the personal conduct, antecedents, and integrity of the applicant. In obedience to this requirement, Blackly, Hurst & Co., by J. T. Blackly, made this statement: "The replies of the applicant herein are to the best of my knowledge and belief, correct. He has been in the service of the undersigned employer since September 1, 1898, filling the position of bookkeeper and cashier, and has continuously filled the position for which this bond is required since that date. He has always to the best of my knowledge and belief given satisfaction in his personal conduct and performance of duties, and kept his accounts faithfully and without default. When last examined or audited, all accounts of his office were found in every respect correct up to date. [This was followed by the words, "Periodically examined by firm."] He has not been nor is he at present, so far as I know or believe, in arrears, default, or with unsettled balance in this or any previous service. I know nothing concerning his habits or antecedents affecting his title to confidence, and I know of no reason why the guaranty hereby applied for should not be granted." In response to this application, the guaranty company executed the bond applied for, which contained the following recitation: "Whereas the employers [Blackly, Hurst & Co.] have delivered to the United States Fidelity and Guaranty Co. a statement in writing relative to its responsibility, and checks to be used by the employee in said position, and in further consideration of \$25.00 paid as a premium for the period from December 1st, 1900, to December 1st, 1901, and upon the faith of said statement as aforesaid by the employer, it is hereby agreed and declared that subject to the provisions herein contained, which shall be conditions precedent on the part of the employer to recover under this bond, the company shall within three months next after notice accompanied by satisfactory proof of loss as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all or any pecuniary loss sustained by the employer of money, securities, or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of said employee, in connection with the duties of the office or position hereinbefore referred to, occurring during the continuance of this bond." On the 2d day of April, 1902, the appellees,

Blackly, Hurst & Co., brought this suit against the appellant, the United States Fidelity & Guaranty Company, and C. M. Barnett, upon the bond executed by them as surety for Barnett, in which they allege that between December 1, 1900, and September 7, 1901, the defendant Barnett, as bookkeeper and cashier of plaintiffs, and in the line of his employment, had received and fraudulently appropriated to his own use \$811 of their money, which he failed to account for. The petition also contains other formal averments necessary to a recovery on the bond. Appellant, in its answer, denied its liability for the moneys sued for, on two grounds: First, because, as it alleges, Barnett had not kept his accounts faithfully as cashier previous to his application to it to become his security, but was at that time in default to plaintiff in sums aggregating \$625, which he had fraudulently abstracted and converted to his own use subsequent to the 11th of May, 1900, and prior to November 17, 1900, by means of false entries and footings upon the books of plaintiffs, which, if not known to them, could have been known by the exercise of slight care, when the application was made to them, but which were not known to the defendant when it executed the bond sued on. It also charges that it was deceived and overreached by plaintiffs' statement that they knew nothing concerning the habits or antecedents of the insured affecting his title to confidence, or any reason why the guaranty should not be granted, when, as a matter of fact, they well knew that Barnett was at that time, and had been for a considerable time before the bond was applied for, engaged in speculating in tobacco—a highly hazardous and dangerous form of gambling—the credit and money therefor being furnished by plaintiffs. Upon the trial, appellant introduced a number of expert accountants, who testified: That during May, 1900, Barnett's books show three false entries and footings, aggregating \$250; in June, one false entry and footing of \$50; in September, one false entry and footing of \$100; in October, one false entry and footing of \$100; and in November, prior to the date of Barnett's application to defendant, false entries and footings amounting to \$125; in all, aggregating \$625. That these false entries were cunningly made, and were likely to be overlooked by any one examining the books who was not an expert accountant, or who was not specially looking for them, but that they would have been discovered by an accurate and careful addition of the various columns of figures by any ordinarily competent person. While, on the other hand, Mr. Blackly, a member of the firm, testifies that the fiscal year of the firm ended on September 1st, at which time a tolerably careful examination of the books was made—as much so as the current business would permit a member of the firm, who had daily duties to perform, to make; that this examination was made

by adding up the columns of the cashbook back to where it had been previously examined, and that the balance in bank, the cash account, and sales notes, which formed the whole cash account, were compared; that this cash account was frequently examined during the year, as carefully as his time would permit, and that he thought that the books were correct when these examinations were made, but had been subsequently altered by Barnett; that the last general examination in which a balance sheet was drawn off was made in September, 1900; that they discovered in October, 1901, that the cash account was out of balance; and that this fact led to the discovery of the shortage sued for in this action. Upon cross-examination Mr. Blackly admitted that, whilst he added up all the columns of the cashbook and bankbook, he had not gone into the ledger accounts, for lack of time; that he was a fairly good bookkeeper.

On this state of facts, the court gave the jury the following instructions:

"(1) The court instructs the jury that the application for a bond sued on in this case contained the following statements: 'He [meaning the defendant Clarence M. Barnett] has always to the best of my knowledge and belief given satisfaction in his personal conduct and performance of duties, and kept his accounts faithfully and without default. When last examined or audited, by firm, all accounts of this officer were found in every respect correct up to date. He has not been, nor is he at present, so far as I know or believe, in arrears, default, or without unsettled balance in this or any previous service. I know nothing concerning his habits or antecedents affecting his title to confidence, and I know of no reason why the guaranty hereby applied for should not be granted.' And said application was signed by the plaintiffs. Unless the jury shall believe from the evidence that one or more of said statements, when made, were not true, to the best of the knowledge and belief of the plaintiffs, or either of them, the law is for the plaintiffs, and the jury should so find.

"(2) But if the jury shall believe from the evidence that these statements contained in said application, and set forth in instruction No. 1, or any of them, was, when made, untrue, to the best of the knowledge and belief of the plaintiffs, or either of them, the law is for the defendant, and the jury should so find.

"(3) If the jury shall find for the plaintiff, it should be for the sum of \$819, with interest from October 10, 1901.

"(4) If the jury shall find for the defendant, they shall so say by their verdict, and no more."

Under the above instructions, the jury found for the plaintiffs, and the defendant appeals to this court, and insists that the instructions quoted supra do not define the correct rule for the measurement of appellees'

duties and responsibilities growing out of the execution of the bond sued on. In the recent case of *Warren Deposit Bank v. Fidelity & Deposit Company (Ky.)* 74 S. W. 1111, it was decided that section 639 of the Kentucky Statutes, which provides that "all statements or descriptions in any application for a policy of insurance shall be deemed and held representations, and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy," applied to bonds of the character sued on in this action, but that misrepresentations which were material to the risk in this character of cases, whether fraudulent or not, would invalidate the bond. In *Graves v. Lebanon National Bank*, 73 Ky. 23, 19 Am. Rep. 50, the court said: "There is no principle of law better settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its moneys, notes, bills, or other valuables are intrusted have the right to be treated with perfect good faith. If the directors are aware of secret facts materially affecting or increasing the obligations of the sureties, the latter are entitled to have these facts disclosed to them, a proper opportunity being presented. * * * A fraud may be perpetrated as well by the assertion of facts that do not exist, ignorantly made by one whom the person acting upon the assertion has the right to suppose used reasonable diligence to inform himself, as by concealing facts known to exist, which in equity and good conscience ought to have been made." In the case of *Deposit Bank of Midway v. Hearne*, 104 Ky. 819, 48 S. W. 160, this court decided that whenever the directors of a bank become aware of the embezzlement of a clerk, or may by the exercise of slight care have become so, they owe to the surety to discharge the clerk, and thus terminate the surety's further risk. In *Belleview Bl. & L. Ass'n v. Jeckel*, 104 Ky. 159, 48 S. W. 482, it was decided: "If a party taking a guaranty from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealments will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist." Quoting *Story on Equity Jurisprudence*, § 215. The law requires of an employer, who makes representations material to the risk for the purpose of inducing another to become bound as the surety of one of his employes to him, more than the mere belief on his part of the truth of such representations. His duty, under such circumstances, requires that, before making such representations, he should use ordinary care to know that they are true. *Lawson on Contracts*, § 238, on this point, says: "Where persons take it upon themselves to make assertions as to which they

are ignorant, whether they are true or untrue, they are as responsible as if they had asserted that which they knew to be untrue. Whether a party misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial. For the affirmation of what he does not know or believe to be true is as unjustifiable as the affirmation of what is known to be false, and the same is true where the party is negligent, or ought to have known or remembered the truth, and did not." Whether appellee used ordinary care to post himself as to the condition of Barnett's accounts before he made the statement to appellant was a question for the jury. For the same reason we think the jury, under proper instructions, should have been allowed to determine whether the plaintiffs, prior to the execution of the bond, knew that Barnett was engaged in any gambling or speculative business which would have materially enhanced the hazard of the risk assumed by appellant.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

TOMPKINS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

WITNESSES—HUSBAND AND WIFE—PRIVILEGED COMMUNICATION—SUBSEQUENT DIVORCE—PRESUMPTION—HOMICIDE—MOTIVE—ADMISSIBILITY OF REBUTTING EVIDENCE—SELF-DEFENSE—INSTRUCTIONS.

1. Where, in a prosecution for homicide, a witness testifies that she is the widow of the decedent, a presumption arises that she was divorced from accused, her former husband, before marrying decedent; and hence parol proof of the divorce, instead of the offer of the judgment record, is not ground for reversal.

2. A witness in a homicide prosecution who testifies that she is the widow of decedent is presumed to have been divorced from accused, her former husband, before having married decedent, and therefore, in the absence of evidence rebutting such presumption, is a competent witness against accused as to matters occurring subsequent to the divorce.

3. In a prosecution for homicide, where, to show motive, the state offers deceased's widow, who testifies that she was frequently in accused's company under his compulsion, thereby incidentally charging him with the crime, denounced as a felony by Ky. St. 1899, § 1158, of unlawfully and forcibly detaining a woman against her will, it is error to exclude evidence for accused that the association between him and the witness arose at her solicitation, and without compulsion on his part.

4. In a prosecution for homicide, it is error to charge, as to self-defense, that accused had the right to kill, if there was, as it then appeared to him, no "reasonably" safe means of averting the danger of losing his life or suffering great bodily harm at the hands of the decedent, since accused would not be compelled to choose an alternative method of escaping danger unless it promised absolute safety.

Appeal from Circuit Court, Hopkins County.

"To be officially reported."

Garth Tompkins was convicted of murder, and appeals. Reversed.

Lee Gibson and O. J. Waddill, for appellant. O. J. Pratt and M. R. Todd, for the Commonwealth.

O'REAR, J. Appellant was convicted and sentenced to death under an indictment charging him with murdering Jim Brame.

The widow of the deceased, Jim Brame, was one of the principal witnesses against the appellant. She had formerly been appellant's wife. She testified that she had, however, been divorced from him, and then had married Jim Brame. Appellant objected to the admission of parol evidence of the divorce on the ground that there was necessarily a record of the judgment of divorce, and that, being the best evidence, must be produced. This is the general rule, and, in a proceeding involving directly the legitimacy of the second marriage, it would doubtless be applied. But here the main inquiry is not whether the witness had or had not been divorced. That question arose collaterally. The law raises a presumption based upon existing conditions. That is, it will be presumed, nothing to the contrary appearing, that the second marriage of a person has been preceded by a lawful dissolution of the first one. This is partly because of the law's favorite presumption of innocence, by which it always supposes an act or state of being to be lawful rather than criminal. There is another policy of the law, no less favored than the one first mentioned, which supports the presumption of the legal dissolution of the first marriage, which is the concern of the law for the legitimacy of the offspring of men and women, for the integrity of the family, its honor, and a policy that favors the capacity of inheritance. Bishop's Marriage, Divorce & Separation, § 1157, fairly states the rule of practice deducible from the cases, and supported by sound reason, so far as it may be said to be a rule. He says: "In respect of divorce, the proper direct proof of it is by the record, if in existence and accessible; otherwise, by showing the contents of it. But marriage being a status, and divorce being the annulling or modifying of it, evidently there are various circumstances in which record evidence can be wholly dispensed with. And if in the particular instance the rules of evidence permit a divorce to be presumed, as often they do, the record cannot and need not, therefore, be shown, for, in the nature of things, proof by record is never proof by presumption." Also, see *Howton v. Gilpin* (Ky.) 69 S. W. 766. It was therefore unnecessary to have proved in this case, after the witness Laura had testified she was the widow of decedent, Jim Brame, having been married to him, that she had been divorced from her former husband, the appellant. There being no evidence rebutting the presumption that she was legally absolved from the marriage bonds with appel-

lant, she was a competent witness against him as to subsequent occurrences.

The killing occurred on the night of December 24, 1902. Appellant was more or less under the influence of intoxicants. He went to Brame's house armed with a Winchester rifle. Laura Brame, the woman whom we have just been discussing, testified that she left with appellant, but that he forced her to go. She also testified that on a number of occasions before the killing she had been in appellant's company, but that he had sought her out and compelled her to accompany him. Appellant denied that he had ever forced or compelled Laura to go with him, but that, on the contrary, since his return to the community, she had sought him out, and voluntarily kept him company. Appellant offered also to prove by five other witnesses that Laura had sought appellant's society, had sent him messages, and offered to accompany him to various places, and that he had not sought her. This was rejected by the trial court, which we deem a prejudicial error. The purpose in allowing the prosecution to prove that appellant had forced Laura to accompany him, and on other recent occasions had compelled her to submit to his society, was to show a motive in appellant for the homicide with which he is charged. Otherwise the introduction of that evidence was prejudicially erroneous. If the witness Laura told the truth, it tended to show that appellant was violently enamored of her, likely producing jealousy in him—one of the most controlling passions superinducing criminal violence. It furthermore showed or tended to show incidentally that he was thereby guilty of another statutory felony—that of unlawfully and forcibly detaining a woman against her will, with intent to have carnal knowledge of her. Section 1158, Ky. St. 1899. At least, such an inference by the jury would not have been unreasonable. While proof of one crime committed by the accused may be allowed as evidence of his motive in committing another, if it have that tendency, yet it would be wholly unauthorized to admit such evidence if it did not have that effect. In every view of the case, it was therefore proper to have allowed appellant to show that the prosecuting witness' statements were untrue; that he had not forced her to accompany him, but that she was voluntarily and willingly doing so, and had time and again recently sought his society. Although the presence or absence of the facts just discussed may not at all have affected the fact that appellant shot and killed Jim Brame without any lawful justification, they were material as affecting his motive, and particularly so as bearing on the enormity of the offense, probably impelling the minds of the jury, if believed to exist, to affix the extreme penalty for his act, instead of the lighter one of life imprisonment, or even a term imprisonment under the manslaughter instruction, as they might have done otherwise.

In instructing the jury, the court gave the law of self-defense in its instruction No. 4, as follows: "If the jury believe from the evidence that the defendant, at the time he shot said Jim Brame, if he did shoot him, had reasonable grounds to believe, either real or apparent, and did in good faith believe, that he was then in imminent danger of losing his life or suffering great bodily harm at the hands of said Brame, and there was, as it then appeared to the defendant, no reasonably safe means of averting said danger, then the defendant had the right, in the exercise of a reasonable discretion, to shoot and kill the said Brame; and if, under these circumstances, he took the life of the said Brame, he is excusable on the ground and under the law of self-defense, and the jury will find him not guilty. The danger which authorizes one to act in defense of his life or in defense of his person from great bodily harm may be either real danger or only apparent danger." The act of self-defense is instinctive, and the right of self-defense is based upon this law of nature. One's right to protect himself from imminent death or great bodily harm by reason of an unlawful assault extends only so far as to avert the impending danger. If necessary, or apparently necessary, to take the life of the assailant, it may be done. Whether that is necessary may depend upon the appearances to the assaulted person in the exercise of a reasonable judgment. If, in the exercise of such judgment, there is another means of averting the danger that is as safe to him as to slay his assailant, he must avail himself of that means. He is not bound, though, to take hazardous chances to save himself from the assault. He owes no such duty to the assailant as to take a chance of losing his own life or limb, or sustaining other great bodily harm, in order that the life of his wrongful assailant may be spared. That would be putting the balance against the innocent, and in favor of the wrongdoer. When one assaulted is placed in such immediate peril of his life or limb by the wrongful assault of another, his right of self-defense rests upon, and will not stop short of, his own safety. *Rowsey v. Commonwealth (Ky.)* 76 S. W. 409; *Meridith v. Commonwealth*, 18 B. Mon. 50; *Kennedy v. Commonwealth*, 14 Bush, 340. The instruction quoted seems to considerably curtail this right of the person assaulted. It permits him to act upon the appearances, in the exercise of a reasonable discretion, but even then he was not allowed to strike in the defense of his life or body unless there was no other reasonably safe means of averting the danger. The adverb "reasonably" is a qualifying word, and modifies the adjective "safe." Webster defines it as meaning moderately or tolerably, and that is its commonly understood meaning. The instruction, as worded, then, would mean, if, in the exercise of a reasonable discretion, there appeared to the accused another means of averting the danger to him, although such means were only tolerably safe or moderately

safe, or in a measure safe, or partly safe, and partly unsafe, he could not lawfully strike to save his life or body from the assault. We are aware of no adjudged case in the jurisprudence of any country where the common law prevails that justifies such a qualification of the right of self-defense. The word "reasonably," discussed, should have been omitted from the instruction.

The other matters complained of—that of limiting the argument, and the alteration of an instruction after the argument was finished—are practices which have been discussed and to some extent questioned by this court in the cases of *Williams v. Commonwealth*, 82 Ky. 642; *Harris v. Commonwealth* (Ky.) 74 S. W. 1044; *Combs v. Commonwealth*, 97 Ky. 24, 29 S. W. 734; *Smith v. Commonwealth*, 100 Ky. 133, 37 S. W. 586; *Wilhelm v. Commonwealth* (Ky.) 28 S. W. 783; *Pearce and Howell v. Commonwealth* (Ky.) 42 S. W. 107. We will presume that the trial court is familiar with these opinions, and will conform the practice to what is therein said.

The judgment is reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

SMITH v. BALLARD et al.

(Court of Appeals of Kentucky. Dec. 17, 1903.)

WILLS—CONSTRUCTION—VESTING ESTATE IN FEE—DEATH WITHOUT ISSUE—EFFECT.

1. A will bequeathing to testator's daughter, free from the claim of any husband she might have, certain real estate, but providing that in the event of her death without bodily issue the same should go to others, vested the fee in the daughter, subject to be defeated if she died without bodily issue at any time.

Appeal from Circuit Court, Oldham County.
"To be officially reported."

Suit between Lou Bell Ballard and others and R. M. Smith for the construction of the will of James B. Ballard, deceased. From a judgment for the former, the latter appeals. Reversed.

D. H. French, for appellant.

PAYNTER, J. This appeal involves the construction of the will of James B. Ballard, deceased. The second clause of the will reads as follows: "I will and bequeath to my two daughters Lou Bell Ballard and Maud Shrader formerly Maud Ballard free from the claims of any husbands they now have or may have, the farm on which I now reside and containing about one hundred and sixty acres." The third clause reads as follows: "In the event of Lou Bell Ballard's death without bodily issue then her portion of my estate shall be equally divided between Martha Hitt wife of John Hitt and Marietta Arvin wife of Robt Arvin free from the claims of their said husbands and in the event of the death of Martha Hitt and Marietta Arvin before the death of

Louis Ballard my son then their said portions shall go to Louis Ballard."

The question which lies at the foundation of this case is what estate Lou Bell Ballard takes in the land devised to her. It is provided in the will that, in the event Lou Bell Ballard dies without bodily issue, "then her portion in my estate shall be equally divided between Martha Hitt," etc. When a devise is made to one person in fee, and in case of his death to another in fee, courts interpret the devise over as referring only to death in the testator's lifetime. The courts were led to so interpret such devises, because of the absurdity of speaking of the one event which is sure to occur to every one living as uncertain and contingent. 2 Jarman, Wills, c. 43. The rule is different, however, when the death of the testator is coupled with other circumstances which may or may not take place, as, for instance, death without children. In such case the devise over takes effect according to the ordinary and literal meaning of the words "upon death," under the circumstances indicated, at any time, whether before or after the death of the testator. 2 Jarman, Wills, c. 49; *Sale, etc., v. Crutchfields, etc.*, 8 Bush, 649. In *Thackston v. Watson*, 84 Ky. 206, 1 S. W. 398, the same doctrine is recognized. The death of Lou Bell Ballard was not uncertain, but the event of her death "without bodily issue" was uncertain, for it might occur with or without bodily issue. So, under the plain language of the will, if her death occurred either before or after the death of the testator, then the estate devised to her goes to the persons designated in the will. Our opinion is that Lou Bell Ballard took the fee subject to be defeated, if she died "without bodily issue" at any time. Counsel for the appellant has not cited any authorities upon the question involved, and the case is not briefed for the appellee. We presume the court below was of the opinion that because the devisee survived the testator she took the fee. This is upon the idea that the testator intended she should take the fee, unless she died without bodily issue in his lifetime. The court was evidently controlled by the principle announced in *Aultman Co. v. Gibson's Guardian, etc.*, (Ky.) 67 S. W. 57; *Ferguson v. Thomason, etc.*, 87 Ky. 519, 9 S. W. 714; *Dickson v. Ogden's Ex'r*, 89 Ky. 162, 12 S. W. 191; *Pruitt, etc., v. Holland*, 92 Ky. 641, 18 S. W. 852; *Mercantile Bank of New York v. Ballard's Assignee*, 83 Ky. 481, 4 Am. St. Rep. 160; *Forsythe v. Lansing's Ex'rs* (Ky.) 59 S. W. 854; *Baxter, etc., v. Isaacs, etc.*, (Ky.) 71 S. W. 907; *Lee, etc., v. Mumford, etc.* (Ky.) 44 S. W. 91; *Clements v. Reese* (Ky.) 74 S. W. 1047. In that class of cases the rule is recognized to be, when an estate is given or devised with remainder over, but in the event the remainderman should die without a child or children then to a third person, the general rule of construction is that the words, "dying without children or issue," are restricted to the death of the remaindermen be-

fore the termination of the particular estate. This rule is not applicable to the case at bar.

This judgment is reversed for proceedings consistent with this opinion.

DENUNZIO'S RECEIVER v. SCHOLTZ.

(Court of Appeals of Kentucky. Dec. 17, 1903.)

GIFTS INTER VIVOS—CORPORATE STOCK—DELIVERY—WITNESSES—COMPETENCY—COMMUNICATION TO ATTORNEY.

1. The owner of a mercantile business decided to incorporate the same, and on doing so one-third of the stock was issued to an employé, who had formerly been given one-fourth of the profits of the business in lieu of salary. The owner at the same time took the employé's notes for the stock, and retained the stock as security, but thereafter spoke of the employé's valuable services, declared his intention to give him the stock, delivered the certificate to him, and tore up the notes. Held a sufficient delivery of the subject-matter to constitute a gift inter vivos.

2. An attorney was employed by the owner of a mercantile business to prepare articles of incorporation for the business, and was at that time told by the owner that he intended to give an employé a certain amount of stock. Later the attorney was employed to prepare the owner's will, and was then told that the stock had been given to the employé. The attorney's advice was not asked as to the giving of the stock. Civ. Code Prac. § 606, subsec. 5, declares that no attorney shall testify concerning a communication made to him in his professional character by his client without the client's consent. Held that, as the communications to the attorney with reference to the gift of the stock did not concern the matter with reference to which he was employed, the statute did not render him incompetent to testify thereto.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

Action by Joseph Denunzio's receiver against Charles Scholtz. From a judgment for defendant, plaintiff appeals. Affirmed.

Shackelford Miller and Wallace & Miller, for appellant. Kohn, Baird & Spindle and S. E. Sloss, for appellee.

PAYNTER, J. Joseph Denunzio died in September, 1894, possessed of a very large estate. In June, 1878, the appellee, Charles Scholtz, who was then quite young, was employed by Denunzio, and continued in his service until his death. So faithfully did he serve his employer that he was advanced from time to time until he was practically in charge of the business. In September, 1893, Denunzio was in bad health, and contemplated a trip to Hot Springs, Ark. Before going he conceived the idea of separating his large fruit business, managed by Scholtz, from his other business. So he concluded to organize a corporation, and its capital stock was fixed at \$30,000. The stock was paid for by the assets of the fruit business. Previous to that time Scholtz, in lieu of a salary, was given one-fourth of the profits of the business. There was issued to Scholtz \$10,000 of the stock of the corporation. At

the same time Denunzio took from Scholtz five notes, of \$2,000 each, without interest, and retained the stock which had been issued in Scholtz's name as collateral security. The notes which Scholtz gave were not found among the assets of the estate, neither was the certificate of stock. This action was brought by the receiver, as in an action on lost notes. The defense to it is that the notes and certificate of stock were given by Denunzio to Scholtz inter vivos.

The principal question involved is, did Scholtz show that the gift had been consummated? The testimony discloses the general facts as stated, and in addition thereto that in March, 1894, Denunzio, in his place of business, spoke of Scholtz's long and valuable services, and declared his intention to give him the \$10,000 stock in the corporation, and then delivered the certificate therefor to him, and tore up the notes taken from him for the \$10,000.

It is insisted on behalf of the appellant that these facts did not constitute a delivery of the subject-matter of the gift, and therefore the effort to make the gift was ineffectual; that it could only have been done by an assignment or delivery of the notes. Several cases are cited by counsel for appellant showing that there must be a delivery of the subject-matter of the gift and an acceptance of it. This is the general rule. The mere unexecuted intention to give of itself does not discharge an obligation. While the notes in this case were not handed to Scholtz, they were destroyed, and the certificate of stock actually delivered to him, with the intention that he should have it free from liability for the indebtedness in its purchase. In *Roche v. Jenkins*, 93 Ky. 609, 20 S. W. 1039, the court upheld a gift where the donor told his physician to tell his son Joseph that he wanted a certain note collected and the proceeds given to his sister. In *Meriwether v. Morrison*, 78 Ky. 572, the gift was upheld where the donor went to his desk, took out the notes, and handed them to a party, telling him to return them to the desk, and at his death deliver them to the party designated as the donee. In *Stephenson's Adm'r v. King*, 81 Ky. 425, 50 Am. Rep. 173, it was held that a delivery of an inventory to certain property in the possession of an agent was a gift of the property. In *Southerland v. Southerland's Adm'r*, 5 Bush, 591, it was held that the gift of a note was effectual by a declaration of the gift, the note then being in the hands of the trustee. In some of these cases the court held that the act and declaration of the donor created a trust, and the gifts were effectual. In *Darland v. Taylor*, 52 Iowa, 503, 3 N. W. 510, 35 Am. Rep. 285, it was held that the destruction of the notes, together with the declarations of the donor that he did not intend for the defendant to pay the debt, constituted a delivery. In *Gardner v. Gardner*, 22 Wend. 526, 34 Am. Dec. 340, it was

held that the destruction of a bond given as an evidence of the debt and a declaration that the money was his wife's, was held to be a gift. In this case the donor did not only declare his intention to make the gift, but actually delivered the thing of value, to wit, the certificate of stock, which he intended Scholtz to have, and to make that effectual he destroyed the evidence of the debt which incumbered the thing given. We think that the gift was effected by the acts proven in the case. The appellee is not only entitled to the presumption that he did accept the gift, because it was beneficial to him to do so, but the evidence shows that he actually accepted it.

On the trial of the case Aaron Kohn was introduced as a witness for the appellee to prove statements made to him by Denunzio concerning the gift to appellee. It is urged that his testimony was not competent, because it was the revelation of a confidential communication from a client to his attorney, prohibited by subsection 5, § 606, Civ. Code Prac., which reads as follows: "No attorney shall testify concerning a communication made to him in his professional character by his client or his advice thereon, without the client's consent." It is insisted for the appellee that Mr. Kohn was a competent witness (1) because the subject-matter of his testimony did not pertain to any communication made to him in his professional character; (2) because if the communication was made to him in his professional character it was not confidential or meant to be kept secret, but, on the contrary, was to be divulged for the purpose of effecting the intention and desire of the client. Kohn was employed to prepare the articles of incorporation of the fruit company. At that time Denunzio told him that he intended to give Scholtz \$10,000 worth of the stock. Kohn prepared Denunzio's will at a subsequent date, at which time he told him that he had given the stock to Scholtz, and had torn up the notes and given him the debt. Kohn testified that the information as to the giving of the stock and the destruction of the notes was not a matter upon which Denunzio asked his advice and had nothing to do with their confidential relations. The conversation detailed by Kohn as to the delivery of the certificates of stock and tearing up the notes was in the presence of J. J. Fisher, now deceased, a friend of Denunzio. It was not the subject-matter about which the client was consulting the attorney. The first statement was made when the consultation took place in regard to the articles of incorporation. The employment was to prepare the articles of incorporation, and not to advise with reference to giving away the certificates of stock therein. The second conversation took place in a consultation during an employment to prepare the will of the client. He did not consult the attorney about property which he had previously given away. The client's purpose was

to dispose of the property that he owned, not of that with which he had previously parted. The will did not mention the Scholtz notes. The Code provision referred to is simply a declaration of the common law as to privileged communications of clients. *Taylor v. Roulstone* (Ky.) 60 S. W. 867, 61 S. W. 354. The policy of the rule makes communications of clients to attorneys with reference to the subject-matter of consultations privileged, so as to encourage full confidence upon the part of the client in order to aid in the administration of the laws by the courts. This is upon the theory that the client will disclose everything within his knowledge in regard to the subject-matter of the employment. This being true, a communication made by a client to an attorney during the course of the employment, but not in regard to the subject-matter of the employment, is not privileged. Instead of the client intending that his statements should be privileged, it would seem that he intended that they should be made public, if necessary, because they were made in the presence of an attorney and another person. It would seem that he wanted his lawyer and his friend to know that he had given the stock to Scholtz and destroyed the notes. To give this information would seem to be carrying out the desire of Denunzio. In *Blackburn v. Crawford*, 3 Wall. 175, 18 L. Ed. 186, the court held an attorney competent to testify to statements made by a deceased client in an action between the heirs and lessee. After recognizing the policy of the rule to be as we have stated, it was said: "But there is another ground upon which we prefer to place our decision. The client may waive the protection of the rule. The waiver may be expressed or implied. We think it is effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its object, and in direct conflict with the reasons upon which it is founded." In *Doheny v. Lacy*, 168 N. Y. 223, 224, 61 N. E. 258, it is said: "The veil of strict secrecy is thrown over communications between attorney and client when they are presumable of a confidential character, but, if the evidence discloses that the circumstances surrounding the transactions were such as not to warrant the presumption that the communications were in confidence, the Code provision is inapplicable. * * * The reason of the rule is in the necessity of secrecy, in order that persons needing professional advice shall be encouraged to disclose freely and without fear the facts upon which that advice shall be given." In *Hall v. Renfro*, 3 Metc. 52, the court said: "We are aware of no statute or rule of practice which excludes or renders

incompetent as a witness an attorney in behalf of his client. Civ. Code, § 670, defines with great exactness and precision the classes of persons who shall be incompetent to testify, and attorneys are not embraced in either of the classes enumerated, except the fifth, which excludes an attorney concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent. In all other cases an attorney is a competent witness for or against his client. Whether he should or should not testify while the relation subsists is a question of professional propriety, which he alone is to determine for himself, and with which the court has no concern."

The answer does not in express terms say that Scholtz accepted the gift, but in a general way states the gift was made. Besides, it is averred that the notes were destroyed and the stock was delivered to the defendant. The question was tried as to whether the gift was effectual under the facts we have detailed, and the jury returned a verdict, under proper instructions, for appellee. Without entering into a discussion as to whether the answer was defective, it is sufficient to say the verdict cured it. If the defect existed. In *Association v. Richart*, 99 Ky. 302, 35 S. W. 541, the court held that when a defective pleading states facts sufficiently general to comprehend a fair and reasonable intendment, and there is enough in it to show that the plaintiff had a cause of action, the defect in the pleading will be cured by a verdict.

We are unable to find an error in the admission of testimony for the defendant, or any error in rejecting testimony offered by the plaintiff, which was prejudicial to the rights of the appellant.

Denunzio was the master and Scholtz the servant. Denunzio evidently was a man of strong mind, and managed and controlled his business, and there is not the slightest evidence that Scholtz exercised any control of him whatever. The evidence simply shows that he was a faithful servant, and had the esteem and confidence of his employer. He was not acting as trustee for Denunzio, nor did he even have possession of the property when it was given to him. The facts do not create a presumption that undue or improper influence was used to obtain the gift.

The judgment is affirmed.

SAVAGE v. BULGER et al.

(Court of Appeals of Kentucky. Dec. 16, 1903.)

WILLS—CONTEST—EVIDENCE IN REBUTTAL—INSTRUCTIONS—PREJUDICIAL ERROR.

1. Under Ky. St. 1890, § 4828, requiring that a will shall be subscribed or acknowledged by the testator in the presence of at least two credible witnesses, it was improper, in an instruction in a will contest, to use the word "credible" in reference to the character of the subscribing witnesses, it being used in the statute in the sense of "competent."

2. Where, in a will contest, there was no evidence tending to show that the subscribing witnesses were not credible, the error in an instruction because of the use of the word "credible" with reference to the character of the subscribing witnesses was not prejudicial.

3. Whatever testimony the propounder of a will may offer after the contestant has rested is in rebuttal, and hence to admit such testimony is not in violation of the Civil Code, prohibiting a party from testifying for himself in chief after having introduced other testimony in chief.

"Not to be officially reported."

On petition for rehearing. Petition overruled. For former opinion, see 76 S. W. 361.

SETTLE, J. Our attention has been called by the petition for rehearing to the fact that in approving the use of the word "credible" in the instruction given by the lower court to the jury in defining the qualifications necessary to be possessed by the attesting witnesses to the will in contest in this case the opinion of the court is in conflict with *Fuller v. Fuller*, 83 Ky. 345, wherein an instruction which required the jury to believe from the evidence that the witnesses to a will were "credible" persons is condemned. The court in that case held that the word "credible" as used in the statute in reference to the attesting witnesses to a will means "competent"; that is to say, the requirement of the statute is that the attesting witnesses to a will must be such persons as are not "disqualified by mental imbecility, interest, or crime from giving testimony in a court of justice." Not desiring that even an apparent conflict shall exist between the opinion in this case and that of *Fuller v. Fuller*, supra, so much of the opinion in this case as expressly approves the use of the word "credible" in the instruction complained of is withdrawn. In *Fuller v. Fuller* it was, however, further held that instruction which directed the jury to believe that the witnesses to the will in contest in that case were "credible" persons was not prejudicial to the party complaining of the instruction, as there was nothing in the evidence that tended to show that they were not credible. The same is true of this case.

It is contended by counsel for appellant that only one of the attesting witnesses to the will, Milton Bulger, was incompetent, and the only ground for such a claim as to him is that at the time of the execution of the will he was partially paralyzed. There is not, however, a scintilla of evidence to show that he was not a "credible person," or that he was not "competent." In other words, there was no evidence tending to show that the witness was "disqualified by mental imbecility, interest, or crime from giving testimony in a court of justice." So, even if it be conceded that the instruction complained of was erroneous because of its use of the word "credible," it is equally true, in view of the evidence, that it was not prejudicial to the appellant.

We think there was no error in the admission of the testimony of Nellie Bulger, for, as said by this court in *King v. King* (Ky.) 42 S. W. 347: "Whatever testimony the propounders may offer after the contestants have rested is in rebuttal, and hence to admit such testimony is not in violation of that provision of the Civil Code which prohibits a party from testifying in chief for himself after having introduced other testimony in his behalf."

The petition for rehearing is overruled.

CUMBERLAND TELEGRAPH & TELEPHONE CO. v. MARTIN'S ADM'R.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

"To be officially reported."

On petition for rehearing. For former opinion, see 76 S. W. 394. Petition overruled.

HOBSON, J. The distinguished counsel for appellee concedes in the petition for rehearing that the facts of the case are fairly stated in the opinion. He also concedes the soundness of the authorities cited, and that if the telephone company had owned both the house and the wire it would not be responsible for the death of the intestate. But he insists that it does not follow that it is not responsible when it owned only the wire, and allowed it to remain on the building after it was requested by the owner of the building to remove it. No authority is cited by the learned counsel sustaining his contention, and he seems to misapprehend the legal principle upon which the opinion rests. This is that there can be no negligence where there is no legal duty. In 1 *Shearman & Redfield on Negligence*, § 8, in defining negligence it is said: "The first element of our definition is a duty. If there is no duty, there can be no negligence. If the defendant owes a duty, but does not owe it to the plaintiff, the action will not lie. And there can be no duty to do any act which one has no legal right to do. The plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him." See, also, to same effect, *Cooley on Torts*, 659, 660. In *Bishop on Non-Contract Law*, § 446, the rule is thus stated: "To sustain an action for negligence, the plaintiff must have suffered a legal injury whereof he is entitled to complain. Therefore, however great the defendant's negligence, if it was committed without violating any duty which he owed either directly to the plaintiff, or to the public in a matter whereof he had the right to avail himself, as explained in the earlier chapters of this volume, there is nothing which the law will redress." He who handles an agency which is of itself dangerous to human life is responsible for injuries therefrom not caused by extraordinary natural occurrences or

the interposition of strangers. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 453; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298. But as to things which are not of themselves essentially instruments of danger the rule is different, and for them the negligent party is not responsible to strangers. *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 513; *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Blakemore v. Railway Co.*, 8 El. & Bl. 1035. If the telephone company had used over its wires a current of electricity which was of itself dangerous to life, a different question would be presented; but the electricity which killed the intestate came from the clouds, and was the act of God. The current which the telephone company used in its business was harmless. It owed the intestate no duty to furnish him a safe shelter from the rain. When he used the porch as a shelter, he took it as he found it. The wire of the telephone company was not in or of itself an instrumentality dangerous to human life, and there was no duty violated to the public in a matter whereof the intestate had the right to avail himself. Section 969 of *Thompson on Negligence* has reference to defects in premises which are in themselves dangerous. Section 807 refers to the liability of the company owning the wire to the owner of the house.

Petition overruled.

ASHCRAFT et al. v. COX.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

DEEDS—CONSTRUCTION—QUESTION OF LAW—LAW OF THE CASE.

1. Where there is no latent ambiguity in a deed, its construction is a question of law for the court.

2. Where a deed has been construed on appeal, such construction constitutes the law of the case, and settles the rights of the parties.

"Not to be officially reported."

Extension of opinion on rehearing. For former opinion, see 76 S. W. 121.

Hazelrigg & Chenault and *J. B. White*, for appellants. *O. H. Pollard*, *H. L. Wheeler*, and *Sutton & Harris*, for appellee.

HOBSON, J. It was decided by this court on the former appeal that appellee's line, under his deed, should run with the cliff to the pine at 3 on the plat of Tarvin; and thence to the forks of the creek at 7 on the plat; thence northward, a straight line, to the cliff at 9. The construction of a deed is a question of law for the court where there is no latent ambiguity. This construction of the deed is the law of the case, and settles the rights of the parties. The verdict of the jury must be read in connection with the former opinion of this court defining their rights, and is in legal effect a finding of \$10 for the th-

¶ 1. See *Deeds*, vol. 16, Cent. Dig. § 258.

ber cut within the boundary so settled. The evidence sustains this finding of the jury in this view. The judgment is not reversed, because we so interpret the verdict and judgment of the court below.

The opinion heretofore delivered is extended to this extent.

LOUISVILLE & N. R. CO. v. CARTER.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

PRIVATE WAYS—OBSTRUCTION—MEASURE OF DAMAGES.

1. In an action against a railroad company for obstructing a passway leading from plaintiff's premises across the tracks to a highway, the measure of plaintiff's damages is the diminution, if any, of the value of the use of her house and land during the time the obstruction of the passway was continued by the defendant.

"Not to be officially reported."

On petition for rehearing. For former opinion, see 76 S. W. 364.

SETTLE, J. The court is asked in the petition for rehearing to extend the opinion in this case by defining the measure of damages applicable to the facts upon which the appellee rests her right to a recovery. In our recent consideration of the case, and in writing the opinion which followed, we were of opinion that the instruction given by the lower court on the last trial upon the question of damages substantially presented to the jury all that was necessary to be said to them on that subject. But as the case has been twice reversed by this court on account of excessive verdicts, we think it proper to comply with the request contained in the petition for rehearing.

Counsel for appellant insists that the rule for the ascertainment of damages in a case like this is the difference in the rental value of the real property during the time of the continuance of the obstruction of the passway, and what such rental value would have been during that time if the passway had not been obstructed, and several cases are cited which apparently sustain this contention. But we think that an examination of those cases will show that the rule asserted will apply only where the property is rented. The only Kentucky authority applicable to this case that we have been able to find is the case of *Bannon v. Rohmeiser* (Ky.) 34 S. W. 1084, 35 S. W. 280, the facts of which are very similar to those of the case at bar. Rohmeiser owned two lots in Louisville. Bannon erected a house across, and thereby obstructed, an alley, by which one or both of her lots were reached from an adjacent street. She recovered damages against him. Bannon appealed, and the judgment in favor of Rohmeiser was reversed by this court because the verdict was excessive. In its response to the petition for

rehearing the court said: "• • • The measure of damages in this case is the diminution of the value of the use (of the property) during the time the nuisance was continued, and the instruction given by the lower court properly presented that question to the jury." The rule thus stated should control the jury in the retrial of this case, and it will be the duty of the trial judge to instruct the jury that, if they find for the appellee, the measure of damages is the diminution, if any, of the value of the use of her house and land during the time the obstruction of the passway in controversy was continued by the appellant.

MERCHANTS' & FARMERS' BANK v. CLELAND et al.

(Court of Appeals of Kentucky. Dec. 18, 1903.)

"Not to be officially reported."

Dissenting opinion. For majority opinion, see 77 S. W. 176.

H. W. Rives, for appellant. H. P. Cooper, Edward W. Hines, A. M. J. Cochran, and W. S. Pryor, for appellees.

PAYNTER, J. (dissenting). I delivered the opinion of the court which was withdrawn, and it so fully states the facts and my conclusions that I adopt it as my dissenting opinion, with some additional observations. It reads as follows:

"On April 4, 1896, T. Horace Cleland, husband of the appellee Ella M. Cleland, entered into a contract with the Inter-State Cattle Company of Macon, Miss., to the effect that it was to increase its capital stock to \$25,000. Cleland was to take the stock, and pay for the same at par value; the amount so invested to be used to purchase blooded mares and other improved stock, suitable for stocking its property. The value of the live stock to be agreed upon by the parties in interest, if possible, but, if not, to be determined by disinterested parties in the usual way. Cleland was to give his undivided attention to the business of the company as manager, and for his services was to be paid \$480 per year. He was to have the right to keep some of his own horses and mares upon the property, and for which he was to pay pasturage. The property belonging to the company consisted of 1,600 acres of land in Noxube county, Miss., and a cash asset of about \$2,000. The value of the assets was estimated at \$18,000. Cleland was to take \$7,000 of the stock, thus increasing the capital stock to \$25,000. He lived at Lebanon, Ky., and owned 75 or 100 head of pedigreed horses, and it appears to have been understood that he was to ship them to Noxube county, Miss. It was in contemplation of the parties that his subscription to the capital stock was to be paid in the horses, although the written contract did not so state. Under the arrangement he was to

¶ 1. See *Easements*, vol. 17, Cent. Dig. § 145.

take the horses to Mississippi about the 1st of January, 1897, at which time he shipped part of them; but it is claimed by the appellee Mrs. Cleland, as there was no feed provided for them by the company, the balance were not then shipped. In March another consignment of the horses was made. Some of them were not shipped until after July 19, 1897. The contract between the parties as to the increase of the capital stock, etc., and acceptance of the horses was never consummated. The Cleland horses were placed upon the company's land. He took possession of it as manager, and proceeded to improve the place. Those representing the corporation claim that Cleland refused to have his horses valued, because he said they were not in proper condition, and that if they were valued he would not get for them what he was entitled to receive. Mrs. Cleland claims that the failure to value the horses was the fault of the cattle company; that when it was suggested that they be valued its officers would postpone it for one reason or another. The cattle company claims that the horses were in such condition when they reached Mississippi that they were hardly able to travel from the railroad to the land. Many of the horses died. Mrs. Cleland claims that she owned the horses under a contract with her husband. Some of his Kentucky creditors placed their claims in the hands of a Mississippi lawyer for collection. Thus the matter stood July 19, 1897, when the contract made between the cattle company and Mr. Cleland was abandoned by mutual consent. The cattle company then sold Mrs. Cleland 640 acres of the land. The contract price was stated in the deed at \$8,500, but a part of that amount consisted in advancements which the cattle company had made between January 1st and that date for the improvement of the property and the expenses of farming operations. As evidence of the indebtedness of the \$8,500, Mrs. Cleland executed her notes, and her husband also signed his name to the notes below hers. To secure her notes she executed a deed of trust on the land which she purchased and the horses that were then living. The Kentucky creditors instituted a proceeding in a chancery court of Mississippi to subject the horses to the payment of their debts, upon the ground that they belonged to the husband, and that the transaction between him and her was fraudulent. The chancery court decided that the transaction between the husband and wife as to the horses was fraudulent, and that they should be subjected to the payment of the husband's debts in suit. The Supreme Court of that state affirmed the judgment. The horses were subsequently sold to pay the debts, thus leaving the land alone pledged to pay the purchase money debt. The Mississippi courts held the transaction was valid as to the deed of trust on the land. The land was sold un-

der the deed of trust, and only brought \$2,100. Shortly after the notes were executed they were assigned to the appellant. This action is based upon the notes upon which credit is given for the \$2,100, the proceeds of the sale of the land.

"Mrs. Cleland resisted the payment of the notes upon the grounds: (1) That she was assured by Mr. Jones, secretary of the cattle company, that she did not incur personal liability in the execution of the notes and the deed of trust. (2) That, if she cannot thus be relieved, the notes should be credited with the sum of six hundred and odd dollars, expenses paid by her for keeping the horses in Kentucky from January until they were shipped to Mississippi, and for the value of the horses that died in Mississippi before and after July 19, 1897; for the amount due for pasturage of other persons' stock upon the company's land during the season of 1897; for the value of her husband's services as manager from January 1 to July 19, 1897; and some other amounts not necessary to mention. (3) That there should be a rescission of the contract, because the land which she bought was infested with ticks. (4) That the title to the land was defective, inasmuch as about five acres of it was in use for cemetery purposes.

"Under the Mississippi laws a married woman is personally bound upon her contracts. On the day the land was sold to Mrs. Cleland the president of the cattle company and some of the directors and Mr. Jones, its secretary, met the Clelands at a lawyer's office to consummate the sale. Mrs. Cleland testifies that while the papers were being prepared she had a conversation with Mr. Jones, secretary of the cattle company, in the room where they had all assembled, and details it as follows: 'Mr. Jones came over and sat down by me, and I told him the horses were mine, that I had put my money in them, and that was the reason I wanted the land deeded to me, and that I was willing to give a mortgage on the land and the horses, but I was not willing to be bound in any other way, and he assured me that I would not be.' Mr. Jones denies that he gave her such assurance. The lawyer testifies that he never heard such a conversation, and that it was never suggested to him in the preparation of the papers by any person that Mrs. Cleland was not to be bound by the notes. The other persons interested in the cattle company who testified deny any knowledge of such an arrangement as claimed by Mrs. Cleland. The notes import a personal liability. The notes were an acknowledgment of a personal liability and promise to discharge it. Her testimony is insufficient to overcome the evidence of the contract furnished by the notes and the testimony of Mr. Jones. In fact she wholly fails to sustain her claim that she was to be under no personal obligation to pay the notes. This conclusion of fact obvi-

ates the necessity of determining what would have been the effect had she established the fact that Mr. Jones gave her the assurance claimed.

"Mrs. Cleland testified that the agreement was at the time she signed the notes that she was to have the credits which she claims. This is denied by Mr. Jones, and there is some other testimony which tends to support him; besides, the circumstances attending the transaction are to the same effect. If it was the agreement that she was to have credits on the notes for the amounts claimed, it is inexplicable why part of them were not given before the notes were executed. The amount of her husband's salary from the first of January until the purchase of the land was easily calculated; the amount which she had paid for the feed of horses in Kentucky during the period mentioned was easily given; the amount of the railroad freight was easily ascertained. If the cattle company was to pay for the horses that died previous to that time, and there were several of them, it would have amounted to several thousand dollars. If the credits were given to which appellee claims she is entitled, she would have owed but a small part of the debt evidenced by the note. If the appellee was to have the credits which she claims, and she was assured that they would be soon given, it is difficult to understand why she would have given her notes for the purchase money of the property for five several amounts, and make the last of them mature March 1, 1901. If these claims were to be given as claimed, it is singular that she and her husband would allow the cattle company to include in the notes the sums which it had advanced in the prosecution of the work on the ranch before the sale to her. The evidence shows that under the arrangement in the sale of the property the appellee and her husband were to have the sums that were due by persons for pasturing stock on the ranch for that season; but the company claims that the appellee's husband, who was looking after the business for her, was to collect these sums, but that he failed to do so, because he did not require them to be paid before the stock was taken from the place. There is a writing between the parties which indicates that the cattle company agreed to collect these amounts. We are of the opinion that the notes should be credited with \$450, the amount specified in the writing.

"It is claimed that the contract of sale should be rescinded because the cattle company represented, through one of its officers, that they were native ticks which were affecting the horses, when as a matter of fact they were Texas ticks. It is claimed that the agent of the cattle company knew that they were Texas ticks. The ticks infested the stock early in the spring of 1897, and the record conduces to show that they gave the horses fever from which many of them died. It is not claimed that the cattle company

knew that their land was infested with ticks before the Clelands moved upon it, nor is it claimed that the party who expressed the opinion that they were Texas ticks had seen them at the time he did so. The appellee and her husband were fully aware of the fact that the horses had suffered and died from the bites of the ticks, and had known that fact for some time before they purchased the land. It seems to us that it is wholly immaterial whether they were native or Texas ticks, because their bites seem to have been productive of the death of many of the horses. So any opinion which an officer of the company expressed as to the character of the ticks could not have deceived the appellee, because she knew the horses were dying of fever produced by their bites. In view of the fact that the record shows that the appellee was fully aware at the time she bought the land of the existence of the ticks upon it and of their effect on stock, she was neither misled nor deceived by any statement which any officer of the cattle company made to her as to the nativity of the ticks.

"The cemetery was situated within 300 yards of the residence which the Clelands occupied for some months before purchasing the land. She could not help knowing of its existence. There was about five acres in it, and it was not excepted out of the deed to Mrs. Cleland. It is not made to appear how the title to the cemetery lot was held. If the cattle company was unable to vest Mrs. Cleland with the fee to the lot, that would be no ground for rescinding the sale, as it was too inconsiderable a part of the tract sold. She is not entitled to damages in excess of the value of the land, because she knew of the exact location of the cemetery, and its proximity to her residence, and has exactly the same effect in the enjoyment of the property as a home, whether the cattle company could or could not vest her with the fee to it. She should be credited on her notes with the value of the land used for the cemetery, to wit, \$50. As Mrs. Cleland did not ask the bank to appeal the Lapsley Case to the Supreme Court of Mississippi, she should not be made responsible for the damages or costs which appellant was compelled to pay on account of its prosecution. The purchase of the land was an extremely unfortunate venture for Mrs. Cleland. The consequences are such as may come to any one who makes a bad bargain. The courts cannot make contracts for women any more than for men. They cannot refuse to enforce them because they are women, however calamitous the effect may be on their fortunes, if there is no reason in law or equity for such refusal. Mrs. Cleland, instead of taking care of the debt which she had contracted, abandoned the property to be sacrificed at public sale, and the court cannot protect her from the consequences of her act."

Courts should be just. It is not their province to be generous, for, if they are, their

generosity must necessarily inflict a great injustice upon the one at whose expense it is bestowed.

I again recur to the question of Mrs. Cleland's claim that she was to be under no personal liability for the debt. The opinion holds that because Jones was introduced as a witness, and testified before Mrs. Cleland that he never made the statement imputed to him, that Mrs. Cleland should not be "bound in any other way" than by the execution of a mortgage on the land and horses, he did not contradict her. When his deposition was taken her defense had been filed and he knew what it was. The burden was on Mrs. Cleland as to this issue of fact. Her deposition presumably was read first, and when his was read in rebuttal there was a complete denial of the statement she made that she was not to be "bound in any other way." I call that a contradiction. It seems to me that its character as such cannot be changed by merely stating that it is not a contradiction. Mrs. Cleland admits the contract of sale had been made before the parties assembled at the lawyer's office to reduce its terms to writing. She also admits the deed to her for the land had been written, signed, and acknowledged by Judge Foot, president of the cattle company, in her presence, before she claims to have had the conversation with Jones. The writings, including the notes, were read to her, and the notes were signed by her, after the alleged conversation with Jones. Is it not remarkable that a woman who was so sagacious that she did not want to be made personally liable for the debt, and had told Jones so, and he had agreed that she should not be, that she did not refuse to sign the notes unless they were so drawn as not to import personal liability? The conclusion to be drawn from the record is that the business associates of Jones were reputable men, and he was especially so; for Mrs. Cleland said in her amended answer and counterclaim that he "was a man of large means and high moral repute and integrity." The president and directors of the cattle company had assembled to reduce the terms of the contract to writing, and it is not claimed that a suggestion was even made to them or their attorney that the notes were not to bind Mrs. Cleland. The only one who did this, according to the claim of Mrs. Cleland, was Jones, and he did it privately to her. It is not claimed that Jones told Mrs. Cleland, under the laws of Mississippi she would not be bound by the notes, or that the words of promise in the notes did not import a personal liability, nor is it shown that it was to be written in the notes that she was not liable thereon. Hence there was no fraud practiced in obtaining her signature to the notes, nor were there any fraudulent representations as to the law of Mississippi, or as to the legal import of the notes. There is no mistake in the execution of the notes, as

the parties did not agree that the notes should be written in words different from those employed in them. So we have a case where a party who executed notes for the absolute and unconditional payment of money is seeking to defeat a recovery by alleging and attempting to prove the money was not to be paid by the promisor. Suppose a case where A. sells B. a horse for \$100, for which B. executes to A. his note containing an absolute and unconditional promise to pay the money. Can A. defeat a recovery by showing a contemporaneous agreement that he was not to be personally bound on the note? I think not. There would be a valuable consideration for the execution of the note. It was voluntarily executed; hence there would be neither fraud nor mistake in its execution. The fact that a mortgage was given to secure the note would not affect the question of personal liability. To refuse a recovery on such a note would be doing so without either fraud or mistake or a want of consideration being shown. The evidence that A. agreed that B. should not be personally bound on the note would be subject to the objections, viz.: (1) It would be allowing a party to contradict the plain terms of a writing which could have no legal effect unless enforced according to its terms; (2) it would be allowing evidence of a contemporaneous agreement, which would not only vary the terms of the writing, but nullify it, without showing that it was omitted by fraud or mistake. This conclusion is supported by Greenleaf on Evidence, vol. 1, § 275, wherein it is said: "When parties have deliberately put their engagements in writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly of one of the parties, is rejected. In other words, as the rule is now more briefly expressed, parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." So far as I am aware, no court of last resort (except in this case) has ever failed to observe this well-settled rule. This court in numerous opinions has recognized its correctness. As there was neither fraud nor mistake in the execution of the written contract, evidence of a verbal agreement pertaining to the subject-matter of it, made before or at the time of its execution, and not embraced therein, is not admissible for the purpose of restricting, enlarging, or in any way varying its terms. National Mutual Benefit Association v. Heck-

man, etc., 86 Ky. 254, 5 S. W. 565; McDaniel, etc., v. Evans, etc., 90 Ky. 568, 14 S. W. 541. The effect of the opinion of the court is to so change the language of the notes that instead of reading, "I promise to pay," they are made to read, "I do not promise to pay," the sums stated in the notes.

For the foregoing reasons, I dissent.

SYKES v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

INTERMEDIATE CARRIER—DEFECTIVE CAR—
INJURY TO CONSIGNEE'S SERVANT—LIABILITY—
PRESUMPTION OF DUE CARE—RELIANCE
—APPEAL—PROPRIETY OF REMAND.

1. The servant of a consignee, suing a carrier for injuries from a defective railroad car, who knew that cars similarly received often possessed the same defects, had no right to rely on a presumption that defendant had supplied a car in such repair as would enable him to unload it in safety.

2. The duty of an intermediate carrier is to inspect a car to see that it is in proper condition to be received by the ultimate carrier, but it owes no duty to the servant of the consignee, rendering it liable for injury from a defective car.

3. Where a judgment for plaintiff is reversed because defendant owed plaintiff no legal duty, and therefore could violate none, the case will not be remanded.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Action by John W. Sykes against the St. Louis & San Francisco Railroad Company. From a judgment for defendant, plaintiff appealed to the St. Louis Court of Appeals, from which court, after reversal, the case was certified in the Supreme Court. Judgment of the Court of Appeals affirmed, with direction not to remand.

J. T. Woodruff and L. F. Parker, for appellant. Thos. B. Harvey, for respondent.

MARSHALL, J. This is an action for personal injuries. The plaintiff recovered \$1,500 damages in the circuit court. The defendant appealed to the St. Louis Court of Appeals, and that court reversed the judgment, and ordered the case remanded to the circuit court for a retrial. One of the judges of that court concurred in reversing the judgment, but not in remanding the case, and deemed the order remanding the case to be in conflict with the decision of this court in *Roddy v. Railroad*, 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333; and for this reason that court certified the case to this court, under the sixth amendment to article 6 of the Constitution, and the case is therefore here for determination as in case of jurisdiction obtained by ordinary appellate process.

The suit was originally against both the defendant railroad and the St. Louis Car Wheel Company. The trial court consulted

the plaintiff as to the St. Louis Car Wheel Company, and the plaintiff recovered a judgment in that court against the railroad company.

The case made is this: The plaintiff was a common laborer in the employ of the St. Louis Car Wheel Company. That company was engaged in the business of making and repairing car wheels. Its place of business was located between the tracks of the Wabash and Missouri Pacific Railroads, and each of said roads had switch tracks running into and upon the property and place of business of the car wheel company, over which cars were run carrying new wheels from, or old wheels into, the place of business of the car wheel company. The defendant had no tracks running to the premises of the car wheel company. It was a part of the plaintiff's business to unload the old wheels so brought to the premises of the car wheel company, and he had been so engaged for about three years before the date of the accident complained of. On January 17, 1898, defendant's coal car No. 5,149, loaded with coal, was delivered by defendant, at Nichols Junction, to the Kansas City, Ft. Scott & Memphis Railroad Company, and consigned to a consignee at Kansas City. It was inspected by defendant's inspector at that time, and found to be in good condition. After delivery of the coal to the consignee at Kansas City, the Kansas City, Ft. Scott & Memphis Railroad Company loaded the car at Kansas City with old car wheels that were consigned by one Jarvis, at Kansas City, to the St. Louis Car Wheel Company, at St. Louis. The car was properly inspected by the Kansas City, Ft. Scott & Memphis Railroad Company at the time of so loading it, and it was then found to be in good condition. The Kansas City, Ft. Scott & Memphis Railroad Company billed the car to Nichols Junction, and carried it to that place, where it was delivered to the common agent of that company and of the defendant; and that agent, acting for the defendant, billed the car to the car wheel company at St. Louis. The car was inspected by the defendant's inspector at Nichols Junction, and found to be in good condition. The car was hauled by the defendant from Nichols Junction to the eastern terminus of the defendant's road (at that time), at Chouteau avenue, in St. Louis, and there delivered to the Missouri Pacific Railroad, and by it hauled over its tracks to the premises of the St. Louis Car Wheel Company, and was delivered to that company on January 29th. It remained there until the morning of January 31st, when the foreman of the car wheel company ordered the plaintiff and other workmen to unload the car, which they proceeded to do; and in the doing of it, and while moving one of the wheels, the plaintiff stepped into a hole in the floor of the car, his right foot and leg went down through the hole, he was thrown down, and the car wheel rolled back

¶ 1. See *Railroads*, vol. 41, Cent. Dig. § 835.

onto his leg and broke it. The hole was eight or nine inches long and four or five inches wide. The plaintiff's testimony and that of his witnesses is to the effect that the hole appeared to be an old break; that there were other holes in the floor of the car, which had been covered over with planks; that the floor of the car was rotten; that there were trash and straw and ice on the floor of the car, which hid the condition of the floor; and one witness said that the hole into which the plaintiff stepped appeared to have been covered with a piece of bark and with trash and straw. The plaintiff testified that he had unloaded many cars before; that it was a very common occurrence for cars to come there with holes in their floors, and that some of them would have planks laid over the holes; that he saw cars there with holes in their floors every day; that the cars of the Burlington Road were the worst, and that it was a common occurrence for the cars of that road to have holes in the floors; that it was not so common for the cars of other roads to have such holes, but that he saw holes in other cars often. He further testified that, when the men started to unload this car, they had to shove the trash away, so that the door of the car would rest flat on the floor of the car; that he never examined this car, before commencing work, to see whether there were any holes in the floor, and never paid any attention to that matter; that he did not see anything wrong with the floor, and did not look for anything; that there was nothing to prevent his seeing whether there was anything wrong with the car, as he had good eyes, but that he did not apprehend any danger, and did not examine the floor of the car at all before he was hurt. It appeared that the defendant charged and collected from the car wheel company the sum of \$38.95 for hauling the car from Nichols Junction to St. Louis. It also appeared that, when the defendant delivered cars that were consigned to the car wheel company to the Missouri Pacific Railroad Company, the defendant ceased to have any control over them, or to have anything further to do with them. It also appeared that the Missouri Pacific Railroad charged \$2 per car for hauling the car from the terminus of the defendant's road to the premises of the car wheel company; and the plaintiff contends that the defendant included that charge in its bill, and collected it from the car wheel company and paid it to the Missouri Pacific Railroad Company, and that in rendering the service the Missouri Pacific Railroad Company only acted as the agent for the defendant. On the other hand, the defendant claims that the Missouri Pacific Railroad was an independent connecting carrier, and that, when the defendant turned over the cars to the Missouri Pacific Railroad, the power, authority, and control of the defendant over the car ceased, and therefore its liability with re-

spect to the car ceased, and that the Missouri Pacific Railroad Company became the connecting carrier to transport the car to its destination, and that this is true without regard to how many miles that company had to haul the car. There is no substantial evidence to support the plaintiff's contention that the defendant collected the charges of the Missouri Pacific Railroad for switching or hauling the car, nor that that road was merely acting as an agent of the defendant in hauling the car from the terminus of the defendant's road to the premises of the car wheel company. So far as the record here discloses, the defendant was an intermediate connecting carrier in this case.

At the close of the whole case the defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted. As before stated, the car wheel company also demurred to the evidence, and the court sustained the demurrer as to that company. The defendant stood upon its demurrer to the evidence, and asked no other instructions. At the request of the plaintiff, the court gave six instructions, but, as the fifth related to the measure of damages, and the sixth related to the burden of proof, and as no point is made here as to those instructions, they need not be reproduced. The other four instructions given for the plaintiff are as follows:

"(1) The court instructs the jury that if you believe and find from the evidence in the case that, at the time of the injury complained of by plaintiff, he was engaged at work in the employment of defendant St. Louis Car Wheel Company in unloading car wheels from a car which had been run in and upon the premises of said car wheel company by the defendant St. Louis & San Francisco Railroad Company, to be by it, the said car wheel company, unloaded; the said railroad company being engaged in and paid for the hauling of freight to and from said premises for said car wheel company upon cars furnished by said railroad company, and then and there to be unloaded upon said premises of said car wheel company; said transportation of freight and unloading of the same as aforesaid being for the mutual benefit of the said railroad company and said car wheel company; and that the plaintiff, at the instance and command of his employer, the said car wheel company, was at the time of the alleged injury engaged in unloading a car, as aforesaid, furnished by the defendant the railroad company; and that, in the performance of said duty by the plaintiff or others, it became and was necessary to stand and move about on the floor of said car; and that said car was then and there in an unsafe condition, by reason of the floor having holes and pitfalls therein, and that the defendants knew of the condition of said floor, or by the exercise of a reasonable degree of care and diligence could have known of its condition; and that

plaintiff did not know of the condition of said floor until the happening of the injury complained of, and that the defect and holes aforesaid were not patent to him, such as would have been disclosed to him, had he been ordinarily observant; and that while plaintiff was so engaged as aforesaid in the service of said car wheel company, unloading from a car furnished aforesaid, then and there loaded with car wheels consigned to said car wheel company, he was hurt, injured, and damaged by the floor of said car being out of repair, and with holes and pitfalls therein, as aforesaid, and that the injury occurred without the fault or negligence of plaintiff contributing thereto—then your finding should be for the plaintiff.

"(2) The court instructs the jury that if you believe and find from all the evidence in the case that the defendant the railroad company was engaged in transporting over its railroad, to and on the premises of the defendant the car wheel company, for a valuable consideration, cars to be unloaded by said car wheel company on its premises aforesaid, then it became and was the duty of the railroad company to furnish cars in such a state of repair that the said car wheel company and its employes could, with reasonable care and prudence, safely go upon and work upon them in order to do the necessary things for the unloading of the cars. And if you should find that the plaintiff, before the time of the alleged injury, did not know that the car furnished as aforesaid by the railroad company was not in a safe condition and repair, he had a right to presume that the defendant railroad company had done its duty, and that said car was in such a state of repair and condition as would enable him to do his work with reasonable safety, and he had a right to rely and act upon such presumption.

"(3) The court further instructs the jury that if you believe and find from the evidence in the case that the plaintiff did not know of the alleged condition of the floor of said car until after the happening to him of the injury referred to in the testimony, and that the condition would not have been observed by him by the exercise of ordinary care and reasonable prudence on his part, it was not incumbent upon plaintiff to search and examine for defects in the floor of said car not so observable, but that he had a right to assume that said car was in suitable and safe condition for the doing of the necessary labor on the same necessary to the unloading thereof.

"(4) If the jury believe and find that the defendant railroad company kept inspectors at Nichols Junction or other points on its railroad line intermediate between the points from which they may find the alleged car was received, loaded for transportation to the defendant car wheel company, at the city of St. Louis, and that said inspectors were charged by the railroad company with

the special duty of examining into the condition of cars at those points, and seeing that they were in a safe and proper condition, before they were suffered to depart therefrom, then the defendant railroad company is liable to plaintiff for any neglect of duty on the part of such inspectors and repairers whereby plaintiff was injured, if the jury believe that said inspectors were negligent. If the jury believe he was so injured in consequence of such neglect of duty, then said railroad company would be likewise liable, if such injury resulted because of the careless and negligent performance of said duty by said car inspectors."

There were a verdict and a judgment for the plaintiff for \$1,500. The defendant appealed to the St. Louis Court of Appeals, where, as above stated, the judgment was reversed, and the cause ordered remanded, and then the case was certified to this court for the reasons stated.

1. Instructions.

It is apparent that the instructions given at the plaintiff's request were modeled after the instructions given for the plaintiff in the case of Roddy v. Mo. Pac. Railroad Co., 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333, and it is equally clear that this case was tried by the plaintiff and the trial court upon the theory that that case affords an exact precedent and parallel for this case. An analysis of that case, and a comparison of it with the facts in this case, will easily demonstrate that the principles underlying the two are not all the same, and that, while much that is said in that case applies equally to this case, the two cases, in their final essentials, are not at all alike, and the ground upon which the plaintiff's cause of action was rested in that case is not present at all in this case, but that the crucial question in this case was not involved or decided in that case. The Roddy Case was this: One Pickle owned a rock quarry about three miles from Warrensburg, a city located on the line of the railroad. The railroad built a branch road from the main line to a point near the quarry for the purpose of affording easy shipping facilities for Pickle's rock. From the branch road Pickle built a switch track or road to his quarry for the purpose of running and standing cars upon it while being loaded. The railroad, when requested by Pickle, delivered the cars on its branch road at the switch, and Pickle's employes moved the empty cars from the branch road onto Pickle's switch track and loaded them, and then the railroad engines hauled the loaded cars away to their destination. The plaintiff, Roddy, was an employe of Pickle, and, while attempting to move a car so furnished by the railroad from the branch road to the switch track, was injured in consequence of a defective brake on one of the cars. Roddy sued the railroad, and obtained a judgment for \$6,000. The railroad appealed to this court. The opinion in that case

was written by the learned and lamented Macfarlane, J., and is in his usual clear, comprehensive, and careful style. It was held in that case: First. That no contractual relation existed between Roddy and the railroad, and that the railroad owed Roddy no contractual duty, and therefore there could be no recovery based upon a breach of contract. Second. That the relation of master and servant did not exist between the railroad and Roddy, and therefore there could be no recovery growing out of any breach of duty arising from the relationship of master and servant. Third. That there is a class of cases, not arising out of any contractual relation or out of any other relationship between the parties, where recoveries are allowed, such as where the manufacturer of an imminently dangerous drug or device or instrument or poison fails to label it with a notice of its dangerous character, and a third party is injured while using it. But it was held that a railroad car, even though supplied with defective brakes, was not an imminently dangerous instrument, and therefore there could be no recovery on that ground. Fourth. That the railroad company and Pickle were engaged in "a matter of mutual interest and profit"; that the railroad knew when it furnished cars to Pickle that Pickle's servants would have to use them in discharging Pickle's part of the mutual business, and therefore "the obligation rested upon defendant to use ordinary care to provide such [cars] as would be reasonably safe for such use." It was then held that Roddy was not conclusively shown to have been guilty of such contributory negligence as cut off a recovery by him. But the judgment was reversed because the instructions given for the plaintiff were erroneous, in telling the jury that the plaintiff had a right to assume that the railroad would do its duty and furnish cars that were in a good and safe condition. Speaking of the instruction given in that case, and declared to be erroneous, the learned judge said: "(8) The instruction, in directing the jury that plaintiff had the right to assume that defendant would furnish Pickle with cars properly supplied with brakes, in good repair and condition, properly declared the law, as applied to the duty a master owes to his servant. But if the servant was informed by the master, or had learned by observation or from any other source, that some of the instrumentalities furnished him were defective and dangerous, and, without promise that they would be repaired, he continued in the master's service, then the risk of injury from such defective instrumentalities would become an incident to such service, which he would assume. *Price v. Railroad*, 77 Mo. 508; *Porter v. Railroad*, 71 Mo. 68, 36 Am. Rep. 454; *Devitt v. Railroad*, 50 Mo. 302; *Thorpe v. Railroad*, 89 Mo. 650, 2 S. W. 3. 58 Am. Rep. 120. While the relation of master and servant did not exist between these parties, defendant owed

to plaintiff the observance of reasonable care in the selection of its cars for his use, which is the same degree of care the master is required to observe in providing his servant with the instrumentalities for carrying on his business. No reason can be seen why, if plaintiff knew that defective and dangerous cars were frequently left for his use, he would not assume the risk of injuries from such defects as could have been ascertained by reasonable inspection on his part. While defendant may have been negligent in the discharge of the duties it owed to plaintiff, if plaintiff neglected such precautions as common prudence demanded, under all the circumstances, he was guilty of contributory negligence, which should have defeated a recovery. In view of the fact that plaintiff himself testified that one-half the cars were without brakes, it was not proper to instruct the jury that he had the right to rely on defendant's performance of its duty in furnishing such as were properly supplied with brakes. The knowledge plaintiff had of the common neglect of defendant imposed upon him, for his own protection and safety, the duty of reasonable care in ascertaining for himself the condition of the cars before he attempted to handle them, and a failure to do so would constitute contributory negligence on his part. Whether such care was used on the occasion of his injury should have been submitted to the jury. For the errors mentioned, the judgment is reversed, and cause remanded."

The first instruction given for the plaintiff in this case is erroneous. That instruction is bottomed upon the assumption that this case is like the Roddy Case, in that the railroad and the car wheel company were engaged in "a matter of mutual interest and profit," and upon the further premise that the defendant here delivered this car to the car wheel company on its premises. This is in conformity to the plaintiff's theory that the Missouri Pacific Railroad Company only acted as the agent of the defendant in delivering the car to the car wheel company, but, as hereinbefore pointed out, the evidence does not furnish any substantial support for this position. On the contrary, this record shows that the defendant in this case was an intermediate connecting carrier, and its liability must be determined as of that character, and not, as in the Roddy Case, on the basis of two persons engaged in "a matter of mutual interest and profit." The first instruction therefore put the whole case to the jury upon an unauthorized basis, and hence that instruction is erroneous.

The second instruction told the jury that, if the plaintiff did not know that the car was not in a safe condition, he had a right to presume that the railroad had done its duty, and that the car was in such a state of repair and condition as would enable him to do his work with reasonable safety, and he had a right to rely and act upon such pre-

sumption. The instruction is an almost exact copy in this respect of the second instruction that was given for the plaintiff in the Roddy Case, and this court declared that instruction to be erroneous, and reversed the judgment for that error. This is an action arising *ex delicto*. The basis of the plaintiff's claim is that the defendant has been guilty of a particular act of negligence, which was the direct and proximate cause of the injury to the plaintiff, and that the plaintiff was guilty of no contributory negligence. The burden of proof is upon the plaintiff to show the negligence of the defendant, and that such negligence was the direct and proximate cause of the injury. Every person is presumed to perform his duty, but such presumption can never supply the want of proof of negligence on the part of a defendant in an action against him *ex delicto*. That presumption is indulged by the law in favor of the defendant, and not as a basis for a judgment against him. Such presumption is a part of the genius of the common law—that every man is presumed innocent until reasonably shown to be guilty. It is the underlying principle in civil cases as well as in criminal cases. It is axiomatic in the law that he who charges negligence or wrongdoing upon another, and seeks damages resulting therefrom, must prove the negligence or wrongdoing, and must connect the injury therewith. He must adduce proof, and has no right to indulge in presumptions. The same rule that presumes a defendant innocent of negligence until the contrary is shown likewise presumes the plaintiff innocent of contributory negligence until the contrary is shown. The second instruction given for the plaintiff was erroneous.

The third instruction given for the plaintiff, while not quite so glaringly erroneous as the second, nevertheless contained the same erroneous elements as to such presumptions, and was therefore also erroneous.

2. The liability of carriers to third persons, other than passengers or employees, for injuries resulting from defective appliances.

Cases like the one at bar are of comparatively recent origin, and, as is to be expected under such circumstances, the law has not been similarly declared in all jurisdictions. Until recent years, railroads were operated independently of each other. Each had its own tracks, depots, rolling stock, and appliances. Each carried the freight offered to it, as far as its line extended, and discharged it at its terminus, in its own depot, by means of its own employees. Consignees got the freight from the depot, and not from the car. Under such a mode of doing business, it is apparent that no third person, other than an employee, could be injured in consequence of any defective appliance used by the railroad, and the railroad company therefore was not obliged to have any regard to any injury that might result to any

third person while loading or unloading a car, for such person had nothing to do with either. The demands of commerce then required that the bulk of the freight should not be broken in transit, and the railroads were forced to arrange for through shipments, without breaking bulk from the point of shipment to the point of ultimate destination. This compelled the railroads to connect their lines, so that the same car into which the freight was loaded at the initial point of shipment should carry it to its ultimate destination. This necessitated the issuing of through bills of lading, and of collecting generally from the consignee, the whole freight by the ultimate carrier, and the distribution by it to each road that hauled the freight of its proportionate share of the freight charges. The statutes of this state have practically made such through shipments obligatory, for section 1139, Rev. St. 1899, makes it unlawful for common carriers to enter into any combination, contract, or agreement, by change of schedule, breakage of bulk, etc., to prevent "the carriage of freights from being continuous from the place of shipment to the place of destination in this state," etc. Formerly all freight was delivered by the shipper to the carrier at its depot, and was loaded on the car by the carrier's servants. Now the statutes of this state (sections 1113, 1119, Rev. St. 1899) permit switches to be constructed to grain elevators or warehouses, coal, lead, iron, zinc, or any other ore, mines, sawmills, and any other industry, by the owners thereof, and compel the railroads to permit such switches to be connected with the railroad tracks. And section 1114 requires all consignments of grain to be delivered at such elevators or warehouses, unless the destination is changed by the consignee or consignor. And sections 1119 and 1120 require the railroads to furnish the switch stands, frogs, and other necessary materials for making connection between such switches to mines and the tracks of the railroad, and to operate such switch tracks, and, upon demand, to furnish sufficient cars to such mine owners at such mine for the transaction of the business, and, in the event the railroad fails so to do, permits such mine owners to furnish cars, and requires the railroad to switch and haul such cars without discrimination between cars owned by the railroad or by any other person.

In this state of the law, it cannot now be fairly said that when a railroad furnishes cars to a shipper, to be loaded by the shipper's servants, and to be hauled by the railroad, or when the railroad delivers loaded cars to a consignee upon the consignee's switch, to be unloaded by the consignee's servants, the railroad and the shipper or consignee were engaged in "a matter of mutual interest and profit," and for this reason the railroad is liable to the servants of the shipper or consignee for injuries received in consequence of defective appliances. For,

under the law in this state, the railroad is bound to permit the construction of switches from its tracks to large business establishments, and is bound to operate such switches, and to deliver car-load shipments in bulk to, and receive car-load shipments in bulk from, such establishments. The liability of a railroad to the servants of shippers or consignees for injuries received by reason of defective appliances does not, therefore, rest upon the convention, agreement, or contract of the parties, nor upon the mutual interest or profit of the parties, but such liability is gauged and regulated by the general principles of law applicable to negligence. In other words, a railroad is liable to any one for injuries that are inflicted by its negligence. It owes a duty to mankind to so conduct its own business as not to be guilty of negligence that results in injury to third persons who are themselves without fault, and who are injured while in the pursuit of their lawful business. This is the basis, the reason, and the extent of its liability. Under this rule, when a railroad loads cars with freight to be delivered to a consignee whose servants are to unload the car, it is charged with the duty to exercise ordinary care to see that the car is in such a state of repair that such servants, while exercising ordinary care themselves, can enter upon it with reasonable safety for the purpose of unloading it. So, when a railroad furnishes a car to be loaded by the servants of the shipper, it is charged with the duty to exercise ordinary care to see that the car is in such a state of repair that such servants, while exercising ordinary care themselves, can enter upon it with reasonable safety for the purpose of loading it. And when a car is loaded for a through shipment, and must pass over one or more connecting roads before it finally comes into the possession of the ultimate carrier for delivery to the consignee, it is the duty of the ultimate carrier, before delivering it, to examine it and ascertain whether it is in such a state of repair that the servants of the consignee, while exercising reasonable care themselves, can enter upon it with reasonable safety for the purpose of unloading it; and, if it is not in such a condition, it is the duty of the railroad to make the necessary repairs, or to notify the consignee of the unsafe condition of the car, so that the consignee can warn his servants before they enter upon it. Therefore, in the case just instanced, the initial carrier is liable because it was negligent in selecting an unsafe and improper car upon which to load the freight; and the ultimate carrier is liable because it was negligent in delivering an unsafe car to the consignee, knowing that the servants of the consignee would enter upon it to unload it. Of course, the initial carrier would not be liable for defects that occurred after the car was selected and after it left its possession, if the car was

reasonably safe when it was loaded and when it passed beyond its control.

This leaves for consideration the liability of an intermediate carrier, who did not select the car, and who is obliged, under the law, to receive it and haul it as far as its road runs, and there deliver it to another intermediate carrier or to the ultimate carrier; and this, too, without regard to whether the car belonged to such intermediate carrier or to some other road or person, for in all such cases the ownership of the car is immaterial, and the carrier's liability is governed by the same rules, whether it owned the defective car or not. It is manifest that an intermediate carrier has no power of selection, and therefore cannot be guilty of negligence in loading the freight upon an unsafe or defective car. An intermediate carrier is not charged with notice that any particular car is to be delivered at the premises or upon the switch of the consignee, or that the consignee's servants will unload it. So far as the intermediate carrier is concerned, it might be that the cars would be unloaded by the servants of the ultimate carrier at its depot. No person except the servants of the intermediate carrier would have any lawful right to enter upon the car while it was in its possession. Therefore it is no part of the duty of an intermediate carrier to examine a car to see whether it is in a safe condition for any one to enter upon it for the purpose of unloading it when it reaches its destination, nor, if it discovers that it is not in such a safe condition, to repair it or to set it out, or to change the load to another and a safe car; nor can an intermediate carrier refuse to receive a car from a connecting line for any such reason. The duty and the right of an intermediate carrier is to examine the car to see whether it is in a reasonably safe condition to be hauled by it to its terminus, and there to be in such a condition that its connecting intermediate or ultimate carrier would be bound to receive it for transportation from such intermediate carrier. This is the extent of the liability and duty of an intermediate carrier. The defendant in this case is an intermediate carrier. No negligence of the intermediate carrier is shown, or in the nature of this case can be shown, and therefore the plaintiff made out no case whatever against the defendant, and the demurrer to the evidence should have been sustained; and hence the judgment is without foundation in law, and must be reversed.

This is a case of first impression in this court, but the industry and research of counsel have furnished the court with many cases, both English and American, which, it is claimed on the one side and denied on the other, are decisive of this case. A review or analysis of those cases is not deemed necessary or profitable, for they cannot be reconciled, and are made to depend upon so many different theories that it would serve no good

purpose to discuss them. It is therefore deemed best to leave the study of those cases to the inquisitive or philosophical minds, and to formulate in as simple and brief a manner as possible the rules applicable to the liability of initial, intermediate, and ultimate carriers to third persons, other than passengers or employes, for injuries resulting from defective appliances, that will be enforced hereafter in this jurisdiction.

It follows that the circuit court held the only party liable in this case that had been guilty of no negligence whatever, and therefore its judgment must be reversed. And inasmuch as the plaintiff could not, upon a trial anew, make out any case against this defendant, the cause will not be remanded. All concur.

WILLIAMS v. BUTTERFIELD et al.*
(Supreme Court of Missouri, Division No. 2.
May 19, 1903.)

DEED—EXECUTION—ACKNOWLEDGMENT—RECORD.

1. Evidence *held* to show that a deed was fully executed and delivered to the grantee, not executed in blank and delivered to a third party.

2. Rev. St. 1899, § 8118, provides that a deed, though neither proved nor acknowledged, that has been recorded for one year, shall impart notice to all persons of its contents. *Held*, that the deed of husband and wife, recorded with the acknowledgment of the wife alone, is notice to one who purchased the land five years later.

Appeal from Circuit Court, Stoddard County; F. R. Dearing, Special Judge.

Action by Edward J. Williams against Olivia Butterfield and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

H. S. Shaw and J. R. Young, for appellant. Robt. L. Wilson, M. A. Dempsey, Geo. Houck, and T. J. Russell, for respondents.

BURGESS, J. This is an action to quiet the title to section 11, township 26, range 12, in Stoddard county, Mo. The court dismissed the bill, and rendered judgment in favor of defendants for costs. Plaintiff appeals.

Henry Bohlicke is the common source of title, the plaintiff claiming under and directly from him, and defendants through mesne conveyances. On the 13th day of December, 1888, Henry Bohlicke was the owner of said land, and he testified on that day he signed a deed to said land, leaving a blank for the name of the grantee, after which the word "trustee" was written, and delivered it to Francis J. Peters. The consideration for the deed was also left blank. Francis J. Peters testified that at Bohlicke's request he traded the land in question for stock in a certain electrolytic gas generator syndicate of Detroit, Mich., which was received by him, and

that thereafter Bohlicke wrote to him to know to whom to make the deed, and that it was decided, with the consent of one Mr. Wolfenden, that he should take title to the land as trustee for one Mr. Wood, and did so, and the deed was made accordingly; that he saw the deed after it was sent by Bohlicke to Wolfenden, and that it was duly acknowledged, and in regular form, but that he never had it, and knew nothing of its whereabouts. This deed testified to by Peters was acknowledged by Catharine Bohlicke, the wife of Henry Bohlicke, before a notary public in Stoddard county, Mo., on the 13th day of December, 1888, and filed for record in the recorder's office of said county on the 11th day of January, 1889. It does not appear from the record of the deed, as copied in the bill of exceptions, that it was ever acknowledged by Henry Bohlicke, though there was extrinsic evidence tending to show that it was, and that thereafter the certificate of acknowledgment was canceled. The consideration received by Bohlicke for the land was some worthless stock, purporting to be shares in a mythical concern, which in fact never had any existence. This deed was afterwards attempted to be set aside in a suit by Bohlicke against Wolfenden for that purpose. On the 13th day of April, 1889, Frederick Wolfenden, as trustee, conveyed by warranty deed to the defendants, Olivia F. Butterfield and John Abbott, section 29, township 24, of range 12 east, but what place this deed has in this record is beyond our comprehension, as it does not describe the land involved in this litigation. Defendants, however, claim to own the land, and the petition alleges that it was conveyed by Wolfenden to defendant John Abbott and Olivia F. Butterfield.

It is asserted by plaintiff that the deed from Bohlicke to Wolfenden is void, because no grantee was named in it at the time of its delivery by Bohlicke to Peters; in other words, it is void because delivered to Peters in blank. But the weight of the evidence is to the effect, and the court so found, that the deed to Wolfenden was not in fact delivered to Peters in blank or otherwise, but was made directly to Wolfenden, in whose possession Peters testified that he thereafter saw it, and that it was in due form, and properly executed. This deed seems to be an entirely different one from the deed which Bohlicke testified he delivered to Peters, and we are inclined to believe it is, if in fact he did deliver the deed in blank to Peters, as he claims to have done. From this standpoint it becomes entirely unnecessary to pass upon the question presented by plaintiff as to the invalidity of the deed in blank which it is claimed Bohlicke delivered to Peters. The original deed from Bohlicke and wife to Wolfenden was signed and acknowledged by them on the 13th day of December, 1888, and was filed for record together with the certificate of acknowledgment of Mrs. Bohlicke in the recorder's office of Stoddard county on the 11th day of January, 1889. The certificate of acknowledgment of

*Rehearing denied December 23, 1903.

Henry Bohlcke was not recorded, for the reason, as the evidence tended to show, that the certificate of acknowledgment as to him had been erased or canceled. The original deed was not produced at the trial. Under these circumstances plaintiff insists that this deed was not entitled to record, and was not constructive notice to plaintiff, who purchased the land from Bohlcke, for a valuable consideration, and in good faith, on the 2d day of April, 1894. But section 3118, Rev. St. 1899, provides that a deed which has neither been proved nor acknowledged, that has been recorded for the period of one year, shall impart notice to all persons of the contents of the instrument, and that subsequent purchasers shall be deemed to purchase with notice thereof, and it must follow that when plaintiff took the deed from Bohlcke five years after the deed from Wolfenden to defendants, Abbott and Butterfield, had been recorded, he did so with notice of their rights and title to the land. While Bohlcke was evidently swindled out of his land, and plaintiff is a purchaser for value of it in good faith, there is nothing disclosed by the record which shows that defendants are not also purchasers from Wolfenden in good faith, are unaffected by any fraud that may have been practiced upon Bohlcke in obtaining the land from him, and, they having the prior title, plaintiff cannot maintain this action.

It follows that the judgment should be affirmed. It is so ordered. All of this division concur.

WILDEN v. McALLISTER.

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

SUPREME COURT—COURT OF APPEALS—CERTIFICATION OF CASES—JURISDICTION.

1. Const. art. 6, as amended by Const. Amend. 1884, § 6, provides that, when any one of the Courts of Appeals shall render a decision which any one of the judges sitting therein shall deem contrary to any decision of any one of said Courts of Appeals or of the Supreme Court, the Court of Appeals must certify the case to the Supreme Court. *Held*, that where the judges of a Court of Appeals unanimously deemed a decision in conflict with a decision of the Supreme Court, such section did not authorize the certification of the case to the Supreme Court, but that it was the duty of the Court of Appeals to set aside its ruling, and conform such ruling to that of the Supreme Court.

2. Such provision did not authorize the certification of a case to the Supreme Court where all of the judges of the Court of Appeals deemed its decision contrary to a prior decision of the Court of Appeals, it being their duty under such circumstances to overrule the prior decision.

Appeal from St. Louis Circuit Court; S. P. Spencer, Judge.

Action by Henry Wilden against Alexander McAllister. From a judgment in favor of

plaintiff, defendant appeals on certificate from the St. Louis Court of Appeals. Case remanded.

Frank A. C. MacManus, for appellant. Arthur E. Kammerer, for respondent.

MARSHALL, J. This case was certified to this court by the St. Louis Court of Appeals because all of the judges of that court deemed that its opinion in this case is in conflict with the decision of that Court of Appeals in the case of *Beck v. Haas*, 31 Mo. App. 180. Section 6 of the amendment of 1884 to article 6 of the Constitution provides that: "When any one of said Courts of Appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said Courts of Appeals, or of the Supreme Court, the said Court of Appeals must, of its own motion, pending the same term and not afterward, certify said cause or proceeding and the original transcript therein to the Supreme Court," etc. But this furnishes no authority for the action of the Court of Appeals in certifying this case to this court. No one of the judges of that court deemed the opinion of that court in this case to be in conflict with the decision of that court in the case of *Beck v. Haas*, but all of the judges of that court so deemed it. Under such circumstances there appears no reason whatever why the Court of Appeals should not overrule *Beck v. Haas*, nor is there any necessity or warrant for sending the case to this court to do what that court had full power to do. The provision of the constitution quoted means that, when a majority of the Court of Appeals render a decision such majority does not deem to conflict with a prior decision of the other of the Courts of Appeals or of this court, but which one of the judges of the Court of Appeals deems to so conflict, the case shall be transferred to this court. In other words, this provision was intended for the protection of the minority of that court, and not to furnish a new method of enabling the majority to keep the decisions of that court harmonious. If the Court of Appeals renders a decision which the judges unanimously deem to conflict with a decision of the Supreme Court, that is no ground for sending the case to this court, but under such circumstances it is the duty of the Court of Appeals to set aside its ruling, and to conform its ruling to the decision of this court. *Rank v. Woesten*, 144 Mo. 407, 46 S. W. 201; *Schaffer v. Railroad*, 144 Mo. 170, 45 S. W. 1073. But when the Court of Appeals deems its decision in any case contrary to any previous decision of that court, there is no impediment in the way of its overruling such prior decision. That court does not need the aid of this court in such cases.

For these reasons this court has no jurisdiction of this case, and it is therefore remanded to the St. Louis Court of Appeals. All concur.

HALEY v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

CARRIER OF PASSENGERS—STREET CAR COMPANY—NEGLIGENT CARRIAGE BEYOND DESTINATION—INJURY WHILE RETURNING—LIABILITY.

1. The act of a street car company in negligently carrying a passenger one block beyond her destination is not the proximate cause of an injury sustained by her from a fall on an icy sidewalk while returning to the point of original destination.

Appeal from St. Louis Circuit Court; W. B. Douglas, Judge.

Action by Fannie E. Haley against the St. Louis Transit Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Lyon & Swarts and Chas. M. Polk, for appellant. Boyle, Priest & Lehmann and Geo. W. Easley, for respondent.

BRACE, P. J. This is an action for damages for personal injuries sustained by the plaintiff in consequence of a fall upon a sidewalk in the city of St. Louis. The defendant objected to the introduction of any evidence under the petition on the ground that it did not state facts sufficient to constitute a cause of action. The objection was overruled, and evidence introduced by plaintiff, at the close of which the court, at the request of the defendant, instructed the jury "that under the pleadings and the evidence in this case the plaintiff is not entitled to recover, and your verdict must be for the defendant." Thereupon plaintiff took a nonsuit with leave, and thereafter, her motion to set the same aside, duly filed, having been overruled, she appealed, and assigns for error the giving of defendant's instruction in the nature of a demurrer to the evidence.

The case made by the plaintiff's evidence is substantially as follows: The plaintiff at the time of the injury was a dressmaker, 60 years of age, weighing 170 pounds, and resided at 1017 North Garrison avenue—the southwest corner of Garrison and Easton avenues. She was in perfect health, and, in the language of one of her witnesses, "was robust, tall, proud, well dressed, had style about her, and earned \$2 a day making dresses." On the 30th of December, 1899, about 10 o'clock at night, the plaintiff boarded the west-bound Easton avenue car of the defendant at the crossing of Eighteenth street and Franklin avenue for the purpose of returning to her home at the southwest corner of Garrison and Easton avenues. As the car was approaching Garrison avenue, where she desired to alight, she pushed the button and rang the bell twice, once before the car reached the street next east of Garrison avenue, and again, when the car was a short distance east of Garrison avenue; but the car did not stop until it reached the next

street—Cardinal avenue—one block west of Garrison avenue. When the car stopped she went to the door, "fussed" with the conductor, who was on the platform outside, for not stopping, got off the car on the north side, went to the north sidewalk of Easton avenue, and was walking east toward Garrison avenue and her home on that sidewalk, when she fell, and thereby sustained an intracapsular fracture of the femur, or a broken bone of the neck of the hip. The injury is serious and permanent. It further appeared from the plaintiff's evidence that on the 30th of December, 1899, the maximum temperature in St. Louis was 13, the minimum 7, and that there was a half inch of snow on the ground that evening, and the weather clear; that the snow fell principally on December 27th, on which day the fall was 1.3 inches; that the snowstorm on the 27th of December was general throughout the city, and there was no snow fall after 10:35 a. m. of that day; that the maximum temperature on that day was 24 and the minimum 18, and on the 28th the maximum was 26 and the minimum 15, and on the 29th the maximum was 19 and the minimum 11. The evidence further tended to show that the night of the 30th of December, although clear, was dark; that there was more light at the Garrison avenue crossing than there was at the Cardinal avenue crossing; that the sidewalk on which plaintiff was walking was covered with snow and ice, was slippery, was shaded by trees growing thereon, and that the stores along it were all closed, and that such was the condition at the place where she fell, which was about half way between the two streets.

The evidence for the plaintiff made a prima facie case of negligence against the defendant, in that its servants failed to stop the car at Garrison avenue, in compliance with plaintiff's timely signal therefor, given in the manner and by the means provided by the defendant for that purpose, and the only question presented by the record is, was such negligence the proximate cause of the injuries for which she seeks to recover damages in this action? The learned counsel for the plaintiff contend that it should be so held, and cite many cases in support of this contention. We have carefully examined all of these cases, and find that each of them is easily distinguishable from this case, and have found none in which a defendant has been held liable in circumstances like those of the case in hand. As was said by Mr. Justice Miller in *Insurance Co. v. Tweed*, 7 Wall, 44, loc. cit. 52, 19 L. Ed. 65: "It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." In the opinion of Mr. Justice Strong in *Milwaukee, etc., Rail-*

¶ 1. See *Carriers*, vol. 9, Cent. Dig. § 1245.

way Co. v. Kellogg, 94 U. S. 469, loc. cit. 475, 24 L. Ed. 256, may be found perhaps as brief, and yet as comprehensive, an expression of the rule as can well be given. The learned justice there says: "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." There was no wanton wrong in this case. The negligence consisted simply in a failure to stop the car, in obedience to the plaintiff's signal, at the crossing nearest to her residence, in consequence of which she was carried to the next crossing, one block further west, where, of her own volition, she left the car in safety. This was the negligence and the immediate and proximate consequence thereof. The plaintiff, after safely alighting at the crossing, in returning to the crossing at which she intended to alight, fell on the sidewalk leading from the one to the other. The injury she received was the result of such fall. The evidence tended to prove that the immediate cause of her fall was the slippery condition of the sidewalk, and that condition may be said to have been the proximate cause of her injury, and thus the causal connection between the negligence complained of and the injury received was broken by the independent and voluntary act of the plaintiff in leaving the car at the crossing one block west of the crossing where she intended to alight. Even if we can go back of the slippery condition of the sidewalk, which was the immediate cause of the injury, to that voluntary act of the plaintiff must the injury be attributed, unless such act and the injury resulting therefrom were the probable consequence of the negligent act of the defendant, and ought to have been foreseen by its servants in the light of the attending circumstances. It may be conceded that the act of the plaintiff in getting off at the next crossing, and in returning by the sidewalk towards the crossing which had been passed, were probable consequences of the negligence of defendant in failing to stop the car at the crossing for which she signaled, which ought to have been foreseen. But it does not at all follow that the accident which befell the plaintiff was one which, in the light of the attending circumstances, ought to have been foreseen by defendant's servants as the probable conse-

quence of plaintiff's walking thereon with due and proper care. Such accident was not the natural and usual sequence of such a walk under such circumstances. The natural and usual sequence of the walk of an ordinarily prudent adult person in perfect health and of a robust constitution as plaintiff was, whether that walk be long or short, whether by day or night, whether in weather cold or hot, on the improved sidewalks of a city in good repair, in its much traveled thoroughfare as this sidewalk was, is that such persons safely arrive at their destinations. Persons sometimes fall on these sidewalks and are injured, but these are unusual and extraordinary occurrences not to be expected or foreseen. If the sidewalk is defective, so as not to be reasonably safe, by which a pedestrian thereon in the exercise of due care is injured, the city is liable for damages. If he is injured by obstructions or dangers created therein by another, such other person is liable therefor, and the city may become so. But in neither event is the pedestrian thereon, or he who may have caused him to become such, in fault. The defendant in this case was charged with no other or different duty in regard to the sidewalk in question than was the plaintiff herself. The fact that by reason of climatic conditions, or other natural causes, the sidewalk may have been in less safe condition than usual, in no way changes the relative rights, duties, or obligations of the parties. Such conditions only impose the necessity of being more cautious when walking thereon. Pedestrians exercising due care sometimes fall and are injured while walking on the public sidewalks under such conditions, but such occurrences are unusual and extraordinary, and not to be anticipated or foreseen. For support of their contention plaintiff's counsel seem to rely more upon the dicta contained in some of the opinions in the cases cited than upon the facts in judgment in those cases. Most of them are steam railroad cases, in which, in violation of the carrier's contract, the passenger was put off the car on the carrier's track in a dangerous situation, from which his injuries directly resulted, or at a distance from his destination, which he could only reach by pursuance of a dangerous way on or along its tracks, and in which was located a peril known to the carrier, and which the passenger must encounter, and from which his injuries resulted. We find no difficulty in differentiating the case in hand from all the cases cited on the facts in each, and only in the facts in each case can the dicta in each be fully appreciated and rightly understood. We have neither time nor space for an adequate review of all those cases, nor do we deem it necessary, since no better rule could be deduced therefrom on the vexed question of proximate cause, as applicable to the facts in this case, than that already laid down, and under which it seems evident that the

defendant's negligence was not the proximate cause of the plaintiff's injury.

The judgment of the circuit court is affirmed. All concur.

HALL v. SMALL.

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

DEEDS—RESERVATIONS—CONTEMPORANEOUS PAROL AGREEMENT—PROOF—STATUTE OF FRAUDS—IMPLIED TRUSTS—EJECTMENT—NATURE OF ACTION—DISCHARGE OF JURY—HARMLESS ERROR.

1. Where a deed recited that it was given in consideration that the grantee would care for and support the grantor during her natural life and for \$1, and the grantor therein expressly reserved to herself a life estate in the premises, parol evidence was inadmissible to establish a contemporaneous oral agreement by which the grantee's estate was increased to a fee, and that the reservation of the life estate was intended solely as security that the grantee would perform his part of the agreement, such parol agreement being within the statute of frauds.

2. Where a deed reserved a life estate to the grantor, and in an action to eject the grantee during the grantor's life the grantee alleged an express parol agreement that such reservation was to be solely as security for his support of the grantor during her life, such agreement could not be enforced as an implied or resulting trust.

3. Where an answer stated no defense whatever, the court properly excluded evidence offered in support thereof.

4. Where, in ejectment, defendant filed an answer attempting to set up an equitable defense, but not as a cross-bill, and did not ask affirmative relief, it was error for the court to discharge the jury on the ground that the case was one in equity, and not at law.

5. Under Rev. St. 1899, § 865, prohibiting the reversal of judgments on appeal for technical errors not affecting the result, where the judgment is for the right party, where in ejectment the court correctly found for plaintiff, its error in discharging the jury on the ground that the case was one in equity by reason of an attempted equitable defense set up in the answer which in fact was insufficient was harmless.

Appeal from Circuit Court, Clinton County;
A. D. Burnes, Judge.

Action by Sally Hall against Claude E. Small. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

E. C. Hall, for appellant. W. S. Herndon, for respondent.

MARSHALL, J. This is an action in ejectment for 26 acres of land in Clinton county. The petition is in the usual form. The answer is, first, a general denial, and, second, a special plea to the effect that on November 13, 1899, the plaintiff deeded the land to the defendant for a consideration stated in the deed to be "that the grantee care for and support the grantor during her natural life and one dollar"; that there was a prior and contemporaneous agreement between the parties that the defendant was to have the land, and in consideration thereof was to

support the plaintiff during her natural life, and that, to secure the faithful performance of his agreement so to do, it was agreed that the deed should contain the following clause: "The grantor herein expressly reserves to herself a life estate in said premises for and during her natural life," and that such clause was put into said deed by the direction of both the plaintiff and defendant for the sole purpose of securing defendant's compliance with said agreement to support the plaintiff; that defendant entered into possession under said deed, made valuable improvements on the land, and has ever since supported the plaintiff, and that she still resides with him, and is enjoying "the fruits of the contract"; and defendant offers to continue to perform the contract, and therefore asks that the trust be declared, and that judgment be entered in his favor. The reply is a general denial, with a special plea that, if any such contract or agreement as is pleaded was made, it is void under sections 8416 and 8418, Rev. St. 1899. The case came on for trial before a jury in the circuit court. The plaintiff proved the rental value of the land, and offered a notice served on defendant on December 22, 1900, to quit on March 1, 1901, and then rested. The defendant then introduced evidence showing that he is the nephew, by marriage, of the plaintiff; that he is in possession of the land under the deed; and that the plaintiff has resided with him ever since the deed was made, and still resides with him, and that he has supported her, and, if allowed to keep the land, is willing to continue to support her during her natural life. The defendant also offered evidence tending to support the agreement pleaded in the answer, and upon objection by the plaintiff the court excluded it. The court then declared the case to be one in equity, discharged the jury, refused defendant's instructions, which declared the agreement pleaded to be valid, and entered judgment for the plaintiff, and the defendant appealed.

1. The property belonged to the plaintiff. She conveyed it to the defendant, the consideration being that he should support her for life. By the terms of the deed she reserved to herself a life estate. Upon the face of the deed, therefore, the plaintiff reserved a life estate in the land, and the defendant became vested with a remainder in fee, the consideration for which was that he should support her for life. Now the defendant attempts to enlarge his remainder into a fee-simple absolute, and to destroy the plaintiff's life estate, by showing that there was a prior and contemporaneous oral agreement between them that he should have a present absolute estate in the land, and that she was to have no estate in the land, and that the clause in the deed reserving a life estate to the plaintiff did not mean what it said, but that it was intended solely as a security that the plaintiff would perform his part of the agreement. The statute of frauds (section

§416, Rev. St. 1899) was intended to prevent exactly what the defendant seeks to do in this case. It provides that express trusts shall be void unless evidenced by a written instrument. It will be observed that the defendant does not allege or prove that there was any mistake in the drawing of the deed, nor does he ask to have the deed reformed. On the contrary, he distinctly avers that the clause reserving the life estate to the plaintiff was inserted in the deed by the direction of both the plaintiff and the defendant. He seeks, however, to vary a written instrument by parol evidence showing a prior and contemporaneous oral agreement which is altogether different from the written instrument. The law has always been that parol evidence is inadmissible for such a purpose. *Jones v. Shepley*, 90 Mo., loc. cit. 313, 2 S. W. 400; *Harding v. Wright*, 119 Mo., loc. cit. 8, 24 S. W. 211; *Rogers v. Ramey*, 137 Mo., loc. cit. 607, 608, 39 S. W. 66. The fact that parol evidence is admissible under a bill to redeem to show that a deed absolute on its face was intended as a mortgage is not at all applicable to cases like this. *Rogers v. Ramey*, 137 Mo., loc. cit. 609, 39 S. W. 66. Of course, courts of equity will correct a deed where mutual mistake or fraud is shown; but even in such cases the evidence must be clear, cogent, and convincing. *Parker v. Vanhoozer*, 142 Mo. 621, 44 S. W. 728.

The plaintiff, however, contends that the case is one of implied or resulting trust, which is not within the statute of frauds. This contention is evidently a misapprehension. The answer sets up an express agreement. It states no facts from which the law would imply a trust, and there is nothing of a resulting trust in the case. The fact that there was an oral agreement made by the defendant to support the plaintiff for life might afford a basis for the law to imply a promise of the plaintiff to pay a reasonable sum therefor, but it would afford no foundation for a court to imply that a deed from the plaintiff to the defendant, with a reservation of a life estate in the plaintiff, was a deed to the defendant of the land in trust for the defendant upon condition that he support the plaintiff for life. Implied trusts have taken a wide range, but never so broad as this. 15 Am. & Eng. Enc. Law (2d Ed.) p. 1123. The answer stated no defense whatever, and the court properly excluded the evidence offered in support of the answer. The court erred, however, in holding that the case was one in equity and in discharging the jury. The petition stated a cause of action in ejectment. The answer attempted to set up an equitable defense, but it was not a cross-bill in equity asking affirmative relief. The case remained, therefore, an action at law. But that ruling of the court does not constitute reversible error under the statute (section 865, Rev. St. 1899), for, no defense being pleaded or proved, the plaintiff was entitled, upon the pleadings, to a peremptory instruction to the jury

to find for her, and the judgment is therefore for the right party, and therefore it is affirmed. All concur.

RIES v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

STREET RAILROADS—CROSSINGS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—HUMANITARIAN DOCTRINE—TRIAL—WITNESSES—EXAMINATION—FACTS PREVIOUSLY TESTIFIED TO.

1. Where, in an action against a street railway company for the death of a pedestrian at a street crossing certain witnesses not only testified that the motorman could see the deceased, but also testified to all the physical facts necessary to determine how far the motorman could have seen him, and were permitted to make all the corrections they desired in their testimony, it was not error for the court to refuse to permit plaintiff's counsel to again ask the witnesses concerning such facts.

2. Where plaintiff's decedent could have seen an approaching street car, by which he was killed at a street crossing, at all times after starting to cross the street, but attempted to cross in front of the car without looking or paying any attention thereto, he was guilty of such contributory negligence as precluded recovery.

3. Where the negligence of plaintiff's decedent, who was killed by a street car at a crossing, was not only concurrent with that of the motorman, but was contemporaneous and coincident with his injury, no recovery could be had under the humanitarian doctrine.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Pauline Ries, by her guardian, Christopher Haag, against the St. Louis Transit Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A. R. Taylor and A. L. Hirsch, for appellant. Boyle, Priest & Lehmann and Geo. W. Basley, for respondent.

BRACE, P. J. This is an action for the recovery of damages for the death of Joseph Ries, husband of the plaintiff, which it is alleged was caused by the negligence of the defendant in operating one of its cars going north on Seventh street. The petition charges that said Ries was on the 30th of March, A. D. 1900, struck, run over, and killed by said car through the negligence of the defendant's servant or agent in charge of the operation of said car, "in this: that he failed to sound the gong or bell upon said car, or to warn said Joseph Ries of its approach, or to stop said car, or to operate the fender of said car so as not to run over him, but instead of so doing carelessly and negligently caused and suffered said car to run upon and over him, thereby causing his death: that said car was at the time, or immediately before it struck said Joseph Ries as aforesaid, running at an unlawful rate of speed: that said defendant was negligent, in that the track was in defective condition, and it carelessly permitted it to remain so." The

answer was a general denial and a plea of contributory negligence. No evidence was introduced tending to prove that the track was in a defective condition, that the car was running at an unlawful rate of speed, or that the fender was not operated properly. In support of the other allegations of negligence, two witnesses (Lizzie Reiter and Theresa Laubersheimer) who claimed to have seen the accident and one witness (H. O. Montgomery) who testified as to the distance within which a car could be stopped at the place of the accident were introduced. At the conclusion of the plaintiff's evidence the defendant demurred thereto. The demurrer was sustained. The plaintiff took a nonsuit with leave, in due time filed motion to set the same aside, which being overruled, the plaintiff appealed.

The errors assigned for reversal are the sustaining the demurrer to the evidence, the refusal of the court to permit the witnesses Reiter and Laubersheimer to express an opinion as to how far the motorman could have seen ahead, and to permit these witnesses to straighten out their testimony and clear the confusion caused by their not understanding the questions put by counsel for defendants. As to the two last assignments, it is only necessary to say that these witnesses not only testified that the motorman could see the deceased, but to all the physical facts necessary to determine how far he could have seen him, and were permitted to make all the corrections they desired in their testimony. The only basis for this last assignment is that the court would not permit counsel to go with them again over the same ground that they had already been over three or four times. The only real question in the case is whether the court committed error in sustaining the demurrer to the evidence. The accident happened at the intersection of Seventh and Pestalozzi streets, in the city of St. Louis, on March 30, 1900, about 20 minutes after 8 o'clock p. m. Seventh street runs north and south, and Pestalozzi street east and west, crossing each other at right angles. The defendant street railway is located on Seventh street. It is a double-track railway, the cars running north on the east track and south on the west track. The deceased was struck and killed by one of defendant's cars running north on the east track, on or near the north crosswalk leading across Seventh street from the northwest to the northeast corner of said streets. The circumstances of the accident must be gleaned as well as may be from the vague, confused, inconsistent, and unsatisfactory evidence of the two witnesses aforesaid, who claim that they witnessed it. The substance of their testimony seems to be about as follows: That on the night and at the hour aforesaid they were walking on the east side of Seventh street south towards Pestalozzi street; that when they got within the distance of four houses, or about

80 feet, from the northeast corner of these streets, they saw the car approaching from the south, a short distance south of the south crosswalk, and at the same time saw deceased coming out of a saloon on the northwest corner, and going to the north crosswalk over Seventh street. In the next view of the car and the deceased that we get in this evidence the deceased, having passed over the pavement from the saloon to the north crosswalk, over the space between the curb and the west track, over the space between the rails of that track, is seen standing on the crosswalk in the space between the west and east track, looking back to the west, and whistling to his little dog, which was on the pavement in front of the saloon; and the car, in the meantime having passed over the south crosswalk and some distance over the space between the two crosswalks, is seen approaching, and near the north crosswalk. There is no evidence tending to prove that while he was in this position he was in any danger from the approaching car. In the next and last view given by these witnesses the deceased is seen moving from his last position on the crosswalk between the tracks towards the east track, and in doing so is struck by the fender of the car. It further appears from the evidence of these witnesses that the headlight on the dashboard in front of the car was shining brightly; that they heard no bell rung, gong sounded, or other warning given as the car approached the north crosswalk; that the motorman was looking west, and they saw no effort made to stop the car before the deceased was struck; that although it was a dark night, and there were no street lights in that locality, yet there was light enough from the headlight and from the lights in neighboring stores and houses for them to see what transpired, and their evidence tended to prove that the motorman could have seen the deceased, and the deceased could both have seen and heard the car, at any time after the deceased entered upon the crosswalk. The evidence of the only other witness for the plaintiff tended to prove that the car going at the rate of 8 miles an hour could have been stopped at that place, with the reverse, in about 30, and with the brake in about 45, feet.

The demurrer to the evidence was properly sustained. While the evidence for the plaintiff tended to prove that the defendant's motorman was negligent in failing to give proper warning and to keep a proper lookout on approaching the crosswalk, it also showed at the same time that the deceased, at any time after he came out of the saloon, could have both seen and heard the approaching car, and yet, without looking or listening or paying any attention whatever to the approaching car, he attempted to cross its track in front of the car, and by it was immediately struck and killed in the attempt. His death was the immediate result

of his own negligence, to which the negligence of the defendant's servants could have been no more than contributory. His negligence was not only concurrent with that of the defendant's servant, but contemporaneous and coincident with his injury, and there is no room in the case for the interposition of the humanitarian doctrine invoked. The motorman was under no obligation to stop his car while the deceased was standing in a place of safety between the tracks with his back to the track on which the car was moving, whistling up his dog; and the motorman could not have stopped it in the time that intervened between the time when he left that position and the time when he was struck.

The judgment of the circuit court is affirmed. All concur.

PECK v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

CARRIERS OF PASSENGERS—INJURY—EVIDENCE—BURDEN OF PROOF—INSTRUCTIONS.

1. An instruction that the negligence charged is that the conductor of defendant's car stopped it to permit plaintiff to alight, and while she was alighting suddenly started it, throwing her down and injuring her, is not objectionable as placing stress on the stopping of the car as part of the act of negligence.

2. A charge in an action against a street railway company for negligence, setting out plaintiff's theory, and stating that the burden is on plaintiff as to the act of negligence "throughout the case," is not objectionable as requiring the plaintiff to prove herself free from contributory negligence, where no reference is made to that.

3. The burden is not shifted from a passenger on proof of her injury in alighting from a street car so as to require an explanation from the company, but she must also prove that the accident occurred through the company's fault.

4. Where a street car company was entitled to an instruction that it was not guilty of negligence unless a car had "stopped" when a passenger attempted to alight, the use of the term "stopped still" was no abuse of the right.

5. Where a passenger, in her petition against a street railway company, alleged, and her evidence tended to prove, and her requests for instructions assumed, that the car had stopped when she attempted to alight therefrom and was injured, she cannot complain of instructions, on defendant's request, that, if the injuries were caused by her leaving the car before it had stopped, or if she got off the car while it was yet moving, the company is not liable.

Appeal from Circuit Court, St. Louis County; Jno. W. McElhinney, Judge.

Action by Alice H. Peck against the St. Louis Transit Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Gilham & Smith, for appellant. Geo. W. Easley and Boyle, Priest & Lehmann, for respondent.

VALLIANT, J. Plaintiff was a passenger on one of defendant's street cars, and in

attempting to alight therefrom fell in the street and received injuries. She said in her petition that the car had stopped for the purpose of allowing her to alight, and that while she was in the act of alighting the defendant carelessly and negligently suddenly started said car, throwing her to the ground in a violent manner. That is the only act of negligence charged. The answer was a general denial and a plea of contributory negligence. The evidence for the plaintiff tended to sustain the allegations of her petition; that for the defendant tended to prove that the car had not stopped, but was slowing down to stop, and that the plaintiff attempted to step off facing the rear while the car was still moving, and in doing so fell. At the request of the plaintiff the court instructed the jury that if the car was stopped, in compliance with her signal, to enable her to alight, and if while she was in the act of stepping from the car it suddenly started forward, and she was thereby thrown to the ground, and if by the exercise of a very high degree of care the defendant's servants could have prevented the car from so starting, and if she was herself exercising ordinary care in so attempting to alight, she was entitled to recover; and, further, that, if the car came to a stop to allow her to alight, it was the duty of the conductor to have held it stationary until she had alighted, if by the exercise of a very high degree of care he could have done so. For the defendant the court gave the following instructions: "(1) The actionable negligence charged in plaintiff's petition is that the conductor of defendant's car, upon which plaintiff was a passenger, caused the car to stop on the south side of Laclede avenue, on Grand, for the purpose of permitting plaintiff to alight therefrom, and that while plaintiff was in the act of alighting the defendant carelessly and negligently suddenly started said car, whereby plaintiff was thrown to the street and injured. The burden of proof as to the act of negligence charged as above rests upon the plaintiff throughout the case, and, before you are entitled to return a verdict in favor of plaintiff, you must find by the preponderance or greater weight of the evidence that the plaintiff's injuries were caused by the act of negligence on the part of defendant, as above stated, and unless you so find your verdict must be for the defendant. (2) If you find from the evidence that the plaintiff's injuries, if any she sustained, were caused by her leaving the defendant's car before it had stopped still on the south side of Laclede avenue, and while the same was in motion, and that but for such attempt on her part to alight from said car while the same was in motion she would not have sustained any injury, then the plaintiff cannot recover, and your verdict must be for the defendant. (3) If the jury believe from the evidence that the plaintiff got off of the car when it was about to stop to permit passengers to alight, but while it

was yet moving, then there is no evidence of negligence on the part of defendant, and the verdict must be for the defendant." There was a verdict and judgment for defendant, and the plaintiff appeals.

The only action of the court assigned for error is the giving for the defendant the three instructions above copied. The complaint of the first instruction is, first, that it gives undue prominence to the fact of the stopping of the car, and treating it as a part of the act of negligence; and, second, that it throws the burden of proof in the whole case on the plaintiff, without distinguishing between the act of negligence stated in the petition and the contributory negligence charged in the answer.

An instruction undertaking to inform the jury as to the act of negligence which formed the gravamen of the plaintiff's case could not have been correctly framed without stating it substantially as it was stated in this instruction. Whilst the stopping of the car and the plaintiff's attempting to alight were not acts of negligence, yet they constituted the condition which rendered the starting of the car an act of negligence according to the petition. The instruction merely stated the act of negligence as plaintiff had stated it in the petition and in the instruction asked by her, and in the only way it could be intelligently stated to conform to the plaintiff's theory.

As to the burden of proof, the instruction only related to the act of negligence charged in the petition. Certainly, the burden of proving that act was on the plaintiff, and that is as far as the instruction goes. There was no reference to a condition of facts from which the jury were asked to find the plaintiff guilty of contributory negligence. There was in fact no suggestion of contributory negligence in the case as it was given to the jury. The defendant merely took the position in its proof and in its instructions that the defendant did not commit the particular act charged to have been committed, and that the accident did not happen as the plaintiff said it did. In a case where a passenger is injured because of the breaking down of a car, or the breaking of some appliance or equipment, where the breaking and the injury to the passenger, as resulting therefrom, are shown, a prima facie case is made, and the burden is shifted to the carrier to show that it was without his fault. Plaintiff in the case before us invokes that doctrine, but this case does not fall within it. We see no fault with the first instruction for defendant.

The complaint of the second and third instructions is that they limit the inquiry of the jury strictly to the letter of the plaintiff's petition, and say, in effect, that unless the car had stopped when the plaintiff was in the act of alighting the charge of negligence was not proven, and the verdict should be for the defendant. Appellant complains of the term "stopped still." If the defendant

had a right to use the word "stopped" in reference to the condition of the car, it was not an abuse of the right to say "stopped still." There is really no difference in the meaning in that connection between "stopped" and "stopped still," except that perhaps the latter is more emphatic. In this respect, however, the writer of the defendant's instructions was not more emphatic than the writer of the plaintiff's instructions, who said in the second instruction for the plaintiff, "If the jury believe from the evidence that the car upon which the plaintiff was a passenger came to a stop, * * * then it was the duty of the conductor to have held the car stationary until she alighted." The serious complaint, however, against these two instructions is that they require the jury to find that the car had actually stopped when the plaintiff was stepping off, and prohibited the finding of a verdict for the plaintiff in case the jury should believe that the car had slowed down in its motion to such a degree that the plaintiff might, without passing the bounds of ordinary prudence, have attempted to alight, and that while doing so a quick motion was suddenly imparted to the car, which threw her down. The learned counsel seek to bring the case within the doctrine announced in *Ridenhour v. Ry. Co.*, 102 Mo. 270, 13 S. W. 889, 14 S. W. 760. The plaintiff in that case was a boy nine years old. The petition stated that on his signal the car stopped to allow him to alight, and that while he was in the act of alighting it was suddenly put in motion, and thereby he was thrown to the street and injured. In that respect the case was like this. The evidence for the plaintiff in that case was that, as the car approached the street at which the plaintiff wished to get off, he told the conductor that he wanted to get off there. The conductor rang the bell to stop. The car "just slacked up" and the boy attempted to get off but, just as he had one foot off the car gave a sudden jerk, and he was thrown down. The evidence for the defendant (which was that of the conductor) was to the effect that the boy was not on the train at all, and the conductor did not know that one had been hurt by his train until informed of it afterwards. Under that state of the pleadings and evidence this court held that the giving of the following instruction was not error: "If the jury find from the evidence that plaintiff was a passenger on defendant's cars, that the agents and servants of defendant in charge of said car knew at what point plaintiff desired to alight, and that when they reached said point said agents and servants of defendant did not stop a sufficient length of time to permit the plaintiff, acting with reasonable care and diligence for one of his years, to alight in safety from said cars, and that by reason thereof the plaintiff, in attempting to alight, was thrown from said car and injured, then he is entitled to recover." In passing on that case this court

held that the statement in the petition that the car stopped to allow the plaintiff to alight was a matter of inducement; that the act of negligence charged was putting the car in motion while the plaintiff was in the act of leaving. Whatever may be said as to a variance between the allegata and the probata in that case, certain it is that, aside from the petition, the plaintiff's evidence and instructions brought it within principles which this court has recognized, namely, that it is not negligence per se for a passenger to attempt to board a car or alight from it while it is moving slowly; that whether, under the circumstances of the given case, it is negligence so to do, is a question for the jury; and that if, while the passenger is attempting to alight when the car is moving so slowly that he cannot be deemed guilty of negligence in so attempting, the motion of the car is suddenly so increased as to cause him to fall, the carrier is liable. The following cases, cited in the brief of the learned counsel for appellant, sustain that doctrine: *Doss v. R. R.*, 59 Mo. 27, 21 Am. Rep. 371; *Wyatt v. R. R.*, 62 Mo. 408; *Kelly v. R. R.*, 70 Mo. 604; *Straus v. R. R.*, 75 Mo. 185; *Leslie v. R. R.*, 88 Mo. 50; *Burger v. R. R.*, 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379. But has this plaintiff, either by her pleadings, her proof, or her instructions, given this defendant any such case to answer as that presented in *Ridenhour v. Ry.*, above mentioned, or in any of the other cases cited? In her petition she said that the car had stopped, in her evidence she stated the same thing, and in her instructions she founded her right to recover on that condition. The court, in its instructions, both for the plaintiff and the defendant, followed the line the plaintiff had marked out. If there was any error, the plaintiff induced it. No such theory as she now presents was offered for the consideration of the trial court during the trial.

The plaintiff now insists that, although all of her evidence conformed to the letter of her petition, and all of her instructions were based on her evidence, yet, because the defendant's witnesses stated that the car had slowed down, she was entitled to have had submitted to the jury the question of whether, under the circumstances as detailed by the defendant's witnesses, she was not exercising ordinary care in attempting to alight from the moving car. If it be conceded that she was entitled to have had that question submitted to the jury, she has no right to complain of the court for not submitting it, because she did not ask it. And she has no right to complain of the instructions given at the request of the defendant, because they were in effect only the plaintiff's instructions turned around so as to show the other side on the same theory.

There is nothing in this record that the appellant has a right to complain of, and therefore the judgment is affirmed. All concur.

JETT et al. v. CENTRAL ELECTRIC RY. CO.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

STREET RAILWAYS — NEGLIGENCE — PERSONS ON TRACK — PROXIMATE CAUSE — DISCOVERED PERIL — ACTION BY PARENTS — EVIDENCE.

1. A girl 11 years of age and a boy about 9, walking on the tracks of a street railway without looking for a car, are guilty of negligence.

2. Where two children went on the tracks of a street railway and walked along the same in the same direction from which a car was approaching them, the motorman of the car had a right to presume, in the first instance, that they had looked for the car, or would look, and get out of the way.

3. Where, in an action against a street railway for the death of a child who was run over by a car, it appeared from plaintiff's evidence that deceased was walking along the track in the same direction in which the car was moving, and could have been seen for over 400 feet by the motorman, it was a question for the jury whether the motorman knew, or by the exercise of ordinary care should have known, of the danger in time to have averted the accident.

4. Where the motorman of a street car sees one walking along the track ahead of the car, and that he is oblivious of his danger, in time to avert accident, but fails to do so, the company is liable.

5. In an action for the death of plaintiff's 11 year old daughter, killed by being run over by a street car while on her way to school, the fact that there was no positive evidence to show that the girl was unmarried was no ground for sustaining a demurrer to the evidence.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Henry W. Jett and another against the Central Electric Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

John H. Lucas, for appellant. Andrew R. Lyon and Scarritt, Griffith & Jones, for respondents.

VALLIANT, J. Plaintiffs' minor child was run over and killed by a street car of the defendant, as they allege, through the negligence of the defendant's servants operating the car. The negligence charged in the petition was the running of the car at a greater rate of speed than 12 miles an hour, in violation of a city ordinance, and in running the car at a high rate of speed against and over the child while she was walking along the track, without giving any warning of its approach, and without exercising reasonable care to avoid striking her after the servants in charge of the car saw that she was in a position of danger, or would have seen it if they had exercised ordinary care. The answer was a general denial and a plea of contributory negligence. There are some undisputed facts in the case. They are as follows: St. John avenue is a public street in Kansas City running east and west. Jackson street, running north and south, crosses it at right angles. Elmwood avenue, which is parallel with and east of Jackson street,

also crosses St. John avenue at right angles. The distance from Jackson street to Elmwood avenue is half a mile, and there is no other street crossing St. John avenue between those two. St. John avenue is the only open thoroughfare running east and west through a section about a mile-wide, and it is therefore a much used highway for people living in that part of the city. The defendant maintains a double-track street railroad along the center of St. John avenue. Between Jackson street and Elmwood avenue, St. John avenue is not paved or sidewalked, except a sidewalk in front of the plaintiffs' premises, and except that along the center of the street, a space 16 feet wide, in which are laid the defendant's tracks, there is a surface of broken stone and granite. In consequence of the otherwise unpaved condition of the street, the travel both for vehicles and pedestrians is along that 16-foot space, particularly so in wet weather when the street is muddy. People usually walked in the railroad tracks because it was better walking that on the street outside, and the children going to school took that course. The plaintiffs' residence is on a lot that fronts 50 feet on the north line of St. John avenue. From the west line of plaintiffs' lot to the east line of Jackson street is 208 feet. Farther to the east is the residence of Mr. Owen. From his house to Jackson street it is 660 feet. Elmwood avenue is still to the east of Mr. Owen's house. On the morning of February 6, 1900, plaintiffs' two children, a girl aged 11 years 10½ months, and a boy about 2 years younger, on their way to school, were on the north track of defendant, when a car of defendant going in the same direction approached behind them, and struck the girl and killed her. In addition to the above undisputed facts, there were other facts about which there was conflict in the evidence; the testimony for the plaintiffs tending to show that the facts were one way, that for the defendant another. If the facts were as the plaintiffs' testimony tended to prove they were, the plaintiffs were entitled to recover; but, if the facts were proved to be as the evidence relied upon by the defendant tended to prove, then the verdict should have been for the defendant. The verdict was for the plaintiffs for \$5,000, and judgment accordingly, from which the defendant appeals.

1. The question in the case, in our judgment, is one of fact. The principles of law governing it are well settled, and there is little, if any, real difference in that respect between the learned counsel. Appellant contends that the testimony shows that these two children were walking on the north side of the north track at a safe distance therefrom as the car approached behind them, and when it had reached within 10 or 15 feet of them, they appeared by their movements suddenly to design crossing the track, and, as if with

that purpose, did step on the track within that distance of the car when it was going at its usual speed; that the motorman immediately saw the movement of the children, and did everything within his power to stop the car, but it was impossible to do so. The boy escaped with a scratch, but the girl was crushed beneath the car. There was evidence tending to prove that these were the facts, and the jury were instructed that, if they found those to be the facts, their verdict should be for the defendant. But there was testimony upon which the plaintiffs rely which tended to prove the following facts: These children came out of the gate in front of their father's house, walked straight to the north track, and went upon it. The boy undertook to walk on top of the north rail, and was doing so, his sister walking in the track, and holding his hand to assist him in accomplishing his feat; that they continued to walk in that way until the car was upon them. The boy jumped to the right, and barely escaped, but the girl was caught. These children, then on the track, were in plain view of the motorman, if he had been looking, from the time he reached Mr. Owen's house until he struck them. When the car struck the child it dragged her under its wheels 50 or 60 feet, and stopped 25 feet east of Jackson street, the point where she was struck; therefore was 75 or 85 feet east of Jackson street. According to this testimony, the point where the children went upon the track—that is, on a straight line from the gate in front of their father's house—was 233 feet east of the east line of Jackson street. They walked, therefore, on the track, 148 or 158 feet, before the car struck them. One of the witnesses, a school girl 13 years old, who lived east of Mr. Owen's house, was walking west on the south track, and saw these children when they came out of their gate walking towards the track. She waved to them, and thought to overtake them. Just after that, as she came opposite Mr. Owen's house, this car passed her. Then she stepped behind it on the north track, and continued to walk west in that track. The car shut off her view of the children, and she saw them no more until after the accident. The evidence was also to the effect that the gong was not sounded, and that the children had no warning of the approach of the car; also that the motorman did not have his hands on the appliances for controlling the car, but was leaning against the car, and conversing with the conductor; also that the car was running unusually fast. If the jury believed the evidence tending to prove those facts, they were bound to find a verdict for the plaintiffs, even though they also believed that the children were guilty of negligence in walking on the track. The motorman, if he was looking, saw the children at least from the time he passed Mr. Owen's house, which was over 400 feet east of the point at which they went

upon the track, so that he ran more than 500 feet with the children in view before he struck them. Of course, the children would have seen the car approaching them if they had looked in that direction, and it was negligence in them not to have looked. And the motorman had a right to presume, in the first instance, that they had looked or would look, and that, seeing the car coming, they would get out of the way. But it was his duty to be on the constant watch, and, in the event it became evident that they were not observing the care they should observe, it became his duty to avoid running upon them if by ordinary care, with the means in his power, he could do so. Whether it must have become evident to the motorman in this case, presuming he was on the lookout, that these children were heedless of the approaching car, and negligently unmindful of their danger, was a question for the jury. If they believed from the evidence that a reasonable man in the motorman's place, on the watch, and mindful that he was running a dangerous machine, would have seen that these two children were so absorbed in the little exploit the boy was trying to accomplish—balancing himself to walk on the rail with the assistance of his sister holding his hand—and that they were apparently oblivious to the approaching danger, then the jury had the right to say that the motorman knew, or that, if he had exercised ordinary care, he would have known, the danger in time to have averted the accident, and, failing to do so, the defendant is liable.

We do not attach any importance to the fact that the plaintiffs' testimony tended to show that the car was running faster than 12 miles an hour, in violation of the city ordinance. Twelve miles an hour, under the circumstances of this case, would have been as effective of the result as a greater speed. Assuming that he was going only 12 miles an hour, if the plaintiffs' evidence is believed, the motorman saw the peril of the child in time to have averted the accident, but without making any effort to do so—without even sounding his gong—he ran upon them. The general rule of law that a plaintiff cannot recover damages for injuries sustained by him when his own negligence has contributed with that of the defendant to cause the injuries has one exception, and that is if the defendant, before the injury is inflicted, discovers the peril (or in some cases even where, by the exercise of ordinary care, the defendant might have discovered it), and has it in his power then and there, by the exercise of ordinary care, to avert the injury, but fails to do so, he is liable. That is the law in this state, so declared in *Kelley v. Ry.*

Co., 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783, and iterated in *Morgan v. Wabaah Ry.*, 159 Mo. 262, 60 S. W. 195. The facts which the plaintiffs' testimony tends to prove bring this case within that exception, and for that reason the court did not err in refusing the instruction asked by the defendant in the nature of a demurrer to the evidence.

There is one other ground assigned by appellant why the demurrer to the evidence should have been sustained; that is, that there was no evidence to prove that the deceased was unmarried. It is true the record shows no evidence offered on that point, but it would be so improbable that a child not quite 12 years old, living with its parents, and going to school from their home, was married, that we should presume the contrary in the absence of any suggestion to the trial court that proof on that point was desired.

The criticisms of the action of the court in the giving and refusing of instructions are all based on separate features of the same proposition, which is appellant's main assignment of error; that is, that there was no evidence to sustain the plaintiffs' case, and an instruction for a nonsuit should have been given. We have already discussed that proposition.

We find no error in the record, and the judgment is therefore affirmed. All concur.

JACKSON et al. v. BINNICKER.

(Supreme Court of Missouri, Division No. 2.
Dec. 23, 1903.)

APPEAL—JURISDICTION OF SUPREME COURT.

1. The Supreme Court has no jurisdiction of defendant's appeal from a judgment of a circuit court for \$678.75, where the answer is a general denial.

Appeal from Circuit Court, Buchanan County; W. K. James, Judge.

Action by Jacob Jackson and others against John Binnicker. From a judgment in favor of plaintiff Bishop, defendant appeals. Transferred to Court of Appeals.

Grant S. Watkins, for appellant. Nichols, Pistole & Neville, for respondents.

BURGESS, J. On the 9th day of November, 1900, plaintiff Bishop recovered a judgment in the circuit court of Buchanan county against the defendant for the sum of \$678.65, and this is an appeal from that judgment. The answer to the petition is a general denial. It is therefore apparent that this court is without jurisdiction of this appeal, and the record is ordered to be transferred to the Kansas City Court of Appeals. All of this division concur.

STATE ex rel. LENTZ v. FORT, Judge.

(Supreme Court of Missouri. Dec. 23, 1903.)

DISBARMENT PROCEEDINGS—BIAS OF JUDGE—CHANGE OF VENUE—REFUSAL—PROHIBITION JURISDICTION—SUPREME COURT—ORDER OF COURT—POWER OF JUDGE—STATUTE.

1. After a term of court has passed, it is beyond the power of the court at any subsequent term to set aside its prior order made; hence where a judge at the February term made an order in disbarment proceedings, calling in another judge on account of his own disqualification, his act, at the June term following, revoking the order, leaves the first order to be considered as if the subsequent order had not been made.

2. Under Rev. St. 1899, § 1678, providing that when any judge shall for any cause be unable to hold court he may call in the judge of another circuit, and section 1679, providing that whenever the judge for any cause shall be unable to hold court, or "if the judge is interested," or "for any reason cannot properly proceed in the cause," a member of the bar may be chosen or elected to act, as well as under the court's inherent power, a circuit judge is authorized to call in another judge to preside in disbarment proceedings in which he is disqualified to act from prejudice.

3. Prohibition proceedings will lie in the Supreme Court to prevent a circuit judge from taking further action in a disbarment proceeding wherein he had overruled an order made at a previous term calling in another judge to try the case because of prejudice of the sitting judge, though there is no statute expressly authorizing change of venue in disbarment proceedings, and no appellate jurisdiction is conferred on the Supreme Court in such cases.

In Banc. Prohibition by the state, on the relation of Erastus R. Lentz, against James L. Fort, judge of the Butler county circuit court. Granted.

El. R. Lentz, for relator. Jas. L. Fort, for respondent.

ROBINSON, C. J. This is a proceeding by prohibition to prevent respondent, as judge of the circuit court of Butler county, from taking further action in and about the disbarment of relator, which proceeding to disbar relator the respondent judge had caused to be instituted in the Butler county circuit court.

Relator's first contention against the right of respondent taking further action in the disbarment proceeding against him is based upon proposition that, as no affidavit of the existence of any fact contained in said charges against him was ever filed with respondent, or in the court of which he is the judge, and as it is not claimed that respondent judge had actual knowledge of the existence of said facts charged, or any of them, his order, made at the opening of the February term, 1901, of said Butler circuit court, directing that L. R. Thomasson, a member of the bar of an adjoining county, file and prosecute charges against relator, were wholly without authority; and, further, because respondent had no right to proceed with the hearing of the charges as filed by said Thomasson until they had been duly verified by

said Thomasson, or some one, as required by law. For his second contention relator says that if respondent, as judge of the Butler circuit court, ever had jurisdiction to hear and consider the disbarment proceedings begun against him in said court, that jurisdiction and authority was lost by an order of February 13, 1901, which respondent, as judge of said Butler circuit court, made and caused to be entered upon the records of said court, in which said order is recited respondent's disqualification to sit at the hearing of said proceeding, and that Judge James Fox, of the Twenty-Seventh Judicial Circuit, is called in to hear and try said cause in his place and stead. And as relator's final protest against the right of respondent to further proceed with the hearing of the charges against him in the Butler circuit court he says that, after respondent had caused the order of February 13th, aforesaid, to be set aside at the subsequent June term of said court, and was threatening to proceed with the hearing of said disbarment proceeding, relator then prepared and filed an application in due form in said court, praying that he be granted a change of venue in said cause on account of the interest of the respondent judge in the result of said proceeding, and on account of respondent's bias and prejudice against relator, and also because L. R. Thomasson, who had filed and was prosecuting the proceeding against him, has an undue influence over the mind of respondent, and that said application was denied and overruled. On part of respondent the following contentions are made: First, that, as this court has no appellate jurisdiction in disbarment proceedings, it is powerless through the writ of prohibition to review his action in the proceeding against relator in the Butler circuit court, or to direct or to stay the course of his conduct therein; and, second, that since, under the statute, the defendant in a disbarment proceeding is not entitled to a change of venue, the order made by respondent as judge of the Butler circuit court on February 13th, disqualifying himself and calling in Judge Fox to preside at the trial of relator, was void, and, being void, it is a matter of no concern that it was not set aside until after the adjournment of said February term of court; and, further, respondent says that the application filed by relator in his own behalf that a change of venue be awarded to him was denied because, under the statutes of this state, a change of venue is not allowable in a disbarment proceeding.

To the relator's challenge of the authority of the respondent, as judge of the Butler county circuit court, proceeding with the hearing of the disbarment against him, for the reason set out in his first contention, all that need be said at this time is that all courts of general jurisdiction in this state, possessed of the authority to admit to the

bar of its own motion a member of the profession, have the inherent power to cause to be instituted proceedings against that member, or any member of its bar, and to that end may designate any member of the same bar, or of any adjoining bar in the same circuit, or the prosecuting attorney of the county, for any professional misconduct such as merits and deserves such a course of procedure; and it is not essential to the court's authority under such proceedings that the facts of the charges made be within the actual knowledge of the judge of the court who may have directed that such proceedings be filed, or that the same be supported by the affidavit of any one; and, further, that prohibition would not lie to stay the action of the court in such a proceeding merely because of the absence of an affidavit supporting the charges made, even though the court might consider that the usual and better practice in disbarment proceedings is to require that the charges against the delinquent be supported by the affidavit of some one. So to the challenge made by respondent of the authority of this court to issue its writ of prohibition herein, because, as he asserts, that, having no appellate jurisdiction in disbarment proceedings, the court therefore is powerless through said writ to review his action as judge of the Butler circuit court in the disbarment proceedings against relator, or to direct or stay the course of his conduct in such proceeding, it will be sufficient to say this writ has not for its purpose the consideration or correction of any errors that may have been committed by respondent, as judge of the Butler circuit court, during the progress of the disbarment proceeding against relator in that court. Confessedly, such matters would come under the exclusive jurisdiction of the St. Louis Court of Appeals, if the proceeding should ever, on appeal, be taken from relator's court for review. But without regard to the appellate jurisdiction of this court in any particular case, we have the amplest authority, through and by aid of the writ of prohibition, to keep all courts of the state (whether from their orders, judgments, or decrees in any cause appeals are or are not allowable to this or any other court) within the proper limit of their authority, or to prevent their continual assertion of authority over any cause or proceeding after its jurisdiction and authority therein has been lost, or transferred to some other court, body, or tribunal, by an order by appeal or otherwise. Under this writ the inquiry is, not whether respondent, as judge of the circuit court of Butler county, committed error against the right of relator in the conduct of the disbarment proceedings. That must be determined on appeal, and not in prohibition. The inquiry here is, did any action taken by respondent in the disbarment proceeding operate to defeat his further right

to proceed with the trial of said cause, as he now asserts his right to do? The action of the respondent in the matter of the disbarment proceedings is only to be considered here in so far, and to that extent only, as it may be necessary to determine its effect upon his present attitude to that cause. This, then, brings us to the consideration of the question that must control our action in this proceeding, to wit, the effect of the disqualifying order made by respondent judge at the February term, 1901, of the Butler circuit court, and the calling in of Judge Fox to hear and try the proceeding for him. If that order was void, and not within the court's authority to make, at the time it was made (as respondent states in his return filed herein, and reasserts in his brief), then there will be no occasion to consider the question of the effect or the want of effect of the subsequent order, made at the following June term of said court, revoking and setting aside said first order of February 13th. If the order of February 13th was (using the language of respondent's return) "without jurisdiction and void," there existed no necessity for setting it aside to authorize respondent to proceed with the hearing of the disbarment proceeding against relator. If, upon the other hand, the order made by respondent at the February term, 1901, wherein he disqualified himself and called in Judge Fox to try the disbarment proceeding against relator, was within the court's authority and power to make, then the question of the effect to be given to the after order made at the subsequent June term of court must be met and answered, as it is now, with this brief observation that, after a term of court has passed, it is beyond the power of the court at any subsequent term to set aside its prior order made, and, as applied to the situation in the disbarment proceedings against relator in the Butler circuit court, it should be said that whatever authority respondent lost by the order of February 13th, to sit at the hearing of the disbarment proceeding against relator, was in no wise restored to him by reason of the revocation of said order at the subsequent June term of court. The order of February 13th must be considered as if the subsequent order revoking it had never been made.

Was, then, the disqualifying order of February 13, 1901, which respondent caused to be entered upon the records of the Butler county circuit court, within the authority and power of the court to make? If so, then respondent should be prohibited from further proceeding with the hearing of the disbarment proceeding against relator, and this, too, without considering the effect of the application for a change of venue, which relator afterwards filed, when respondent, at the June term of court, set aside the former disqualifying order of February 13th, and

threatened to proceed with the hearing of the proceeding against relator. It is to be noted here that in respondent's answer it is not claimed that the order of February 13th was ignored, or was subsequently revoked, because of the fact that the occasion for the making of said order, reciting his disqualification to sit in the cause, no longer existed, or that the judge who had been called in to try the cause in his place and stead could not be obtained, or had no authority to sit in the cause, or of anything of that nature, but the sole and only claim for respondent's reassertion of authority over the cause and for revoking and setting aside his order of February 13th is that said order was void because of the want of authority in the court to make it in the first instance. This position assumed by respondent is predicated, as before said, solely upon the proposition that it is not permissible under our statutes to allow to a defendant in a disbarment proceeding a change of venue, and that, as the effect of the order of February 13th would accomplish that end if carried out, it was a void order, and hence could be ignored whenever respondent realized his attitude erroneously assumed in the cause. If now we may agree that the rule as announced in *In re Bowman*, 7 Mo. App. 569, upon which respondent so much relies, is yet correct, that an attorney against whom disbarment proceedings are pending is not of right entitled upon his own motion to a change of venue, and this because he is not among those directly or impliedly named or designated in our change of venue act (a rule, however, which this court has taken occasion to disapprove, by dictum at least, in the very recent case of *State ex rel. Scott v. Smith et al.*, 75 S. W. 586), this further fact must be borne in mind: that the judge of the Butler circuit court had, independent of the provisions of article 11 of chapter 8, Rev. St. 1899, in which is prescribed to whom and in what cases a change of venue may be granted, the right, whenever his interest in the result of a matter pending in his court is disclosed, or whenever his relationship to or prejudice against a party to that inquiry is such that a fair or impartial hearing cannot be had, to disqualify himself from further acting in said cause, and to call in another judge, just as respondent did by the order of February 13th entered upon the records of the Butler circuit court, and the judge so called in is possessed of all the power and authority in that case that the regular judge had before the disqualifying order was made; and this not only upon statutory grounds, but upon the most obvious principles of natural justice that no one should be required or permitted to sit in judgment in any cause, when untrammelled justice is the promise to all, who is biased or prejudiced against a party thereto, or when for any reason he is disqualified to act in the cause. By section 1678, Rev. St.

1899, it is provided that whenever the judge of any circuit shall be sick, absent, or for any cause be unable to hold any term or part of term of court in his circuit, he may request the judge of another circuit to hold it for him, and that such judge called in shall possess all the powers of the regular judge of the circuit; and this is followed by section 1679, wherein it is further provided that whenever the judge for any cause shall be unable to hold any term or part of term of court, and shall fail to procure another judge to hold said term or part of term, or if the judge is interested or related to or shall have been of counsel for either party, or when the judge, if in attendance, for any reason cannot properly proceed in any cause or causes pending in such court, a member of the bar may be chosen or elected for the occasion, who will possess all the authority and power of the regular judge in such cause or causes to be heard and determined. Under the sweeping and comprehensive language of these plain statutory provisions there ought to be no doubt of the power and authority of respondent, as judge of the Butler county circuit court, to here make and cause to be entered upon the records of his court the order of February 13th, if doubt of the court's inherent power and authority to have so acted without such statutory enactments could be entertained under a form of government and with a code of law that guarantees to all a fair and impartial trial before an unbiased judge. What more specific directions, and at the same time more comprehensive authority, for respondent's action in making the disqualifying order of February 13th could be asked or desired? And how those unqualified powers of the judge, found in the statutes under a chapter defining the jurisdiction and authority of courts, can be said to be limited or abridged by the provision of another chapter of our statutes which has for its purpose the designation of the persons to whom and the circumstances under which a change of venue may be asked and taken as a matter of right to the applicant, we cannot conceive. The mere absence, in the change of venue act, of a right in a defendant in a disbarment proceeding, to obtain upon his own application a change of venue from a judge or from the court where in the proceeding is pending (if such right is denied him in said act), can in no way operate as a limitation upon the general power and authority given to the judges under sections 1678 and 1679, *supra*, in all cases pending in the court over which he presides, to disqualify himself, when for any reason he cannot properly preside in said cause. The two provisions of the statutes are wholly independent one of the other. To determine the rights of a party to a suit who seeks to avoid a trial before a prejudiced judge, or a judge who the party may think is prejudiced against him, we look alone to the provisions

of the change of venue act. To determine the powers and duties of the court or the judge thereof in that suit, when the judge recognizes his own disqualification or inability to try aright the cause before him or to sit at its hearing for any reason, we look to the more comprehensive provisions of sections 1678 and 1679. What the defendant sought in the disbarment proceeding upon his own application may probably and of necessity have been denied to him on account of the peculiar language of the provisions of the change of venue statutes upon which his application was based (if the reasoning in the Bowman Case is correct), and yet at the same time the judge who denied the change of venue sought on defendant's application (because no warrant for the act was found in the statute invoked by the applicant) may, with the next stroke of his pen, acting under a duty imposed upon him by another provision of the law, made for the assistance and protection of the courts rather than in the interest of the litigant, do in effect of his own motion, what the court had refused to the applicant, in his motion—change the venue of the cause by disqualifying himself upon the record, calling in another judge to sit at the hearing of said cause. The question of the right of a party litigant before the court is one thing. The question of the court's power and authority in that case is quite another. The circuit court of Butler county, when it made the order of February 13, 1901, reciting the disqualification of the judge thereof to sit in the hearing of the disbarment proceeding against relator, was a court of general jurisdiction, and as such had plenary power and authority to award changes of venue in all cases whatever when for any reason the judge of said court could not properly proceed with the hearing of any cause or causes pending therein, and this, too, independent of the consideration of the right which the party or parties being proceeded against in that court might or might not have to ask and obtain a change of venue on complying with the provisions of our change of venue act; and when, in the exercise of that jurisdiction, the court made the order of February 13th calling in Judge Fox, of the Twenty-Seventh Judicial Circuit, to try the cause, respondent's authority to proceed with the hearing of said cause was lost, except in so far as it might become necessary for him, as judge of the Butler circuit court, wherein the cause is still pending, to make such order in and about the proceeding as may be required to have it properly disposed of in that court.

From what is here said it follows that the preliminary rule in prohibition should be made absolute, and it is so ordered.

BRACE, MARSHALL, BURGESS,
GANTT, and VALLIANT, JJ., concur. FOX,
J., not sitting.

GULATH v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

MUNICIPAL CORPORATION—FLOODING FROM SEWER—ACT OF GOD—EVIDENCE.

1. Evidence held insufficient to show that a large sewer was not kept in repair, or that it had become cracked, the timbers on the bottom had bulged up, or stones and other obstructions accumulated, so as to diminish its capacity.

2. Evidence held to show clearly that a sewer was sufficient to meet the demands on it under ordinary conditions.

3. Where a rainstorm, such as had never occurred before, caused a flooding of lands from a sewer, no greater than would have occurred under natural conditions, the sewer having been scientifically built according to the best judgment of the engineers, and having a sufficient capacity under ordinary conditions, the injury results from an act of God, for which the city is not liable.

Appeal from Circuit Court, St. Louis County; Jno. W. McElhinney, Judge.

Action by Charles Gulath against the city of St. Louis. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Chas. W. Bates and Wm. F. Woerner, for appellant. Alfred A. Paxson, for respondent.

MARSHALL, J. This is an action for \$2,000 damages, alleged to have been caused to the premises of the plaintiff, Nos. 2734-2748, Chouteau avenue, in the city of St. Louis, and to the stock of furniture, goods, etc., therein, by an overflow of the Mill Creek sewer on July 8, 1898. The plaintiff recovered judgment in the circuit court for the amount claimed, and the defendant appealed.

The petition sets out the plaintiff's ownership of the premises and personal property aforesaid, and then alleges that the defendant constructed the Mill Creek sewer from Ohio avenue westwardly for several blocks under La Salle street and Chouteau avenue, near the plaintiff's property, and connected it with the portion of said sewer running eastwardly to the Mississippi river, and required property owners in the district to be drained thereby to connect with the same or its laterals, and that it thereby became bound to keep and maintain the sewer in good order, so that plaintiff's property would be free from danger or injury on account of said sewer or the use thereof; that the sewer was provided with openings at or near street crossings, to admit and carry off surface waters. The petition then contains the following statement of the plaintiff's claim: "The said Mill Creek sewer was constructed by defendant with a wooden bottom, composed of timbers and logs laid crosswise, and said defendant wholly neglected to keep same in proper repair, but

§ 3. See Municipal Corporations, vol. 26, Cent. Dig. § 1773.

carelessly, negligently, and knowingly permitted said timbers and logs to bulge and project up from the bottom of said sewer, which caused the sides and top of said sewer to crack and become displaced, and placed and permitted large stones, a large iron wagon box, and other articles to be and remain in said sewer in places therein between California and Montrose avenues, under said La Salle street, which, with the bulging and projection of said bottom as aforesaid, formed obstructions to the passage of the water and sewage which said sewer was designed and intended to carry off to said river, and caused said sewer, in case of ordinary heavy rains, to choke and dam up the flow through same, and to back up the contents thereof out through said openings, flooding the streets and adjacent property for long distances; all of which was well known to defendant long before the 8th day of July, A. D. 1898, or by the exercise of reasonable care and diligence would have been known by defendant. That the defendant, prior to last-mentioned date and since the original construction of said Mill Creek sewer, extended said sewer and constructed a large number of public and district sewers, and permitted a large number of private sewers to be constructed, and caused the same to be connected with and empty into said Mill Creek sewer, and thus caused said Mill Creek sewer to drain a large territory of over 6,500 acres of land, which was more than double the capacity of said sewer to carry off in case of ordinary heavy rainfalls; all of which was well known to defendant for several years before the 8th day of July, A. D. 1898. That on many times before, and more particularly on or about, the 8th day of July, A. D. 1897, plaintiff and others notified defendant, its officers and agents, of the condition and insufficiency of said sewer, and damage and danger the same were causing and liable to cause to plaintiff's property, and prayed an abatement thereof, which petition and prayer were ignored, and no action taken thereon by defendant in any wise for plaintiff's protection and relief. That on said 8th day of July, 1898, there was a heavy rainfall in said city, such as had previously frequently occurred, and by reason of said sewer being out of repair and obstructed as aforesaid, and by reason of the insufficiency of said sewer as aforesaid, the water and sewage in said sewer was backed and forced through said openings, in such large quantities as to flood the streets and force its way and come into and flood plaintiff's said property, greatly damaging and ruining same," etc.

The answer is a general denial, with the following special defense: "Further answering, the defendant avers that Mill Creek sewer is, and for many years last past has been, a main public sewer of the city of St. Louis, and extends for a distance of five miles or more from a point in the western

part of the city in a generally eastward direction to the Mississippi river, into which the water and sewage of said sewer are discharged at a point a short distance south of Chouteau avenue. And defendant avers that said sewer is one of the largest sewers in the world, and on July 7 and 8, 1898, was a safe sewer, and fully adapted to carry off all surface water, sewage, and other matter properly within said sewer, or which, according to the rules of experience in the building of sewers, could reasonably or properly be expected or anticipated; and said sewer was at said time well adapted for the uses for which it was constructed and maintained. The defendant avers that on the 7th and 8th days of July, and especially on the night between said 7th and 8th days of July, 1898, there was a great and unusual and extraordinary and unprecedented rainfall, and such a rainfall as had never before occurred in said city of St. Louis, and the rain water and surface water from the streets and ground rushed down the hills from the higher ground to the low ground in which plaintiff's premises were located, and gathered in the streets and in said low ground near and about the said premises of plaintiff in such an unusual and unprecedented quantity that the said water formed a flood which flowed along the streets and ran in and upon the adjacent streets and ground in the neighborhood and upon the adjoining property."

The trial developed the facts to be as follows: Mill Creek sewer is one of the largest (if not the largest) and best constructed sewers in the world. It is a public sewer, and runs along a natural watershed. It is substantially the original creek called "Mill Creek" converted into a sewer. It drains a large area—about 6,400 acres—just as the original creek did. The city began to construct it in 1864, and has extended the construction by sections westwardly from time to time as the public revenues permitted. The last work of extension was completed in May, 1891, and the sewer as thus constructed begins at the west bank of the Mississippi river and extends westwardly for about five miles, and ends at a point on Whittier street at a point 330 feet north of Lindell avenue. The sewer is 16 by 20 feet at its mouth, and gradually diminishes in size until it is 10 feet in diameter at its western terminus. Its drainage capacity is 3,340 cubic feet per second in the portion near the plaintiff's premises. It has a capacity for carrying off a rainfall of one inch an hour, which was the maximum capacity then required by experienced engineers throughout the country, and upon which basis the sewers of other cities were built. Its cost was \$1,495,482.74. It was originally built by laying a bottom of timbers about a foot square and 29 feet long, close together. The walls were 4 feet and 8 inches thick, and rested on the timbers. It had an arch-

ed top 8 or 10 feet in radius and 2 feet thick. It was shown that the section of the sewer near the plaintiff's premises was completed in 1874 and 1875. Between November, 1881, and May, 1898, the city expended for the construction and repair of this sewer the sum of \$227,328.77. In the latter part of the year 1896 a crack and "subsidence" was discovered in the sewer at Fourteenth and Gratiot streets (which was about 14 blocks east of the plaintiff's premises). An examination showed that it was caused by the side walls of the sewer settling, which caused the timbers to bulge up in the center from an inch to a foot. As soon as this was ascertained, an emergency was declared by the board of public improvements, and a contract for the work was immediately let, and the timbers were taken out from the bottom of the sewer where this bulging condition appeared, and an inverse concrete foundation was put in, and the side walls rebuilt where they were in a collapsed condition. This work was all completed by April, 1898, and an inspection of the sewer at that time showed it to be in good condition and repair. There were no cracks in it. There was no bulging of the timbers that would have any appreciable effect upon the drainage capacity of the sewer. It was not unusually choked up (of course, there was dirt and filth in it, and one witness found a loose stone in it about two feet in diameter), and it did not need any repairs at that time, in the opinion of the engineers who went through it and inspected it. The plaintiff's premises were located at perhaps the lowest point of the area naturally drained by the Mill creek, and later drained by this sewer. The testimony of persons who had lived in that neighborhood for over 40 years was that before the sewer was constructed the land (including plaintiff's premises) was overflowed by the creek many times. The testimony further shows that after the sewer was constructed there were three or four overflows. One was on a Sunday in May, 1897, another on the night of the cyclone in 1896, and the third on July 8, 1898. The date of the fourth is not disclosed. The United States signal officer testified that the records of his office showed that the greatest rainfalls in St. Louis were as follows: On May 27, 1896, the day of the great cyclone, the fall was 2.23 inches, of which 1.33 was the greatest in one hour. On July 17, 1893, the fall was .96 of an inch in 24 hours. On March 4, 1897, there was a fall of 1.02 inches in 24 hours. On March 5, 1897, there was a fall of 2.31 inches in 24 hours, the greatest being 1.23 inches in an hour. On July 8, 1898 (the day of the overflow complained of in this case) there was a maximum rainfall of 1 inch in 10 minutes; and in 1 hour there was a rainfall of nearly 3 inches, to wit, 2.56 inches in 62 minutes, and during a period of 2 hours there was a fall of 3.89 inches, and in 24 hours there was a fall of 5.10 inches. He

also testified that on July 7th there was a rainfall of nearly 2 inches in 24 hours. He further testified there never was any rainfall that equaled that of July 8, 1898. He also testified that a rainfall of an inch an hour, or 2½ inches in 24 hours, is considered excessively heavy. It further appeared that on July 8, 1898, the sewer overflowed; the tops were lifted off of the manholes; the water spouted up as much as 10 feet into the air; the low lands, including the plaintiff's premises, were overflowed; the cellars of the houses were filled with water, and in some places the water stood several feet deep on the first floors of the houses; the streets were covered with water to a depth of from a few inches to waist deep; and the houses were damaged and the goods injured, and a deposit of filth and slime, which was very offensive to the smell and injurious to property, was left. The overflow lasted only a few hours after the rain ceased, and after that the usual conditions were restored, and the sewer proved adequate to efficiently carry off the surface waters and the sewage, as was ordinarily the case. At the close of the plaintiff's case, and again at the close of the whole case, the defendant demurred to the evidence, but the court overruled the demurrer, and the defendant saved proper exceptions. In the view hereinafter taken of this case, it is not necessary to set out or consider the various instructions given or refused. As stated, the defendant appeals from a verdict in favor of the plaintiff.

1. The plaintiff predicates a right to recover upon two grounds: First, that the defendant was negligent in not keeping the sewer in repair, but permitted it to become cracked, and the timbers on the bottom to bulge up, and allowed stones and other obstructions to accumulate in it, so that its capacity was diminished; and, second, that the sewer was inadequate and insufficient to drain the territory connected with it, and therefore it overflowed.

The first ground is unsupported by any substantial evidence. The crack or "subsidence" that is referred to in the evidence occurred in 1896, nearly two years before the injury complained of, and was at Fourteenth and Gratiot streets, which was nearly 14 blocks east of the plaintiff's premises, and was promptly remedied, as emergency work by the city, and was completed in April, 1898, about three months before the accident, and therefore had no possible bearing upon this case. The testimony shows that some of the bottom timbers had bulged up from an inch to a foot, but all the experts called by both the plaintiff and the defendant, said that it had no appreciable effect upon the capacity of the sewer, and could not have caused the injury complained of. One of the plaintiff's witnesses testified that he found a stone about two feet in diameter in the sewer, and that some sand and filth had banked around it. But no one pretended to say—for it

would have been palpably absurd for any one to so say—that this had any effect upon this case, or that the accident would not have occurred if this stone had not been there; and the physical facts show that such effect of the stone was impossible. The evidence also shows that the engineers thoroughly examined the sewer only a short time before the accident, and found it in good condition, and not in need of any repairs. Hence no further attention need be given to the first ground relied upon by the plaintiff.

The learned counsel have devoted the bulk of their briefs and arguments, as they did the most of their testimony, to a consideration of the sufficiency of the sewer to drain the territory connected with it, and to the question whether or not the city can be held liable if it failed to provide in the first place a sewer of sufficient size and capacity and construction to drain the area connected with it, and to enlarge such capacity from time to time so as to meet the increased burdens cast upon it by the building up of the city. Counsel for the plaintiff showed by reports of the sewer commissioner and of the committee on sewers of the board of public improvements that this sewer needed enlarging, and that it had been many times overflowed, and they also showed that for more than two years before the date of this accident the city had been engaged in the construction of the Tower Grove storm sewer for the purpose of relieving the overburden on the Mill Creek sewer; but counsel contends that even that will not prove efficient, as only 25 per cent. of the burden will be thereby removed, and counsel contends it is now overtaxed 50 per cent. of its capacity. On the other hand, counsel for defendant show that in the 17 years preceding the accident, the city had expended upon the reconstruction and repair of this sewer \$227,328.77; and they further show that the sewer is ordinarily competent to take care of all the demands upon it, and that it is only on occasions of violent and unusual storms like that that occurred on the occasion of the cyclone in 1896, and like the storm that occurred on the occasion here involved, July 8, 1898, that there has been an overflow.

The defendant further contends that the question of when and of what size or capacity a sewer shall be constructed is a governmental question that is confided to the municipal assembly, and that it is not competent or proper to permit a jury or a number of juries to sit in judgment over the city authorities, and say, in the light of subsequent developments and the increased demands of a growing city, that the city authorities were negligent in not providing a sewer of sufficient capacity to meet all the then known and subsequently discovered demands upon it. In support of this position counsel for defendant have cited a great number of cases, and claim that such is the weight of modern authority. And such is the rule laid down

in Smith's Modern Law of Municipal Corporations, § 1169, and in 10 Am. & Eng. Enc. of Law (2d Ed.) p. 241. On the other hand, counsel for plaintiff contends that the city is liable if it fails to exercise ordinary care in the adoption of plans for a sewer or in the construction of a sewer, which turns out to be insufficient to drain the territory connected with it, and cites cases in support of this contention. Dillon on Municipal Corporations (4th Ed.) p. 1046, says the late cases properly tend to hold that the city is liable on the ground of negligence where the sewer is not of sufficient size, "under ordinary conditions," to drain the district connected with it, and in consequence overflow and injure private property. These are interesting questions, concerning which courts are disagreed. But it is not necessary or proper to consider or decide them in this case, because in this case there is no room for controversy that this sewer has always proved amply sufficient to meet the demands upon it under ordinary conditions, and that it is only in cases of unusual and extraordinary storms like that of May 27, 1896, when the cyclone visited St. Louis, and that of July 8, 1898, when there was a rainfall of 5.10 inches in 24 hours, and one or two other occasions, when there was an overflow. If, therefore, it be conceded, for the sake of the argument, that the discretion of the city can be reviewed by a jury, and the city be made liable for a failure to construct a sewer of sufficient size to meet the demands upon it under ordinary conditions, and even if it be likewise conceded that the city acts ministerially, and not in its governmental capacity, when it constructs its sewers, still the plaintiff would not be entitled to recover in this case, because this injury did not arise from any breach of its duty, or from any municipal negligence under ordinary conditions, but it arose from the act of God—from an unusual and unprecedented storm, which was the greatest of which there is any record known to the signal service. This sewer was scientifically built, according to the best judgment of the engineers of the days when it was built, and with the maximum capacity, then deemed necessary or proper, of one inch an hour, which the United States signal service says is excessively heavy. It has proved efficient and sufficient under ordinary conditions. On a few occasions when there were unusual, unanticipated and extraordinary floods, it has not been sufficient to carry off storm waters as fast as they fell, and the low lands, where the plaintiff's property is located, have been flooded. But, while this is true, it is contradicted in this case that these same low lands were overflowed on like occasions before this sewer was built, and when the drainage afforded by nature was insufficient to carry off the extraordinary rainfalls. So that this is not a case where the sewer constructed by the city affords less efficient drainage than was afforded naturally, nor

is it a case like *Rychlicki v. St. Louis*, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651, where the city collected surface water into drains and projected it in bulk and not naturally upon a man's lands. This case falls within the rule laid down in *Flori v. St. Louis*, 69 Mo. 341, 33 Am. Rep. 504, where the city was held not liable for damages produced by the fall of a market house, caused by a windstorm of unprecedented force and virulence. In that case this court, per Norton, J., said: "There was no obligation on the city in the construction and maintenance of the market house to anticipate unprecedented windstorms, as required by the instruction. It would be strange doctrine to require defendant to anticipate such a storm as had never before occurred, and provide against it, in the erection and maintenance of a market house. The utmost requirement that could be exacted would be that they should keep the building in such condition as would enable it to withstand the ordinary force and power of ordinary and usual windstorms." To hold a municipality for damages in a case like this would be to make it prohibitory upon the city to construct sewers at all; for, if the city could be held liable under circumstances like those present in this case, it would practically be to say that the city is an insurer against all damages that may arise in any manner whatever, the act of God included. If this was the law, no city could afford to build or maintain a sewer at all. Drains would have to be left in their natural condition. And in this case the damage to the plaintiff would have been the same, according to the undisputed testimony in the case, if Mill creek had never been converted into a sewer. In *Brash v. St. Louis*, 161 Mo., loc. cit. 438, 61 S. W. 808, this court, speaking through Brace, J., quoted with approval the rule laid down in 1 *Sherman & Redf. on Neg.* (5th Ed.) § 39, wherein it is said that, if the negligence of the city concurs with a superior force as the act of God, the city is liable, "but, if the superior force would have produced the same damage whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury." And the learned judge added, "And this is the prevailing doctrine in this state," and cited many cases in support thereof; concluding with the remark, "There is nothing in the rulings in *Flori v. St. Louis*, 69 Mo. 341 [33 Am. Rep. 504], or *Turner v. Haar*, 114 Mo. 385 [21 S. W. 737], inconsistent with this doctrine."

The plaintiff, however, invokes section 21 of article 2 of the Constitution, which provides "that private property shall not be taken or damaged for public use without just compensation," etc. This provision has no application to this case. If the defendant could be held liable at all, it would be on the ground of negligence, and not as for a taking or damaging of private property for

public use. *Van De Vere v. Kansas City*, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396; *Rude v. St. Louis*, 93 Mo. 416, 6 S. W. 257.

These considerations produce the conclusion that the plaintiff failed to make out a case against the city, and that the demurrers to the evidence should have been sustained. The judgment is reversed. All concur.

CITIZENS' BANK v. BURRUS et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

LIABILITY OF PRINCIPAL TO SURETY—ACTION ON BEHALF OF SURETY—MISREPRESENTATIONS TO SURETY—ESTOPPEL—EVIDENCE.

1. Evidence held to show that the acceptance by a wife of a part of the proceeds of sale of land held in her husband's name, and the purchase therewith of other land, was in good faith, to satisfy his debt to her, and not to cover up his property to defraud his creditors.

2. On general principles, and under Rev. St. 1899, § 540, requiring actions to be brought in the name of the real party in interest, an action against a debtor, his sureties being joined as defendants—they not having paid the claim, nor having any interest in it except as sureties—is not an action in their behalf, though the petition alleges that it is, and they requested the commencement of the action.

3. That a debtor's wife permitted him to hold himself out to his sureties as the owner of her property does not estop either of them from setting up her ownership as against the creditor, to whom no such representations were made, even in an action by the creditor on request of the sureties.

4. Sureties who have not paid their principal's debt, having suffered no wrong, can claim no relief on account of his own or his wife's representations that her property belonged to him.

Appeal from Circuit Court, Scotland County; E. R. McKee, Judge.

Suit by the Citizens' Bank against Charles R. Burrus and others. From a decree in favor of plaintiff, defendants appeal. Reversed.

E. Scofield, Pettingill & Myers, J. M. Doran, and J. M. Jayne, for appellants. Smoot, Mudd & Wagner, for respondent.

ROBINSON, J. This is a suit in equity by the Citizens' Bank of Memphis, Mo., a judgment creditor of Charles Burrus, to set aside as fraudulent a conveyance from himself and wife, Mary, to William Burrus, of 153 acres of land in Scotland county, and to subject certain notes held by Mary Burrus, amounting in the aggregate to \$1,055, to the payment of judgments held by plaintiff, aggregating the sum of \$996, against said Charles Burrus and several securities who signed notes with him at plaintiff's bank, which said securities have also been named as defendants in this proceeding. The petition sets out the fact of the rendition of judgment in 1899 in favor of plaintiff, the insolvency of Charles Burrus, and of his own

¶ 2. See Estoppel, vol. 12, Cent. Dig. § 283.

ership of a certain tract of land in Scotland county, known as "Burrus' Home Place," comprising about 700 acres, together with a large amount of personal property thereon; the sale and conveyance thereof by said Charles Burrus, and the after purchase of the land in controversy from the Scotland County National Bank with the proceeds accruing from the sale of the former tract; the conveyance of the latter tract in the name of his wife, Mary Burrus, to defraud his creditors, and of her after conveyance of said tract to William Burrus, a brother of Charles Burrus. The petition then alleges that the purchase price for the latter tract was all paid by said William Burrus to Mary Burrus, except the sum of \$1,000, for which sum the said William executed his two promissory notes, for \$500 each, payable to the order of Mary Burrus, in three and six months, respectively, after the date thereof, which notes, it is further averred, are still held by the said Mary Burrus, and remain unpaid. The petition then sets up the fact that the judgments declared on were obtained on account of money borrowed from plaintiff by the defendant Charles Burrus in 1896, evidenced by certain promissory notes upon which the defendants Breedlove, Brem, Ladd, Shawley, Houston, and Smith had signed as sureties, and that said sureties had notified plaintiff that they desired it to prosecute its claims to judgment, and also requested it to institute this proceeding to have the conveyance of the above-named land set aside as fraudulent. The petition then proceeds as follows: "Plaintiff further alleges and charges the facts to be that all the judgments hereinbefore mentioned were and became liens upon all the real estate owned, either in law or in equity, by the said Chas. R. Burrus. Further alleges that said Burrus is wholly and absolutely insolvent, and is the owner of no property that can be seized and sold on execution, except that herein mentioned and described. Plaintiff further alleges and charges that it is wholly remediless by or through the ordinary process or proceedings at law against C. R. Burrus; that all debts for which said judgments were rendered were the individual debts of said Chas. R. Burrus, and the plaintiff and the parties owning said judgments were, before the institution of the suits thereon, notified by each and all of the sureties to proceed to the collection of said debts against said C. R. Burrus, he being the principal, and party primarily liable for the payment of the same; that, in equity and good conscience, he ought to pay for the same, and the property owned by him and fraudulently conveyed, as hereinafter alleged, ought to be subjected to the payment of the aforesaid judgments. Plaintiff further alleges and charges the facts to be that on or about November 15, 1897, the defendant C. R. Burrus resided with his wife, the said defendant Mary E. Burrus, on a large farm, sit-

uated in Mt. Pleasant township, in Scotland county, Missouri, the title to same being in said C. R. Burrus (he in fact being the owner of the same), which consisted of about 700 acres; that said C. R. Burrus on or about said date sold said farm, and, with the proceeds arising from said sale of said farm, purchased the north half of the southeast quarter, and the northeast fourth of the southwest quarter, and thirty-three (33) acres, being all of that part of the southeast fourth of the northwest quarter lying west of Memphis and Edina Public Road, and thirty (30), being all of that part of the southeast fourth of the southwest quarter lying west of said public road, all in section eleven (11), township sixty-four (64), of range twelve (12), in Scotland county, Missouri, for the price and sum of \$5,500; that he purchased the same of the Scotland County National Bank, and he had title and conveyance to same made to and in the name of the defendant Mary E. Burrus, his wife; that, at the time said conveyance was made, said C. R. Burrus owed the debts herein sued for; that said deed is recorded in Book 61, p. 159, of the records of said county. That said deed was made by said Chas. R. Burrus for the purpose of hindering, delaying, and defrauding his creditors, and same was accepted by his wife, Mary E. Burrus, for the purpose and with the intention of so hindering, delaying, and defrauding the creditors of said C. R. Burrus; that afterwards, in the fall of 1898, for the purpose of complicating said transaction, and with the fraudulent purpose and intent of hindering, delaying, and defrauding the creditors of the defendant C. R. Burrus, the said defendant Mary E. Burrus and Chas. R. Burrus conveyed the aforesaid land to the defendant Wm. D. Burrus, and the same was received and accepted by the said defendant Wm. D. Burrus with the intent and for the purpose of hindering, delaying, and defrauding the creditors of said Chas. R. Burrus; that both of said deeds and conveyances were without consideration and voluntary, and made for purpose aforesaid. Plaintiff therefore says that by reason of the notices given by said sureties, and by reason of insolvency of said defendant C. R. Burrus, and by reason of the fraud of the defendants Burrus, plaintiff has a right to maintain this creditors' bill and equitable proceedings, and prays for such relief as in equity and good conscience it is entitled, and for general relief, and further says that this petition and prayer is made for the benefit of said sureties, and at their request, and by their consent. Plaintiff further alleges and charges the fact to be that said sureties, having signed said notes as sureties for defendant C. R. Burrus, and he at the time being the owner of about 700 acres of land in Mt. Pleasant township, Scotland county, Missouri, and a large amount of personal property, signed for him, solely as his sureties, the said notes upon

which the said judgments were rendered as heretofore set out in this petition, and said plaintiff, having been notified by said sureties to collect the debts off of the principal debtor, C. R. Burrus, and in pursuance of said notice, brought said suit and obtained said judgments. And plaintiff further charges the facts to be that with the proceeds of said 700 acres of land and of said personal property said C. R. Burrus purchased the land heretofore described in this petition, and used \$3,500 of such proceeds in paying for said land, and had the title of same taken in the name of defendant Mary E. Burrus; and plaintiff further charges the fact to be that, as to the securities aforesaid of Chas. R. Burrus, said conveyance was voluntary and without consideration, and at the time said C. R. Burrus was wholly insolvent; and further alleges and charges the fact to be that afterwards the defendants Mary E. and Chas. R. Burrus conveyed said land to defendant Wm. D. Burrus, and executed a deed to him therefor, and all the purchase money therefor was paid by Wm. D. Burrus to said Mary E. Burrus, except \$1,000, for which said Wm. D. Burrus executed and delivered to Mary E. Burrus, and in her name, two notes, for \$500, due respectively ninety days and six months after date, which said notes are yet unpaid, and are held and are in the hands of said Mary E. Burrus, and are past due; and plaintiff says that said notes cannot be reached, nor can the amount due thereon be reached, by or through the ordinary process of law; and plaintiff further states that, on all the claims heretofore set forth in this petition, judgments were rendered, and on the — day of February, 1890, executions were duly issued on said judgments, and that a nulla bona return was made therein, and that this suit is brought by this plaintiff at the instance and request of said securities, and before the institution of this suit said securities indemnified this plaintiff against costs and liabilities on account of said suit on said debt, and said suit is prosecuted for their benefit." The answer filed by the defendants Charles, Mary, and William Burrus was a general denial.

When the cause was reached for trial the court formulated and submitted to the jury called to determine the fact the following issues:

"(1) Did defendant Chas. R. Burrus purchase land of Scotland County National Bank with his own funds, and cause the same to be conveyed to his wife, for the purpose of hindering, delaying, and defrauding his creditors?

"(2) Were the lands purchased of the Scotland County National Bank by Mary E. Burrus, and paid for with her own money?

"(3) Was the land conveyed to Wm. Burrus by Mrs. E. Burrus and Chas. R. Burrus, her husband, for the purpose of hindering, delaying, and defrauding the creditors of Chas. R. Burrus?

"(4) Was said land conveyed to Wm. Burrus by Mrs. Mary E. Burrus and Chas. R. Burrus without consideration?

"(5) Was the sixty acres of the original farm that had been conveyed to Mary E. Burrus purchased and paid for with her own means?

"(6) Was Chas. R. Burrus indebted to his wife at the time of the sale of the original home place in the sum of \$2,747.77, for money loaned to him prior thereto, or indebted to her in any amount?

"(7) If you answer the above questions 'Yes,' you will state the amount you find he was indebted to her?

"(8) Did Mrs. Mary E. Burrus purchase and pay for forty acres of land of C. W. Murray with her own money?

"(9) Did Mary E. and Charles R. Burrus jointly purchase and pay for eighty acres of land of George Owens, which was deeded to Charles R. Burrus?

"(10) Did Charles and Mary Burrus jointly purchase and pay for forty acres of the Phillips land at sheriff's sale, the title to same being taken in the name of Charles R. Burrus?

"(11) Did Mary E. Burrus knowingly suffer and permit her husband, Charles R. Burrus, to claim to own personal property of hers, and real estate she had a right to, that was in her name, and exercise acts of ownership over and to hold the same out to the world as his?

"If you answer the above interrogatory in the affirmative, you will please further answer the following:

"(12) Did either of the securities mentioned in the petition, on account of such apparent claim of ownership by said Charles R. Burrus of his wife's property, sign his note as his security, and become liable for the debt or debts sought to recover by this action?

"(13) If you answer this interrogatory in the affirmative, you will also state in your answer which surety was so induced to sign said note or notes?"

The jury found in the affirmative on the 2d, 5th, 6th, 8th, 9th, 10th, 11th, 12th, and 13th interrogatories, and in the negative as to the 1st, 3d, and 4th. To the 7th interrogatory their answer was, "Two thousand dollars;" and to interrogatory 13 their answer was, "Brem, Ladd, and Shawley." The findings of the jury were adopted by the trial court, and the following decree was entered in the case: "It is therefore considered and adjudged by the court that said sum of \$1,065 is subject and ought to be applied to the payment of the debts to the plaintiff, and it is ordered and adjudged that plaintiff have and recover of and from the defendants Charles R. Burrus, Mary E. Burrus, and William D. Burrus said sum of \$1,065, and that they recover their costs laid out and expended off of Chas. R. and Mary E. Burrus. And it is further ordered that the defend-

ants Charles R. and Mary E. Burrus surrender said notes to the clerk, to be canceled by him and delivered to the said William D. Burrus, and that execution issue therefor." From this decree Charles, Mary, and William Burrus have appealed.

It may be noted here that no allegation is made in the petition filed that, in the procurement of the various loans upon which plaintiff obtained its judgment, either Charles or Mary Burrus made any representations to the plaintiff touching the ownership of the wife's property, or that the wife permitted her husband to hold himself out to plaintiff as owner thereof, or that the loan in question was made by plaintiff in reliance on such apparent ownership, and no proof along that line or to that effect was offered or made at the trial. The testimony on the part of plaintiff tended to show that the notes upon which plaintiff obtained its judgment against Charles Burrus and his securities were made in the year 1896, as the result of money borrowed by the said Charles Burrus from the plaintiff bank with the defendants Breedlove, Brem, Ladd, Shawley, Houston, and Smith as securities, but that no one of the notes contained the names of all the above-named securities who have been joined as defendants in this suit, and that, as these notes would fall due, they would be renewed from time to time, by consent of the securities, until in February, 1899, when, at the request of most of the securities of the different notes, the plaintiff reduced them to judgment; that, at the time said notes were given, Charles Burrus and his wife resided on a large farm, containing about 700 acres, in Mt. Pleasant township, in Scotland county, the title to which, with the exception of 60 acres, valued at about \$1,800, was in his name; the latter 60-acre tract being in the name of his wife, and, as shown by defendant's testimony, had been purchased by her in 1892, and paid for by money derived from her father's estate, and the deed taken in her name, and filed for record in Scotland county. The testimony also shows that there was considerable stock and other property on the farm at the time, some of which, it appears, was owned by the wife, but most of it was the property of the husband, and that all of it was controlled and managed generally by the husband, and by him was given in and listed for taxation in his own name, and that three only of Charles Burrus' securities (Brem, Ladd, and Shawley) claimed to have signed the notes in question, on which their names appear, in reliance on Charles Burrus' apparent ownership of all property given in by him for assessment. This land, known as the "Home Place," except the 60 acres owned by Mrs. Burrus, had been occupied by Charles Burrus and his family as a homestead for 30 years or more, and at the time of making the notes in question was mortgaged for something like \$10,000. In November, 1897,

Charles Burrus sold the entire 700-acre farm upon which he was then living, subject to the incumbrances thereon, for \$4,000 in cash and some property in the state of Illinois, and, from the cash received, paid to his wife \$3,000, to apply on a \$2,000 indebtedness which the court found the said Charles Burrus was owing to his wife at the time on account of money borrowed, and a part of what the wife was entitled to have received from the sale of her 60 acres of said home farm tract, which said 60-acre tract was valued at \$1,800. Some time in the early part of the year 1898 Mrs. Burrus purchased from the Scotland County National Bank the 153-acre tract in controversy for \$5,600, took the deed in her own name, gave the \$3,000 received from her husband in part payment thereof, and executed a mortgage thereon to the bank to secure \$2,660, the balance of the purchase money. Afterwards, in the fall of that year, she sold and in conjunction with her husband conveyed this land so purchased by her from the bank to William Burrus, a brother of Charles Burrus, for \$6,000. The said William Burrus paid \$1,100 in cash, surrendered to Mrs. Burrus certain notes held by him against her and her husband jointly, amounting in the aggregate to \$1,240, gave to her his two promissory notes, for \$500 each, payable in three and six months, respectively, after the date thereof, and assumed to pay the mortgage of the Scotland County National Bank, of \$2,660, on the land. Whatever the purpose of Charles Burrus may have been in selling the home farm, and paying to his wife \$3,000 of the money received therefrom, there is nothing in the record to indicate that she, in accepting the same from her husband, had any other purpose in view than having satisfied, in part, what was justly due and owing to her from him. That her purchase of the 153 acres in question, and its sale afterwards, was in good faith, and not for the purpose of covering up property of her husband, was made most certain by the testimony. In our judgment, the evidence utterly fails to show any fraudulent intent on the part of Mrs. Burrus, either by act or deed, in the entire transaction.

While the record shows that Charles Burrus was much embarrassed during the entire history of the transaction related herein, and at the time of the institution of this proceeding was hopelessly insolvent, it is also true that his codefendants in the suits in which plaintiff obtained the judgments upon which this suit is predicated are perfectly solvent, and amply able to pay plaintiff's judgment claims, if it seeks or wishes to collect from them. It is also to be noted in this connection that no claim has been made in the petition, and that no proof was offered at the trial, that Charles Burrus ever held himself out to the plaintiff, or represented to it, that he was the owner of his wife's property, or that he ever made any

representations whatever to its officers in reference thereto, or that they were in any wise governed in the matter of making the loan to Charles Burrus by such facts; but plaintiff's contention now is that as Mrs. Burrus permitted her husband to hold himself out as the owner of her property to the securities, or a part of them, who signed the notes to the bank with him on the faith of such apparent ownership, she ought now be estopped from claiming the property in controversy as against the bank, who had brought this suit at their instance and request, and, as it is alleged in the closing lines thereof, for their benefit.

In the first place, this is not an action prosecuted by plaintiff for and in behalf of the securities who signed with Charles Burrus the notes in question, although plaintiff does say in the closing lines of its petition, as above indicated, that such is its purpose. It is distinctly alleged that plaintiff yet holds and owns said judgments, and that no part of same has ever been paid by said Charles Burrus or any one else; and the judgment decree, as entered, is in favor of the plaintiff personally, and not as the assignee of, or as the trustee for, the securities mentioned. In fact, the securities have been joined as codefendants with the Burruses in these proceedings—for what purpose, however, no reason is assigned or suggested.

Without stopping to comment upon the form of plaintiff's action, it will suffice to say at this time that, upon the facts shown, there is no place for the application of the doctrine of estoppel invoked against the defendant Mary Burrus, that has resulted in the decree as rendered. As her husband made no statement whatever to the plaintiff bank, or to any of its officers or agents, regarding the ownership of his property or his wife's property, and as plaintiff was in no wise induced to loan the money which it did to her husband, Charles Burrus, on account of his apparent ownership of her property, no wrong was done the bank by the wife by acquiescence or otherwise in a false statement regarding the ownership thereof to others by the husband. Plaintiff was led into no error that should estop Mrs. Burrus from the assertion of the true facts regarding that property, where it is sought to be taken as the property of her husband by one not deceived by her conduct or action concerning it. While no principle in our jurisprudence is better established than that where one, by his or her act, deed, or conduct, induces or causes another to believe in a certain state of facts, and that other, acting upon it, parts with his money or property, the former will be estopped to deny that such fact really existed, in a controversy between said parties involving the question of the existence or nonexistence of such fact or facts asserted or assumed, yet equally as well founded is the rule that no one can invoke estoppel to stay the asser-

tion of a truth by another, who has not himself or herself been misled, or induced to do some act or thing to his or her injury, on account of some false act, conduct, or deed of that other, which otherwise he would not have done, or when he who invokes the rule had no knowledge of the false action of the other at the time he acted. Applying this rule to the unquestioned facts of this case, as found by both jury and court, it must be manifest that Mrs. Burrus is not estopped from asserting her title to the notes in question, which she had received from the sale of the 153 acres of land in controversy, previously purchased by her in good faith, and paid for with her own means, as against the plaintiff or any one except those securities on her husband's notes at plaintiff's bank, who say they were induced to sign the notes on account of his apparent ownership of the wife's property with the wife's acquiescence; and they cannot be heard to invoke estoppel against Mrs. Burrus in this proceeding, or in a kindred proceeding by themselves, as no definite wrong had yet resulted to them to this time by means of what they say they did on account of her conduct in permitting her husband to claim her property as his own. Until the act or conduct which induced them to sign the notes with the husband of Mrs. Burrus at plaintiff's bank had resulted in their having lost something, they would have no standing in court in a proceeding against the property of Charles Burrus, and much less against the property of his wife, which he had the appearance of owning, only. Counsel for respondent has referred us to no authority sustaining the theory upon which the decree entered herein is predicated, and we apprehend the books would be searched in vain for its precedent. As the plaintiff had not been misled or deceived by the act, conduct, or representation of Charles Burrus regarding the ownership of his wife's property, in which it is claimed she acquiesced, it cannot, in this proceeding, invoke estoppel against the wife's assertion of title to the notes in question, derived through the sale of that property. Not having been misled or deceived by the act, conduct, or representation of either Mr. or Mrs. Burrus, the plaintiff cannot, in its own behalf, invoke estoppel against Mrs. Burrus. Neither can the plaintiff, being a stranger to the transaction between Charles Burrus and his securities, whereby the latter were induced to sign the notes held by plaintiff on account of his untrue statement as to the ownership of his wife's property with her acquiescence or approval, set up such acts and conduct in behalf of said securities as a ground of estoppel against the wife, now asserting her claim of ownership of her property, for, as before said, only those to whom a representation had been made, or who have been led or induced to assume some responsibility or part with something of value, can take ad-

vantage of the plea of estoppel. Under our practice act (section 540, Rev. St. 1899) all actions are required to be prosecuted in the name of the real party in interest. This, if nothing more, would preclude this case from being considered as one for the benefit of the securities. Moreover, the securities themselves would have no standing in court to subject the notes in question, belonging to and held by Mrs Burrus, to the payment of the debt evidenced by the judgment against themselves and Charles Burrus, until they, as securities, had first paid the debt, which, it appears, from both the petition and the facts, they have not done. Neither does the fact that the securities notified plaintiff, as provided by section 4500, Rev. St. 1899, to proceed against Charles Burrus as the principal debtor on the notes held by the bank, and that suit was instituted in pursuance of such notice, and, further, that this proceeding was instituted at the request of said securities, and that before doing so the plaintiff was indemnified against all costs and liabilities on account thereof by the securities, as the petition alleged was done, entitle plaintiff, who was in no way shown to have been misled or deceived by any acts or representations of any one to its wrong or injury, to avail itself of the doctrine of estoppel in this action against Mrs. Burrus. When the court determined that Mrs. Burrus received from her husband \$3,000 that afterwards went into the land in controversy, the resale of which resulted in her getting the two notes that have been subjected to plaintiff's judgment by its decree, from the sale of the old homestead of 700 acres, on account of an honest indebtedness due to her from her husband, in part, and the balance on account of money he had gotten from the sale of her part of that tract, and that Mrs. Burrus had been guilty of misconduct regarding her property, so as to cause the plaintiff to be deceived thereby, or to have given her husband a credit in plaintiff's bank which he otherwise would not have had, it then became a matter of no concern to the court whether or not Mrs. Burrus had improperly permitted her husband to use her property as his own, and in such a way as thereby to have induced some of the securities to have signed the notes in question with her husband at plaintiff's bank in reliance of such apparent ownership, and plaintiff's bill should have been dismissed.

Judgment of the trial court will be reversed, and plaintiff's bill ordered dismissed. All concur.

PULLIS et al. v. PULLIS et al.

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

PARTNERSHIP ASSETS—ACTION FOR SHARE OF DECEASED PARTNER.

1. The heirs at law of a deceased member of a partnership may not sue for his share of

an unadministered asset of the firm, but the administrator of the partnership, or, he being dead, its administrator de bonis non, must sue for the asset.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Action by Kate Pullis and others against Thomas R. Pullis and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

James G. Owen and McKeag & Cummings, for appellants. Henry Boemler and Harmon J. Bliss, for respondents.

BRACE, P. J. This is an appeal from a judgment of the St. Louis city circuit court sustaining demurrers to the plaintiffs' amended petition, filed February 16, 1901, and, which omitting caption, is as follows: "Plaintiffs, by their amended petition, leave of court first had and obtained, for their cause of action state that the Oak Hill Cemetery Association is now, and was at the time hereinafter stated, a stock corporation duly incorporated under the laws of the state of Missouri, having its chief office or place of business in the said city of St. Louis; that the defendants Merrit H. Marshall, Sr., Nathan D. Allen, and A. S. Mermod claim to have an interest in the shares of stock which were wrongfully and fraudulently issued for no other consideration than the surrender of certificate No. 11, hereinafter mentioned, by intermediate surrenders and cancellations, all of which are involved in the controversy in this case; that the plaintiffs are the only heirs at law of Theodore Pullis, deceased, who departed this life on or about the 2d day of January, 1884, intestate; that Augustus Pullis administered on the estate of said deceased in the probate court of the city of St. Louis, and finally settled said estate on or about the 28th day of September, 1892; that at the time of his death the said Theodore Pullis was a member of the firm of Pullis Bros., a copartnership composed of Augustus Pullis, Theodore Pullis, and Thomas R. Pullis, Jr., the interest of each being one undivided one-third of all the assets and property of said firm; that Augustus Pullis, as surviving partner, administered on the copartnership estate of Pullis Bros., and finally settled said copartnership estate on or about the 26th day of October, 1889; that during the life of Theodore Pullis, on or about the 2d day of January, 1882, the said Pullis Bros. became the owners of the entire estate of T. R. Pullis & Sons in the Oak Hill Cemetery Association, which was represented by one hundred and sixty (160) shares of the capital stock of the said association, and evidenced by certificate No. 11, of the then value of fifty dollars per share, and at the time of the death of Theodore Pullis said shares of stock then appeared on the books of the said corporation having been previously issued on June 17, 1879, in the name of T. R. Pullis & Sons, a copartnership in which the said members

of the copartnership of Pullis Bros. had been all interested prior to the death of T. R. Pullis, Sr., that afterwards, on the 9th day of December, 1893, said corporation issued a stock certificate to Pullis Bros. for one hundred and sixty (160) shares of its capital stock, which was at the time numbered 18; that previous to issue of said certificate No. 18, on or about the 2d day of January, 1882, the said copartnership of T. R. Pullis & Sons was by mutual consent dissolved, and the said firm of Pullis Bros., for value received, became the entire owner of said one hundred and sixty (160) shares of said corporation, and continued to be up to the time of the death of said Theodore Pullis, deceased. Plaintiffs further state that the said Augustus Pullis, now deceased, did not either in the estate of Pullis Bros. or in the estate of Theodore Pullis, deceased, inventory nor administer on said shares of stock, or in any manner ever account to the plaintiffs for their interest in said shares of stock; that Thomas R. Pullis, Jr., of the defendants, well knew of all of these facts, and after the final settlement of the said estate of said Theodore Pullis, deceased, the said Thomas R. Pullis, of the defendants, and the said Augustus Pullis, deceased, surreptitiously concealed the existence of the interest of the said Theodore Pullis, deceased, from the plaintiffs in and to the shares of stock, and did, on the 9th day of December, 1893, surrender to the said corporation said certificate No. 11, and had the corporation cancel said certificate and issue a certificate in the name of Pullis Bros., which was said No. 18, for the said one hundred and sixty (160) shares. Plaintiffs aver that the concealment of said Augustus Pullis, deceased, and Thomas R. Pullis, Jr., of the existence of certificate No. 11 and the issue of said certificate No. 18 were fraudulently done by the said Augustus Pullis and Thomas R. Pullis, Jr., for the purpose of destroying the evidence of said shares of stock and depriving the plaintiffs of their interest in said shares of stock. Plaintiffs further state that afterwards, to wit, on or about the 15th day of October, 1894, Augustus Pullis departed this life, and by his last will and testament appointed Angeline E. Pullis executrix of said will; that she administered on said estate, and finally settled it on the 22d day of March, 1897; that soon after the death of Augustus Pullis, to wit, on the 23d day of September, 1895, Thomas R. Pullis, Jr., of defendants, then being the only surviving partner of said Pullis Bros., he having at that time and long prior thereto possession of the said certificate No. 18, unlawfully and fraudulently surrendered said certificate, without any authority from the plaintiffs, to said corporation, and had certificate No. 32, for two hundred shares, issued to Christian A. Pullis, and on the 30th day of September, 1895, had certificate No. 43 issued to Cora B. Pullis, his wife, for one hundred and ninety

shares, and certificate No. 44, for ten shares, issued to himself, Thomas R. Pullis, Jr.; that on the face of all of these said certificates it is expressly stated that the transfers of shares of stock could only be made on the books of the said corporation; that no transfer was ever made by any person authorized of certificate No. 11 and 18 aforesaid; that the said corporation, by its agents and officers, negligently and fraudulently canceled said certificate and issued as aforesaid the said certificate Nos. 32, 43, and 44 aforesaid, without any other consideration than the surrender of said certificate Nos. 11 and 18, as aforesaid, the increase of shares having been justified by the increase in assets and an increase in the capital stock authorized by a vote of the stockholders; that no further money has been paid to the association than was originally paid by T. R. Pullis & Sons and said Pullis Bros. Plaintiffs further state that the said A. S. Mermod and the said Nathan D. Allen were respectively president and secretary and treasurer as well as directors during all of the time hereinbefore stated of the said Oak Hill Cemetery Association, and well knew that the copartnership of T. R. Pullis & Sons was composed of T. R. Pullis, Sr., Theodore Pullis, Augustus Pullis, and T. R. Pullis, Jr., and that Pullis Bros. was composed of Theodore Pullis, Augustus Pullis, and Thomas R. Pullis, Jr., and well knew that the estate of T. R. Pullis & Sons and that of Pullis Bros. were administered on by Augustus Pullis as surviving partner, he giving bond in both of these estates, and that before the surrender of certificate No. 11 aforesaid and the issuing of said certificate No. 18 these copartnerships had been finally settled, and that Augustus Pullis was no longer authorized to act for either, his rights as surviving partner and that of Thomas R. Pullis, Jr., having been abrogated by said administration, but, notwithstanding the knowledge of the said corporation, its agents and officers, it fraudulently permitted and aided the said Augustus Pullis and Thomas R. Pullis, Jr., in their fraudulent canceling of said two certificates, and did issue the certificate named in lieu thereof, without requiring either Augustus Pullis or Thomas R. Pullis, Jr., to show anything for their part in said fraudulent acts of surrender and receipting for the shares issued by it. Plaintiffs further aver that they have at all times since the 2d day of January aforesaid been the owners of and entitled to the one undivided one-third of said four hundred shares; that is, 133 $\frac{1}{3}$ shares, of the value of \$4,000. Plaintiffs further state Nathan D. Allen and A. S. Mermod, by intermediate cancellation and issue of the 200 shares of stock issued to Christian A. Pullis, now hold a certificate of 100 shares each since September 13, 1897; that all of the defendants holding these certificates have collected at various times dividends from said corporation to the amount of at least

\$3,000, the one-third of which rightfully belongs to the plaintiffs; that Thomas R. Pullis and Cora B. Pullis are both insolvent. Plaintiffs further state that the defendants knew at all times the interest of the plaintiffs in said shares of stock, which was not known to plaintiffs to within six months prior to the filing of this suit; that no settlement has ever been made between the estate of Theodore Pullis, deceased, and the partners who survived him of the Pullis Bros., nor with these plaintiffs. Therefore the plaintiffs pray for an accounting of the dividends collected by the defendants on the interest of plaintiffs; that an accounting and settlement be made, so as to ascertain the interest of the plaintiffs in and to said four hundred shares of stock; and for an order and decree that the certificate of stock now held by defendants be surrendered and canceled, and that said corporation issue to the plaintiffs separately the number of shares each may be entitled to; and the plaintiffs further pray for a restraining order enjoining the defendants from selling, assigning, or transferring in any manner the said shares of stock until a final hearing of this case; and for an order and decree that the said corporation pay all future dividends that shall be declared on 133½ shares of stock to plaintiffs; and for such other and further orders and relief as to the court may seem proper and equitable in the premises, and that summons be issued to Merrit H. Marshall, Sr., Nathan D. Allen, and A. S. Mermod."

A fatal objection to the petition is so clearly and tersely stated in one of the demurrers thereto that a quotation of that statement may well furnish a sufficient reason for sustaining the judgment of the circuit court without further argument or examination of the many other objections urged against it. It is as follows: "Said petition shows on its face that there is no right of action in the plaintiffs, or any of them, for possession of the property described in plaintiffs' petition, or any part thereof, or interest therein, or accounting therefor, nor any right of action growing out of or in regard to said property, for the reason that it appears from said petition that the shares of stock of the Oak Hill Cemetery Association issued to Thomas R. Pullis & Sons, and described in said petition, for possession of one-third of which stock and accounting for the revenue therefrom this action purports to have been brought, was an asset of the copartnership firm of Pullis Bros. at the time of the dissolution of said copartnership firm by the death of Theodore Pullis, and that, consequently, the legal title to said stock vested immediately upon his appointment in the administrator of the copartnership estate of Pullis Bros. (which administrator appears by plaintiffs' petition to have been Augustus Pullis), and that all rights of action for possession of or in regard to said stock were by

virtue of his said appointment solely in said Augustus Pullis, as administrator of the copartnership estate of Pullis Bros., and that, as it further appears from plaintiff's petition that said Augustus Pullis is dead, and administration of said copartnership estate of Pullis Bros. has been closed, all said rights of action in regard to said stock must pass to and be exclusively in an administrator de bonis non, when lawfully appointed on a reopening of the administration of the copartnership estate of Pullis Bros., for the benefit of the creditors and distributees thereof, and until such administrator de bonis non is appointed said rights of action are in abeyance, and such rights of action are not in the distributees individually nor collectively, and still less are they in the plaintiffs herein, who are alleged by said petition to be the heirs at law of Theodore Pullis, which said Theodore Pullis appears by said petition to have been a distributee of said copartnership estate of Pullis Bros."

If authority were needed to support so evident a proposition, it may readily be found in the cases cited in the brief of counsel for respondents.

The judgment of the circuit court is affirmed. All concur.

KOONS v. KANSAS CITY SUBURBAN BELT R. CO.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

RAILROADS—FLAGMAN—INJURIES—CONTRIBUTORY NEGLIGENCE—HUMANITARIAN DOCTRINE—APPLICATION—WILLFUL INJURY—EVIDENCE.

1. Where, in an action for the death of a crossing flagman, who was struck by an engine backing over a crossing, plaintiff's evidence tended to show that deceased was not on the track at all until the engine, which had previously been standing still just beyond the crossing, started to move, nor until the engineer approached deceased so close that he was not within the range of vision of the operatives of the engine, when he suddenly stepped on to the track while flagging the driver of a team approaching the crossing, plaintiff was not entitled to recover, notwithstanding decedent's contributory negligence under the humanitarian doctrine, there being no evidence that decedent's injury could have been prevented notwithstanding his negligence.

2. In an action for death of a railway crossing flagman evidence reviewed, and held insufficient to establish that defendant's servants had been guilty of willful injury in failing to stop the engine by which deceased was killed as soon as possible after they knew, or by the exercise of ordinary care might have known, deceased had been struck.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Sarah P. Koons against the Kansas City Suburban Belt Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Lathrop, Morrow, Fox & Moore, for appellant. F. F. Rozzelle, F. P. Walsh, and John G. Park, for respondent.

MARSHALL, J. This is an action under the statute to recover \$5,000 damages for the death of the plaintiff's husband, caused by being run over and killed by one of the defendant's cars on March 9, 1899, at Second and Holmes streets, in Kansas City. The plaintiff recovered a judgment below, and the defendant appealed.

The petition alleges that the deceased was employed by the defendant as a flagman or watchman at Second and Holmes streets, and that he was killed while in the discharge of his duties at said time and place. The petition then charges that: "The death of the said Edmond B. Koons was directly occasioned by the negligence, carelessness, and want of ordinary prudence upon the part of the defendant, its servants and agents, in the following respects, to wit: (1) Prior to said injury and death defendant had enacted and given all its servants notice of two rules governing the operation of its locomotive engines, which rules were applicable to the operation of said engine number sixty-seven at said time and place, and were and are in words and figures as follows: 'The engine bell must be rung before an engine is moved.' * * * The engine bell must be rung for eighty rods before reaching every road crossing at grade, and until it is past. The whistle must be sounded as per rule.' Said engine, immediately prior to said injury, stood twenty to fifty feet west of Holmes street, and defendant's agents and servants in charge of said locomotive engine negligently and carelessly started and moved the same over and across Holmes street in said city at said time without giving any signal whatever, and neither rang the bell nor sounded the whistle on said engine, so that said engine came upon the said Edmond B. Koons unawares, and struck and killed him as heretofore stated. That, if said bell had been rung or whistle sounded, said Edmond B. Koons would have taken warning, escaped from danger, and all injury would have been avoided. (2) The agents, servants, and employes of defendant operating said locomotive engine knew, or by the exercise of ordinary care might have known, that Edmond B. Koons was, immediately prior to the movement of said engine, upon the defendant's track, in a position of peril, in front of said engine, in time to have stopped or prevented the movement of said engine, and to have avoided injuring said Koons, but said servants of defendant negligently failed and omitted so to do, and ran said engine over him as heretofore stated. (3) One of the servants of defendant, named Parish, engaged in operating said engine, passed down said track east of said Koons, and negligently and carelessly signaled to the servants of defendant in charge of said locomotive engine to move eastward, and said engine was, in obedience to said signal, moved toward the east when he, the said Parish, knew, or by the exercise of or-

inary care might have known, that said Koons stood on said track in front of said engine, and in a position of peril; but said Parish negligently failed to give said Koons any signal or warning, and negligently failed to postpone the movement of said engine until said Koons had passed out of danger; and although said Koons was wholly ignorant of any intended movement of said engine, and could not have discovered the same by the exercise of ordinary care, the same was started forward, ran against, upon, and over him, causing his death as aforesaid. (4) Said engine struck said Koons without injuring him, and his body, resting against the brake beam of said engine, was pushed along unharmed in front of the same for a distance of seventy to eighty feet, and said Koons and bystanders and spectators were during all of said time shouting, screaming to, and signaling the servants of defendant operating said engine to stop the movement thereof, and said servants, in consequence of said shouts, screams, and signals, knew, or by the exercise of ordinary care might have known, that said Edmond B. Koons was being shoved ahead of said engine, and was in a position of peril, in time to have stopped said engine and prevented all injury to him; but they negligently and carelessly failed to do so, and negligently ran said locomotive over him and killed him as aforesaid." The answer is a general denial and special pleas of contributory negligence and assumption of risk.

The case made is this: The deceased had been in the employ of the defendant as flagman or watchman at the intersection of Second and Holmes streets for about three years before the accident. Second street is 60 feet wide, and runs east and west, and Holmes street is 50 feet wide, and runs north and south. The defendant has a double track, standard gauge road on Second street. It was the duty of the deceased to look out for all cars, and to watch the crossing, and warn persons of the approach of cars. For two or three months the defendant had been engaged in taking earth out of a pit which was located west of Holmes street, and which was reached by a switch track from the south track on Second street. Two engines, trains, and crews were employed in the work. One engine, which was numbered 67, remained at the place all the time, and was engaged in taking the train of empty cars from the north track and switching it onto the south track by means of a cross-over, which was located about 25 or 30 feet east of Holmes street, and then pushing the train westwardly along the south track to the switch track and over the switch track to the pit; and when the cars were loaded the same engine brought them back onto the south track, and stopped with its tender at or near the west line of Holmes street. The other engine, which was numbered 61, was engaged in moving the loaded cars westwardly from Holmes street over the south track to the

west bottoms, and when they were unloaded that engine moved the empty cars eastwardly over the north track to Holmes street, and there it was stopped with its tender at or near the west line of Holmes street. The engines were attached to the rear of the trains, and were always faced towards the west. So that when engine No. 67 pulled the loaded cars along the south track, and stopped with its tender at or near the west line of Holmes street, and when engine No. 61 brought the empty cars from the west bottoms eastwardly along the north track, and stopped with its tender at or near the west line of Holmes street, the two trains would be standing side by side. The two engines were then uncoupled from their trains. The engines were then switched so as to be exchanged from one train to the other. To accomplish this, it had been the uniform custom during all the time the work was progressing for engine No. 67 to back eastwardly across Holmes street to a point clear of the said cross-over, and there stop. Then engine No. 61 would come back eastwardly, across Holmes street, to the cross-over, and thence across the cross-over from the north track to the south track, and then run forward westwardly across Holmes street to where the loaded cars had been left standing, and couple onto them, and push them westwardly along the south track to the west bottoms. Then, as soon as engine No. 61 had thus been exchanged from the empty cars on the north track to the loaded cars on the south track, and had moved westwardly over the south track, engine No. 67 would proceed from the south track over the cross-over to the north track, move westwardly across Holmes street to where the empty cars had been left standing on the north track, couple onto them, and pull them eastwardly across Holmes street over the cross-over onto the south track, and then shove them westwardly along the south track across Holmes street to the switch track that was west of Holmes street, and over the switch track to the pit. This work went on constantly from 6 o'clock a. m. until 6 p. m. on every day for two or three months prior to the accident, during all which time the deceased had been acting as flagman at the crossing on Second and Holmes streets, and was familiar with the manner of doing the switching above described. Thus it will be observed that every time the exchange of engines aforesaid was made engine No. 67 crossed Holmes street four times, and engine No. 61 crossed Holmes street twice. The engines were ordinary road engines, with square tenders, about 12 feet high. The switchman had a little shanty about 8 feet square and 6 or 7 feet high on the southwest corner of Second and Holmes streets, and which projected about 2 feet and 8 inches into Holmes street. On March 9, 1899, about 4 o'clock p. m., engine No. 67 had pulled a train of loaded cars from

the pit along the south track, and stopped with the rear of its tender resting about 8 or 10 feet west of the west line of Holmes street. It uncoupled from the cars as usual, and awaited some 25 minutes the coming from the west on the north track of engine No. 61 with the empty cars. Then engine No. 61 arrived on the north track with the empty cars, and stopped with the rear of its tender about 8 or 10 feet west of the west line of Holmes street. About this time a citizen, M. J. Schmitt, appeared, driving south on Holmes street towards the tracks. The deceased went out to a point about 18 feet east of the west line of Holmes street to flag Schmitt. The deceased flagged Schmitt, and he stopped at a point in Holmes street about 70 to 75 feet north of the north track. About that time engine 67 backed eastwardly across Holmes street, and while doing so it struck the deceased, knocked him down, and the brake beam caught him and dragged him the balance of the way across Holmes street, and to a point east of Holmes street, variously testified to be from 25 to 45 feet east of the east line of Holmes street, when the engine was stopped, and the deceased was taken out from under the tender so badly mangled and crushed that he died immediately.

The plaintiff introduced two eyewitnesses to the accident—M. J. Schmitt and Mrs. Elsie Schneider. Mr. Schmitt saw the accident from a point in Holmes street 70 or 75 feet north of the north track, and Mrs. Schneider saw it from the front porch of her house, which was 225 feet east of the center line of Holmes street and 112 feet south of Second street, and which house stood upon an elevation of some 20 to 25 feet above the railroad tracks on Second street. Schmitt testified that after the deceased flagged him he stood still for about five minutes, or "a few minutes any way." He further testified as follows: "Q. What track did Mr. Koons stand in, if he was in either track? A. Why, the way I could see, I think he was standing inside of the first south rail. Q. You mean north of the first south rail? A. North of the first rail on the south track." He further testified that at that time the engine No. 67 was standing still on the south track about 8 or 10 feet west of the west line of Holmes street, and that the deceased was so standing between the rails of the south track, at a point in Holmes street, about 18 feet east of the west line of Holmes street; that the engine No. 67 then moved eastwardly on the south track, and struck the deceased; that he paid no particular attention to it, but heard no bell rung or whistle sounded, but noticed a slight sound made by the escape of steam from the piston rod on the engine; that when the engine struck the deceased he (Schmitt) was paralyzed with fear for a moment, and then he hallooed to stop the engine, and that some persons at the saloon on the corner also screamed, but he could not

say whether the engineer heard the sound; that at that time the engine was moving slowly—about two or three miles an hour—and the deceased had been dragged about 10 feet; that on account of the sun shining on the cab windows he could not see any one in the engine. On cross-examination he was asked: "Q. He was standing about the middle of the street? A. After he was struck? Q. No, I mean before he was struck, at the time he was signaling to you. Did you see where he stood then? A. I could not say exactly, but my impression was since he was standing inside the south rail. Q. Inside the south rail? A. Inside the south rail. Q. Do you mean he was standing on the track between the two rails? A. Well, between the inside. I could not state exactly at that distance, but I think by the way he was caught on the brake beam he was standing inside the south rail. If he was near the center of the rail, or where, I could not say. Q. Of the south rail you mean the south track? A. The south rail of the south track. There were two rails to the track, and he was inside the south rail. That is the way it appeared to me he was standing at the time he was struck." Schmitt further testified that he had passed there before, and that the deceased usually stood south of the outside of the track when he was flagging. He further testified: "Q. Did you watch the engine as it moved towards Mr. Koons? A. Well, I looked at the cab. I kind of noticed the engine. But I was not positive then the old gentleman was standing on the track before he was struck, or standing on the outside of it. I never paid any particular attention to it at that time. Q. You assumed he would get off if he was on the track? A. That he would go away in case he was. I was not paying any attention to that." Mrs. Elsie Schneider, the other eyewitness, who testified for the plaintiff, said: "Q. Did Mr. Koons stand in one of the tracks of the defendant? A. Well, he stood not in the tracks; he stood on the Holmes street, but he made a step over to flag a wagon that came from the north side when it happened." She also said that when the engine struck the deceased she heard him scream several times, but did not hear any one else scream. On cross-examination she said that she had noticed the deceased flagging before that day, and that he never stood "right in the track when the train came. He stood on the side of the track when he flagged." She also said that just before the accident the deceased had been talking to two colored women on the corner. She further testified as follows: "Q. When the engine started up, did you see it start? A. Yes, sir. Q. You saw it approach Mr. Koons? A. Yes, sir. Q. When the engine started up and approached Mr. Koons, where was he standing? A. He was standing in the middle of the street there, and a wagon was coming from the north, and he wanted to flag that wagon not to come

over, and he just made a step to flag that wagon, and I guess he stepped a little too far on the track, and there is where it struck him. Q. How far was he standing from the track when he started to flag? A. Right by the track. Q. He was standing right by the side of the track? A. Yes, sir. Q. And about that time the engine began to pull along? A. Yes, sir. Q. When the engine was moving up towards him, he stepped over on the track? A. Yes, sir. Q. And the engine struck him? A. Yes, sir; because the wagon was coming from the other side. He wanted to flag that wagon, and he stepped — Q. (interrupting). In other words, just before the engine came to him, he stepped on the track in front of the tender? A. Yes, sir." She further testified that when the engine moved towards the deceased there was a bell ringing, but she could not tell which engine the bell was on. It was further shown by the plaintiff's evidence that an engine running from two to four miles an hour could be stopped at that place in five or six feet after the engineer got a signal to stop and after he got his hands on the lever.

For the defendant the engineer of No. 67 testified to the custom herein described of handling the trains and exchanging the engines, and said that his engine invariably moved across Holmes street first. He said further that he and his fireman were in the cab of the engine. He was on the north side and the fireman on the south side. That after No. 61 came from the west with the empty cars, and stopped opposite his engine, west of Holmes street, the head switchman, whose duty it was to direct the movements of the trains, went east of Holmes street towards the switch, and signaled to him to move eastwardly. That he immediately caused the fireman to ring the bell, and looked eastwardly, and saw that the track was clear, and then he moved his engine eastwardly. That he had seen the deceased about five minutes before, standing on the north side of Second street, talking to a policeman. That he did not see him just as the engine moved, and did not look for him specially, because it was the duty of the deceased to look out for all cars and engines, and to keep other people off of the crossing as they approached, and likewise to keep off the tracks himself. That he was the "guardian" of the crossing, and it was his duty to look out for the trains, and not the engineer's duty to look out for him. That trains could not be operated if engineers had to look out for flagmen at crossings before starting their trains. That he was looking eastwardly all the time after he started the engine, and did not see the deceased at all. That he heard no shouts or screams, and did not know that Koons had been knocked down and was being dragged under the tender. That he saw a young man named Mahoney, who was standing on

the northeast corner of Second and Holmes streets, waving his hands for him to stop, and pointing under the tender, and he then stopped immediately, supposing something was wrong; and the fireman got down and looked under the tender, and told him that Koons was under the tender; and that this was the first he knew of Koons being there; and that he stopped the engine at about 16 feet from the end of the board crossing—that is, the tank was about 35 feet long, and the engine was at the crossing, but the tender was east of the crossing. That the engine only ran 48 feet and 5 inches from the time it started until it stopped. He further testified that a stop in 10 or 15 feet when the engine is running at three or four miles an hour is a good stop. He further testified that when he was sitting on his seat in the cab of the engine he could not see a man on the track "for quite a ways back of the tank," and that standing up in the cab he could not see one who was 15 or 20 feet behind the tender, but could see him if he was 35 feet, and possibly if he was 25 feet behind the tender. There was shown to be some differences between the testimony of the engineer at the trial and when his deposition was taken, but he explained that when his deposition was taken his wife had just died, and he was in a sad condition, and that his testimony was not as clear or accurate then as it was on the trial, and that since his deposition had been taken he had measured the distances accurately. The fireman corroborated the engineer's testimony in all particulars, except that he said he was not certain that engine 67 invariably moved eastwardly first.

At the close of the plaintiff's case, and again at the close of the whole case, the defendant demurred to the evidence. The court overruled the demurrers, and the defendant excepted. The case was tried below by the plaintiff, and was submitted to the jury, on the theory that the deceased was in a place of imminent peril, to wit, standing between the rails of the south track, and was engrossed in the discharge of his duty, and was oblivious to his danger, or risked his life to save that of others, and that the defendant actually knew of his peril, or by the exercise of ordinary care could have known of it, and either by a willful, wanton, and reckless disregard of human life or intentionally ran over him and killed him, and therefore the defendant is liable notwithstanding, as the plaintiff's instruction put it, "the husband of the plaintiff was himself guilty of negligence in being upon or near the track of defendant, and in permitting himself to be inattentive to the dangers surrounding him."

1. The plaintiff predicates a right to recover upon what is known as the "humanitarian doctrine"; that is, that where the defendant has been guilty of negligence, and the plaintiff has been guilty of contributory neg-

ligence, still the plaintiff can recover if, after the defendant actually knows, or by the exercise of ordinary care could have known, of the peril of the plaintiff, he willfully, wantonly, or recklessly injured the plaintiff. The plaintiff invokes the law as laid down in this state in *Kelley v. Railroad*, 101 Mo., loc. cit. 75, 13 S. W. 806, 8 L. R. A. 783, and in *Morgan v. Railroad*, 159 Mo. 262, 60 S. W. 195, and claims that it is based upon the English case of *Davies v. Mann*, 10 Mees. & W. 546, which plaintiff says holds that, even if both parties have been negligent, the defendant has no right to be guilty of a willful, wanton, or reckless disregard of human life, and injure the plaintiff. The plaintiff also invokes the rule laid down in *Callahan v. Railroad*, 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249, and that stated in *Beach on Contributory Negligence* (3d Ed.) § 42, that it is not deemed negligence in law if one risks his life or exposes himself to danger in an effort to save the life of another, or to protect another who is exposed to sudden danger. The plaintiff also contends that when the engine was started the deceased was standing between the rails of the south track at a point 18 feet east of the west line of Holmes street, and the engine was at a point 10 feet west of the west line of Holmes street, and that the engineer could see any one who was standing on the track 25 feet behind the engine, and therefore the deceased was within the "zone of vision" of the engineer, and hence the engineer saw, or by the exercise of ordinary care could have seen, the deceased in a position of imminent peril in time to have stopped the engine before striking the deceased, and failed to do so. The plaintiff further contends that after the engine struck the deceased and knocked him down and was dragging him, and before any particular injury had been inflicted upon him, the engineer knew, or by the exercise of ordinary care could have known, of the position of peril of the deceased, and could have stopped the engine in time to avoid seriously hurting him, but that, instead of so doing, the engineer either willfully, wantonly, and recklessly or intentionally continued to run the engine, and did not stop it until fatal injuries had been inflicted upon the deceased. The humanitarian doctrine in this state is as the plaintiff states it, but it is not necessary in this case for the writer hereof to reiterate what he has often heretofore said with respect to the rule thus announced being incomplete and unilateral, for the reason that it omits to take into account the correlative obligation of the plaintiff not to be guilty of willful, wanton, or reckless conduct after he actually knew, or by the exercise of ordinary care could have known, of his peril in time to avert the injury. Neither is it necessary in this case to say more than that in the opinion of the writer the case of *Davis v. Mann*, *supra*, does not support the humanitarian rule as it is now stated in this

state and elsewhere, for the reason that in that case the plaintiff had tethered his donkey, and left him to feed on the highway, and the defendant's servant came along the highway with the defendant's wagon, and, instead of being on the wagon and managing the team, he was walking some distance behind the wagon, and was allowing the horses to proceed uncontrolled along the highway, and they ran into the donkey, who, being tethered, could not get out of the way, and killed him. Lord Erskine told the jury that: "Though the act of the plaintiff in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages traveling along it might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant"; and his lordship directed them, if they thought the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff. The jury found for the plaintiff, and the case went to the Court of Exchequer, where the judgment was affirmed, and wherein the opinions were as follows: "Lord Abinger, C. B.: I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but, even were it otherwise, it would have made no difference, for, as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there. Parke, B.: This subject was fully considered by this court in the case of *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 240, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and, I believe, quite correctly, that 'the rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*, that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his own wrong.' In that case of *Bridge v. Grand Junction Railway Company* there was a plea imputing negligence on both sides. Here it is otherwise; and the judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause

of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road. Gurney, B., and Rolfe, B., concurred. Rule refused." The writer hereof has always been unable to understand how this case can be said to afford a basis for the rule that holds the defendant liable for willful, wanton, and reckless conduct, but does not make the plaintiff liable for similar conduct; for that case only entitles the plaintiff to recover if the defendant's negligence be such that the plaintiff, by ordinary care, could not have avoided being injured. In that case the donkey was fettered so he could not get out of the way, wherein that case differs from the case at bar, for here the flagman could have gotten out of the way. And in that case the illustrations given by Parke, B., were of a driving over goods left on a public highway, or over a man asleep on the highway, or purposely running against a carriage going on the wrong side of the road, and therefore were cases where the thing or person injured could not avoid the defendant's negligence or wantonness, and could not themselves have been guilty of willfulness or wantonness or recklessness. But it is not necessary to pursue that matter further now, for, whatever differences of opinion there may be, still, under any rule that has ever been laid down on this branch of the law, the facts in this case do not bring the case within the rule, and therefore the plaintiff cannot recover.

This case is wholly unlike the *Morgan Case* or the *Callahan Case*, relied on by the plaintiff, and is easily distinguishable from the case of *Erickson v. Railroad*, 171 Mo. 647, 71 S. W. 1022. It is unlike the *Morgan Case* because there the injured party was a citizen, and not an employé, while here the injured party was a flagman, whose duty it was to look out for all cars, and to warn all people to keep out of danger, and to keep out of danger himself. It is unlike the *Callahan Case* because there the injured party had a right to rely upon it, from the previous manner of doing business, that the section gang would not throw the ties down from the bridge onto the street until he told them the coast was clear, and because he necessarily exposed himself to danger to save a child, while here the deceased was perfectly aware of the fact, from the pr-

vicious manner of doing business, that as soon as engine No. 61 came from the west with the empty cars, engine 67 would back across Holmes street, and, knowing this, he was actually engaged in flagging Schmitt against the approach of engine 67, and in so doing it was not at all necessary for him to expose himself to danger or to risk his life by standing on the track, as this duty had always theretofore been safely performed by standing outside of the track, and because, according to Schmitt's testimony, he never was at any time in danger, having stopped 70 or 75 feet north of the north track. This case is also unlike the Erickson Case in that there the flagman had a number of trains to watch, and was actually engrossed in flagging a street car against a train on another track that was about to back cross the crossing, and was injured by an engine on a track closer to him, which he did not know was coming, and had no reason to expect, while here the deceased had only these two engines to look out for, and from the previous manner of doing business he knew the engine that did this hurt, No. 67, would back across Holmes street first, and he was then actually flagging Schmitt against this engine. As stated, the facts in this case do not bring the case within any of the cases or rules above referred to or cited and relied on by the plaintiff. It will be remembered that the plaintiff's theory is that the plaintiff is entitled to recover, because notwithstanding the negligence of the deceased in standing on the track, the defendant actually knew, or by the exercise of ordinary care could have known, that the deceased was in imminent peril in time to have averted the injury, and did not do so, and that the plaintiff's application of this doctrine to this case is that the deceased could have been seen by the engineer standing on the track before he moved his engine, and that, even if this is not true, the engineer knew the peril of the deceased after he was knocked down, and while he was being dragged, and before he was seriously hurt, in time to have stopped the engine and to have averted the injury, and failed to do so. Upon the first branch of this proposition the plaintiff contends that the deceased was standing on the track at a point in Second street, 18 feet east of the west line of Holmes street; that the engine was standing 10 feet west of the west line of Holmes street; that the "zone of vision" of the engineer was 25 feet behind the tender, and therefore the deceased was within sight of the engineer, and his peril was known, or could have been known by the exercise of ordinary care, to the engineer, in time to have averted the injury. The evidence shows that the rear of the tender of the engine was standing 8 or 10 feet west of the west line of Holmes street, and that the deceased was standing about 18 feet east of the west line of Holmes street; but right there there is a fatal break in the

plaintiff's chain of causation, for, instead of the evidence showing that the deceased was standing between the rails of the south track, there is no substantial evidence that such was the fact, but, on the contrary, the only real evidence—the only testimony in the case that is worthy of the name of evidence—is that the deceased was not standing on the track, but was standing in a perfectly safe place, and in the place at which he usually stood, until the engine had started to back across Holmes street and was approaching the deceased, and when the engine had gotten so close to him that the engineer could not see him, when "he just made a step to flag that wagon, and I guess he stepped a little too far on the track, and there is where it struck him," as Mrs. Schneider, the plaintiff's eyewitness, described it. This is what Mrs. Schneider said was the cause of the injury, and she is the only witness in the case who speaks advisedly or accurately or as a fact as to how the unfortunate accident occurred. It is true that the plaintiff relies upon the testimony of Schmitt as furnishing a basis in fact for the contention. But an analysis of Schmitt's testimony shows that he did not pretend to speak advisedly or accurately upon this point, and that what he said is plainly an argument or conclusion of his own, and not a fact of which he can or pretends to speak. He says he paid no particular attention at the time to where the deceased was standing, but he first said he "thought" the deceased was standing on the track; then he said he could not say exactly where he stood, but his "impression was since" that he was standing inside of the south rail; and then he said "it appeared to me" he was standing on the track "at the time he was struck"; and finally he said, "I think, by the way he was caught on the brake beam, he was standing on the inside of the south rail. If he was near the center of the rail, or where, I could not say." Thus it will be observed that, after saying he paid no attention to it at the time, "his impression since the accident" is, and he "thinks" now, that the deceased was standing on the track, and he winds up his testimony by saying he "thinks" "by the way he was caught by the brake beam he was standing inside the south rail." This is not testimony of a fact which the witness knows, but is simply the opinion or impression of the witness formed since the accident, or it is his deduction drawn from the fact that the deceased was caught by the brake beam. Of course, the deceased was on the track when he was struck, else he would never have been injured. But when did he get on the track—before the engine came so near him that the engineer could see his peril or afterwards? That is the pivotal question underlying the plaintiff's right to recover; and, conceding all that Schmitt says, and giving all legal weight to his testimony, it wholly fails to afford a substantial basis for the plaintiff's case to rest

upon, or to make out a case to go to the jury upon. This leaves only the testimony of the plaintiff's other eyewitness, Mrs. Schneider, and she says that the deceased was not on the track at all until the engine started to move, nor until the engine approached the deceased, and then he took a step, and went too far, and was struck. This positive testimony is not only uncontradicted, but it is the only real testimony in the case as to the position of the flagman before the engine started to move and as to when he got on the track, and this testimony leaves no room for reasonable minds to differ that at the time the plaintiff got into a position of peril he was so close to the tender that the engineer could not see him, and therefore the humanitarian doctrine has no place in this case, for there is absolutely no evidence of willfulness, wantonness, or recklessness, nor of intention to injure the flagman, shown, and hence the plaintiff is not entitled to recover. *Moore v. Railroad* (Mo.) 75 S. W. 672, number of July 22, 1903.

Touching the second branch of the proposition—that the engineer knew, or by the exercise of ordinary care could have known, that the deceased was being dragged in time to have avoided seriously injuring him—the testimony of Schmitt is that he hallooed and some persons on the corner screamed while the deceased was being dragged, and before he was seriously injured; but he also said he could not say whether the engineer heard him or them or not, while the engineer and fireman both say the bell was being rung on engine No. 67, and Mrs. Schneider says a bell was ringing, but she could not say whether it was on engine 61 or 67 (it must have been on 67, for 61 was standing still at the time), and Schmitt says the steam escaping from the engine was making a noise, and both the engineer and fireman say they did not know that the flagman had been knocked down or was being dragged or was under the tender, until the engineer stopped the engine because of the signals given by the young man Mahoney, who was standing on the northeast corner of the streets aforesaid, and because he was pointing down at the tender, and he supposed there was something wrong. Upon such a state of facts it would not be fair or just or reasonable to find that the engineer knew the flagman was being dragged, and willfully, wantonly, recklessly, or intentionally failed to stop the engine. The engineer was sitting on the bench in the cab of the engine, looking eastwardly. His "zone of vision" of the track began at a point 25 feet behind the tender. Admittedly, there were only 28 feet between the rear of the tender and the place in Holmes street where the deceased stood, and at that time the deceased was not standing on the track. When the train had moved three or four feet it was not possible for the engineer to see the deceased. At some time after the engine be-

gan to move the deceased unguardedly stepped onto the track. The engineer did not and could not see him. He was knocked down and dragged from 48 feet 5 inches, as the engineer testified, to about 70 to 75 feet, as some of the witnesses put it; but the engineer did not know it until after the engine was stopped and the fireman got down and looked under the tender and saw the deceased and told the engineer. The engineer was an old and experienced man, had never injured any one before, and had no feeling against the deceased, and no desire or intention to injure him. The accident was unfortunate, but there is no element of willfulness or wantonness or recklessness or intentional wrong in the case. The diligence of counsel has supplied a great many cases of flagman being injured, in some of which recoveries have been permitted, and in others denied, but it will serve no good purpose to analyze them in this case.

The instruction for a nonsuit should have been given. The plaintiff made out no case, and the judgment is reversed.

ROBINSON, J., concurs. BRACE, P. J., concurs in the result. VALLIANT, J., concurs in all except what is said in criticism of *Kelny v. Railroad*.

WOOD et al. v. PORTER et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

FRAUDULENT CONVEYANCES—DEBTOR'S RIGHT TO MAKE PREFERENCES—ATTACHING CREDITOR—RIGHT TO ATTACK.

1. Since even an insolvent debtor may make preferences, creditors attaching land cannot assail as fraudulent in law a prior deed of trust by which the debtor's equity of redemption in the property is incumbered for the security of other creditors whose claims exceed its value.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

Suit by Hugh W. Wood and others against John C. Porter, the Boone County National Bank, and others. From a judgment for plaintiffs, the Boone County National Bank and certain other defendants appeal. Affirmed.

Geo. P. B. Jackson and Montgomery & Montgomery, for appellants. J. H. Bothwell and Charles E. Yeater, for respondents.

BRACE, P. J. On the 7th of July, 1885, Jonathan R. Barrett and his wife executed a deed of trust upon certain real estate situate in and adjoining the city of Sedalia in Pettis county to secure a large indebtedness. Afterwards, on the 28th of August, 1894, Barrett, without being joined by his wife, executed a second deed of trust upon the same property to the St. Louis Trust Company to secure the payment of an indebtedness

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 333.

amounting in the aggregate to \$107,999.55. The debts were divided into four classes, the first class aggregating, without interest, the sum of \$5,500, the second class \$43,729, the third class \$11,152.88, and the fourth class \$47,617.67; and were to be paid in the order of classification. The first class was made up of two notes—one for \$5,000, of which the plaintiff Hugh W. Wood was the owner; and the other for \$500, of which Tippie N. Barrett was the owner at the time these proceedings were instituted. The deed of trust states that besides the first mortgage, above referred to, there are other mortgages on separate parcels of the real estate conveyed, securing debts aggregating \$17,100. The deed of trust conveys the property to the trustee in the usual form and with the usual clause of defeasance; that is, if the grantor shall pay the debts as they become due and payable, the property shall be released. It further provides, however, if he fail to pay the debts secured, the deed shall remain in full force, and the trustee may "whenever, and as soon as the note of said Jane H. Wilson, above described, shall become due according to its terms, or at any time thereafter, proceed to sell," etc. This note was in the second class, was for \$22,653.45, dated July 1, 1893, and payable to Jane H. Wilson five years after date. No provision is made for any sale by which any debt secured may be paid for any other default. The deed of trust contains a covenant to pay the taxes annually as they become due, but, if the mortgagee fail to do so, then it is provided that either the trustee or any creditor secured by the deed of trust might pay the taxes, and such payment, with interest, should be the first and prior lien over all debts secured. It is not provided that this failure to pay taxes should constitute any default, but it is provided that the trustee might, "in its discretion, and as shall appear to it for the best interest" of the secured creditors, sell "so much of the property as would pay such defaulted taxes," so as to "preserve the remainder of the property." Such sale is not required to be public and after advertisement, but the power given is to sell privately, and take the property so sold free and clear of the lien of the deed of trust. The deed of trust provides that the mortgagor shall have the right at any time to sell certain designated portions of the property for not less than certain stated sums, free from the lien of the deed of trust, the proceeds to be paid over to the trustee, and applied upon the secured debts, who was then to release the property so sold from the lien of the deed of trust. The reservation covers all the property conveyed except the town lots, which are subject to deeds of trust having prior liens. The deed of trust states that certain of the secured creditors hold other and additional security for their respective debts in addition to and differing from the security provided by the deed of trust, and

that all sums received from such other securities shall be applied upon the indebtedness secured by the deed of trust before anything shall be paid on account thereof out of the security provided by the deed of trust. There is no designation of which of the creditors are so secured, or what securities they have. The deed of trust authorizes the trustee to perform the duties and exercise the powers conferred upon it by the terms of the deed of trust by or through any of its officers or agents which it may appoint, but the trustee shall not be responsible for the negligence, default, or other wrongful act of such officer or agent, provided care be exercised by it in the selection of the same. "Nor shall it be held liable or responsible for any of its own acts performed or anything suffered or permitted to be done hereunder, unless done, suffered, or permitted to be done willfully or through gross negligence." Afterwards four of the creditors of the said Barrett, whose debts had been included in the third and fourth classes of the debts in said second deed of trust, viz., the Boone County National Bank of Columbia, Mo., Con Donahue, the Boyle County National Bank of Danville, Ky., and W. A. Latimer, receiver of the first National Bank of Sedalia, Mo., and two other creditors of said Barrett, whose debts were not included in said second deed of trust, viz., Edwin Curd and the People's Bank of Sedalia, severally instituted suits in the Pettis county circuit court on their several demands, in which suits, upon several affidavits filed therein charging that the said Barrett, defendant therein, had fraudulently conveyed, assigned, and disposed of his property so as to hinder and delay his creditors, writs of attachment were issued in September, 1894, and levied on said real estate. Afterwards, on the 3d of August, 1896, the first deed of trust was foreclosed, in accordance with the provisions thereof, by a sale at public auction, conducted by the defendant John C. Porter, sheriff, acting as trustee, at which the property was sold for the sum of \$44,550, and, after paying the debts secured by the deed of trust and costs, there remained in the hands of Porter the sum of \$5,615.30. Afterwards the said Barrett died insolvent, and on the 17th of April, 1897, this proceeding was instituted by an action commenced in said circuit court by the said Hugh W. Wood against the said John C. Porter, sheriff and trustee, as aforesaid, in which the plaintiff claimed said surplus, and asked that the same be paid to him. Thereupon the defendant Porter answered by bill of interpleader, setting up the facts aforesaid, admitting that the fund was in his hands, alleging the conflicting claims of the parties under and against said second deed of trust, asked permission to bring the same into court and thereupon to be discharged, which was accordingly so done. Thereupon the parties alleged to be interested appeared and pleaded in pursuance of the order of the court, all

except the said Tipple N. Barrett, and the said attaching creditors disclaiming any interest in the fund. Upon the issues joined by the petition of plaintiff the said Hugh W. Wood and the interplea of the said Tipple N. Barrett on the one hand, claiming the fund under said second deed of trust, and the interpleas of the attaching creditors claiming said fund as such on the other hand, the case was submitted to the court, the issues found for said Wood and Barrett, and the fund ordered paid to them in the proportion which the debt of each bore to the whole amount of the fund. From this judgment the attaching creditors appeal.

There was no evidence tending to prove fraud in fact, and the only question presented for determination is whether this second deed of trust is, as against the appellants, fraudulent in law. It is contended for the appellant that it is, upon these grounds: First. Because it provided that no default should authorize a sale of the property until the maturity of the note of Jane H. Wilson, which was 3 years, 11 months, and 3 days after the date of the deed of trust. Second. Because of the provision in the deed that the grantor might sell certain portions of the property for not less than certain stated sums, and apply the proceeds to the secured debts. Third. Because of the provisions in the deed that the trustee shall not be held liable for the negligent or wrongful acts of its agents if it shall have exercised due care in the selection of such agents, and shall not be held for its own acts "unless done, suffered, or permitted to be done willfully or through gross negligence."

In the view we take of this case, it is unnecessary to review the numerous authorities cited, or the argument of the learned counsel for appellants in support of these propositions. The undisputed facts are that the only property conveyed by this instrument was the equity of redemption of the said Barrett in the real estate therein described, and that the value of that property, as ascertained by a sale regularly made in market overt after due notice, was less than the amount of the debts of the respondent Hugh W. Wood and Tipple N. Barrett, the debts of the first class, and in fact the only debts really secured thereby. The bona fides of these debts is not questioned, and no evidence was introduced tending to prove any fraudulent intent in making the conveyance. It is well-settled law in this state "that a debtor, whether solvent or insolvent, may prefer one or more of his creditors, and to that end may, by any suitable means, appropriate the whole or any part of his property to the payment or part payment of his just debts to one or more of his creditors to the exclusion of others." *Meyer Bros. Drug Co. v. White*, 165 Mo. 136, 65 S. W. 295, and cases cited. "The statute is aimed only at intended fraud, but the payment of a debt to one creditor is no fraud upon other creditors—no legal in-

jury to them." *Bump on Fraud. Conveyances* (4th Ed.) § 168. By the conveyance in question no more property is appropriated to the payment of the preferred debts than is required for that purpose. No legal injury is thereby inflicted on the other creditors. "Nothing of value is withdrawn from them that the law of preference will not approve, or that the statute of frauds will condemn." *Bangs Milling Co. v. Burns*, 152 Mo. 350, 53 S. W. 923. If property exceeding in value the amount of these preferred debts had been transferred by the conveyance, then there would have been a foundation for an inquiry as to whether a legal presumption of fraudulent intent might not arise from the provisions of the deed; but, in the absence of such foundation, the inquiry would be futile.

The judgment of the circuit court is affirmed. All concur.

LEITNER v. GRIEB.*

(Court of Appeals at Kansas City, Mo. Nov. 9, 1903.)

MASTER AND SERVANT—ASSUMPTION OF RISK—TASK BEYOND SERVANT'S POWER—REQUEST FOR ASSISTANCE—YOUTH OF SERVANT.

1. Where an employer directs two employes to move a heavy stone, and, on their suggestion that they should have a third man to assist them, tells them to move the stone or quit the job, whereupon they undertake the task, and on account of loose earth beneath the stone a crowbar upheld on the shoulder of one slips, injuring his arm, the injured employe assumes the risk, and the master is not liable.

2. The fact that the injured servant was but 17 years of age would not change the rule, it appearing that he had some experience at the same kind of labor, and there being nothing to show that he was not fully aware of the character of the undertaking.

Appeal from Circuit Court, Jackson County; E. P. Gates, Judge.

Action by Frank Leitner, by his next friend, against Louis Grieb. Judgment for plaintiff, and defendant appeals. Reversed.

Harkless, O'Grady & Crysler, for appellant. Kagy & Horn, for respondent.

BROADDUS, J. This suit is for damages alleged to have been sustained by reason of an injury caused by the negligence of defendant. The answer was a general denial, and allegations of contributory negligence on the part of plaintiff, and assumption by him of the risk. The facts given in evidence to support plaintiff's cause of action, briefly stated, are as follows: Plaintiff at the time of the injury was a young man about 18 years of age, in the employ of defendant, and had been for a while previous to his alleged injury engaged in handling stone. At the time of his said injury he and another workman by the name of Smith were required by defendant to remove a large stone to

*Rehearing denied January 4, 1904.

a trench which had been dug for a foundation which defendant with his laborers were then engaged in building. Both plaintiff and said Smith suggested to defendant that on account of the great size of said stone they ought to have another man to assist them. That defendant told them to roll the stone into the ditch. That, if they could not, "to leave the job," or words substantially of the same import. Thereupon plaintiff and Smith placed the crowbars which they had for the purpose under the stone, and endeavored, by raising the ends in their hands, to move the stone as required. The stone was lying on some loose earth, on account of which either plaintiff's bar or the rock slipped. Plaintiff had the end of the bar over his shoulder, and when the bar or rock so slipped the additional weight thus caused to be thrown upon it caused the said bar to slide down on plaintiff's arm, whereby he was severely injured. There was also evidence that prior to the occasion named a derrick had been used in handling stone, which, however, was not then in a condition to be utilized.

The only question presented is whether, under the proof and the pleadings, the plaintiff is entitled to recover. It is the contention of the plaintiff that the rule of law applies to this case, viz., that a servant is not obliged to quit the service of his master because he has failed to furnish safe appliances or tools for the performance of his labor, or a safe place in which to perform it, and that by so remaining in his master's employment he does not waive his right to recover for injuries received in consequence of a failure of duty in that respect upon the part of the master, if he has reasonable grounds to believe that he can safely use such appliances or tools, or safely labor in the place furnished by the master, by the exercise of proper care. But the facts in proof do not show that either the crowbar used by the plaintiff or the place where he was engaged at labor was unsafe at the time of his injury. It was not from any apprehension of danger that he and his fellow workman, Smith, suggested to the defendant that they ought to have another man to help move the stone, but it clearly appears that their demand for additional help was because they believed that they were not strong enough to move the stone into the trench. The injury to the plaintiff was not the result of any apprehended danger, but of the effort upon the part of plaintiff and his fellow workman to accomplish that which was beyond a reasonable exertion of their powers. The cases cited have no application to the facts of this case, as neither the safety of the crowbar used nor the place in question had anything to do with plaintiff's injury. The question is therefore one of principle, and not of precedent. It is like this: The master directs his servant to perform a certain service. The servant objects because he thinks it beyond his

power to perform it alone and unaided, or that he ought to have assistance in the work. The master tells him if he does not choose to undertake it to quit his service. The servant does, however, attempt to perform the service, and is injured, not by reason of any defect in the tools or appliances or the place furnished for the servant, but because he has undertaken that which he knows is beyond the reasonable exercise of his power. And, furthermore, we know of no rule of law that holds the master liable in damage for an injury to his servant that cannot reasonably be anticipated and guarded against by the exercise of proper care. Here the servant assumed the risk. To hold otherwise would be holding that the master is an insurer of the safety of his servant while in his employ. The plaintiff, however, insists that, as he was of tender years, the defendant was required to exercise a higher degree of care than would have been required of him if he had been a person of mature years and sound discretion. But the evidence shows that plaintiff was fully 17 years of age, and that he had had some experience at the kind of labor in which he was engaged when injured, and there was nothing to show but what he was as fully aware of the character of the undertaking as was his fellow workman, Smith.

For the reasons given, we do not think the plaintiff was authorized to recover; therefore the cause is reversed. All concur.

AMERICAN BRASS MFG. CO. v. PHILIPPI et al.

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

For majority opinion, see 77 S. W. 475.

Separate Opinion.

GOODE, J. In this case the appeal was taken from the judgment of a justice of the peace during the April term, 1902, of the circuit court, to which, under the statutes, the appeal was returnable. That term passed, as did likewise the June and December terms of the circuit court, and the February term convened. Meanwhile no notice of the appeal had been given by the appellant. The majority of the court deem it unnecessary to decide what the effect of section 3366 of the Revised Statutes of 1899 is as to requiring notice of appeal to be given during the term of the circuit court at which the appeal is returnable, if taken while the circuit court is in session. The general purpose of the statutes in regard to forcible entry and detainer and unlawful detainer actions is to expedite their determination as much as possible, and, in pursuance of this policy, an appeal taken from the justice's judgment during a term of the circuit court to which the appeal lies is made returnable to that term. Whether it is necessary to give notice at that

term by virtue of the new enactment (section 3366, *supra*) is a point which does not necessarily arise for decision on this record. We think, however, that the section of the statutes last mentioned is at least so far operative that, if the second term after the appeal is taken goes by without notice, as happened in this case, the appellant is delinquent, and the appeal may be dismissed on motion of the respondent.

For this reason we think the judgment should be affirmed.

REYBURN, J., concurs in this opinion.

MCDONNELL v. STEPHENSON.*

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

ACTION FOR COMMISSION—SALE OF REAL ESTATE—CONTRACT—FAILURE OF PROOF—QUANTUM MERUIT.

1. In an action originating in the circuit court to recover on an alleged contract for the payment of a commission for the sale of land, mere proof by plaintiff that he produced a customer able and willing to purchase at the agreed price, without showing that defendant agreed to pay a commission for finding a purchaser, is insufficient to entitle plaintiff to recover, since in such case no recovery can be had on a quantum meruit.

Appeal from Circuit Court, Boone County; John A. Hockaday, Judge.

Action by James R. McDonnell against S. M. Stephenson. From a judgment for defendant, plaintiff appeals. Affirmed.

H. S. Booth, for appellant. N. T. Gentry, for respondent.

BROADDUS, J. This is a suit upon contract to recover \$100 as commission for the alleged sale of defendant's farm. The petition alleged that a contract was entered into between plaintiff and defendant whereby defendant agreed to pay plaintiff said sum, provided plaintiff found a purchaser for the land at the price of \$5,000. There was evidence that plaintiff, who resided in Hallsville, Mo., was a real estate broker; that he had negotiations with a man by the name of Ryman, who was willing and able to purchase defendant's land at the price above mentioned; that plaintiff brought said Ryman and defendant together on the 12th of August, 1902, at which time Ryman wanted to know of defendant if he would give him until Saturday following to close up the deal; that defendant would not give him such time to close the deal, but consented to give him until the following Friday, August 15th, at noon, to do so. In the meantime, however, the land was sold to another person by the name of Pemberton, the sale being made through the agency of a Mr. Smith, a real estate broker, who also had the farm for sale. There was other evidence, but it is not per-

tinent to the issue raised by the record. A jury was waived, and the cause was tried by the court. The finding and judgment were for defendant, from which plaintiff appealed.

The plaintiff asked several instructions based upon the theory that, if plaintiff produced a purchaser for the land at the agreed price, who was able and willing to buy, then he was entitled to recover. These the court modified by the following language: "Provided plaintiff has shown that defendant agreed to pay plaintiff one hundred dollars for making such sale, as averred in his petition." Defendant asked no instructions. It is apparent that the court found against plaintiff on the ground that he had sued on a contract, and had failed to prove it. The plaintiff earnestly contends that, as the evidence shows that he did produce a purchaser able and willing to take the farm at the agreed price, he was greatly injured by the judgment of the court. We are impressed with the fact that there is much equity on plaintiff's part. But it was a case at law, and as such we must view it. When the petition counts on contract, there can be no recovery on quantum meruit. *Lumber Co. v. Snyder*, 65 Mo. App. 568; *Eyerman v. Cemetery Ass'n*, 61 Mo. 489. The rule is different where the suit originated before a justice of the peace. See *Walker v. Guthrie* (decided at present term) 76 S. W. 875. The plaintiff having failed to prove his contract, he was not entitled to recover on quantum meruit.

The cause is affirmed. All concur.

ORANE CO. v. NEEL et al.*

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

MECHANICS' LIENS—MATERIALMEN—ACTION TO FORECLOSE—EVIDENCE—TESTIMONY OF CONTRACTOR—COMPETENCY—DEPOSITIONS—EXHIBITS—FAILURE TO INCLOSE WITH DEPOSITION—STATUTES—TRIAL COURT'S DISCRETION.

1. In an action by a materialman to enforce a mechanic's lien on a building in which the materials sold by him to the contractors had been used, testimony of the contractor that he told plaintiff that the material was for use in the building, and that he would be paid on completion of the work, was incompetent, as not having any tendency to prove that the material was sold on the credit of the building.

2. The fact that the materialman delivered part of the materials on the premises sought to be charged was no evidence that they were sold on the credit of the building.

3. Rev. St. 1899, § 2903, requiring that exhibits produced to one taking a deposition, and proved or referred to by the witness, shall be inclosed, sealed up, and directed to the clerk of the court, is mandatory.

4. Where an exhibit was not attached to the deposition or sent under seal to the clerk, as required by Rev. St. 1899, § 2903, it was within the discretion of the trial court whether or not to permit, after the commencement of trial, the withdrawal of the deposition, and the attachment thereto of the exhibit.

*Rehearing denied January 4, 1904.

*Rehearing denied January 4, 1904.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by the Crane Company against S. M. Neel and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Grant I. Rosenzweig, for appellant. Ellison A. Neel and Edward C. Wright, for respondents.

BROADDUS, J. This is a proceeding to enforce a mechanic's lien. The plaintiff is a dealer in plumbing supplies. The defendant Neel made a contract with his codefendant, the Fautot Company, a manufacturing concern, to construct in his building hot-water heating appliances, including radiators. It is claimed that said Fautot Company bought the radiators that were used in the construction of said heating appliances from the plaintiff. Defendant Neel's answer was a general denial.

On the trial, plaintiff sought to prove that the articles in question were sold by the plaintiff to the Fautot Manufacturing Company aforesaid for the purpose of being used in the defendant Neel's building, and for that purpose introduced Mr. Fautot, one of the members of the defendant company, who testified by deposition. In his deposition he made the following statement: "I went to the Crane Company with a list of the materials to be used in the construction of the heating plant in Dr. Neel's residence, and stated to the Crane Company that that material was for use in the Neel residence, and that they would receive their pay on completion of the work." On motion of defendant Neel, the following part of said statement was struck out of the record, so far as it affected him, to wit: "And stated to the Crane Company that that material was for use in the Neel residence, and that they would receive their pay on completion of the work." The plaintiff also introduced the deposition of Andrew Seymour, who was the plaintiff's bookkeeper at the time the articles in controversy were sold. In said deposition the witness referred to a certain entry in plaintiff's book which contained the original order for the articles in dispute. This paper was identified as Exhibit A, but was not attached to the deposition, being sent under seal to the clerk of the circuit court. The notary was in court, and plaintiff offered to withdraw the deposition and have the said item attached to it by him, but the court refused the offer and excluded the exhibit. It was shown that it was the habit among the lawyers practicing in the Kansas City courts to withhold exhibits and produce them on the trial. There was other evidence introduced, but plaintiff frankly admits that, without that which the court excluded, he was not entitled to recover. The court peremptorily instructed the jury to find for defendants. Plaintiff assigns as error the action of the court in excluding said evidence.

In *Deardorff v. Everhartt*, 74 Mo. 37, it was held that "the declarations of the contractor

that the materials were purchased for appellant's building, although made when they were obtained, are not evidence against the owners of the land." And a different ruling made in *Morrison v. Hancock*, 40 Mo. 564, was overruled. While plaintiff insists that the ruling in the former case is not good law, it would not apply to this, for the reason that here the contractor was testifying to his own declarations, which would prevent the application of said rule. But we cannot see how that fact could make any difference, as the reason for the rule is that the contractor, not being the agent of the owner of the building, is not authorized to bind such owner by his declarations. The rule is also recognized in *Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118. But it is suggested that the rule only had reference to its incompetency as evidence that the material was used in the construction of the building sought to be charged with the lien, but that it is competent evidence to prove that plaintiff sold the material to be used in such building—in other words, that the sale was made upon the credit of the building. We do not see how this can be so. The plaintiff may have sold the material to the contractor without any intention of looking to the building as security for the price of the material, and the mere fact that plaintiff knew that the material was to be used in defendant's building was no evidence in itself that it so sold it to be so used. And the fact, if it was a fact, that plaintiff delivered a part of the material on the premises sought to be charged with the lien, is also of itself no evidence that it was so sold. The plaintiff may have, for aught that appears in the record, sold the material in question without reference to any particular place where it might be used, as materialmen sometimes do where the financial standing of the contractor appears to be a sufficient guaranty for the price of the materials, or, in other words, where the sole credit is given to the contractor. And such seems to have been the case here, according to the evidence of the defendant Neel, who testified that before he paid the contractor for the material in question a member of the plaintiff's firm informed him that it had not sold to the Fautot Company the material to be used in his house, and that Fautot informed him that he was buying all his material from plaintiff, without any reference as to where it was to be utilized.

The action of the court in excluding Exhibit A aforesaid is also approved. Section 2903, Rev. St. 1899, requires that "all exhibits produced to the person [taking the deposition] and proved or referred to by a witness shall be inclosed, sealed up and directed to the clerk of the court in which * * * the action is pending." But plaintiff contends that said section is only directory, and not mandatory. We think otherwise. And it is not perceived how the evidence of a witness and an exhibit, the identification of which depends upon the witness, can be admitted in the form of a deposition without a compliance with the stat-

ute. It was competent, with the permission of the court, for the plaintiff to have withdrawn the deposition and attached said exhibit. But this should have been done before the trial, at which time, judging from what the court said, it would have been permitted. But it was a question of discretion in the court, which we think was soundly exercised. With the evidence excluded, the plaintiff failed to show that the articles were sold to be used in defendant's building, and he was not, therefore, entitled to a judgment enforcing his lien on the property.

There are other questions raised on the appeal, but, in view of the foregoing conclusions, they are not deemed important, and will not be considered.

The cause is affirmed.

SMITH, P. J., concurs in result.

ELLISON, J. (concurring). In order to establish a mechanic's lien by a materialman for purchases by the contractor, it is necessary to prove, among other things, that the material was sold by the materialman for the owner's building. If the materialman does not sell the material for the building, he cannot have a lien, for the law will not cast a lien upon him without his having any part or agency in its inception. He may never have seen the building, and may not know its location, but he must sell the material for it. The language of the statute is that he must furnish the material "for" the building. The proof of the fact that he did sell for the building may be made like proof of any other fact; i. e., by anything which tends to show such was his purpose. The declaration of the contractor that he bought for the building certainly does not tend to prove that the materialman sold for it. For the contractor may purchase for a certain building, and yet the seller have no knowledge whatever of the purpose of the purchase. But if the declaration of the contractor was made to the materialman, and was connected by proof that the latter acted upon it by selling the material to him, it is good evidence that he sold for the purpose then declared. In such case the declaration of the contractor alone is not evidence, but the act of the materialman in response thereto is evidence. The declaration only explains the act which is the substantive thing. I believe the Deardorff Case ought not to be regarded as opposed to this view. In this case the evidence refused by the court was that the contractor went to plaintiff, and stated "that the material was for use in the Neel residence." But the object in proving this declaration of the contractor was stated to the court to be to show "that the material was bought at the time by the Faurot Company for use in the Neel residence." That being its purpose, it was properly excluded, for proof of the contractor's purpose was not proof of the seller's purpose. If the object had been to prove the seller's intention, and the offer of proof of the

declaration had been followed by proof of the seller's immediate compliance therewith, it would have been competent, as tending to show the seller's intention. But it was not offered for that purpose, and was not connected in that way. It was therefore the mere independent declaration of the contractor, which could not affect the owner.

REDMOND v. MISSOURI, K. & T. RY. CO.

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

RAILROADS—ACTION FOR KILLING LIVE STOCK —STATUTES—NEGLIGENCE—FINDINGS OF FACT—OMISSION.

1. A railroad company is not required to fence its tracks at a station, where the fencing would interfere with the business of the road and with the public, and endanger the lives and safety of employes of the railroad and its officers in operating it.

2. Under Rev. St. 1899, § 1106, providing that "whenever any live stock shall go in upon any railroad or its right of way," not inclosed by a fence as required by law, and shall be killed or injured, the railroad company shall pay the damage sustained; and section 1105, providing that a railroad company shall be liable in double damages for live stock killed or injured by failure to maintain fences or cattle guards—no recovery can be had where the stock went on the track within the switch limits of a station, where defendant was not required to fence, though they were killed at a point beyond such switch limits, where it was required to fence.

3. Under Rev. St. 1899, § 2867, providing for recovery against railroads for killing live stock "without proof of negligence, unskillfulness, or misconduct on the part of the officers, servants, or agents of such company," there can be no recovery, in the absence of proof of negligence, where the animals did not get on the track at a point where defendant, though not required to fence, yet might have fenced without interfering with the handling of trains.

4. Where plaintiff in an action against a railroad company for killing live stock, under Rev. St. 1899, § 2867, providing that recovery in such case may be had "without proof of negligence, unskillfulness, or misconduct on the part of the officers, servants, or agents of such company," asks no instruction raising the issue whether the engineer could have discovered the stock on the track, by the exercise of reasonable care, in time to have prevented the killing, it is not permissible for him to raise such issue for the first time on appeal.

5. The trial court is not required to instruct upon the different issues arising in a case unless asked to do so.

On Rehearing.

6. Under Rev. St. 1899, § 695, providing that, when requested by a party, "the court shall state in writing the conclusions of facts found separately from the conclusions of law," the fact that a party makes such request, but does not ask the trial court to find a fact omitted, and give its conclusion of law thereon, nor call the attention of the court to the omission in his motion for a rehearing, no reversible error can be predicated thereon.

Appeal from Circuit Court, Boone County; John A. Hockaday, Judge.

¶ 1. See Railroads, vol. 41, Cent. Dig. § 1432.

Action by J. T. Redmond against the Missouri, Kansas & Texas Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Webster Gordon, for appellant. Geo. P. B. Jackson, for respondent.

BROADDUS, J. The plaintiff sues for damages for the killing of two of his mules by defendant, the petition being in three counts. The first alleges that the animals came upon defendant's track and were killed at a point where defendant's railroad was not fenced as required by law. Plaintiff prays for single damages and for a reasonable attorney's fee, as provided by sections 1106, 1107, Rev. St. 1899. The second count is for double damages under section 1105, Rev. St. 1899, and under the third count plaintiff seeks to recover damages for the negligent killing of said animals by defendant. A jury was waived, and the cause tried by the court. The finding and judgment was for defendant, and plaintiff appealed.

At the request of defendant the court gave the following instructions: "(1) The court instructs you that upon all the evidence bearing upon the third count of the petition the plaintiff is not entitled to recover, and your verdict must be for the defendant on that count. (2) The court instructs you, in reference to the first and second counts of the petition, that if you believe from the evidence that the plaintiff's mules were struck at a point on defendant's railroad within the switch limits of the station at Huntsdale, and that the length of the track set apart and used by the defendant as its switch at said station was unnecessary [necessary] for the transaction of the defendant's business at said station, or for the convenience of the public in transacting business thereat, or for the safety of the men engaged in operating trains, then the defendant was not required to fence its tracks at said place, and the plaintiff cannot recover on the said counts." By request of plaintiff the court made a finding of facts as follows: "First. As matters of law the court finds that the defendant was not required to fence its tracks at the station at Huntsdale, if such fencing would interfere with the transaction of the business of said company with the public, or endanger the lives and safety of its employes and officers in operating its cars." Second. As matter of fact the court finds that the fencing of said road at the Huntsdale station would have interfered with the business of said road with the public and endangered the lives and safety of its employes and officers in operating the same. Third. As matter of law the court finds that it was the duty of the engineer operating the train which killed the mules in question to have used all reasonable effort and skill to have stopped the train, and avoided striking and killing said mules, after he saw them ahead of him on the track.

Fourth. As matter of fact the court finds that said engineer operating said train did use reasonable care and skill to prevent the train from striking the mules after he first saw them on the track."

The evidence disclosed that the animals came upon the track within the switch limits of the station, and were killed after they had passed such limits, at a bridge where the track crosses a stream. As to whether the engineer in charge of the locomotive could have seen the animals in time to avoid killing them, or that he in fact did see them before they were struck by the engine, the evidence was somewhat conflicting. As the animals came upon the track within the switch limits, the fact that they were killed at a point beyond such limits, and where the defendant was required to fence, would not render defendant liable under either the first or second counts. The defendant was not required to fence its tracks at the station. *Lloyd v. Ry. Co.*, 49 Mo. 199; *Edwards v. Ry. Co.*, 66 Mo. 567; *Grant v. Ry.*, 56 Mo. App. 65; *Morris v. Ry. Co.*, 58 Mo. 78. And it is the place where animals come upon a railroad track that determines the liability of the company, and not where they are injured or killed. *Hurd v. Chappell et al.*, 91 Mo. App. 317, and authorities cited. The finding of the court that the place where the animals came upon defendant's track was within the switch limits, and substantially that such switch limits were requisite for the business of the company and public and for the safety of the railroad employes, is conclusive on the question of the reasonableness of the length thereof.

The plaintiff was not entitled to recover under the damage act (Rev. St. 1899, § 2867), because the animals did not get upon the track at a point where defendant, although not required to fence, yet might have done so without materially interfering with the handling of defendant's trains, unless there was proof of negligence. *Webster v. Ry. Co.*, 57 Mo. App. 451; *Pearson v. Ry. Co.*, 33 Mo. App. 543; *Jennings v. Railroad*, 37 Mo. App. 651.

The court found that the engineer operating the train used reasonable care and skill to prevent it from striking the mules after he first saw them on the track. If it was a pertinent inquiry whether the engineer could have discovered the mules on the track, by the exercise of reasonable care, in time to have prevented the killing, it was not raised by the plaintiff. He asked no instruction raising such issue; consequently it is not permissible for him to raise such issue for the first time in this court. The instructions and declarations of law given appear to be unexceptionable. Under our system of practice as construed by the courts, the trial court is not required to instruct upon the different issues arising in a case unless asked to do so.

Finding no error in the record, the cause is affirmed. All concur.

On Motion for Rehearing.

(Jan. 4, 1904.)

The motion is based upon two grounds, the second of which has no merit whatever. We will therefore confine our attention to the first, which is as follows: "Because the opinion in this cause, in holding that the appellant, after having requested the trial court to state its finding of fact and conclusions of law separately, as provided by section 695, Rev. St. 1899, was nevertheless required to ask an instruction on common-law negligence for failure to exercise ordinary care to discover the stock on the track in time to avoid its injury, and for that reason is precluded from raising such question on appeal, is in conflict with the following decisions of this court, and also of the Supreme Court, which same this court must have inadvertently overlooked." Then follows a list of numerous cases cited. Under the statute in question it is made the duty of the trial court, upon request of a party to a suit, to "state in writing the conclusions of facts found separately from the conclusions of law." It is therefore insisted that for a failure of the court to find all the facts and conclusions of law thereon is error. We do not think the statute should be so construed, for the effect would be to inculcate trickery by permitting a party remaining silent when he should speak to take advantage of an oversight or omission of the court to find some particular fact and conclusion of law thereon. As said in the original opinion herein, it became the duty of the appellant to have asked the court to find the fact and give its conclusion of law thereon. And because the court was asked to find the facts and conclusions of law did not relieve him of the duty of rectifying any omission made by the court. And where the judgment is supported, as in this case, by the facts and law as declared by the court, it ought not to be disturbed for the cause assigned. And it ought not to be disturbed for the further reason that the matter was not called to the attention of the trial court in plaintiff's motion for a rehearing, so that the omission could have been remedied.

Motion overruled. All concur.

FULLERTON v. SCHLOSS.*

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

CONTRACTS—LOAN—PAYMENT BEFORE MATURITY—AGREEMENT TO PAY BONUS—MODIFICATION OF AGREEMENT—CONSIDERATION.

1. The grantor and grantee in a deed of trust agreed that the grantor might pay the debt secured before maturity on payment to the gran-

tee of a certain bonus. Before maturity the grantee proposed that, if the grantor would pay off the debt, the grantee would release the grantor from the payment of the bonus. The grantor procured another loan, and the grantee demanded the bonus, which resulted in an agreement that the grantor should pay the bonus on an understanding that the grantee should pay him back the amount thereof if he should reloan the money. At the time of the agreement as to the new loan there had been default in the taxes, which would have authorized the grantee to foreclose. *Held*, that the agreement whereby the grantee was to repay the bonus in case he reloaned the money was not void for want of consideration.

Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by Joseph A. Fullerton against Moses A. Schloss. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Chas. C. Crow, for appellant. Jno. Geo. Parkinson, for respondent.

ELLISON, J. Since the verdict in this case was for plaintiff, we will state the facts, as the evidence in his behalf tends to show them: Plaintiff executed two notes to defendant, one for \$2,500 and one for \$300, secured by deed of trust on real estate owned by plaintiff. The latter note was due in one year, and the former in five years. It was provided in the deed of trust that plaintiff might pay off said notes at any time before due if he would pay defendant a bonus of six months' interest at 8 per cent., amounting to \$112. That several years before the largest note became due defendant desired plaintiff to pay them off, and asked him to secure a new loan for that purpose, and that, if he would do so, he (defendant) would release and forego all claim to the bonus provided for in the deed of trust. Plaintiff, in compliance with this request and promise to release and forego all claim to the bonus, did procure another loan; but when he came to pay defendant the latter demanded that he pay the bonus as originally agreed and provided in the deed of trust. This respondent at first refused to do, but it was finally agreed between them that, if plaintiff would pay the bonus thus demanded, defendant would make an effort to reloan the principal sums then being paid to him by plaintiff (or a like amount), and, if he succeeded in doing so, he would then pay back to plaintiff the bonus which plaintiff paid with the principal sum. Defendant did reloan the money, but refused to pay back the \$112 bonus, whereupon plaintiff brought this action, and recovered judgment in the trial court.

It is urged by defendant that there was no consideration to support the agreement upon which the suit was brought. We think there was. The largest note was not due. Defendant proposed to plaintiff that, if he would negotiate a new loan, whereby he would be enabled to pay off the debt, he (defendant) would release him of the bonus. It

*Rehearing denied January 4, 1904.

was a valuable service to defendant, rendered by plaintiff when the latter negotiated a new loan for the purpose of paying him a debt not yet due. Then when defendant came to propose to plaintiff that the latter should pay the bonus which he had agreed to release, plaintiff said he would do so if defendant would pay him back that amount if he could reload the money. Defendant agreed to do it. It seems to us that the consideration is plain and ample. The consideration for the second contract was the release of performance of the first contract. It seems that at the time of the agreement that plaintiff should negotiate a new loan there was some default in the payment of taxes, which, under the terms of the deed of trust, would have authorized defendant to foreclose, and the court so instructed the jury for defendant, stating therein that if, therefore, the payment made by plaintiff was voluntary, he could not recover. But from the fact that the deed of trust could have been foreclosed for nonpayment of taxes it does not follow that it would have been. Plaintiff, at any time before that was accomplished, could have paid them, and thus kept defendant from his money until it was due. Instead of exercising such right, plaintiff accepted defendant's proposition, and negotiated a new loan. There was only one instruction given for plaintiff. It clearly put the issue between the parties to the jury. It is not fairly subject to defendant's criticism.

We do not regard the suggestion that the verdict was for \$12 more than justified by the facts as well founded. The contract proven, and which we have seen was supported by a consideration, was for a return of the entire bonus.

An examination of all points and suggestions made by defendant fails to satisfy us that there is any error in the record, and the judgment is therefore affirmed. All concur.

CONNERSVILLE BUGGY CO. v. LOWRY et al.*

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

ATTACHMENT—MORTGAGED CHATTELS—MORTGAGE—DEFAULT—RIGHT TO POSSESSION—EXTENSION OF TIME FOR PAYMENT—PRIOR PAROL AGREEMENT.

1. An agreement to extend the time for payment of a debt secured by chattel mortgage does not postpone the mortgagee's right to the possession of the mortgaged property for failure to pay the debt at the time originally agreed on.

2. A chattel mortgagor, who, by the terms of the mortgage, has given the mortgagee the right, on default in payment of the mortgage note, or any installment thereof, to take possession of and sell the chattels, has no general or special property right in them sufficient to sustain an interplea in attachment as against the mortgagee's attaching creditor, where at

the time of the attachment the mortgagor has defaulted in the payment of installments.

3. A chattel mortgagor, who, by the terms of the mortgage, has given the mortgagee the right, on default in payment of the mortgage note, or any installment thereof, to take possession of and sell the chattel, cannot, on interpleading in attachment proceedings brought by a creditor of the mortgagee, in which the chattels are attached, at a time when the mortgagor has defaulted in the payment of installments, show that the mortgage note had been transferred to, and was owned by, another than the defendant mortgagee, since the interpleader must recover on the strength of his own claim, and not on the weakness of his adversary's.

On Rehearing.

4. A chattel mortgagor, who, by the terms of the mortgage, has given the mortgagee the right, on default in payment of the mortgage note, or any installment thereof, to take possession of and sell the mortgaged property, cannot show an oral agreement for extension of time for payment of the mortgage, made prior to the formal execution thereof.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by the Connerville Buggy Company against Fred D. Lowry, in which Edward T. Smith interpleaded. From a judgment for plaintiff, the interpleader appeals. Affirmed.

James C. Rieger, for appellant. Chas. B. Adams and Metcalf & Brady, for respondent.

BROADDUS, J. The original proceeding was by attachment against defendant, Lowry, in which certain personal property was attached as the property of said defendant, then in the hands of the appellant, Smith, who filed an interplea in which he claimed that he was the owner of such property. At the conclusion of the trial the court instructed the jury to find for the plaintiff company. The interpleader appealed.

The facts were that on the 6th day of March, 1900, the interpleader acknowledged a chattel mortgage to secure a note payable to defendant, Lowry, in the sum of \$800, payable in eight monthly installments, of \$100 each, bearing 6 per cent. interest from date. One of the conditions of said mortgage was that in default of payment of said note, or in default of payment of any of said installments when due, then the whole became due, and the said Lowry or his successor was authorized to enter upon the premises where said property might be found, and take possession of and sell the same, and apply the proceeds to the payment of the note. Notwithstanding said mortgage was dated the 6th day of March, it was in fact of the date of the 18th of January, 1900, as was also said note. The interpleader introduced evidence tending to show that the note, by agreement, was extended on February 4, 1900, to May 15, 1901. He also offered evidence to show that said note had been transferred to one Shellenberger, which, upon objection by the plaintiff, the court excluded. It was held in *Bowens v. Benson*, 57 Mo. 26, that an agreement for the extension of the

*Rehearing denied January 4, 1904.

¶ 1. See *Chattel Mortgages*, vol. 9, Cent. Dig. § 236.

time for the payment of the debt did not postpone the mortgagee's right to the possession of the mortgaged property for failure to pay the debt at the time originally agreed on. See, also, *Baldrige v. Dawson*, 39 Mo. App. 527. It therefore follows that as the mortgagee was entitled to the possession of the property, under the terms of the mortgage, the debt being due and unpaid, the interpleader did not have the right to the immediate and exclusive possession thereof. It is well-established law that, in order to recover the possession of personal property, the claimant must show that he has general or special rights in such property, and the right to the immediate and exclusive possession thereof. *Hardware Co. v. Hardware Co.*, 75 Mo. App. 518; *Upham & Gordon v. Allen*, 73 Mo. App. 224; *Bank v. Fisher*, 55 Mo. App. 51.

The action of the court in excluding the evidence of the interpleader offering to show that one Shellenberger was the owner of the note is upheld, because it was immaterial. The interpleader could only recover upon the strength of his own claim, and not upon the weakness of that of his adversary. *Car Co. v. Barnard*, 139 Mo. 142, 40 S. W. 762; *Graham Paper Co. v. Morton B. Crowther*, decided by this court, but not reported.

The interpleader having failed to show that he had either a general or special property right in the articles in controversy, and the right to the immediate and exclusive possession thereof, the court very properly instructed the jury to find for the attaching plaintiff.

The cause is affirmed. All concur.

On Rehearing.

(Dec. 7, 1903.)

ELISON, J. On further consideration of this case, we have concluded that no reason exists for a change of the views which are expressed in the original opinion. The alleged agreement for an extension of the mortgage itself was made some time before it was executed and delivered. The mortgage did not contain any provision of that nature, but did contain a provision for immediate possession by the mortgagee on default of the note secured. A prior oral agreement not incorporated in the subsequent written instrument is of no avail.

The judgment is affirmed. All concur.

ARBuckle BROS. v. McCUTCHEON et al.
(Supreme Court of Tennessee. Nov. 28, 1903.)

TAXATION—BACK ASSESSMENT—CONSTITUTIONAL LAW—TITLE OF STATUTE.

1. Under Acts 1901, p. 334, c. 174, § 31, providing for back assessments, such an assessment, when made by the tax-collecting officer, is void if it does not state the amount of the tax due.
2. That Acts 1901, p. 334, c. 174, § 31, entitled "An act to provide * * * laws for the assessment and collection of revenue," etc., pro-

vides for revenue agents, does not render it unconstitutional, as containing a subject not covered by the title.

Appeal from Chancery Court, Hamilton County; T. N. McConnell, Chancellor.

Bill by Arbuckle Bros. against J. N. McCutcheon and another. From a decree in favor of complainants, defendants appeal. Affirmed.

Charles T. Cates, Jr., Atty. Gen., and Oscar T. Peoples, for appellants. Robt. P. Woodard, for appellees.

NEIL, J. The bill in this case was brought to recover of the clerk of the county court of Hamilton county certain taxes which the complainant paid him under protest as taxes claimed by the state, and also to enjoin the clerk from proceeding to collect certain taxes claimed by the county of Hamilton.

The bill states three grounds of relief: First, that complainants were, during the time covered by the assessment complained of, engaged in interstate commerce, and hence they were not taxable as merchants or otherwise in Tennessee, their place of business being in the city of New York; secondly, that the assessment is void, because it does not comply with the statute; thirdly, that the act under which the assessment was made is unconstitutional, because it contains two subjects one of which is not covered by the title or caption.

In the view we take of this matter, it is not necessary that the first point should be considered.

We think the second point is well taken.

The assessment complained of is in the following language:

"In re the Back Assessment of Arbuckle Bros. Coffee Co.

"Before J. N. McCutcheon, County Court Clerk.

"In the matter of the back Assessment of Arbuckle Bros. Coffee Co. for the years 1899, 1900, 1901, and 1902, said Arbuckle Bros. were cited to appear on the 3rd day of May, 1902, and which by consent was continued until the 17th day of May, 1902, and to show cause why the average stock carried by said Arbuckle Bros. Coffee Co. for doing a mercantile business in Hamilton County, State of Tennessee, for said years should not be assessed upon complaint and information by John D. Caldwell, State Revenue Agent of Tennessee. And the said Arbuckle Bros. having appeared by agent and counsel, and a full and complete hearing of the matter being had upon the motion of said John D. Caldwell, Revenue Agent, the citation issued thereon, the plea of said Arbuckle Bros. and all the proof introduced and the condition and character of the business of said Arbuckle Bros. being examined into, I am of the opinion that said Arbuckle Bros. have been and are now doing a mercantile business and have not paid a mercantile tax for the years 1899, 1900, and 1901.

"I therefore find that said Arbuckle Bros. Coffee Co. are liable for a mercantile tax, and that a reasonable assessment of the average stock carried for the year 1899 would be One Thousand (\$1,000) Dollars; for the year 1900, One Thousand (\$1,000) Dollars; for the year 1901, One Thousand (\$1,000) Dollars.

"I therefore back assess said Arbuckle Bros. for the year 1899, on a valuation of One Thousand (\$1,000.00) Dollars; for the year 1900, on a valuation of One Thousand (\$1,000) Dollars; for the year 1901, on a valuation of One Thousand (\$1,000) Dollars. This 24th day of May 1902.

"J. N. McCutcheon, County Court Clerk."

This assessment is void in that it does not contain a statement of the amount of taxes due. This is required under a true construction of section 81, c. 174, p. 334, Act 1901, under which it was made.

This section, after setting out the circumstances under which back assessments shall be made and the officers—among others, the county court clerk—who shall make them, proceeds: "Said officials herein vested with the power to back or re-assess property shall have full authority, in proceedings, to back or re-assess such property, to make proper, correct and adequate assessments of the same at its actual cash value, which, when entered upon the tax books or filed in writing with the authorized tax collecting authority, shall become, a final and valid assessment of the property, and collectible as such, as fully and amply as if originally entered upon the assessment rolls. Should it appear that any property has been assessed at less than its actual cash value, in violation or in disregard of the provisions of this act, the official back or re-assessing the same shall add to the assessment a penalty of twenty-five per cent. upon the amount of the added tax, and the cost of the proceedings, which said penalty and cost shall become a part of the taxes and collectible as such. If the proceeding is determined in favor of the owner of the property, the costs shall be paid by the county."

Upon the language quoted it seems clear that the Legislature intended that in making the assessment the officer should state the amount of the taxes due. It was so held construing similar statutes in *Wilson v. Benton*, 11 Lea, 51, 55. It is natural and reasonable, likewise, that this course should be pursued when the back assessment is made by the collecting officer himself, as in the present case; the county court clerk being the collecting officer for merchants' taxes.

A different course is prescribed in the statute for ordinary assessments. These are made by officers whose business it is only to make assessments. Hence it is not necessary or required, or even proper, that they should make extensions of the amount of taxes due. The books of the ordinary assessors are returned to the clerk of the county court, and he is required to make out from them a tax-

book, and deliver it to the trustee. These taxbooks are required to be made out by districts, to be ruled in appropriate columns, to show the names of owners in alphabetical order, the number of lots and blocks, number of acres, description of the property as contained in the assessment rolls, the value of each lot, tract, or parcel of land, the valuation of personal property, under appropriate heads, and the total valuation of real and personal property against each taxpayer, the amount of poll taxes due according to the assessment books; and it is also required that on the total valuation of the real property of each taxpayer the state, county, special road, school, and municipal taxes shall be extended in appropriate columns separately, according to and at the rate levied by the proper authority for each of said purposes; and that a column shall be added showing the total of all taxes levied and to be collected from each taxpayer. Acts 1901, p. 348, c. 174, § 40.

The provisions of the section just referred to do not apply to a tax collecting officer making back assessments, although in setting out the amount of taxes due he would no doubt do well to itemize in the manner referred to therein.

We do not think the third point is well taken. The objection made under this head is that section 81, p. 373, of the act above referred to, provides for revenue agents, and defines their duties. We think these provisions fall fairly within the title of the act, which is as follows: "An act to provide more just and equitable laws, for the assessment and collection of revenue for state, county and municipal purposes, and to repeal all laws in conflict with the provisions of this act, whereby revenue is collected from the assessment of real estate, personal property, privileges and polls." The general subject embraced by this language is the providing of revenue for the state, counties, and municipalities of the state. The revenue agents are mere instrumentalities to effectuate the general purpose of the act.

On the second ground stated, however, it must be held that the complainant is entitled to recover the amount sued for, and to have an injunction against the enforcement of the illegal assessment above mentioned.

Before closing this opinion it is proper to say that counsel for complainant on the first point attempted to differentiate the case made in the bill as to the interstate commerce controversy from *American Steel & Wire Co. v. R. A. Speed, Clerk* (April Term, 1903) 75 S. W. 1037. While the present case is very much like the case referred to, and probably falls within that decision, we have not thought it necessary to go into that matter; but, to prevent future misapprehension, we direct that the decree which shall be entered in the case shall show the ground on which the affirmance of the chancellor's decree is herein rested.

It results that the chancellor's decree is affirmed, as above stated.

ATTALLA IRON ORE CO. v. VIRGINIA IRON, COAL & COKE CO.

(Supreme Court of Tennessee. Dec. 5, 1903.)

CORPORATIONS—CONTRACTS—BREACH OF TRUST BY OFFICERS—RELIEF IN EQUITY.

1. Two managing officials of an existing corporation entered into a secret agreement with a third person for the formation of a new corporation, in which the two officials were to have a controlling interest. After the creation of the new corporation as proposed, the officials of the existing corporation, and on its behalf, but without the knowledge of the directors and stockholders, entered into a contract with the new corporation. *Held*, that on the reasonable application of the directors and stockholders of the existing corporation equity would annul the contract without regard to whether it was favorable or unfavorable to the existing corporation.

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Suit by the Attalla Iron Ore Company against the Virginia Iron, Coal & Coke Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Chambliss & Chambliss and Snodgrass & Latimore, for complainant. Curtin & Shelton and Jos. L. Kelley, for defendant.

BEARD, C. J. The complainant is a corporation operating an iron ore mine in the state of Alabama, while the defendant is a chartered company with iron furnaces in the state of Tennessee and elsewhere.

The present bill was filed by complainant to recover damages from the defendant corporation, which it alleges are sustained from the breach of a contract claimed to have been entered into between the two corporations on the 9th of October, 1899, by which the complainant bound itself to deliver to the defendant 100,000 tons of iron ore of a certain degree of metallic richness at the rate of 4,000 or 5,000 tons a month f. o. b. at Attalla, Ala., to be paid for by the defendant at the fixed rate of \$1.25 per ton on the 20th of each month for all the deliveries of the preceding month. It is alleged in the bill that, after receiving 20,000 tons of iron ore under the provisions of the contract, the defendant attempted to repudiate it by a formal vote of its directors on the 10th of June, 1900, since which time it has declined to regard it as a binding obligation, and has declined to receive the remaining 80,000 tons of iron ore which complainant was entitled to deliver and receive the stipulated pay therefor. The damages claimed for this breach amounted to \$40,000, without interest.

An answer and cross-bill were filed by the defendant corporation, in which a denial was made of any liability on the alleged contract, among other grounds, because it was made by certain officers of the defendant, to whom was delegated the duty of managing its affairs in the interest of its stockholders and creditors, and who, in disregard of this duty, and without the knowledge or consent of

their principal, organized, with one Bueck, the complainant corporation, with the purpose of making the contract in question and of selling iron ore to the defendant at a large pecuniary profit to themselves. It was also averred that immediately upon acquiring knowledge of this agreement or alleged contract, it was disaffirmed by the defendant, and notice of such action was at once communicated to the complainant.

In the cross-bill the defendant asked for a dismissal of the original bill and for a decree annulling the contract set up therein.

Upon the trial of the case the bill of complainant was dismissed, and relief was granted in accordance with the prayer of the cross-bill. This decree has been affirmed by the Court of Chancery Appeals, and the cause is now before us for review. The facts bearing on this controversy, as found by that court, are that in the year 1899 the defendant owned and controlled a number of iron furnaces in this and other states, and in view of the demand for iron products made efforts to secure sufficiency of iron ore to keep their furnaces running. With this view George L. Carter, president, and M. D. Chapman, vice president, of the defendant corporation, who had been placed in control of the operations of these furnaces, opened negotiations with one Bueck looking to the purchase by him for their corporation of 200,000 tons of iron ore. Under authority received from them, Bueck made a canvass of the iron ore producing territory, and found as available for furnishing the crude product desirable property lying at Attalla, Ala., upon which he took an option, upon the assumption, from his previous negotiations with the parties named, that the defendant company would pay for ore \$1.25 per ton. After securing this option, he visited Bristol, in this state, where the headquarters of this corporation seemed to be, and induced Carter and Chapman to become interested with him; and it was there and then agreed between these parties that a corporation should be organized by the three to own and control the Attalla property, and that the defendant corporation should take iron ore from it. The result was the chartering of the complainant company, its capitalization at \$100,000, and the conveyance to it of the property.

In other words, summing up the transaction, it is found as a fact by the Court of Chancery Appeals "that when the Attalla mining property was taken under this option it was understood and agreed between these parties that the complainant corporation should be organized; that Carter and Chapman should be interested in it, and should in fact control a majority of its stock; and that the contract sued on in this case should be made, and the profits resulting from the sale of the ore thereunder be divided between Carter, Chapman, and Bueck in proportion to their respective interests."

As significant of doubt in the minds of

these parties as to whether such a transaction would bear scrutiny, and, as we think, with the evident purpose of concealing the identification of Carter and Chapman with it, the whole of the capital stock of this new company was issued to Bueck, who caused \$30,000 to be placed in the name of the father-in-law of Carter, but for the latter's use, and \$30,000 was delivered to Chapman.

It is further disclosed that in these preliminary negotiations Carter and Chapman proposed to commit the defendant company to an obligation to take from the new corporation 200,000 tons of iron ore at \$1.25 per ton; but when they came subsequently to reduce the agreement to writing, for some undisclosed reason the amount was limited to 100,000 tons.

This was all done without the knowledge of the board of directors of the company. Disclosure of the circumstances under which this transaction took place and the interest in it of the parties to whom had been committed the management of the interests of the defendant was made months afterwards, and then was, by it promptly repudiated. The defendant has paid for all the iron ore which it received, and the case therefore does not fall within the rule of *Thomas v. Brownville, Ft. K. & P. R. Co.*, 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018. So that, if complainant's bill can be maintained, it must be upon the ground that its officers, Carter and Chapman, made with the corporation, which, by reason of their controlling interest, they dominated, a binding agreement, the breach of which by the defendant is actionable.

This is unlike the *New Memphis Gas Light Co. Case*, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880, in which it was held that directors of a corporation are not forbidden, by reason of their position, from dealing with it, under proper circumstances, with the view of securing indemnity to themselves as accommodation indorsers of the company's paper. In such a case they are permitted, while the corporation is a going concern, expecting to continue its business, to secure themselves against possible loss from such an indorsement. Even in such a case as that this court said the transaction will invite the closest investigation, and it must be characterized by the utmost good faith.

To the contrary, the present is a case where two persons occupying positions of trust as the managing officials of one corporation enter into a secret agreement with a third party to form a new corporation, in which they are to have a large controlling interest, with the view of binding their principal to the making of a large contract for iron ore at the then highest market price, when the delivery of this ore may extend through a period of more than two years, the profits of the transaction to be divided between themselves and this third party; and this in the face of feverish conditions of the market.

If Carter and Chapman had made this contract in the name of the defendant company with themselves and Bueck as individuals, or with the latter nominally, but really representing them to the extent of a two-thirds interest in it, no one would for a moment contend that their principal, on discovering their connection with it, could not repudiate it. Hiding behind the thin disguise of an easily procured charter, which they have obtained for a company practically controlled by them, such an arrangement should not and cannot be given greater legitimacy. At the best we think it is simply an effort by these agents to bind their principal by an unrevealed arrangement to purchase iron ore from themselves and their partner.

It is true the weight of the authorities is that such a contract is not void, but only voidable; and, notwithstanding the vice which tainted its origin, it may be subsequently validated. Among the cases so holding are *Thomas v. Brownville, Ft. K. & P. R. Co.*, supra; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Barr v. N. Y., L. E. & W. R. R. Co.*, 125 N. Y. 263, 26 N. E. 145; *Barnes v. Brown*, 80 N. Y. 527. But we are dealing now with a case where an effort is made to enforce by recovery for its breach a contract so affected in its origin, and which has never been in any way validated, either expressly or indirectly, by the retention of its fruits, in whole or in part. We think to aid in the enforcement of such contract would be repugnant to the great rule of law which finds destructive voice in all contracts made by a trustee or fiduciary in which he is personally interested, and which can only be removed at the election of the party he represents. *Munson v. R. R. Co.*, 103 N. Y. 58, 8 N. E. 355.

No apter expression of this rule of law can be found than in the opinion of the Supreme Court of the United States in the case of *Wardell v. U. P. R. R. Co.*, 103 U. S. 651, 26 L. Ed. 509. In that case, as in the present, there was a contract made by the executive committee of the railroad company, of which the president was one, and not by the board of directors, with one Wardell and another, to furnish coal to the company for a period of 15 years upon terms exceedingly favorable to Wardell and his associates. Soon after a corporation was organized, and the majority of its stock was taken by six directors of the railroad company, one of those also being the president. The coal contract was assigned to this corporation without consideration. And this new corporation continued for several years to execute its provisions, when it was abruptly terminated by the railroad company, and forced possession was taken under its order of the books, mines, etc., of that corporation. Wardell filed his bill to obtain relief under the contract. The United States Circuit Court held that the contract was a fraud upon the railroad company, and that, apart from it, the complainant was entitled to some compensation for his time, etc., and a return of

the money actually invested by him, the fruit of which was seized by the railroad; to this extent applying the rule in *Thomas v. Brownville, Ft. K. & P. R. Co.*, supra. The Supreme Court, in disposing of the case, said that the evidence justified the conclusion of the court below as to the nature of this contract, and affirmed its decree in all respects. In disposing of the question we are now considering, that court said: "The law * * * will also condemn the transactions of the party in his own behalf when in respect to the matter concerned he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations and all persons who stand in a fiduciary relation to other parties and are clothed with power to act for them are subject to this rule. They are not permitted to occupy a position which will conflict with the interest of the parties they represent and are bound to protect. They cannot, as agents or directors, enter into nor authorize contracts in behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railroad company to secure an advantage to themselves at its expense by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration. *R. R. Co. v. Magnay*, 25 Beav. 586; *Benson v. Heathborne*, 1 Young & C. 326; *R. R. v. Dewey*, 14 Mich. 477; *R. R. Co. v. Poor*, 59 Me. 277; and *Drury v. Cross*, 7 Wall. 299 [19 L. Ed. 40]."

What is true with regard to the agents of a corporation is equally so with regard to the agents of any other company or individual. While the rule was applied to persons occupying a fiduciary relation to a railroad corporation, still it is a general one that applies to all agents whatever may be the character of the principal.

Nor can Bueck or third party in control of the complainant corporation rightfully protest against the application of this rule to the contract in question; for, where a stranger participates with the officer of a corporation in the commission of an act of manifest bad faith or breach of duty to it, he, equally with the officers, commits a wrong, and ought not to be allowed to derive profit from it. *Hall v. Auburn Turnpike Co.*, 87 Am. Dec. 75.

The principle here announced authorizes the annulment of a contract such as the present one, if seasonably challenged, without regard to whether it is favorable or unfavorable to the complaining principal. But that the contract here sued on was most oppressive is abundantly shown. For nine months after its date it is found that iron ore which was to be

furnished under this contract at the highest market price prevailing at its date had dropped in price to 75 cents per ton, and yet the defendant was confronted by a demand that it should continue to receive this article during the existence of the contract at the price therein stipulated.

Without further pursuit of this question, we are content to affirm the decree of the Court of Chancery Appeals, and this is accordingly ordered.

JACKSON v. CRUTCHFIELD et al.

(Supreme Court of Tennessee. Nov. 21, 1903.)

LIMITATIONS—PERSONS UNDER DISABILITY—TIME ALLOWED—FRAUDULENT CONVEYANCE.

1. Shannon's Code, § 4448, provides that persons under disability at the time of the accrual of a cause of action may commence the action after removal of the disability within the time of limitation for the particular cause of action, unless it exceed three years, and in that case within three years from the removal of disability. Section 4473 provides that the limitation of an action against a guardian shall be fixed at ten years. Nine months before a minor became of age his guardian died. *Held*, that the minor, on coming of age, was entitled to the whole of the time limited for his cause of action against the guardian counting from the accrual of the same, and the three years allowed by section 4448 were years of grace to a person under disability, and were not intended to cut down the time fixed by the statute for the particular cause of action.

2. Where a guardian, being indebted to his ward, made a voluntary conveyance of his land, without reserving enough property to pay his debts, such conveyance was constructively fraudulent, and the land was properly ordered sold for the ward's debt.

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Bill by Sparks Jackson against Thomas W. Crutchfield, as administrator ad litem of plaintiff's guardian, and others. From a decree of the Court of Chancery Appeals for complainant, defendants appeal. Affirmed.

R. D. Twinman, C. M. Rankin, and Tomlinson Fort, for appellants. Shepherd & Friserson, for appellee.

NEIL, J. In the aspect in which this case comes before us it is a bill by a ward against the administrator of his guardian to hold the latter to account for a balance on the estate not paid over. The main defense is the statute of limitations. The facts on which this question turns are as follows: The complainant reached his majority on November 11, 1895, something like nine months after the death of the guardian. The bill in this case was filed three years and eight months after complainant attained his majority, and four years and five months after the death of the guardian. No administrator had been appointed on the estate of the guardian until, in accordance with the prayer of the bill, an administrator ad litem was appointed in the present case. The Court of Chancery Appeals found that there was a balance due, and rendered judgment therefor, and ordered certain land to be sold to pay the amount adjudged.

The question made upon the statute of limitations arises on a construction of Code 1858, § 2757 (Shannon's Code, § 4448).

That section reads as follows: "If the person entitled to commence an action is, at the time the cause of action accrued, either (1) within the age of twenty one years, or (2) of unsound mind, or (3) a married woman, or (4) beyond the limits of the United States and the territories thereof, such person, or the (their) representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three years, and in that case within three years from the removal of such disability." Laws 1715, c. 27, §§ 4, 9; Laws 1797, c. 43, § 4; Laws 1819, c. 28, § 2; Laws 1823, c. 16, § 1.

It is insisted that, in accordance with this section, the person under disability at the time the cause of action accrued had only three years in which to sue after the removal of disability, even though the limitation fixed for the particular kind of action in other sections of the Code had not expired when the action was brought. In other words, it is insisted that, although under section 2775 (Shannon's Code, § 4472) the time of limitation fixed for action against sureties on guardian's bonds is six years, and by section 2776 (Shannon's Code, § 4473) the limitation of an action against the guardian himself is fixed at ten years, yet a person who was under disabilities, as a ward, at the time the cause of action accrued has not the full six years and ten years, respectively, for the bringing of his action, but only three years from the time he arrives at his majority. So, in the present case, it is insisted that the right of action accrued upon the death of the guardian (*Sanders v. Forgasson*, 3 Baxt. 260), which was during the minority of the complainant; that he had only nine months of the general statute of limitations above referred to (that is, of the six years and of the ten years, respectively, grace) in which to sue between the death of his guardian and the attaining of his majority; and that thereafter (that is, from the date of attaining his majority) he had only three years in which to bring suit, and did not have the full benefit of the six years and ten years, respectively, and of the three years in addition thereto, or of any part of the said three years in addition, but only the three years.

There are some general expressions in some of our cases that seem to indicate that a person under disability will have only three years after the removal of that disability in which to sue, irrespective of the time fixed for the particular kind of action in favor of persons in general. These cases are *Gulon v. Anderson*, 8 Humph. 298, 326, 327; *Murdock v. Johnson*, 7 Cold. 605, 619, 620; *Hanks v. Folsom*, 11 Lea, 555, 562; *Stevens v. Bomar*, 9 Humph. 546, 550. However, in each of these cases it appears from examination that

the time fixed by the general statute for the bringing of the action had already expired, and the three years referred to was in addition to that time. The court did not have in mind such a case as the present, wherein it is insisted that the person under disability had only the three years, regardless of the time fixed for the special kind of action by the general statute of limitations.

There is one case, however—*State v. Parker*, 8 Baxt. 495, 498—in which the point seems to have been ruled in accordance with the contention of the defendants in the present case. There were several rights of action involved in that case, but the point arose only upon those claimed by Wm. S. Howard, Hester A. Moffit, and Jas. F. Howard. Said the court (page 498): "As to Wm. S., Jas. F., and Hester A., who are minors, the cause of action accrued at the time of the resignation of A. E. Moore as guardian and the appointment of F. M. Snoddy as guardian in his place, which was on the 5th of March, 1866. * * * Wm. S. Howard became of age on the 14th of June, 1868, and Hester A. Moffit became of age on the 9th of December, 1870, and, this action not being commenced within three years after the removal of their disability, the statute is a bar to their recovery; but not so as to the youngest child, James F. Howard, who became of age on the 13th of December, 1872." The action was brought on the 27th of March, 1874, against W. W. Parker, as surety on the bond of Moore. By comparing the dates above referred to, it will be seen that from the date of the accrual of the cause of action, March 5, 1866, to the time when suit was brought, March 27, 1874, there had elapsed eight years and twenty-two days. From the accrual of the cause of action to the majority of William S. Howard on the 14th of June, 1868, there had accrued two years, three months, and nine days. But from the 14th of June, 1868, to the bringing of the action there had accrued five years, nine months, and thirteen days. The six years from the accrual of the cause of action, March 5, 1866, would have brought the time up to March 6, 1872. So it appears that in this case, as to William S. Howard, the full six years had elapsed from the accrual of the cause of action before suit was brought. The same is true as to the case of Hester A. Moffit, and also as to the case of James F. Howard; that is to say, six years from the accrual of the cause of action forward carried the date to March 6, 1872, and suit was not brought until the 27th of March, 1874. In the meantime, however, William S. Howard had become of age on the 14th of June, 1868, and it was held that he was entitled to only three years from that time, which, added to the two years, three months, and nine days that had elapsed from the accrual of the cause of action to the date of arrival at majority, gave him in the aggregate only five years, three months, and nine days, in-

stead of six years, in which to bring his suit. Between the accrual of the cause of action and the 9th day of December, 1870, when Hester A. Moffit arrived of age, there elapsed four years, nine months, and seven days, and it was held that she had three years in addition in which to sue, which gave her in the aggregate seven years, nine months, and four days. There elapsed between the accrual of the cause of action and arrival of age of Jas. F. Howard on the 13th day of December, 1872, six years, nine months, and eight days, and it was held that he had, in addition to this, three years in which to sue, and this gave him in the aggregate nine years, nine months, and eight days. In short, it seems to have been held in that case that a person under disability had only three years in which to sue after the removal of this disability, regardless of the question whether the time had elapsed fixed by the general statute for the particular cause of action.

On the contrary, in the case of *Patton v. Dixon*, 105 Tenn. 97, 102, 58 S. W. 299, 300, it is said, though, it seems, only arguendo, that a person under disability would, after the removal of the disability, have three years additional in which to sue, provided the time fixed for the particular form of action (in that case seven years) had elapsed from the accrual of the cause of action (in that case adverse possession), or, to quote the language of the judge who delivered the opinion in that case: "Three years after discovery would have barred the separate action of the wife, provided the seven years had elapsed from the original adverse possession."

The subject is exceedingly complex, and it is difficult to state a general rule that would cover all cases. We believe, however, that the true principle is laid down in *Demarest v. Wynkoop*, 3 Johns. Ch. 135, 8 Am. Dec. 467. That was a bill brought to redeem a mortgage. It appeared that Daniel Ludlow, the defendant, took a deed in fee May 7, 1788, and went into possession. At that time Hannah Demarest, who afterwards sought to redeem, was an infant of the age of seven years, and entitled to all the equities of redemption which she subsequently claimed by her bill. She was of age in 1802, and her bill was not filed until 1815, 13 years after she arrived at majority. So that not only 20 years had elapsed since the mortgagee went in possession, but 10 years since the disability of the infancy had ceased. The court continues: "She had then lost her equity of redemption by the lapse of time. It is true she has not had twenty full years free disability to redeem, but she has had ten years free of disability, and more than twenty years in the whole have elapsed, and this is all the statute allows. * * * The party has, in every event, twenty years to make his entry; and, if under disability during

any part of that time, he has ten years, and no more, after disability ceases. It may so happen that the twenty years, and more, will elapse during the disability, and then ten years will be afterwards allowed cumulatively; or the disability may cease so far within the period of twenty years as to allow of only twenty years in the whole, though part of that period be covered by the disability."

So, in the present case, we are of the opinion that the complainant was, as to the surety, entitled to the full six years from the date of the accrual of his cause of action; and, as he was carried forward by the operation of the time limited for the cause of action to a period more extended than the three years of grace allowed to a person under disability, the latter period did not apply, but his case was governed by the general statute of limitations of six years. Of course, under the statute, if the six years had expired during his minority, he would have been entitled to three years additional in any event. The same observation to the ten-years statute, *mutatis mutandis*. Other phases of the matter may arise which we do not undertake to dispose of in this opinion. All we now determine is that, in any event, the person under disability is entitled to the whole of the time limited, for the particular cause of action, counting from the accrual of the cause of action, and that the three years allowed by section 2757 (*Shannon's Code*, § 4448) were intended as years of grace. In a sense, to a person under disability, and were not intended to cut down the time fixed by the statute for the particular cause of action. Indeed, any other result would seem to be entirely out of harmony with the general spirit of our statutes of limitations. Persons who are under no disabilities whatever have the whole of the six years or ten years, as the case may be, in which to sue; and, if they die, their heirs or representatives have the right to sue within that time, thus enjoying in the aggregate the whole of the period. *Haynes v. Jones*, 2 Head, 372; *Jones v. Preston*, 3 Head, 161; *Heiskell v. Cobb*, 11 Heisk. 644. It would, indeed, seem an anomaly if persons under disability did not have at least as much time.

We are of the opinion that the case of *State v. Parker*, *supra*, was erroneously decided in so far as it fixed three years from the date of the removal of the disability as the time within which action might be brought, regardless of whether the time limited for the particular cause of action had expired or not, and to that extent should be overruled. In disposing of the question arising on the statute of limitations in this case we have not considered it necessary to determine the legal effect of the fact that no administrator had been appointed on the estate of the guardian prior to the filing of the bill. We prefer to place the case upon the point previously stated, which was the

one presented and discussed in the opinion of the Court of Chancery Appeals and in the briefs of counsel.

Another question presented by this record is whether the Court of Chancery Appeals acted correctly in directing the land to be sold for the payment of the debt found to be due. We think there was no error in this action of the court, because it appears that the guardian owed the debt sued for, that the conveyance was voluntary, and it was not shown that enough property was reserved to pay the debts. The conveyance was therefore constructively fraudulent, being voluntary.

It is insisted that the conveyance was made in consideration of an indebtedness which the guardian owed to the father of the vendees, but this is not found as a fact by the Court of Chancery Appeals.

It results that there is no error in the decision of the Court of Chancery Appeals, and it must be affirmed.

MUSGROVE et al. v. HAMILTON COUNTY.

(Supreme Court of Tennessee. Nov. 21, 1903.)

COSTS—SMALL-OFFENSE CASES—PAYMENT BY COUNTY—CERTIFICATION.

1. Shannon's Code, § 7601, provides that in all cases the fees due a justice of the peace for any proceedings before him shall be certified to the circuit court, and be taxed and certified by the court and attorney general as other costs. Section 7604 provides that in all small offenses and all other cases triable before a justice, and finally acted upon by him, the costs may be taxed by him, and the execution issued against the defendant or prosecutor, as the case may be, therefor. *Held*, that in a small-offense case, where the costs have been taxed against defendant, and he, failing to pay fine and costs, is committed to the workhouse to work out the same, the costs, to be collectible of the county, which can only be where execution against defendant has been returned nulla bona, and he has worked them out or paid them after being committed, must be certified by the judge of the circuit court and by the attorney general, as under sections 7593, 7602, 7603, where costs are chargeable against the county in criminal cases.

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Suit by T. O. Musgrove and others against Hamilton county. Decree for complainants. Defendant appeals. Reversed.

W. H. Cummings, O. R. Evans, and R. B. Cooke, for appellant. Shepherd & Frierson and Snodgrass & Latimore, for appellees.

WILKES, J. The various complainants in this case are justices of the peace, constables, and deputy sheriffs of Hamilton county. They sue the county of Hamilton to recover from it certain fees and costs which they claim to have earned in the discharge of their official duties, and which they allege have been paid into the county treasury of

Hamilton county, either in money, or in work and labor done for the county, in accordance with the statutes of the state.

There was a demurrer to the bill, which was overruled, and the county has appealed.

The allegations of the bill are, in detail: That up to the September term, 1902, of the circuit court of the county, there was a fund of about \$4,000 in the treasury of the county belonging to complainants in unequal amounts, and held by the county in trust for them. That this fund arose in the following manner: Such of the complainants as are justices of the peace of the county had each issued warrants against persons guilty of offenses known and designated under the laws of the state as "small offenses." That such persons were arrested, brought before the justice of the peace issuing the warrant, and, having pleaded guilty, were fined a small amount, and adjudged liable for the costs accrued in the case. Failing to pay or secure the fine and costs so adjudged against them, they were sent to the jail or workhouse of the county, to be confined at labor until such fines and costs were worked out or paid. That the number of cases, the names of the defendants, and the amount of costs in each case, cannot be specifically stated, because the warrants upon which the cases were tried, and judgments indorsed showing these facts, are on file in the office of the county judge of the county, and are not accessible to complainants, but that the costs, and to whom payable, can be readily shown upon a reference to the master.

The bill alleges: That in each of the cases the defendants therein were lawfully charged with having committed a small offense, under the statutes. That they each pleaded guilty, or submitted their cases, and were fined, and a judgment was duly rendered against each. The costs were legally taxed and entered on the warrants, showing, in separate items, their character, and the officer and witnesses to whom going. That in all of the cases the defendants failing to pay or secure the fine and costs were committed to the workhouse to work out the same. That a number of these defendants, after they reached the jail or workhouse, paid to the county judge the fine and costs adjudged against them, which was covered into the county treasury. Others there gave bond and security, and the amounts were subsequently collected and paid into the county treasury. Others were carried to the workhouse, where they worked out, under the laws, for the benefit of the county, the fines and costs adjudged against them. That in all these cases complainants have made application to the county for payment to them, respectively, of the amount of costs due them and held by the county for them, but that, instead of paying the money to them, the papers in the cases were referred to the revenue commissioners of the county, who examined the costs taxed and adjudged in each

of said cases, and approved the same. That after this, in some way not authorized by law, the circuit judge and attorney general of the circuit and district embracing Hamilton county assumed to, and did, disapprove the costs in said cases to the amount of \$4,000. It is charged that this action of the judge and attorney general was without warrant of law, as neither had any power to pass upon the costs taxed in said cases and paid into the treasury by the parties against whom adjudged. That the county, having collected these costs from the defendants in the cases, and by virtue of the judgments against them, holds the fund so collected in trust for the complainants.

It is further alleged that since the September term, 1902, of the circuit court, and since the original bills of costs mentioned above were presented for payment, various other sums have accrued, and have become due to complainants, to about the same amount as those disapproved by the circuit judge and attorney general, and these they can also show upon a reference.

It is further alleged that the complainants join in this bill under an agreement with the county attorney that no objection would be taken to the bill because of the multiplicity or misjoinder of parties complainant, it being the desire of all parties to have the legal question involved settled with as little cost as possible.

The prayer of the bill is for an account to ascertain the amount due each complainant, and for a judgment for the same, and for general relief.

The bill was demurred to on several grounds, the only one of any substantial merit being that the bill shows that the costs sued for have been examined and disallowed by the judge and the attorney general of the circuit, and that their action is conclusive upon the county against the complainants' right to recover.

The case was decided in the court below and in the Court of Chancery Appeals upon this aspect of the case, and is presented and argued before this court upon the same feature. The chancellor held that it was not the province of the judge and attorney general to pass upon and disallow costs which had been adjudged against defendants who have submitted their cases and been fined before justices of the peace under the "small offense law"; and this cost, having been paid by the defendant to the county and covered into the treasury, belonged to complainants. The chancellor was of opinion that the right and power of the judge and attorney general to pass upon such bills of cost depended upon a construction of the statute (Shannon's Code, §§ 7593, 7602).

Section 7602 makes it the duty of the judge and attorney general to carefully examine all bills of cost certified for payment by justices of the peace in which the state or county has been charged with the costs of crim-

inal prosecutions, and if it shall appear in any manner that the prosecution in which the state or county has been taxed with the cost by the justice is frivolous, malicious, or commenced to secure fees, it shall be the duty of the judge and attorney general to disapprove and disallow said bill of cost, and no part of said cost shall be paid by the state or county in such case.

Section 7593 provides that the cost chargeable upon the state or county in criminal cases shall be made out so as to show the specific items, and be examined, entered of record, and certified to be correct by the court or judge before whom the cause was heard or disposed of, and also by the district attorney general, and they are granted full power, and it is made their duty, to examine into, inspect, and audit all bills of cost accruing against the state or county, and to disallow any part or all of said bills of cost as may be illegally or wrongfully taxed against the state or county.

Section 7594 provides for the auditing of bills of cost by the comptroller, chairman of the county court, or county judge, as the case may be, after said bills of cost have been examined and approved by the judge and attorney general; and this section provides that the comptroller, judge, or chairman of the county court may disallow any and all costs taxed against the state or county on account of malicious, frivolous, or unnecessary prosecutions, in the event the judge or attorney general should, by mistake or otherwise, approve such bills.

The chancellor was of opinion that these acts authorized the judge and attorney general to act upon and disapprove bills of cost certified by justices of the peace where the costs had been taxed against the state or county, but that the act contained no authority for the judge and attorney general to audit and reject bills of cost adjudged by justices of the peace against defendants who had paid the costs adjudged against them into the county treasury.

The Court of Chancery Appeals concurred in this opinion of the chancellor.

Counsel for the county insists that the power exercised by the judge and attorney general to examine and disallow these bills of cost is conferred by section 7601 of Shannon's Compilation, which is as follows: "In all cases the fees due to justice of the peace for any proceedings before him therein shall be certified to the circuit court and be taxed and certified by the court and attorney general as other costs, in the manner herein prescribed."

Section 7603 provides that the certificate of the justice trying a cause, that the prosecution is not frivolous, malicious, or set on foot to secure fees, shall not be conclusive on the judge or attorney general, but it is made their duty to inquire into them, and to disapprove bills of cost, if the prosecution is frivolous, malicious, or commenced to secure fees, as provided in section 7602.

Section 7604 is taken from the Alabama Code of 1852, and has special reference to what are denominated "small-offense cases," and provides as follows: "In all small offenses and all other cases triable before a justice and finally acted on by him the costs may be taxed by him and the execution issued against the defendant, or prosecutor, as the case may be, therefor."

Section 7605 provides that the costs due constables or other executive officers on proceedings in criminal cases before justices of the peace are certified and allowed in the manner prescribed in the last three sections in regard to similar fees due justices of the peace.

The argument of the county is that these sections of the statute, and especially 7601, are broad enough, and in their plain terms cover "small-offense cases" before justices, in which the costs are adjudged against defendants. They cite in support of their contention the case of *State v. Wilbur*, 101 Tenn. 211, 47 S. W. 411, and *Walker v. Henderson*, 101 Tenn. 213, 47 S. W. 411. In that case the clerk of the circuit court claimed certain costs. The county judge refused to audit the bills presented by the clerk, and the latter instituted proceedings by mandamus to compel him to do so. The particular items of costs in that case objected to by the county judge were a fee of 35 cents for entering bills of cost of record, and a fee of 25 cents for certifying bills of cost.

In that case it was said by the court as follows: "It should be remarked that the cases in which these fees are alleged to have accrued originated before justices of the peace, where defendants have either submitted their cases under the small-offense law, or upon examination have been discharged by the justice. In such cases, when the costs are not paid by the defendant, it is the duty of the justice to certify the same to the circuit court, where they are examined by the circuit judge and attorney general, and, if found correct, judgment allowing the same is entered upon the minutes of the court."

It is said that this holding is not conclusive in the present case, because the only question involved in it was the allowance to the clerk of the two fees of 35 and 25 cents; that no question was made as to whether the costs should have been certified to the circuit court for judgment, or whether they should have been certified by the judge and attorney general for payment, but that it was assumed that the costs were properly certified to the court for examination and approval by the judge and attorney general; that the language used was not to settle the question whether the costs should have been certified to the court at all, or not, but was used simply to summarize the state of the record, so as to present the question of the allowance of the two items. But it is evident that these items could not have been allowed if it was not necessary that the costs should be brought to and entered in the circuit court, and yet this court

passed upon them as though they were properly before the court, and disallowed them because they were illegal and not warranted by law.

We are of opinion that the determination of the question here involved depends upon a proper construction and application of the statutes (sections 7601, 7604, Shannon's Compilation), which are taken from sections 3986 and 3987 of the Code of Alabama of 1852, and they must be read and construed together, and in the light of other sections relating to costs before justices of the peace.

Under section 7604, it is clearly contemplated that, in all small-offense cases and cases finally acted upon by the justices of the peace, the costs may be taxed by the justice, and execution may be issued against the defendant or the prosecutor, as the case may be; but if these costs cannot be made by execution out of the defendant in cases where they are taxed against the defendant, then section 7601 provides that they shall be certified to the circuit court, and taxed and certified by the circuit court and attorney general as other costs, in the manner as herein prescribed. In other words, in small-offense cases the justices shall give costs against the defendant, and these costs shall be made by execution, if practicable, if not secured; and, if not paid or secured, then the defendant may be confined in the jail or workhouse until he shall pay the costs by his labor. If the justice and other officers entitled to these costs desire that they shall be paid by the county, they must be certified to the circuit court, and examined and approved by the judge and attorney general, and audited by the county judge, before they can be collected from the county.

It is true that when the county has received these costs, either in cash or in work done by the convict, it holds the fund for the benefit of the parties legitimately entitled to the costs, and for the payment of the fine that may be imposed; but these costs cannot be paid to the parties in whose favor they are taxed if the prosecution has been frivolous, malicious, or set on foot to secure fees, and, if such facts appear, then it follows that the justices and other officers and witnesses are not entitled to the fees, because they have been instrumental in illegally exacting them. But the county is in no sense a party to such illegal exaction, since it receives the convict under a judgment regular upon its face, and presumably just and correct.

The judgment of the justice, and his certificate that the prosecution is not frivolous, malicious, or set on foot to secure fees, is not conclusive on the judge or attorney general, but it is made their duty to inquire; and if the prosecution appear to them to be malicious, frivolous, or commenced to procure fees, it is their duty, under section 7603, to disapprove said bills of cost.

We cannot assume that the judge and attorney general will be arbitrary and unjust

in passing upon these bills of cost, and in rejecting them when they should be allowed. At any rate, the statute has imposed upon them the duty of examining and approving or disapproving the bills, and the county cannot be required to pay such bills over their disapproval. This construction makes a uniform and consistent system for the payment of all costs out of the state and county treasuries in felony cases. Judgment in the first instance is rendered against the convicted defendant. Upon this judgment, execution issues, and is collected from the defendant, if practicable. If the execution is returned nulla bona, the costs are then retaxed against the state, and are then paid by the state after being examined and approved by the judge and attorney general, and audited by the comptroller. A similar course is pursued in regard to costs chargeable upon the state and county in criminal cases under the provisions of section 7593 of Shannon's Compilation. And likewise the same course is pursued as to costs provided for under section 7602 of Shannon's Compilation.

The fundamental idea in all these cases being that no costs shall be drawn out of the county or state treasuries until they shall first have been properly taxed, and shall have been approved by the judge and the attorney general, and audited by the comptroller or county judge, as the case may be.

The provision of the several statutes providing for the disallowance of costs where prosecutions are frivolous, malicious, or commenced to procure fees, applies only to suits instituted before justices of the peace, and is intended by the statutes to give the circuit judge and district attorney general a supervision over all costs taxed by justices of the peace whenever it becomes necessary that they shall be paid out of the public treasury; and, under the provisions of section 7603, the certificate of the justice of the peace as to the good faith of the taxation is not conclusive upon the judge and district attorney general.

Of course, where the costs are paid by the defendant under the execution issued against him, or are secured by him before going to the workhouse, there is no necessity for its being certified to the circuit court, or approved by the judge and district attorney general, because, in the first place, it has already been paid; and, in the second place, it is not in such case payable out of the county treasury, and there is nothing for the judge and attorney general, or any other tribunal, to audit and approve or disapprove.

We think it is the clear intent of the statutes that officers and witnesses who have conspired together in a frivolous, malicious prosecution, for the purpose of making fees, shall not be entitled to these fees, even although, under their manipulations and illegal proceedings, the convicted defendant may unjustly have been required to pay them into the county treasury. They are in no sense

the legitimate property of such officials and witnesses.

We do not see that the provisions of the Jarvis law have any application whatever, or are involved in the determination of the questions at issue in this case.

The fact that the circuit judge and district attorney general have disapproved these bills of cost is prima facie, if not conclusive, evidence that the prosecutions were malicious, frivolous, and made for the purpose of securing fees, or that they are, for some other reason, not properly taxable against the county. If these officers arbitrarily reject proper costs, there is an adequate remedy against them.

It is evident that the statute contemplates that the bills of cost shall be acted upon before they are worked out, because they are required to be certified when taxed to the county judge and to the superintendent of the workhouse, in order that it may appear what is the extent of the defendant's punishment, and for what length of time he must be confined, or what amount of money he must pay in order to relieve himself of the judgment against him. Shannon's Code, § 7420.

We consider that this is conclusive of the controversy in this cause, and it follows that there is error in the decree of the chancellor and in that of the Court of Chancery Appeals; that the demurrer should have been sustained upon the ground and for the reasons indicated.

The decrees of the chancellor and the Court of Chancery Appeals are therefore reversed, and the bill of complainants is dismissed at their cost.

On Rehearing.

(Dec. 3, 1903.)

In this case there is a petition to rehear, based upon extracts from a published synopsis of the original opinion. These extracts present only a partial statement of what was decided, and omitted the clause which embodies the gist of the opinion. The opinion says: "The fundamental idea in all these cases is that no costs shall be drawn out of the state or county treasury until they shall have been first properly taxed, and shall have been approved by the judge and attorney general, and audited by the comptroller or county judge, as the case may be." The error of counsel for petitioners is in assuming that some costs which are to be paid out of the county treasury are what we style "certifiable," and some are not, whereas no costs are payable out of the public treasury either state or county unless they have been certified. Costs arising under sections 7601 and 7604, in what are styled small-offense cases, must be certified, as well as those arising under sections 7593, 7602, and other sections.

It is said in the petition that this holding assumes the whole point in issue. We do not understand that the court assumes the

point, but that it decides it upon a proper reading and construction of the statutes. It is said in the petition that under our holding the cost becomes payable by the county immediately upon the rendition of the judgment. We did not so hold and do not so understand the law. To epitomize our holding:

Under the law, the county judge is made the final auditor or tribunal to determine whether a bill of cost shall or shall not be paid out of the county treasury. When a bill of cost in a small-offense case is presented to him, for payment out of the county treasury, his first inquiry should be, has it been properly taxed by the justice against the defendant? Shannon's Code, § 7604. If it has been taxed against the prosecutor, it may not be retaxed against the county, even though it cannot be made by execution out of the prosecutor. *Morgan v. Pickard*, 86 Tenn. 208, 9 S. W. 690. The next inquiry of the county judge should be, Has execution been issued against the defendant on it, and returned nulla bona? Shannon's Code, § 7604. Subsection 5 of section 7619 does not apply to costs in small-offense cases. Next, has the bill of costs been presented to the judge and attorney general, accompanied with the certificate of the justice of the peace who tried the case that the prosecution has not frivolously, maliciously, set on foot, to procure fees? Shannon's Code, §§ 7601, 7602, 7603. Next, has it been approved by the judge and attorney general? Shannon's Code, § 7602. Next, have the costs been paid into the county treasury, either in cash, or in work of the convict? If all these prerequisites appear, and there is no other valid objection to the bill of costs, the county judge may order its payment out of the county treasury; otherwise not.

We cannot agree with counsel for the petitioners, nor with the concession of counsel for the county, that the costs became at once payable out of the county treasury (even though taxed, certified, and approved), before the county has realized the fund out of which to pay them. It is the purpose of the workhouse act, in addition to the punishment of confinement, and along with such confinement, to provide the funds to pay the costs of the prosecution. If the county fails to realize such fund because of escapes or deaths, or other causes, then it has no funds properly applicable to the payment of such costs, and cannot be required to pay them. They are charges against the county, but to be paid out of the funds realized from the defendant, and not otherwise. It is proper to add that the certification of bills of cost for payment is not to be confused with the certified statement of sentence required, under section 7420, to be furnished, one to the county judge, and one to the superintendent of the workhouse.

There are several collateral questions presented in both the original briefs and in the petition to rehear, which we do not consider

material, as we base our holding upon the proper construction and plain meaning of the statutes themselves. We are thoroughly satisfied that this holding is wise in policy, just in reason, correct in principle, and sound in law, and we affirm it unanimously; at the same time expressing our appreciation of the ability and ingenuity of counsel for the petitioners. The petition is dismissed.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

LOCAL OPTION LAW—VIOLATION BY PHYSICIAN—PROOF OF SALE—NECESSITY.

1. In order to hold a physician liable for a violation of the local option law, there must be an illegal sale, brought about by virtue of his act; and giving a prescription alone will not justify a conviction.

Appeal from Smith County Court; S. A. Lindsey, Judge.

Dr. J. W. Williams was convicted of a violation of the local option law, and appeals. Reversed.

N. A. Gentry, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was indicted and convicted as a physician for giving an illegal prescription for intoxicating liquor in a local option territory, and his punishment assessed at a fine of \$25 and imprisonment in the county jail for 20 days. The indictment is a reproduction of that in *Stephens v. State*, 73 S. W. 1056, 7 Tex. Ct. Rep. 970. We there held that the physician could not be subjected to punishment for simply giving a prescription. In order to hold a physician responsible under the local option law, there must be an illegal sale, brought about by virtue of his act. For a discussion of the matter, see *Stephens' Case*, supra.

The judgment is accordingly reversed, and the prosecution ordered dismissed.

PARKER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION—CRIMINAL PROSECUTIONS—JURORS—COMPETENCY—OPINIONS—VARIANCE.

1. Where, in a prosecution for violating the local option law, there was evidence that several persons went to defendant, who was a distiller, to purchase a cask of whisky which he agreed to sell them on a United States internal revenue certificate, and, the purchasers having trouble in raising the money, M. finally agreed to take part of the whisky, and paid the defendant \$6.25 therefor, and the other purchasers finally succeeded the next day in raising the balance of the money, when the cask was carried to a particular place, and the whisky divided, M. receiving his share, there was no variance between such proof and the information alleging that M. was the purchaser.

2. Where, in a prosecution for violating a local option law, a juror stated that he had formed an opinion as to defendant's guilt, and that it would take evidence to remove such opinion, but the source of his opinion did not appear, and he answered that, notwithstanding such opinion, he could and would give defendant a fair trial, and render an impartial verdict on the law and evidence, it was not error to overrule a challenge for cause.

Davidson, P. J., dissenting.

Appeal from Titus County Court; P. H. Rogers, Judge.

D. W. Parker was convicted of violating the local option law, and he appeals. Affirmed.

Etheridge & Baker and Ralston & Ward, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. They have local option in Titus county, and appellant had a distillery in said county. In one end of his house was the distillery, and in the other a warehouse presided over by a storekeeper placed there by the United States government. The whisky was run into the storeroom, and, after going through a refining process, was placed by this storekeeper in casks. For each of these casks a certificate was issued to appellant, which certificate called for a cask of whisky corresponding to the number mentioned in the certificate. Upon presentation of this certificate, together with evidence of payment of United States internal revenue tax, the holder of the certificate would receive the cask of whisky. Louis Miller, the alleged purchaser, with Wigginton and several others, bought one of these certificates from appellant under the following circumstances: Miller desired to purchase two gallons of whisky. Appellant refused to sell him whisky under any sort of consideration. But it was finally agreed between them that, if sufficient amount of money was gotten together to pay the United States revenue tax—which was \$1.10 per gallon, the casks containing 10 gallons of whisky—that he (appellant) would transfer, for the further sum paid of \$14, a certificate which would call for the delivery of a 10-gallon cask of whisky as soon as evidence of the payment of the United States tax was produced. Appellant, Wigginton, and others agreed to take the 10 gallons, and to this end undertook to raise \$25; \$11 to go to the United States government, and \$14 to appellant. Miller, the alleged purchaser, and Wigginton met appellant at his residence after supper. There was some trouble in raising the money, and Miller finally agreed to take $2\frac{1}{2}$ gallons of the whisky, and paid \$6.25 to appellant on this nocturnal visit. Wigginton paid the remainder, less \$2.50, and the next morning made up the \$2.50, and delivered that to appellant. Money was sent to Dallas, the internal revenue tax paid, the receipt returned to the warehouseman, the certificate was transferred by appellant to the parties, and Wigginton secured the cask, car-

ried it to an appointed place, where the whisky was divided between the purchasers; Miller receiving his $2\frac{1}{2}$ gallons. It is contended there is a variance between the allegations in the information and the evidence, to wit, that Miller was purchaser, and the proof; that is, the sale should have been alleged to all the parties purchasing, and not to one of them. Under the circumstances stated, we are of opinion there was no variance, and that Miller was the purchaser of the $2\frac{1}{2}$ gallons.

Error is assigned upon the action of the court impaneling the juror Wilhite. The bill of exceptions shows affirmatively that appellant had exhausted his challenges, and Wilhite sat on the jury over his objections, the court refusing to sustain his challenge for cause. The circumstances attending the examination of the juror were as follows: He was asked if from hearsay or otherwise he had formed an opinion as to the guilt or innocence of defendant, and answered that he had formed such opinion. He was then asked if that opinion was such as would require evidence to remove it. He answered this in the affirmative. He was then asked if he would go into the jury box with that opinion if he was selected on the jury, and he stated he would. On cross-examination by the state he said he could give defendant a fair and impartial trial if he was selected on the jury. He was then asked if that opinion was such as would influence his action in rendering a verdict. He said it would not. On redirect examination he stated it would take evidence to remove the opinion that he had, and that the opinion was as to the guilt or innocence of the defendant. He was then asked if he did not vote the prohibition ticket at the recent election. He answered that he did. Cause for challenge was interposed and overruled. Appellant had exhausted his challenges, and the juror sat on the trial. The court did not err in refusing to set aside the juror. It is true, he had formed an opinion; but the bill does not show whether this opinion was formed from hearsay or from talking with the witnesses. If it was from hearsay or reading newspaper reports, the mere fact that he had an opinion would not per se disqualify him. It must be such an opinion as would influence him in finding a verdict. In order to disqualify a juror on account of conclusion as to the guilt or innocence of defendant, as provided in subdivision 13, art. 673, Code Cr. Proc., "such conclusion must be established," and the ultimatum of the matter is, can the juror give a fair and impartial verdict upon the law and facts? If so, he is competent; if not, he is incompetent. To disqualify a juror on account of a conclusion in his mind as to the guilt or innocence of the accused, the conclusion must be such as is not only "established," but such "as will influence him in finding his verdict." In commenting upon this question in *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458, the following language was used: "The juror does not disclose the facts that influenced him in forming

¶ 1 See *Jury*, vol. 21, Cent. Dig. §§ 463, 465.

his opinion. It is manifest he did not receive his information from the witnesses, because he did not talk with them about the case. He met defendant several times, but does not state whether he discussed the facts with him. If he did, the opinion may have been favorable to defendant. Upon this, however, the record is silent. The juror swore that he could render a fair and impartial verdict upon the law and the evidence. The mere fact that the juror has established in his mind a conclusion of guilt or innocence of the party on trial is not a sufficient cause for disqualification." In *Adams v. State*, 35 Tex. Cr. R. 295, 33 S. W. 355, it was said: "That the answers of said jurors, in connection with the qualification of the court to the bill of exceptions, shows that those of said jurors who had formed any opinion in the case had done so not from having heard any witness state the facts, but from rumor and hearsay; and they further declare that, notwithstanding any opinion then entertained as to the guilt or innocence of appellant, they could give appellant a fair and impartial trial on the evidence in the case." See, also, *Keaton v. State*, 41 Tex. Cr. R. 621, 57 S. W. 1125; *Johnson v. State*, 21 Tex. App. 368, 17 S. W. 252; *Kennedy v. State*, 19 Tex. App. 629; *Post v. State*, 10 Tex. App. 591. The bill of exceptions in this case does not show from what sources the juror received his information upon which his conclusions were formed; but states that, notwithstanding said conclusion as to the guilt or innocence of defendant, he could give defendant a fair and impartial trial, and would do so if selected on the jury. We do not understand that because the juror may not change a pre-existing opinion until he hears something would per se disqualify him. If so, then the fact that he had an opinion at all would disqualify him, because no rational mind could change an opinion without hearing something converse to that opinion, or having something brought to bear upon his mind changing that opinion. In other words, an opinion per se is not a disqualification. If the juror can give defendant a fair and impartial trial, as required by the Constitution of this state, he is a qualified juror; and a pre-existing opinion that will not influence his action in returning a verdict is not a disqualification. So to hold would be placing a premium upon ignorance and a disqualification upon intelligence. In our opinion, the court did not err in holding that the juror was qualified.

The judgment is affirmed.

DAVIDSON, P. J. (dissenting). I cannot agree in the conclusions of my Brethren affirming this case. The bill of exceptions renders it certain that it would require evidence to overcome the conclusion in the juror's mind of the guilt or innocence of appellant. I am of opinion that the Bill of Rights is superior to the statute, and it guarantees the accused

"a trial by an impartial jury." This juror was partial if his answers are to be taken as the criterion of his mental status. Certainly he was not "impartial." He was not in a condition to give appellant the benefit of the presumption of innocence and reasonable doubt as the law and his oath required he should. Both of these legal propositions were concluded in his mind, and he declared it would take evidence to change that conclusion. His oath required him to try the case on the facts adduced on the trial, giving defendant the benefit of the presumption of innocence and reasonable doubt. Yet he states it would take testimony to change his already formed conclusion before hearing the facts. *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458, is quoted. That opinion was written by the writer. The juror in that case stated he had an opinion which it would require evidence to remove if the evidence was the same on the trial as he had heard it was; and, if it was the same on the trial as he had heard, it would influence him. The bill in that case left the matter in that condition. Nothing is shown as to whether the facts on the trial were the same as he had heard they were. If the bill of exceptions in that case had shown the evidence introduced upon the trial was the same as that which had produced the conclusion in his mind, it occurs to me that the ruling would have been different. Be that as it may, the bill of exceptions in that case fails to show this court, and it may have failed to enlighten the court below, as to the similarity of the facts which produced the impression upon the juror's mind with those adduced upon the trial. This case is totally unlike that. Here the juror had his mind concluded, and there was no qualification or contingency about it, and it was so fixed that it would take evidence to remove that conclusion. The right to the "impartial" jury is guaranteed by the Bill of Rights, and neither legislative action nor judicial construction can change a partial juror into one that is "impartial." When the mind of the juror is made up beforehand, it is absolutely immaterial whence the reasons or causes therefor, or what induced that conclusion—he is disqualified. The sources of information may be looked to in order to test the mental status of the juror under such circumstances, but it does not change the fact of partiality, if once that conclusion has been fixed—that is, established—in the mind of the juror. That conclusion, if established, is just as disqualifying when made up from reports, rumors, and newspapers as on the facts, provided the conclusion is established to the extent of requiring evidence to remove it. It is wholly immaterial how or why that conclusion becomes established. If it be established, the matter is settled, and neither the Legislature nor the court can constitute the juror "impartial." I believe the judgment should be reversed, and therefore I dissent.

MANOR v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

CRIMINAL LAW—INDICTMENT OF SEVERAL—SAME CRIME—ORDER OF TRIAL—DISMISSAL OF INDICTMENT.

1. Code Cr. Proc. art. 707, declares that, where parties are indicted for offenses growing out of the same transaction, either may file an affidavit that the evidence of the other party is material to his defense, and that he believes there is not sufficient evidence to convict him, in which case such person shall be first tried. A defendant having made an affidavit under the statute, an order was made that the other defendant be first tried, but a motion of the district attorney to dismiss as to such other defendant was granted on the ground that his testimony might be of weight on the trial of affiant in establishing whether it would be necessary to prosecute such other defendant. On the trial of affiant the other defendant refused to testify on the ground that it might incriminate him. *Held*, that the court's action in dismissing as to the other defendant, and not requiring him to be first tried, was error, as it deprived affiant of the right guaranteed by the statute to have the party tried, that he might not be deprived of his testimony.

Appeal from District Court, Travis County; George Calhoun, Judge.

Jim Manor was convicted of murder in the first degree, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the first degree, and his punishment assessed at death.

Appellant, Whitfield Jackson, and Sarah Cain were jointly indicted for the murder of R. Cain, Sarah's husband. When the case was called for trial, the state announced "Ready." Sarah Cain presented an affidavit for severance, and asked that Whitfield Jackson be first placed upon trial. This was granted. Thereupon appellant presented his affidavit, asking for severance, and that Whitfield Jackson and Sarah Cain both be first tried. This was granted. The case of Whitfield Jackson was called, and the district attorney made a verbal request of the court for time in which to talk with the witnesses. The case was postponed until after the noon recess. When the court convened, the attorneys announced "Ready" in Whitfield Jackson's case. The district attorney then presented a motion to dismiss as to Whitfield Jackson and Sarah Cain. The motion to dismiss is as follows: " * * * Sarah Cain has filed an affidavit that the testimony of Whitfield Jackson is material to her defense, and Jim Manor has filed an affidavit that the testimony of both Sarah Cain and Whitfield Jackson is material to his defense. Jim Manor has confessed to the act of killing of Cain, and the trial of said Manor is unquestionably demanded by the facts; and it may be that the testimony of Jackson and Cain in the trial of Manor may have great

weight in establishing whether it will be necessary to further prosecute them. Wherefore it is deemed in the interest of public justice and expense to dismiss this case as to Whitfield Jackson and Sarah Cain, and said dismissal is prayed." This was granted. Application for continuance was made on account of these matters, and for the testimony of Whitfield Jackson and Sarah Cain. The application was overruled. It is also shown in the bill of exceptions that during the noon recess the district attorney had J. M. Fox make affidavit against Whitfield Jackson and Sarah Cain, charging them with same murder, before Justice of the Peace Johnson, and, upon dismissal of the indictment against them, they were immediately arrested under the warrants and placed in the county jail. These complaints were made before filing the motion to dismiss. In qualification of the bill, it is stated: "The court ruled, and so informed defendant and his attorney, that by the dismissal of the case against Jackson and Cain said Jackson and Cain became competent witnesses for defendant Manor, and that, even if they had been rearrested, they were still competent witnesses for defendant Manor; and defendant Manor was during the trial of the cause, without objection, allowed to put both Cain and Jackson on the stand as witnesses in his behalf." The qualification of the bill of exceptions refusing the continuance is practically the same as the foregoing, with this addition: "Defendant Jim Manor afterwards introduced both of said witnesses in his behalf, without objection, but both witnesses refused to testify on the grounds that they might incriminate themselves." Article 707, Code Cr. Proc., provides, substantially, that, where parties are jointly or severally indicted for offenses growing out of the same transaction, they may sever, and direct the order of trial, under the circumstances mentioned in the article. These severances were sought under that article, and proper orders entered. This entitled appellant to have the cases of Jackson and Cain first tried. To avoid this, and for the purpose, as stated in the motion to dismiss, the district attorney obtained the permission of the court to dismiss the case against these two parties, by virtue of the indictment, and assigned his reason as above stated, to wit, "that he had the confession of appellant, and that his trial was unquestionably demanded by the facts, and it might be that the testimony of Jackson and Cain in behalf of Manor would have great weight in establishing whether it was necessary to prosecute them." It occurs to us that the reasons assigned by the district attorney for the dismissal are reasons why the dismissal should have been refused. Clearly, under the statute, it was the right of appellant to have these parties first tried, so he might use their evidence in case of an acquittal. Usually, with the consent of the court, the district attorney

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1382.

may dismiss pending indictments; and, so far as the parties themselves are concerned whose cases are dismissed, no objection can be urged by them. This is not a question of right accruing to the parties whose cases are dismissed, and whose testimony is sought by the severance. It was appellant's right to have them tried first, to obtain their testimony. It was and is his rights that are involved, and for his benefit the statute was enacted. In the Brown Case (Tex. Cr. App.) 58 S. W. 131, Sharpe's case was dismissed by the district attorney to avoid the severance, and Brown placed upon trial. Pending the trial, Sharpe's case was dismissed from the docket, leaving him untrammelled; and it would seem from the opinion that an agreement or promise had been made by the district attorney with Sharpe to dismiss his case if he would testify truthfully. But in any event he testified, and the accused had his testimony before the jury. He did not decline to testify, as did the witnesses in this case. These matters had the effect of depriving appellant of his right of severance and of the testimony of the witnesses. They refused, under the circumstances, to testify. If they had been tried and acquitted, they would then have been competent witnesses. Appellant would have had the benefit of their evidence. As it is, their testimony was not before the jury, and the very object of the statute was defeated. Without going into a discussion as to the effect of the statute with reference to dismissal of cases by the district attorney, and the statute which rejects the testimony, in behalf of a party on trial, of his confederates, whether accomplices, principals, or accessories, we hold in this case that, under the circumstances, appellant was deprived of a legal right guaranteed by the statute, and that he had a right, under the circumstances, to have the parties tried, and he could not be deprived of their testimony in the manner in which it was done. Whitfield Jackson and Sarah Cain could not be required to testify if their testimony tended to incriminate them in any way in the transaction. That the state may dismiss cases against a party is not denied, nor is it discussed here; but, under the facts of this case, appellant was deprived of the testimony of the codefendants. He was entitled to it.

The judgment is reversed, and the cause remanded.

BELL, alias JOHNSON, v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

ASSAULT WITH INTENT TO MURDER—SUFFICIENCY OF EVIDENCE.

1. Evidence that defendant, who had been drinking, met B. and E. on the sidewalk, ran into B., and, on B.'s pushing him away, began cutting E. with a razor, inflicting serious wounds, whereupon they proceeded against him

with a knife and umbrella, justifies a conviction of assault with intent to murder.

Appeal from District Court, McLennan, County; J. E. Yantis, Special Judge.

Will Bell, alias Bill Johnson, was convicted of assault with intent to murder, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant, who was convicted of assault to murder, urges the want of sufficient evidence to justify the conviction. He was drinking. While walking along the sidewalk, he met Brock and Bennett, and ran against Brock, who pushed him away, asking what he meant. Appellant immediately began cutting Bennett with a razor, inflicting one or more serious wounds, which confined Bennett to his bed for about six weeks. When appellant began cutting Bennett, Brock drew his knife, and went to the rescue, inflicting one or more wounds upon appellant, which kept him indoors for about five weeks. Meanwhile Bennett struck appellant with his umbrella. Appellant testified, he accidentally ran against Brock, when Brock set upon him with his knife, and Bennett with his umbrella, and he thereupon drew and used his weapon. The issue was sharply presented, and the jury settled the matter by crediting the state's testimony, which is sufficient to support the conviction.

The judgment is affirmed.

STEPP v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

AGGRAVATED ASSAULT—FORMER JEOPARDY—JUDGMENT—INFORMATION—LOSS—FILING NEW INFORMATION—SERVICE ON DEFENDANT.

1. When a criminal prosecution was called for trial, the county attorney filed his affidavit, averring the loss of the information, and filed a new one, without making any attempt at substitution, whereupon defendant claimed the statutory two days' service, which was refused. Held, that the filing of such new information made the case a new one, and entitled defendant to the time demanded.

2. Where defendant and his brother on the morning after the difficulty appeared before a justice of the peace, and defendant's brother filed a complaint charging defendant and the assaulted party with having engaged in an affray, to which defendant pleaded guilty, and was fined \$1, the judgment imposing such fine was not sufficient to support a plea of jeopardy in a subsequent prosecution for aggravated assault.

Appeal from Walker County Court; Jno. C. Williams, Judge.

J. B. Stepp was convicted of aggravated assault, and he appeals. Reversed.

Dean, Humphrey & Powell, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1405.

DAVIDSON, P. J. This conviction was for aggravated assault.

When the case was called for trial, appellant filed his first application for continuance, which was refused. The county attorney then filed his affidavit, stating the loss of the information. There was no attempt at substitution. He simply made affidavit of the loss of the original information, and filed a new one. Appellant claimed two days' service, under the statute, in which to prepare his defense and written pleadings. This was refused, and exception reserved. The court committed error. The filing of the new information made the case a new one. *Turner v. State*, 21 Tex. App. 198, 18 S. W. 96; *McKinney v. State*, 41 Tex. Cr. R. 413, 55 S. W. 337.

The law of self-defense should be fully submitted to the jury upon another trial. If defendant's theory is correct, he was acting in self-defense, and the issues raised by that phase of the testimony ought to be fully submitted to the jury.

Under our decisions, there is no merit in the plea of jeopardy. Appellant and his brother called upon the justice of the peace on the morning after the difficulty the previous night, and his brother filed a complaint charging appellant and Harrington with having engaged in an affray; and to this appellant pleaded guilty, and was fined \$1. This was pleaded in bar of the prosecution for aggravated assault. Under our decisions, the court was correct in not sustaining this as a plea in bar of the prosecution for aggravated assault.

The questions presented by the application for continuance are not discussed, as they will not arise upon another trial.

For the error discussed, the judgment is reversed, and the cause remanded.

MONTGOMERY v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

MANSLAUGHTER — ADMISSIBILITY OF EVIDENCE—INSTRUCTIONS—DUTY TO RETREAT.

1. In a prosecution for manslaughter, it is not ground for reversal that the state was permitted to ask defendant whether he did not know that it was a violation of law for him to fire off his pistol on the public road just before decedent's attempt to arrest him, over an objection that the question called for a conclusion of law; the witness answering that he did not think it was wrong, there being no one to be disturbed.

2. In a prosecution for manslaughter, where, in order to justify his going armed, defendant has offered proof of the lawless state of society at the place where the homicide occurred, and that his brother had been shot there, it is not error to permit cross-examination by the state as to the particular character of lawlessness in that community, and to show that the brother was shot in the daytime, and not under conditions similar to those surrounding defendant at the time of the homicide.

3. If such cross-examination was error, it was harmless.

4. In a prosecution for manslaughter, the court is not under obligation to define the term "force," in charging that decedent's attempted arrest of defendant was illegal, and that defendant had the right to resist the same, and to use all force reasonably necessary, from his standpoint, therefore, and that, if he used no more force than was reasonably necessary, he would be justified in slaying decedent, but, if he did use more force than was reasonably necessary, from his standpoint, his mind being excited by the attempted arrest, he would be guilty of manslaughter.

5. Pen. Code 1901, art. 678, provides that the party whose person or property is unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. In a prosecution for homicide committed in resisting an unlawful arrest, the court instructed that defendant had a right to resist the arrest, and to use all force necessary to prevent it and to release himself, and that he could only be convicted of manslaughter in case he used more force than was necessary. *Held*, that it was unnecessary to further instruct that defendant was not bound to retreat.

Davidson, P. J., dissenting.

Appeal from District Court, Brazos County; J. C. Scott, Judge.

A. H. Montgomery was convicted of manslaughter, and appeals. Affirmed.

Doremus & Butler, M. J. R. Jackson, D. M. Doyle, and W. W. Meachum, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

While appellant was on the stand as a witness in his own behalf, the state, on cross-examination, asked him: "Did you not know that it was a violation of law to fire off your pistol in a public road on the night of the homicide, at the time you fired it in the air, just before Joe Hall attempted to arrest you?" This was objected to because the question was calculated to elicit a conclusion of law, instead of the facts connected with the firing of the pistol. The witness answered as follows: "I did not think it was wrong to fire off my pistol at night after the meeting was over, and there was no one to be disturbed." It does not occur to us that the opinion contained in the answer of the witness, that he did not think it was wrong to fire off the pistol, etc., was calculated to prejudice him. Moreover, we do not understand this character of testimony to be objected to because it was in itself illegal, but simply because the question would tend to elicit appellant's opinion on a matter of law. So far as appears, appellant was carrying his pistol in violation of law, and he is to be presumed to have had a knowledge of that—much more, that he was not authorized to be firing a weapon, on a public road, that he was not authorized to carry. There was no error in the admission of this testimony.

If it was admissible as a part of appellant's defense to show a lawless state of so-

clety over at Bedias, where the homicide occurred, in order to justify his going armed, and to apprehend danger when deceased undertook to arrest him, then the state had the right to cross-examine the witness as to the particular character of lawlessness in that community; and if appellant proved by the witness, as a circumstance showing the lawless condition of society there, that his brother had been shot, the state was authorized, on the cross-examination of this witness, to show the circumstances under which the shooting occurred; that is, that it occurred in the daytime, and not under conditions similar to those surrounding appellant at the time this homicide was committed. But concede that the character of testimony was error; it was not calculated to injure appellant.

Appellant objected to the court's charge in which he, in effect, instructed the jury that the arrest of appellant by deceased, or his attempted arrest, was illegal; that appellant had a right to resist the same, and to use all force reasonably necessary, from his standpoint, to resist the arrest or attempted arrest, or to release himself therefrom; and that if he used no more force than was reasonably necessary to prevent the arrest, or to release himself from such illegal arrest, he would be justified in slaying deceased, but if he used more force than was reasonably necessary, from his standpoint, in resisting the attempted arrest, or in releasing himself from an arrest, and his mind became excited by such arrest or attempted arrest, and he was rendered incapable of cool reflection on that account, and under such circumstances he slew deceased, he would be guilty of manslaughter. The objection to the court's charge on this subject, both in the charge on manslaughter and in the charge on self-defense, is that the court failed to define "force," or the nature and character of the force which appellant could use. And in this connection appellant requested a charge on this subject which he claims would have cured the defect. We have examined the requested charge, and it does not occur to us that it attempts to give or does give any better definition of "force" than the court employed. We know of no authority requiring the court, under such circumstances, to give a definition of "force"; it being considered sufficient for the court to instruct the jury as to this matter that appellant was authorized to use all force reasonably necessary to protect himself from an illegal arrest, or to release himself from such illegal arrest, as from his standpoint he believed necessary, leaving the question of fact to be determined by the jury, which they are to decide from all the circumstances surrounding the parties at the time.

Appellant contends that the court erred in failing to charge on the doctrine of retreat; that is, that appellant was not bound to retreat in order to avoid the necessity of kill-

ing his assailant. We understand it is well settled that, in every case where the facts involve the question of retreat, it is the duty of the court to instruct the jury on this subject. For authorities, see White's Ann. Pen. Code 1901, § 1168. However, it is held, where the facts and issues made do not require such a charge, it is not error for the court to fail to instruct the jury, under article 678, Pen. Code 1901. Hunt v. State, 33 Tex. Cr. R. 252, 26 S. W. 206; Smith v. State, 33 Tex. Cr. R. 513, 27 S. W. 137. In this case we have examined the record carefully. The facts show substantially that appellant and two companions were returning in the nighttime from a debating society at Bedias Schoolhouse to their home, and, about 200 yards from the schoolhouse, appellant pulled his pistol and fired it. Deceased, who was the constable of that precinct, heard the firing, and followed the parties. He came up with them, and put his hand on appellant, and told him he arrested him. The parties were strangers to each other; appellant not knowing the official capacity of deceased, and deceased not announcing his official capacity or producing any writ. Appellant told him to turn him loose. He immediately drew his pistol and commenced firing at him. He shot at him three or four times, one of which took effect, mortally wounding deceased. The court instructed the jury, as has been before seen, that the arrest was illegal, and appellant had a right to resist it, and further instructed them that he had a right to use all force necessary to overcome resistance in order to prevent the attempted arrest, or in order to release himself from the illegal arrest, and that appellant could only be convicted of manslaughter in case he used more force than, from his standpoint, was reasonably necessary to prevent the arrest or release himself from the arrest. It occurs to us that this presented the issue to the jury in as favorable light for defendant as he could ask. There was no suggestion in the charge that appellant was required to resort to any other means in order to avoid slaying his adversary; but the charge pointedly authorized him to stand on his right to resist the arrest, or to release himself from the arrest, and to use whatever force, from his standpoint, was reasonably necessary in order to prevent the arrest or to accomplish his release. If the court had given a general charge on self-defense, or had in any manner suggested in the charge given that resort must be had to other means before killing, then the charge that he is not bound to retreat would have become necessary, or if there was any peculiar condition in the facts that appellant might have avoided the difficulty by retreating, such a charge would have been necessary. But here the court directly instructed the jury that appellant was unlawfully assailed, and that he then and there was authorized to use any force that was necessary to overcome his

adversary, and free himself from the attempted arrest, or arrest, as the case might be, and, as we view the question, this charge adequately presented the issue in the case, and it did not become necessary for the court to instruct the jury that appellant was not bound to retreat, because, in our opinion, the charge of the court which told the jury that appellant could resist and overcome force with force, that was being used on him, was tantamount to telling the jury that appellant was not bound to retreat or to resort to any other means before he was authorized to use force, which the court told the jury he could use under the circumstances. In our view of the case, there was no error in the failure of the court to give a charge on the doctrine of retreat, under article 678, Pen. Code 1901.

There being no error in the record, the judgment is affirmed.

DAVIDSON, P. J., dissents.

KUSH v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

THEFT—INDICTMENT—OWNERSHIP—POSSESSION OF SERVANT—ARTICLES STOLEN—PROOF—NUMBER AND VALUE.

1. In a prosecution for theft, an indictment charging the stolen property to be the property of a servant of the actual owner, such servant being in possession, was sufficient.

2. Where, in a prosecution for theft of railroad tickets, the tickets were charged to be the property of an agent of the railroad company in possession, it was not necessary that the indictment should also allege that the tickets were in the physical custody of another, who was a mere servant of such agent.

3. In a prosecution for theft of railroad tickets the state was not bound to prove the exact number or value of the tickets stolen as alleged in the indictment.

Appeal from Polk County Court; A. B. Green, Judge.

Charles Kush was convicted of theft, and he appeals. Affirmed.

F. Campbell, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft of property under the value of \$50, and his punishment assessed at a fine of \$1 and 10 days' confinement in the county jail.

The Assistant Attorney General moves to dismiss the appeal on account of an alleged defective recognizance. In our opinion, the recognizance is in accord with article 887, Code Cr. Proc. 1895. The property appellant is charged with stealing was six railroad tickets, of the value of five cents each, the same being the corporeal personal property of J. F. Burton. The undisputed proof shows that the alleged stolen tickets were the property of the Houston, East & West Texas Railway

Company; but the evidence establishes the fact that J. F. Burton had the actual care, management, and control of said tickets as agent of said company. Under this state of facts it was proper for the indictment to allege the tickets to be the property of J. F. Burton. *Bailey v. State*, 18 Tex. App. 426; *Frazier v. State*, Id. 434; *Littleton v. State*, 20 Tex. App. 168.

Appellant further insists that Pickard had the management and control of said tickets. The evidence shows Pickard was the mere servant and temporary employé of Burton. Under this state of facts it would not be necessary for the indictment to allege the possession in Pickard. *Emmerson v. State*, 33 Tex. Cr. R. 89, 25 S. W. 239; *Graves v. State* (Tex. Cr. App.) 42 S. W. 300.

Appellant further contends there is a variance between the allegations in the indictment and the proof in this: that the indictment alleges "six tickets of the value of five cents each," whereas the proof only shows five tickets were taken of the value of one-fourth of a cent each. This is not a variance. The state is not bound to prove the exact number or value of the articles alleged in the indictment, but may prove a less number or a less value.

No error appearing in the record, the judgment is affirmed.

McMILLAN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

HIGHWAYS—OBSTRUCTION—CRIMINAL PROSECUTION—EVIDENCE.

1. In a prosecution for willfully obstructing a public road, evidence reviewed, and held insufficient to sustain a conviction.

Appeal from Liberty County Court; M. D. Rayburn, Judge.

John McMillan was convicted of obstructing a public road, and he appeals. Reversed.

E. T. Branch, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of willfully obstructing a public road, and his punishment assessed at a fine of \$100.

Upon the trial, appellant testified substantially as follows: "On or about February 15, 1902, I erected a fence, as described, across my land, which fence entirely kept people from passing along the north side of the right of way of the railroad. I put the fence on my land. I did not obstruct the Liberty and Beaumont Road. The railroad company moved out their fence fifty feet, and the telegraph company took eleven feet more, and that entirely obstructed the Liberty and Beaumont Road; and I merely put a fence on my land, as I believed I had a perfect right to do. When I bought my land, my vendors told me that the railroad right of way fence was the north line of their right of way, and

that was fifty feet from the tracks. My land is on both sides of the railroad. I did not intend to violate the law. I bought this land seven or eight years ago, and at that time the railroad right of way fence was fifty feet from their track. Now at this point it is one hundred and eleven feet from their track. The Liberty and Beaumont Road runs parallel with their track on the north side of their right of way, and the public traveled close to the right of way fence. The public had not traveled at the point where I fenced my land before the right of way fence was moved. It was grown up and covered with grass, and there was no road where I fenced my land. The county did not condemn my land, nor pay me anything for it. No hands have ever worked where I built the fence across my land." This testimony is not controverted in any substantial way. It fails to show that any public road was obstructed by defendant, but that, if any such route was obstructed, the obstruction was placed there by the railroad company. In our opinion, the evidence is not sufficient to support the conviction. We do not deem it necessary to discuss many of the questions raised by appellant, in view of the disposition we make of this case. However, most of the questions so raised by appellant were passed upon by us in *Dyerle v. State*, 68 S. W. 174, 5 Tex. Ct. Rep. 380, and *Hatfield v. State*, 67 S. W. 110, 4 Tex. Ct. Rep. 445.

Because the evidence is not sufficient to support the verdict, the judgment is reversed, and the cause remanded.

STEWART v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

CRIMINAL LAW—LARCENY—INSTRUCTIONS—APPEAL—ESCAPE.

1. A motion to dismiss an appeal by one convicted of crime on the ground of his escape from jail will be denied where it appears that he is allowed to leave the jail on account of its unhealthful condition, and he has made no attempt to escape from the sheriff's custody.

2. A charge in effect authorizing a conviction for larceny on unexplained recent possession alone is on the weight of evidence, and erroneous.

3. A charge on circumstantial evidence should be given in a larceny case which depends on circumstantial evidence as to the original taking.

4. A charge on insanity in a criminal case in which it is pleaded in defense should not be in the abstract, but should be applied to the particular case on trial.

Appeal from District Court, Stonewall County; H. R. Jones, Judge.

Wash Stewart was convicted of larceny, and appeals. Reversed.

Woodruff & Scott, for appellant. Cullen C. Higgins, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of a horse, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

The Assistant Attorney General has filed a motion to dismiss this appeal on the ground of an alleged escape of appellant from the jail of Stonewall county since conviction and pending his appeal. There are affidavits pro and con on the subject. We gather from them that the sheriff of Stonewall county did not closely confine appellant in the jail, but permitted him to go at large about the town, requiring him for a while to sleep at the jail, and afterwards permitted him to sleep at his house. In other words, at the sheriff's instance, on account of the unhealthful condition of the jail, he assumed a personal custody of appellant, and treated him as a trusty. There is no evidence that appellant at any time attempted to run away or to escape from the custody of the sheriff. The motion to dismiss the appeal is accordingly overruled.

Appellant complains of the court's charge on recent possession, urging that it is a charge on the weight of evidence. The charge on this subject was as follows: "If you believe from the evidence that the property alleged in the indictment to have been stolen, if stolen, was recently thereafter found in the possession of the defendant, and that the circumstances connected with his possession, when first called upon, were of such a character as to demand of him an explanation of his possession, and he failed or refused to make such explanation, then I charge you that, before you would be warranted in finding him guilty from such circumstances of possession alone, you must be satisfied that his possession was personal, was recent, was exclusive, was unexplained, and that it involved a distinct and conscious assertion of property by defendant, and, if either of these constituents are wanting, defendant is entitled to be acquitted." This charge, analyzed, would amount to an instruction to the jury that they were authorized to convict on an unexplained possession alone, and was consequently on the weight of the evidence. *Lockhart v. State*, 29 Tex. App. 35, 13 S. W. 1012; *Stiener v. State* (Tex. Cr. App.) 28 S. W. 214; *Scott v. State* (Tex. Cr. App.) 36 S. W. 276. For a proper charge on this subject, where the facts show recent possession and an explanation is given, see *Wheeler v. State*, 34 Tex. Cr. R. 350, 30 S. W. 913. Where recent possession is relied on as a circumstance tending to show guilt, and no explanation is given, the court is not required to charge on recent possession, no more than any other fact tending to prove guilt by circumstances. Such a charge is only authorized where appellant relies on an explanation in connection with the incriminative fact of recent possession, and then the charge is defensive.

Appellant also complains of the failure of the court to give a charge on circumstantial

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1794; Larceny, vol. 42, Cent. Dig. § 200.

evidence. This was a case depending on circumstantial evidence as to the original taking, and the court should have given a proper charge on this subject.

It is also contended that the court failed to give appellant the benefit of an affirmative charge on his plea of insanity. The court's charge on this subject appears to be a definition of insanity, and given in the abstract. The court should have applied the law of insanity to the particular offense for which appellant was being tried.

It is not necessary to discuss the separation of the jury nor the absence of defendant during the argument of his case, save to observe that, as shown in this record, there was no error in what occurred as to these matters.

For the errors pointed out, the judgment is reversed and the cause remanded.

SCOVILLE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION—IMPEACHMENT—LIMITATION BY INSTRUCTIONS—PRELIMINARY STEPS—SERVICE OF INDICTMENT.

1. While Code Cr. Proc. 1895, art. 540, provides that in cases of felony the clerk shall immediately make out a certified copy of the indictment and deliver the same to the sheriff, commanding him to deliver the copy to defendant, it was not error to deny a request for a copy when first demanded, when the state announced itself ready for trial after the first trial had been prosecuted to conviction and new trial granted, and defendant had been out on bond and was rearrested.

2. In a prosecution for burglary, it was proper for the state, on cross-examination of defendant, to show for impeachment purposes that he had been convicted of burglary, and had subsequently been indicted for burglary and also for theft.

3. In a prosecution for burglary, testimony of defendant elicited on cross-examination, to the effect that he had been convicted of burglary some nine years since, and subsequently been indicted for burglary and also for theft, is not, on its face, inadmissible for remoteness.

4. Where extraneous crimes are introduced on the cross-examination of defendant as a witness for the purpose of affecting his credibility, it is error for the court to fail to limit the effect of such testimony to defendant's credibility as a witness.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Charles E. Scoville was convicted of burglary, and appeals. Reversed.

Thomas & Spellman, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of five years.

Appellant insists that the court erred in failing to have served upon him a copy of the

indictment, as required by the statute. The bill shows that appellant had been convicted, new trial granted, and for a short while thereafter he was out on bond, and was rearrested. Subsequently, when the state announced ready for trial, he for the first time demanded a copy of the indictment. The court refused to grant his request. In this there was no error. On another trial he should be granted a copy of the indictment. See article 540 et seq., Code Cr. Proc. 1895.

While appellant was on the stand as a witness he was asked by the state if he had ever been indicted before for any offense; to which question he answered that he had been convicted of burglary about nine years ago, had subsequently been indicted for burglary, and had also been indicted for theft. Appellant objects to this testimony on the ground that the same was not competent, foreign to the issue under investigation, and could but serve to prejudice the minds of the jury against defendant. We do not think these objections are well taken, but such testimony was admissible as going to the credit of defendant as a witness in the trial of this case. Nor do we think the testimony itself shows that this testimony is remote, as insisted by appellant in his argument and brief.

In appellant's motion for new trial he insists that the court erred in failing to instruct the jury for what purpose they should consider the evidence of appellant of other crimes. Where extraneous crimes are introduced on the cross-examination of defendant as a witness for the purpose of affecting his credibility, it is error for the court to fail to limit the effect of such testimony to the only purpose for which it can be legally considered, to wit, the credibility of the defendant as a witness. *Bennett v. State*, 64 S. W. 254, 3 Tex. Ct. Rep. 42; *Wilson v. State*, 76 S. W. 434, 8 Tex. Ct. Rep. 337. Except as stated, the charge of the court is correct.

For the errors discussed, the judgment is reversed and the cause remanded.

LIGHTFOOT v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

INDICTMENT—SERVICE OF TRUE COPY—VARIANCE.

1. Bill of Rights, § 10, declares that a defendant shall have the right to demand the nature and cause of the accusation against him and to have a copy thereof. Code Cr. Proc. 1895, art. 540, declares that as soon as one is arrested the clerk shall deliver to the sheriff a certified copy of the indictment, with an order commanding him to deliver it to the defendant. Article 541 requires the sheriff to serve it, article 542 authorizes defendant when on bail to have a copy of the indictment, and by articles 567, 568, and 569 a defendant has two days after such service before trial. *Held*, that where the copy of an indictment served on a defendant varied from the original, in that it charged the crime to have been commit-

¶ 4. See Criminal Law, vol. 14, Cent. Dig. § 1876.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1402.

ted on a day subsequent to the trial, his objection to going to trial without having had a true copy of the indictment was good.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Charlie Lightfoot was convicted of burglary, and he appeals. . Reversed.

Thomas & Spellman, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of three years.

Appellant assigns as error the action of the court forcing him to trial without being served with a true copy of the indictment. The bill of exceptions shows that appellant was charged by indictment with the offense of burglary, alleged to have been committed on the 8th day of October, 1901. A paper purporting to be a true copy of the indictment was served on him, which alleged that the offense was committed on the 8th day of October, 1903—an impossible date, being subsequent to the trial. Appellant claimed that this was not a true copy of the indictment against him, and he requested a true copy to be served on him, and refused to plead to the indictment until such service should be made. It is further shown that after his arrest he had been continuously in jail until the case was called for trial, and at no time had he been served or in any manner waived service of a true copy of said indictment. The court refused the request, and compelled appellant to proceed with the trial without having been served with and without having waived a true copy of said indictment. To this action of the court appellant reserved his exceptions. The Constitution of this state (see Bill of Rights, § 10) among other things says: "And defendant shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof." In pursuance of this, our Legislature has enacted article 540, Code Cr. Proc. 1895, as follows: "In every case of felony, when the accused is in custody, or as soon as he may be arrested, it shall be the duty of the clerk, where an indictment has been presented, to immediately make out a certified copy of the same and deliver such copy to the sheriff, together with a writ directed to said sheriff commanding him to forthwith deliver such certified copy to the defendant." Article 541, Code Cr. Proc. 1895, requires the sheriff to serve this copy and make the return thereof. Article 542 authorizes defendant, when on bail, to have a copy of the indictment delivered to him at his request. Articles 567, 568, 569, Code Cr. Proc. 1895, authorize a defendant to have two entire days after service of a copy of indictment on him before he can be brought to trial; and it has been held that he could demand this limit of time without

announcing the purpose for which he wanted it, and regardless of any motion he might desire to make. See *Evans v. State*, 36 Tex. Cr. R. 32, 35 S. W. 169; *McDuff v. State*, 4 Tex. App. 58. In the latter case it was held that defendant's attorneys could not waive the right to have service of the indictment made on him. It was further said "that ordinarily the service of a copy of the indictment may appear to be immaterial, but that this question, or the motives actuating defendant in insisting upon it, should not be considered. It has always been found that the ends of justice, though they may for the time be delayed, are better subserved by a strict compliance with statutory provisions, which may appear to be entirely technical, than by denying or ignoring them in the anxiety of bringing on a speedy trial and the swift execution of the law." That case was reversed because service of a copy of the indictment was denied him. It appears in this case that what purported to be a true copy of the indictment was served on appellant, but on inspection it was found to vary in a very material respect, in that it charged the offense to have been committed on a day subsequent to the trial, which was an impossible date. If, as said by counsel, the indictment served on him was a true copy of the original indictment, there was no necessity of making any preparation for trial. He could go into court and quash the indictment. If appellant was entitled to a copy, he was entitled to a true copy, and where there was a variance between the copy served as to a material allegation it was not a copy of the indictment returned against him. So we hold that, however technical may appear the objection here urged, appellant's right to service of a true copy of the indictment, being guaranteed by the Constitution and the statute, could not be denied by the court.

For the error of the court in compelling him to proceed with the trial, without service of a true copy of the indictment, the judgment is reversed, and the cause remanded.

TATE v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1903.)

INCEST—CONSENT—INDICTMENT AND PROOF— ACCOMPLICE—INSTRUCTIONS— HARMLESS ERROR.

1. Even if the joint indictment of the man and woman for incest is tantamount to alleging her consent, the state may on his trial prove that she did not consent.

2. An indictment, by charging incest between defendants, does not charge the woman to be the man's accomplice.

3. Defendant cannot complain of a charge because on the weight of evidence, where it is favorable to him.

4. Under the evidence on a prosecution for incest, held that the woman was clearly an accomplice, so as to require corroboration of her testimony.

5. An instruction, on a prosecution for incest, that it was not necessary the woman should have voluntarily, and with the same intent which actuated defendant, united in the act of intercourse, but, if she submitted without objection or resistance, when resistance or objection would have prevented the act, she would be an accomplice, should have been given.

Brooks, J., dissenting.

Appeal from District Court, Burnet County; Clarence Martin, Judge.

R. L. Tate was convicted of incest, and appeals. Reversed on rehearing.

The following evidence was introduced on the trial:

The prosecutrix, Dollie Andrews, testified that she was 22 years of age, and late in the evening of April 28, 1902, while her father was away, serving as a member of the grand jury, defendant (her uncle) came to her home. "He was at the lot, taking out his horses, when my stepmother and myself were feeding the cow. He came to where I was feeding the cow, and said he would feed for me. I told him no, I could feed her. He then asked me if he might come to my bed that night. I told him no. He said he believed he would come anyhow. I told him he had better not. He said it would not hurt. I told him he must not come. He then said something about 'all right.' My stepmother went to the house before I did. She was not present, and did not hear this conversation between us. Defendant ate supper and spent the night. Soon after we had this conversation spoken of at the lot, defendant went to Capt. Badger's to phone Olive about a coffin for Mr. Shugart. Defendant left about 8 o'clock, and returned in about 10 minutes. In answer to the message Olive came to our house, and remained about 20 or 30 minutes. My two sisters, Bertha and Lottie, went to Uncle Allie Tate's to attend an entertainment that night, and did not return home until 11:30 o'clock. Brother George came home about 9 o'clock, but remained only a short time, and did not return until about 4 o'clock in the morning, and left the next day with a train of stock. I retired that night about 9:30 o'clock. My mother and two little half-sisters and defendant were the only persons at home. I slept in the middle west room. My mother and two little half-sisters slept in the room east of and adjoining my room, which is separated by a partition wall with a door between. Defendant slept in George's room, which is in the southeast portion of the building, east of the hall, and south of mother's room. My bed was near the partition wall between my room and mother's, and mother's bed was located in the southeast corner of her room. The door between was open. * * * I do not know exactly how long I slept, but I was awakened by a man on my body. He had complete sexual intercourse with me. I made no outcry or resistance, because I was so frightened I could nei-

ther speak nor move. I tried to speak and move, but could not. He remained on top of me about five minutes after I woke up. He then got up and left the room. Nothing was said by either of us. He had on his night clothes. He went out through the dining room and kitchen. The night was dark and stormy, and I recognized him as defendant by a flash of lightning. My sisters returned from my uncle's about 11:30. I was awake when they returned, and asked them the time. I think it was about half an hour after the assault. I did not say anything to them about the assault. They slept in the same room I did. I did not get up for breakfast the next morning, and when I did defendant had gone. I have not seen defendant many times since the occurrence, not more than three. He has visited our house since. I went to work next morning, and remained until noon, and in the evening watched the loading of cattle on the cars." She states that her health was not good, and changed for the worse on May 15th; that her menses ceased on April 16th, and she discovered her pregnancy for the first time on October 17th, when Dr. Yett examined her, at which time she told Dr. Yett, her mother, and father who was responsible for her pregnancy. And on October 18th, accompanied by her father, she went to San Antonio, and remained there until February 14, 1903, when she returned home, having given birth, on January 22d, to a child. The child was placed in an orphans' home, and afterwards died. She states this was the only time she has ever had carnal intercourse with any man, and it was without her consent.

Defendant testified substantially that he spent the night of April 28, 1902, at the home of W. H. Andrews, father of prosecutrix, but denies having the conversation in the lot detailed by prosecutrix, and denies being in her room and having carnal intercourse with her on that night. That the first he knew of prosecutrix's pregnancy was when Dr. Yett told him of it in November or December, 1902, and about that time Evans talked to him also about it, and said they had sent Dollie off. "Evans said Dollie had made a statement about the matter, and that she had accused him [defendant] of being to blame for her condition. I told Evans the accusation was false, and if it was laid to me it was a blackmailing scheme. He said he knew nothing about that, but he was a friend to me and Henry Andrews, and it would take money, and lots of it, to meet the expenses, and asked me to help about the matter. I first refused to do it, but Evans said it was nothing but right for me to do so, as she was kinsfolk, and Andrews was not able to pay the expenses, and by doing this the matter would be hushed up. He told me that he had put up \$150 and Dr. Yett had furnished \$100 toward paying the expense of keeping Dollie away. I then gave Evans a check for \$100, and a little later another check for \$200. At the time I gave this money I told him I hated like the devil to do it, as it

¶ 5. See Incest, vol. 27, Cent. Dig. § 13.

might look like I was guilty of the charge. I told him at the time that I did not give the money as hush money, but gave it through sympathy for her father, and to hush up a family scandal. I admitted to Evans that I was no angel, and that there had been times in my life when such things might have been charged against me, but not with a blood relative, for that was too tough." R. H. Evans testified with reference to this conversation substantially as did the defendant. Bertha Andrews and Lottie Andrews, sisters of prosecutrix, testified that they were away from home on the evening of April 28, 1902, from about 7:30 o'clock until about 11:30, and on their return prosecutrix asked the time, and it was 11:30. It was the night Tom Shugart died, and was stormy. That they slept together in a bed in prosecutrix's room. W. H. Andrews, the father of prosecutrix, testified: That he was a member of the grand jury, and was away from home on the 28th of April, 1902. That he lived at Marble Falls, and the grand jury was in session at Burnet. About May 15th his daughter quit work because of sickness, and she was sick all the summer, and in bed a great portion of the time. That he went to Marlin about 15th of June, and was gone four weeks. When he returned his daughter was still sick, though improved. That about October 1st she went to her aunt's, in the country, for a week. Dr. Yett was called to see his daughter several times from May to October, and prescribed for delayed or suppressed menstruation. That witness did not know what was the matter with her until October 17th, when Dr. Yett found her pregnant, and she was taken to San Antonio. That young men visited her, like they would any other young lady, and they would take her out to entertainments and other places. Mrs. W. H. Andrews identifies April 28, 1902, as the date when appellant stayed all night at their house, and relates that Bertha and Lottie went to a party on that evening; that Dollie was sick during the summer, and she did not know what was the matter until Dr. Yett examined her, and pronounced her pregnant, and she afterwards noticed that she was abnormally large about the abdomen. Dr. T. M. Yett testified that he visited Dollie professionally on June 7 or 8, 1902; also on July 10th, and three or four times between that and October 17th. She was feeling badly; was nervous, and so continued until October 17th; that he prescribed during that time for suppressed or delayed menstruation, and on October 17th made an examination, and found her pregnant, about five months advanced. "I don't think a woman 22 years old could be easily copulated with the first time. The hymen would obstruct the entrance of the male member, and her vagina would be smaller than if she had had experience in that line. Whether complete copulation could be effected or not would depend on the assistance of the woman and the position of her legs—were they laying out

straight, the act of copulation would be very hard to effect. A woman 22 years old, who had never been copulated with, holding her legs out straight, and not assisting in the act, could hardly become pregnant from such act of copulation, for the reason that it is not probable the act of copulation would be complete. The hymen is a delicate membrane, partially covering the entrance to the vagina, and this is usually destroyed by the first act of copulation, being usually accompanied with pain and some hemorrhage." Dr. Haygood and Dr. W. D. Yett testified substantially as did Dr. T. M. Yett as to the act of copulation just quoted. Dr. Kinney testified that he delivered prosecutrix of a hermaphrodite child on January 22d, at San Antonio.

Flack & Dalrymple, Ike D. White, McLean & Spears, E. L. Anthony, and A. S. Fisher, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of incest, and his punishment assessed at confinement in the penitentiary for a term of five years.

The state was permitted, over the objections of appellant, to prove by prosecutrix, Dollie Andrews, that when appellant had carnal intercourse with her it was without her consent. This was objected to by appellant on the ground that it stated a conclusion of the witness, and not a fact; that the indictment, in effect, charged that the carnal intercourse was with the consent of the prosecutrix, and therefore the state was bound by such allegation, and could not prove the want of consent. The indictment was joint against R. L. Tate (appellant) and Dollie Andrews (prosecutrix), and alleged, in substance, that they had carnal knowledge of each other, she being a female and he a male; that they were related within the inhibited degree to marry, and that they knew of such relationship, etc. Being a joint indictment for incest on the part of both, it is claimed by appellant this was tantamount to alleging such carnal intercourse of each other with consent, and that the state should not be permitted to controvert this allegation by proving that same was without her consent. In the first place, we do not think that the bare fact that the indictment alleging the carnal intercourse between the parties necessarily carried with it the idea that the indictment has charged the said intercourse was with the consent of prosecutrix. But, even conceding this is true, and that it is tantamount to alleging the consent of prosecutrix, still prosecutrix is not on trial, and the allegation that she consented to the act of copulation could not possibly in any sense bind the state in the prosecution of appellant. We know of no rule of evidence requiring an allegation in an indictment to be proved, unless the person against whom the allegation is made is on trial, and it becomes a necessary part of the

description of the offense with which he is being tried. The fact that Dollie Andrews subsequently turned state's evidence, and testified against appellant, is clearly authorized by law; and the mere fact that the indictment charges carnal knowledge with appellant would not be any character of legal declaration that Dollie Andrews was an accomplice, but this fact would still be left, as any other issue in the case, for the jury to determine from the evidence adduced on the trial. The court did not err in permitting the state to prove that prosecutrix did not consent to the act of carnal intercourse.

Appellant complains of the following portion of the court's charge on accomplices: "You are instructed, in connection with the above paragraph of this charge, that, should you find from the evidence in this case that the witness Dollie Andrews, with whom the alleged incestuous intercourse is alleged to have been had, did voluntarily, and with the same intent which actuated defendant, or directly or indirectly, consent to and unite with him in the alleged commission of the offense as alleged, then, in that event, she would be an accomplice, and her testimony would not be sufficient to warrant a conviction, unless she be corroborated by other credible evidence tending to connect defendant with the commission of the alleged offense." We think this charge is correct, and the same has been frequently approved by this court. It first defines an accomplice, and then states specifically the acts that would make Dollie Andrews an accomplice, and leaves the facts for the jury to determine. We have often commended trial courts for leaving the question of accomplice to the jury, and the fact that the evidence may perhaps be conclusive that prosecutrix is an accomplice would not render the action of the court in not telling the jury that such prosecutrix was an accomplice reversible error. Clearly, it would not be error as in this case, where prosecutrix swears to a state of facts that would not make her an accomplice, and the evidence for the state indicates the contrary. This shows a direct issue proper for the jury to pass upon.

Appellant, in connection with the charge on accomplices, asked the following charge: "In this case I charge you that, if you find from the evidence that prosecutrix, Dollie Andrews, made no objection nor resistance to the alleged incestuous intercourse, when such act of resistance or objection would have prevented the act of sexual intercourse, then you will find that she was an accomplice, and must be corroborated by other evidence other than her own as to the very act of intercourse, before you can convict defendant." And again: "You are charged it is not necessary, to make the prosecutrix, Dollie Andrews, an accomplice in this case, that she should voluntarily, and with the same intent which actuated defendant, unite in the act of carnal intercourse, as charged, but, if she

submitted to it without objection or resistance on her part, then she would be an accomplice; and before you can convict defendant you must find there is other testimony besides the testimony of the said prosecutrix which tends to establish the act of carnal intercourse as charged in the indictment." This charge is on the weight of the evidence. The mere fact that the party makes no objection or resistance to sexual intercourse does not per se make said party an accomplice. Prosecutrix says that the reason she did not resist was on account of fright, and that she was incapacitated from resistance on that account. However incredible this statement may be, it is still an issue for the jury to pass upon, and not for the court to judicially declare that said party is an accomplice by sheer force of that fact. The court did not err in refusing these charges.

Appellant also complains of the following portion of the court's charge: "You are instructed that, the state having introduced in evidence the exculpatory declarations of defendant to the effect that he told B. H. Evans that he was not guilty of having sexual intercourse with Dollie Andrews, and that he was not the father of her child, the state is bound by such declarations, and, unless such declarations are shown to be false, you will acquit defendant, and say by your verdict, 'Not guilty.' You are instructed, however, that the state is not bound to prove the falsity of such declarations by direct and positive evidence, but may prove the same by any evidence that may be sufficient to satisfy you of the falsity of the same." We held in *Cavaness v. State* (Tex. Cr. App.) 74 S. W. 908, that a similar charge was upon the weight of the evidence, though favorable to appellant. And, being favorable to appellant, he cannot complain of it, and so there is not such error therein as authorizes the reversal of the case.

The evidence supports the verdict of the jury, and the judgment is affirmed.

HENDERSON, J. (dissenting). I do not agree to the views expressed by a majority of the court with reference to the testimony of Dollie Andrews, the alleged accomplice. It is held in the opinion that the charge was sufficient, and it was not necessary to give the requested charges on the subject. The charge given and those refused are set out in the opinion, and it is not necessary here to reiterate them. If we recur to her attitude in the case, she was jointly indicted with appellant for the same offense. The indictment was evidently dismissed against her in order that she might become a witness, though there is no testimony as to any agreement on her part to testify because of the dismissal. In her testimony she relates that appellant asked her at the cow pen for permission to go to her bed that night, and she told him no. He told her he was coming

anyway, and she replied that he should not. She states she does not know when he entered her room that night, but when she woke up he was on top of her; that, although her mother was in the next room, she did not cry out, and did nothing in resistance of his act of carnal intercourse, but passively submitted thereto. She explains this by stating she was frightened. She further testified that the act of copulation was without her consent; that she told no one of it, and only admitted it in October afterwards, when she was found to be pregnant. Her testimony, in my opinion, made her an accomplice, and the court should have so instructed. See *Sessions v. State*, 37 Tex. Cr. R. 58, 38 S. W. 605. But instead the court told the jury, if she voluntarily, and with the same intent which actuated appellant, copulated with him, she would be an accomplice, or if she directly or indirectly consented to the carnal intercourse she would be an accomplice. Now, she testified as to her want of consent, and under the charge the jury might believe that relieved her from being an accomplice. In the view I take of this question, before the witness Dollie Andrews could escape the onus of being an accomplice she must have done something more than this record indicates. It was incumbent on her to make some sort of resistance to the act of copulation. Merely remaining passive during the operation would not be enough. Appellant is not shown to have made any threats or used any coercion which might furnish a ground for her silence and submission. Indeed, I do not believe that any one can read this record without coming to the conclusion that she was consenting to what was done, and this issue as to her being an accomplice should have been fully and fairly submitted to the jury. One of the requested charges was directly upon the issue omitted by the court's charge, as it instructed the jury, in order to constitute prosecutrix an accomplice, it was not necessary that the evidence should show that she voluntarily, and with the same intent which actuated defendant, united in the act of carnal intercourse with him, but, if she submitted to it without objection or resistance on her part, that she would be an accomplice. And this is further amplified by the other requested charge, which suggested that, if she made no objection or resistance to the alleged incestuous intercourse, when such act of resistance or objection would have prevented the act, in such case she would be an accomplice. I believe these charges should have been given, more especially as the evidence of corroboration is by no means strong; and under the charge as given, without further explanation as to what the court meant by consent directly or indirectly given, the jury would very likely conclude that said witness was not an accomplice, and so convict appellant on her uncorroborated tes-

timony. Accordingly, I believe the court erred in not giving the requested instruction.

On Rehearing.

(Dec. 9, 1903.)

DAVIDSON, P. J. The judgment was affirmed at the recent Austin term, the writer concurring with Judge BROOKS, who rendered the original opinion; Judge HENDERSON dissenting. The motion for rehearing was filed and heard upon oral and written argument. After a more careful review of the record, the writer believes the original opinion is incorrect, and that the judgment should have been reversed because of the insufficiency of the evidence to justify the conviction. The girl with whom the incestuous intercourse is charged to have occurred, under the evidence, was clearly an accomplice, and, after a careful review of the testimony, we fail to find evidence corroborating her statement. The reporter will insert the evidence bearing upon this phase of the case. The requested charges should have been given. The motion for rehearing is granted, and the judgment is now reversed, and the cause remanded.

BROOKS, J., dissents.

GARNER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

HOMICIDE—DEGREES—CAUSE OF DEATH—PREVIOUS DISEASE—MANSLAUGHTER—ADEQUATE CAUSE—SELF-DEFENSE—INSTRUCTIONS.

1. Where, in a prosecution for homicide, defendant claimed that prior to the shooting deceased was afflicted with an incurable disease, which caused his death, and that the operation on his arm and the administration of an anesthetic, which was the result of defendant's shooting deceased, had no effect in hastening his death, it was the duty of the court to specifically charge the law as applied to such theory of the case.

2. Where, in a prosecution for homicide, there was no evidence that any bloodshed occurred or that any blood was drawn by means of an assault on defendant by the deceased, and several eyewitnesses testified that deceased struck defendant before the latter fired at deceased, an instruction on manslaughter that an assault and battery by deceased causing pain "and" bloodshed constituted adequate cause was error.

3. Where, in a prosecution for homicide, the testimony of all defendant's witnesses was to the effect that an assault was being made on defendant by deceased and one or two other persons, but the state's testimony tended strongly to show that only deceased was engaged in an assault on defendant at the time defendant fired at deceased, an instruction that, before defendant would be authorized to defend himself, he must believe that deceased or another or others were engaged in the assault on him, was insufficient, since it denied defendant the benefit of self-defense if the jury believed that only deceased was making the assault at the time the shot was fired.

4. Where, at the time of the difficulty, the parties were strangers to each other, and no

former grudge existed between them, the killing arising on the spur of the moment, defendant could not be guilty of murder in the first degree in killing deceased.

Appeal from District Court, Galveston County; J. K. P. Gillaspie, Judge.

Peter Garner was convicted of murder in the first degree, and he appeals. Reversed.

See 73 S. W. 13.

Marsene Johnson and Aubrey Fuller, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death; hence this appeal.

This is the second appeal, appellant having been convicted in the lower court once before, and the case reversed. 73 S. W. 13, 7 Tex. Ct. Rep. 403. The facts appearing in this record are substantially the same as on the former appeal.

Appellant excepted to the charge of the court as to his responsibility for the homicide, and he requested a special instruction on this subject. We have examined the court's charge on this subject, and the general principles announced appear to be in harmony with the decisions of this court. *Powell v. State*, 13 Tex. App. 244; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188; *Morgan v. State*, 16 Tex. App. 593; *Franklin v. State*, 41 Tex. Cr. R. 21, 51 S. W. 951. However, in view of another trial, the court should give a charge more directly applying the law on this subject to the facts of the case. The theory of the state was that, although the proof showed deceased was suffering from acute nephritis, an acute form of Bright's disease, the operation on his arm and extracting the bone, together with the administration of an anæsthetic, while the operation was performed, had the effect of hastening the death of deceased. Appellant's theory was that deceased did not die, nor was his death hastened, on account of the wound or on account of the operation and administration of the anæsthetic, but he died solely on account of the disease with which he was afflicted before and at the time he was shot. So that the court should have instructed the jury directly upon these two theories; that is, if the death of deceased was hastened on account of the wound inflicted, or on account of the operation, or on account of the anæsthetic administered, or because of one or all of these, appellant would be responsible for the homicide unless the jury should believe that the death was attributable to manifest neglect, etc., of the physicians or attendants of deceased. On the other hand, if the jury believed that the death of deceased was not hastened by the wound, or by the operation, or by the administration of the anæsthetic, one or all of these, and appellant died alone on account of the disease with which he was afflicted

at the time he was shot, then appellant would not be responsible for the homicide, or if deceased died from manifest neglect of his attendants, etc., appellant would not be responsible for his death.

On the former appeal the case was mainly reversed on account of the failure of the court below to charge on manslaughter, the court observing, after recounting some of the testimony, as follows: "We have stated enough of the evidence to make it apparent that manslaughter was decidedly an issue in this case." As stated before, the facts here connected with the homicide are substantially the same as on the former trial. However, the court here did charge on manslaughter, but he left appellant in a worse condition than if the court had not attempted to give him the benefit of such a charge. In defining manslaughter the court correctly told the jury that an assault and battery by deceased causing pain or bloodshed is deemed adequate cause; but subsequently, in applying the law to the facts, the learned judge coupled these two causes by the conjunction "and," and required the jury to believe that both pain and bloodshed must concur on account of the assault before appellant could claim the benefit of adequate cause so as to reduce the homicide to the grade of manslaughter. Perhaps, if there was no controversy that deceased, by his assault on appellant, inflicted both pain and bloodshed, the charge might be without error; still it would be the better practice to afford appellant both or either of said causes. But an examination of the record here fails to disclose that any bloodshed occurred, or that any blood was drawn from appellant by means of the assault. We believe nearly all of the eyewitnesses agree in the statement that deceased made an assault on appellant and struck him before appellant fired any shot. For the court to tell the jury, under such circumstances, that both pain and bloodshed must concur, was equivalent to telling the jury that there was no manslaughter in the case, inasmuch as no witness had stated that any blood was drawn from appellant. *Hardy v. State* (Tex. Cr. App.) 37 S. W. 737; and for other authorities see *White's Ann. Pen. Code*, § 1202.

Appellant also complains of the court's charge on self-defense; insisting that the court charged but one theory of the case of self-defense—that is, before appellant would be authorized to defend himself, he must believe that deceased or another or others were engaged in the assault on him—whereas he contends that there is a phase of the case presented by the state's witnesses to the effect that only deceased was assaulting appellant at the time the shot was fired. We have examined the court's charge on this subject, and we believe the effect of it was to deny appellant the benefit of a charge of self-defense if the jury believed that only the deceased was making the assault on him

at the time the shot was fired, inasmuch as the only charge given by the court on this subject authorized him to defend against an assault made by deceased and another or others, and nowhere is there any charge given by the court authorizing appellant to defend against an assault made on him by deceased alone. All the testimony by appellant's witnesses is to show an assault being made on him by deceased and one or two other persons, but the effect of the testimony on the part of the state tended strongly to show that only deceased was engaged in the assault on appellant at the time the shot was fired. The jury might have believed from this presentation of the case that appellant would have no right to defend himself and fire the shot if only deceased was engaged in the assault on him. It occurs to us that the charge is subject to the vice complained of. The jury evidently were disposed to believe the state's theory throughout, and were more likely to believe the state's witnesses on the matter of assault by deceased than defendant's witnesses; consequently they should have been distinctly told that, if deceased was assaulting appellant at the time in such manner as to cause him to reasonably believe his life was in danger or he was in danger of serious bodily injury, he had a right to shoot. Of course, the charge as given by the court, predicated on assault by deceased and others, should also have been given in order that appellant's rights on every phase of the case should have been amply protected.

Appellant strongly urges that the evidence here does not sustain the conviction, and he asks for an expression of the court on that subject. On the former trial we said that the issue of manslaughter was decidedly an issue in the case, and we say now that under the evidence in this case appellant might be guilty of murder in the second degree or manslaughter. The parties were strangers to each other; consequently no former grudge existed between them. The evidence all shows it was a casual difficulty, arising on the spur of the moment, and we do not believe the record before us discloses a case of murder in the first degree.

For the errors discussed, the judgment is reversed, and the cause remanded.

GOODE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

AGGRAVATED ASSAULT—CORRECTION OF CHILD BY PARENT.

1. A father directed his daughter to take a child he had in his arms, and, on her saying she would do so directly, he got up, and she ran away, he chasing her, and, on catching her, caught her by the sleeve and tore it, or slapped her, and took her by the hair and led her away. *Held*, that he was not guilty of an

aggravated assault; the statute excepting therefrom correction of a child by a parent, moderately done.

Appeal from District Court, Jasper County; W. P. Nicks, Judge.

G. D. Goode appeals from a conviction. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an aggravated assault upon his daughter, a 17 year old girl. The evidence discloses he had in his arms a little child, and requested or ordered his daughter to take the child. She replied that she would do so directly. Appellant got up, the girl broke to run, and he chased her to a residence some 200 yards away. Mrs. Dailey, the owner of the residence, testified that when he came in the house he caught her by the sleeve and tore it, while the girl testified that he slapped her, took her by the hair, and led her off the gallery. These are the facts upon which the conviction was obtained. The statute provides that correction by the parent of the child is not a violation of the law, if moderately done. There is nothing in the testimony which shows that the parent had exceeded the bounds of moderation, and therefore we are of opinion the evidence is not sufficient to justify the conviction.

The judgment is reversed, and the cause remanded.

WATKINS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—APPEAL.

1. Where the statement of facts fails to disclose that local option was in force at the time and place where the offense is alleged to have occurred, the conviction will be reversed.

Appeal from Walker County Court; Jno. C. Williams, Judge.

Sam Watkins appeals from a conviction. Reversed.

Hutcheson, Campbell & Hutcheson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law. We have examined the statement of facts, and the same fails to disclose that local option was in force at the time and place where the offense is alleged to have occurred. This is necessary. *Lively v. State*, 72 S. W. 393, 7 Tex. Ct. Rep. 189.

The judgment is accordingly reversed, and the cause remanded.

¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 352.

TOMPKINS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

CRIMINAL LAW—COMPLAINT—BELIEF.

1. A complaint on which an information is based is insufficient, it stating merely that complainant has good reason to believe, but not that he believes.

Appeal from Cherokee County Court; Jas. P. Gibson, Judge.

John Tompkins appeals from a conviction. Reversed.

Shook & Robinson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and appeals.

It is only necessary to consider one question; that is, the validity of the complaint on which the information is based. The complaint charges as follows: "I, Chas. R. Guinn, do solemnly swear that I have good reason to believe that," etc. This is exactly like *Smith v. State*, 76 S. W. 436, 8 Tex. Ct. Rep. 340. In that case we held, under a similar allegation, that the complaint was defective, in that it failed to charge further that appellant did believe, etc. Though this matter was presented in the court below, the objection was overruled. It should have been sustained. Accordingly we hold the complaint defective, and the information based thereon must fall with it.

The judgment is reversed, and the prosecution ordered dismissed.

FORD v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

LOCAL OPTION—SALE—CONTINUANCE—ABSENT WITNESS—APPLICATION.

1. A sale of liquor for checks of a company, redeemable at its store in goods, will sustain a conviction of violation of the local option law.

2. There is no diligence entitling defendant to a continuance for absence of a witness where he does not have process issued for him till three days before the trial, five months after return of the indictment.

3. The statements of defendant, indicted for selling in violation of the local option law, on application for continuance for absence of a witness, that he expects to prove by the witness that he was living with defendant at the time of the offense, and intimately connected with his business and actions, and during the time he lived with him and at the time charged he never sold, nor during said time was he interested in the sale of, intoxicating liquor, are too general.

Appeal from District Court, Jasper County; W. P. Nicks, Judge.

Wallis Ford appeals from a conviction. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1337.

DAVIDSON, P. J. Appellant was convicted of violating the local option law. The facts show he sold several bottles of whisky to the alleged purchaser, and took in pay therefor checks of the Kirby Lumber Company. These checks are shown to be redeemable at the company's store in goods, but money could not be gotten for them without discounting. Appellant contended, and asked the court to so charge, that, in order to constitute a sale on this sort of transaction, it must be founded on a money consideration, by which the property is transferred from the seller to the buyer. This contention is without merit.

Appellant moved for a continuance for the testimony of Davis, who resided in Hardin county. His process was issued on October 12, 1903, and sent to Hardin county, where it was not executed because the witness could not be found. This was not diligence. The indictment was returned on May 26th, and appellant tried on October 21, 1903. No process, so far as this application shows, was called for until October 12th, months after the return of the indictment, and only a few days before the trial. He expected to prove by this witness that he was living with defendant at the time of this offense, and intimately connected with his business and actions, and during the time he lived with him and at the time alleged in the indictment he never sold, nor during said time was he interested in the sale of, intoxicating liquor. These statements are entirely too general.

These are the two questions urged for reversal. There is no merit in either. The judgment is affirmed.

MILLER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

BURGLARY—INDICTMENT—EVIDENCE—GENERAL VERDICT.

1. An indictment may, to meet anticipated proof, charge the burglary in one count as night burglary, and in another count as day burglary.

2. Where the indictment charges day burglary in one count, and night burglary in another count, and the evidence justifies finding day burglary, the general verdict will be imputed to the count charging it.

3. A conviction of day burglary is justified by testimony of the owner that on leaving he locked the doors and pulled down the windows, and that on returning in the evening he found the lock had been broken by pulling out the staple, evidence that defendant was seen with the stolen goods, and his admission that he entered the house and took the goods, though he claimed he entered by an open side door.

Appeal from District Court, Ft. Bend County; Wells Thompson, Judge.

Will Miller appeals from a conviction. Affirmed.

T. E. Mitchell, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

¶ 1. See Burglary, vol. 3, Cent. Dig. § 24.

DAVIDSON, P. J. This is a conviction for burglary. The indictment contains two counts, charging night and day burglary. Both were submitted in the charge. A general verdict was returned. Motion in arrest was properly overruled. It is proper pleading to charge the offense in different counts to meet anticipated proof. The evidence justified finding day burglary, and the verdict will be imputed to the count alleging that character of burglary.

It was contended on new trial that the evidence did not sustain the conviction. The state proved by the alleged owner that on leaving he locked the doors and pulled down the windows of his house. Returning during the evening, he found "the lock had been broken by pulling out the staple." His goods had been taken. Appellant had been seen with the stolen goods, and on the trial admitted entering the house and taking the goods. He claimed, however, a side door was open, and he entered there. The charge of the court is criticised here for the first time, and will not be considered. *Johnson v. State*, 42 Tex. Cr. R. 87, 58 S. W. 60, 51 L. R. A. 272; *Id.*, 42 Tex. Cr. R. 103, 58 S. W. 69. There is no merit in the criticism anyway.

The judgment is affirmed

SMITH v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1903.)

CRIMINAL LAW—INTOXICATING LIQUORS—LOCAL OPTION—WITNESS—REPUTATION FOR VIOLATING LAW—ACCOMPLICE.

1. Defendant in a prosecution for violating the local option law cannot prove that a witness for the state has the reputation of violating the local option law.

2. The prosecuting witness in a prosecution for violating the local option law cannot, under the statute, be considered an accomplice.

Appeal from Cherokee County Court; James P. Gibson, Judge.

John Smith was convicted of violating the local option law, and appeals. Reversed.

Shook & Robinson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$50, and 30 days' confinement in jail.

Appellant complains of the following portion of the court's charge: "A witness may be impeached by proving his general reputation for truth and veracity in the community in which he lives to be bad, and, if you find such has been done in this case, then you are not bound to disbelieve the testimony of such witness on that account; but the testimony of such witness is still before you, to be given by you such weight and credit

as you think it entitled to; and, if there is a conflict in the evidence, you should reconcile such conflict, if you can, but, if not, then you should decide which of the testimony is entitled to the greater credibility." The state concedes that this charge is erroneous. It is clearly so under *Crockett v. State*, 40 Tex. Cr. R. 173, 49 S. W. 392; *Poyner v. State*, 40 Tex. Cr. R. 640, 51 S. W. 376. In the latter case we held it was not necessary for the court to give any charge on this question at all.

The court did not err in refusing to permit appellant to prove by witnesses Lattimore and Crouch that state's witness Tom Fry had the reputation of violating the local option law in Jacksonville. It is proper to permit defendant or the state to prove the general reputation of a witness for truth and veracity, but we know of no law authorizing proof of the fact that defendant had the general reputation of violating the local option law.

Appellant insists that the court erred in refusing special charges to the effect that prosecuting witness was an accomplice. The statute says that the purchaser of the whisky is not an accomplice, and the court did not err in so holding.

For the error discussed, the judgment is reversed, and the cause remanded.

THOMAS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

INDICTMENT—INCONSISTENCY OF COUNTS—ARREST OF JUDGMENT—INCOMPETENCY OF GRAND JUROR.

1. Judgment will not be arrested because the two counts of an indictment are inconsistent, where the state elected on the trial to rely on one, and the other was not submitted to the jury.

2. That one of the grand jurors who found an indictment was incompetent because he had not paid his poll tax is not a ground for arresting judgment on the indictment.

Appeal from District Court, Bowie County; P. A. Turner, Judge.

John Thomas was convicted of mingling strychnine with a liquid containing lemon juice and sugar, to injure and kill Martha Washington, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged by indictment in two counts: First, assault with intent to murder; and, second, unlawfully mingling and causing to be mingled with certain liquid, containing lemon juice and sugar, a noxious substance or potion, known as strychnine, with the intent to injure and kill Martha Washington. Motion in arrest of judgment was urged because of the two counts being inconsistent. It is not

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1087.

¶ 2. See Criminal Law, vol. 15, Cent. Dig. § 2449.

necessary to discuss that question, as the state elected upon the trial to rely upon the second count—the first was not submitted to the jury.

That portion of the motion in regard to one of the grand jurors being incompetent because he had not paid his poll tax has no merit. This does not constitute a reason for arresting the judgment. *Hudson's Case*, 40 Tex. 12; *Woods v. State*, 26 Tex. Civ. App. 490, 10 S. W. 108. The fact that the juror was subject to challenge because he had not paid his poll tax does not constitute cause for setting aside the indictment. This is well settled by the decisions. Those authorities which render the indictment void because more or less than 12 grand jurors were impaneled have no application in this character of case. Twelve jurors were impaneled, against one of whom existed a cause for challenge. Causes for challenge should be exercised at time of impaneling the grand jury, and cannot be used in arrest of judgment or to set aside indictment.

The judgment is affirmed.

McDANIEL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

HOMICIDE—MISCONDUCT OF JURY—RECEPTION OF ADDITIONAL EVIDENCE—APPEAL—ERRORS REVIEWABLE—ABSENCE OF STATEMENT OF FACTS.

1. On appeal from a conviction of homicide, contentions that the verdict was contrary to the law and evidence, that the court erred in not charging on the law of principals and on the law of assault, and erred in the charge given on self-defense, cannot be reviewed, in the absence of a statement of facts.

2. In a prosecution for homicide, where the jury, before an agreement had been reached on the punishment to be inflicted on defendant, received statements from one of their number that it would not do to give defendant a light penalty, as defendant, when he should have served out a short term, would not be as old as his father was when he got out, and to consider what his father had done (referring to a homicide committed by the father), and thereupon the jurors, who were in favor of a light penalty, agreed to a term of 25 years, the conviction would be reversed.

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Dave McDaniel was convicted of murder in the second degree, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 25 years.

There is no statement of facts in the record, consequently we cannot review appellant's contention that the verdict of the jury is contrary to the law and the evidence.

Appellant also insists that the court erred in not charging on the law of principals and on the law of assault with intent to murder, and complains of the charge of self-defense. But these matters cannot be reviewed without the facts before us.

After the jury retired to consider their verdict, as disclosed by the affidavit of W. R. Ross, one of the jurors, the following statement was made in the jury room: "Before an agreement had been reached as to the amount and degree of punishment to be inflicted on appellant, one of the jurors volunteered other evidence, in this: Some of the jurors wanted to give defendant five years, and from this on up to life imprisonment, and, in trying to bring the jurors who were in favor of a light penalty up to a higher one, said jurors stated that would not do; that he [defendant] when he should have served out said short term would not be as old as his father, N. H. McDaniel, when he got out [meaning out of the penitentiary], and to look what he had done since he got out [meaning the killing of L. C. La Rue]; and, after said statement was made, some of the jurors who were in favor of giving defendant a lower term than 25 years agreed to said term of 25 years." There is nothing in the record controverting this statement of the juror Ross. We take it that it is undisputed that such conduct took place in the jury room. It is reversible error for the jury to receive other evidence than that introduced upon the trial of a character calculated to increase the punishment against defendant. Such character of evidence, as disclosed by the affidavit of the juror, was introduced in this case, and used for the purpose of increasing defendant's punishment. This being true, we have no alternative but to reverse the judgment. *Darter v. State*, 39 Tex. Cr. R. 40, 44 S. W. 850, and authorities cited.

The judgment is accordingly reversed, and the cause remanded.

JONES v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

HOMICIDE—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—APPEAL—ERRORS REVIEWABLE.

1. In the absence of a bill of exceptions, alleged error in refusing a continuance cannot be reviewed on appeal from conviction of homicide.

2. In a prosecution for homicide it was not error to fail to charge that defendant had the right to protect his property, though there might be some dispute about his ownership, if he had the right of possession, where there was no dispute as to the ownership of the property over which the fight that led to deceased's death occurred.

3. In a prosecution for homicide it was not error to fail to charge on the law of circumstantial evidence, where several eyewitnesses testified to the killing.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 2055.

¶ 3. See Criminal Law, vol. 14, Cent. Dig. § 1883.

Appeal from District Court, Brazos County; J. C. Scott, Judge.

Mose Jones was convicted of murder in the second degree, and appeals. Affirmed.

Sam R. Henderson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 12 years.

There is no bill of exceptions in the record. In motion for new trial, appellant insists that the court erred in refusing his application for continuance. But this is not verified by bill of exceptions, and cannot be reviewed.

He insists that the court erred in its charge in failing to tell the jury that defendant had a right to protect his property, though there might be some dispute about defendant's ownership, if he had the right of possession. There is no dispute in this record as to the ownership of the boat over which the fight occurred that led to the death of deceased.

Appellant also insists that the court failed to show the jury that defendant in the defense of his property was not required to yield in the least, but could repel force with force. The charge complained of is correct, and properly presented the law of self-defense, both of person and property.

The court did not err, as appellant insists, in failing to charge on the law of circumstantial evidence, since several eyewitnesses testified to the killing.

In his motion he urges "that the facts proven do not beyond a reasonable doubt convince the mind that this defendant committed the offense." We are of opinion the evidence is sufficient to support the conviction. The jury have resolved the controverted question as to appellant's guilty participation in the killing against him, and they were amply warranted by the evidence in so doing.

The judgment is affirmed.

DEAN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1903.)

CRIMINAL LAW—MURDER—IMPEACHING TESTIMONY—ABSENT WITNESS—CONTINUANCE.

1. Where sufficient diligence was used to procure the attendance of a witness in a murder case, and his testimony was material, the case should be continued.

2. An instruction in a criminal case, where impeaching testimony has been introduced, that such testimony is solely to enable the jury to weigh the testimony of the witness sought to be impeached, is too restrictive, the jury being at liberty to entirely discredit the testimony of such a witness.

Appeal from District Court, Smith County; Tom C. Davis, Judge.

George Dean, alias B. D. Dean, was convicted of murder in the second degree, and appeals. Reversed.

T. O. Woldert, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 25 years; hence this appeal.

Appellant assigns as error the action of the court overruling his application for continuance. The application was predicated on the absence of Speal Dean, a brother of appellant. Sufficient diligence was used. The application shows, under the peculiar facts of this case, that the testimony of the absent witness was material, and the case should have been postponed or continued, in order to procure his attendance.

Appellant also contends that the court's charge as to certain impeaching testimony was erroneous. It appears that two of the state's witnesses testified to a state of facts inculpatory and hurtful to appellant. Appellant impeached them by showing they had testified differently before the examining court or jury of inquest. On this testimony the court instructed the jury as follows: "Certain character of testimony has been introduced which is in law known as 'impeaching testimony'; that is, that witnesses who have testified in the case have at other times testified different and contradictory to the testimony of the witnesses testifying before you. This character of testimony is admitted before you for the purpose of enabling you to weigh the testimony of the witness or witnesses thus sought to be impeached, and it is introduced only for this purpose." As we understand the rule, the jury may entirely discredit and disbelieve a witness who has been impeached; yet the court told the jury that it was introduced simply and solely for the purpose of enabling the jury to weigh the testimony of the witnesses thus impeached. We are of opinion the charge was too restrictive. *Howard v. State*, 25 Tex. App. 693, 8 S. W. 929; *Winn v. State*, 34 Tex. Cr. R. 37, 28 S. W. 807.

It is not necessary to discuss other matters. For the errors pointed out, the judgment is reversed and the cause remanded.

NORSWORTHY v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1903.)

THEFT—STATEMENTS OF DEFENDANT—ADMISSION OF EVIDENCE—BILL OF EXCEPTIONS—ARTICLE FOUND WITH ANOTHER—RULING ON JURORS.

1. Evidence held to raise no issue as to whether statements of defendant were made while he was under arrest, or believed he was under arrest, so as to make them inadmissible.

2. A bill of exceptions to the admission, on the trial for theft of a calf, of evidence of the

finding parts of the skin of the stolen calf in the possession of others, though stating that defendant objected to the evidence on the ground that no privy had been shown between defendant and either of such persons, should set out the evidence to show that the privy had not been shown.

3. Where a bill of exceptions to admission of evidence shows it was admitted on the statement of the district attorney that he would connect defendant with it, the bill should show that this was not done.

4. Where the evidence connects defendant with another in the theft of a calf, it may be shown that the skin of the calf was subsequently found in the possession of the other person; this being admissible against the other person, had he been on trial.

5. Defendant's bill of exceptions to the admission of a report and bill of sale, objected to on the ground that they were immaterial, irrelevant, and calculated to prejudice the jury, and that they had not been offered by defendant, should disclose their contents.

6. Defendant may not complain of a ruling as to a juror subject to challenge for cause, where at the time he still had peremptory challenges left, and it is not shown that he was compelled to take any objectionable juror, nor that such juror was not a fair and impartial juror, though defendant says he was objectionable to him.

Appeal from District Court, Lavaca County; M. Kennon, Judge.

W. F. Norsworthy appeals from a conviction. Affirmed.

Patton & Schwartz, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of one head of cattle, and his punishment assessed at confinement in the penitentiary for a term of two years.

By appellant's first bill of exceptions, he questions the action of the court permitting the state to introduce the confessions of appellant to the sheriff, made in the presence of the justice of the peace, county attorney, and deputy sheriff, on the ground that appellant was then under arrest, and reasonably believed himself under arrest. The circumstances indicate that the sheriff was investigating the case, and went to the little village of Sublime where appellant lived, who was both a butcher and constable of that precinct. He went from Miller's store across the street to appellant's market house, and asked appellant to come over to Miller's store with him, which he did, and there, in the presence of several other parties, asked him about a certain yearling alleged to have been missing, and a hide. The sheriff spoke to him, as follows: "I just wanted to go to you first. I have heard this talk about the yearling, and want to know whose yearling it was he had killed." Appellant said, one of his own. The sheriff then said, "Where is the hide?" and appellant said, "over at home." The sheriff then asked him to show him the hide, and that, if it was his own, everything would be all right. Appellant replied to the sheriff that he would not show it to him. The sheriff then said, if he would

not, he would have to get a search warrant and search for it. After some further conversation, appellant told him there was no use getting a search warrant; that he could just go over there and search for it, but he would not find it as the hide was not there. To which the sheriff replied, "Why, you just told me that it was there." And defendant said, "You will not find it." The record further shows that appellant was not then arrested—that being in the morning—and appellant was not arrested until about midnight, when process was gotten out for him. We do not believe there is anything in this showing indicating that appellant was either under arrest, or that he believed himself under arrest. Consequently the testimony was admissible. *Connell v. State* (Tex. Cr. App.) 75 S. W. 512. In this connection, appellant contends that, although the evidence may have been admissible, yet there was an issue as to its admissibility, and this should have been submitted by the court in the charge to the jury. Neither appellant nor his witnesses testified to a contrary state of facts than that testified to by the sheriff, and we do not believe the sheriff's testimony raised any issue on this question. Therefore it was not necessary for the court to instruct the jury in regard thereto.

During the trial the state showed by the witness Noble, sheriff of Lavaca county, that after the alleged commission of the offense he went to Sublime, where appellant lived, to investigate the matter, and that he had a conversation with him; that he (witness) went down to the house of a Mexican, and of Henry Mack's and Jack Monroe's; that he found at the Mexican's some pieces of a red hide, apparently about the size of a yearling, and he found at Henry Mack's house a part of a hide, to wit, a half of a hide apparently of a yearling, and the same color as the strips found at the Mexican's, which half hide had an inverted figure 3 on it. Appellant objected to this testimony on the ground that no privy had been shown between appellant and either of said parties in the theft of any animal, or that defendant had at any time left any hide or part of a hide with them. Thereupon the state's attorney stated that he expected to connect defendant with the taking of the animal, the hide of which was found with these parties. As has been often stated, a bill of exceptions must be complete within itself, and it must show the conditions or environments being all the evidence on that point, so that the matter can be intelligently revised in the appellate court. Appellant does not show in the bill that he was in no wise connected with the hide, or pieces thereof, found in the possession of said parties after the theft; but that his objections alleged as grounds that no privy had been shown between said parties in the theft of the animals is not a certificate by the judge that his objections were a true statement of the facts. The

¶ 4. See *Larceny*, vol. 32, Cent. Dig. § 144.

bill further shows that the district attorney proposed to connect defendant with the taking of said animal, the hide of which was found with these parties. The bill should have shown that this was not done in any wise. However, if we were authorized to recur to the statement of facts, we believe appellant was sufficiently connected with the theft of the animal, in connection with said parties in whose possession portions of the hide were subsequently found. Henry Mack, who has died since the theft of said animal, was directly shown to have been with appellant, helping him to drive said animal, on the night it was stolen. The principle is that while the act or declaration of a codefendant, made after the consummation of the offense, and when defendant was not present, cannot be used against him, still, where the evidence has connected them in the perpetration of the crime, any fact or circumstance which would tend to prove the guilt of the codefendant not on trial would be admissible against defendant on trial—as, for instance, the subsequent finding of the weapon or means used in the commission of the homicide in the house or possession of the codefendant. *Pierson v. State*, 18 Tex. App. 524; *Rodriguez v. State*, 32 Tex. Cr. R. 259, 22 S. W. 978. On this principle, bloody clothing taken from the possession of a codefendant the day after the murder is admissible evidence against the defendant on trial, and especially so where it is corroborative of the testimony of the accomplice inculcating such other party in the murder. *Thompson v. State*, 33 Tex. Cr. R. 217, 26 S. W. 198. And again, in *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817, it was held competent for the state to prove that 10 days subsequent to the robbery a part of the fruits of the robbery were found in possession of defendant's co-conspirator.

Appellant objected to the introduction in evidence of the butcher's report of defendant, filed October 6, 1903, and the accompanying bills of sale. His objection was made on the ground that the same was immaterial, irrelevant, and calculated to prejudice the minds of the jury against defendant, and that the same had not been offered in evidence by defendant. In answer to this bill, it is sufficient to say that the contents of the report and bill of sale are not disclosed in the bill of exceptions.

Appellant, in his motion for new trial, raises an objection to the action of the court in regard to the juror Treptow. He says this juror, on his voir dire examination, qualified as to the payment of his poll tax; that, if he had not so understood him, he would have challenged him for cause. He further shows that, when he asked the jurors to state whether any of them had not paid their poll tax, the juror Treptow remained silent, and he accordingly understood that he had paid his tax. He says this juror was objection-

able to him, because he thought he might be under the influence of certain influential persons engaged in the prosecution. In this connection he showed that the juror had not paid his poll tax prior to February 1, 1903. He further says that all of his peremptory challenges were exhausted on said talesmen, and he had no other means known to him of removing the said Treptow from the jury. The state contests this motion, and shows that appellant had three challenges which he exercised after accepting Treptow. And in addition we would observe that it is not shown appellant was compelled to take any objectionable juror, nor is it shown that Treptow was not a fair and impartial juror. So the ruling of the court was without prejudice to appellant. *Carter v. State*, 76 S. W. 437, 8 Tex. Ct. Rep. 318.

Appellant insists that the evidence is not sufficient to support the verdict, because there is no testimony tending to support the evidence of the accomplice. We do not agree with this contention, but believe the testimony is ample. The judgment is accordingly affirmed.

RIDDLING v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1903.)

RAPE—ASSAULT WITH INTENT—SUFFICIENCY OF EVIDENCE.

1. Evidence on a prosecution for assault with intent to rape held sufficient to show defendant's purpose to use sufficient force to compel intercourse.

Appeal from District Court, Nacogdoches County; R. W. Simpson, Judge.

R. O. Riddling appeals from a conviction. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to rape, and his punishment assessed at confinement in the penitentiary for a term of 10 years.

There is but one question in the case which requires any consideration; that is, as to the sufficiency of the evidence to support the verdict. The identity of appellant as being the person who entered the room where prosecutrix was sleeping is thoroughly established. Unquestionably, he had the intent to have carnal knowledge of her. She was almost an utter stranger to him, and he had no possible ground to believe that she would consent to such intercourse. As soon as he approached her bed in the darkness, she screamed. He attempted to put his hand over her mouth and suppress the noise she was making. Her father came to her rescue, and appellant fled. He did not have time, as he ran out of the yard, to open the gate, but ran over it and broke it down. We think the evidence shows a purpose to use sufficient force

to accomplish his object of compelling prosecutrix to have carnal intercourse with him, and he only desisted when the parent of prosecutrix was aroused from slumber and came to her rescue. The evidence is sufficient. *O'Brien v. State* (Tex. Cr. App.) 40 S. W. 969; *Barnett v. State*, 42 Tex. Cr. R. 302, 62 S. W. 765.

The judgment is affirmed.

CAGE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

ASSAULT—DEADLY WEAPON—EVIDENCE.

1. Evidence that accused assaulted the prosecutor, and cut him with some sharp instrument, so that he had to stay in a hospital three or four days, and threatened at the time to kill him, is insufficient, in the absence of evidence of the nature of the instrument, or the size or depth of the wounds, to show that the weapon used was a deadly weapon, and hence insufficient to sustain a conviction of assault with intent to murder.

Appeal from District Court, Galveston County; J. K. P. Gillaspie, Judge.

Mose Cage, alias Jacko, was convicted of assault with intent to murder, and appeals. Reversed.

R. H. & Alice S. Tiernan, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant contends that the court should have charged on self-defense. There is no exception contained in the record to the court's charge, or to the failure to charge on this phase of the case.

Appellant also complains because the court did not define manslaughter to the jury. The court gave a charge on aggravated assault, which we think sufficiently presented appellant's defense as to manslaughter.

Appellant further insists that the conviction cannot be sustained because the evidence is not sufficient. We have examined the record carefully in this regard, and it shows on the part of the state that appellant assaulted prosecutor, and that he was cut, evidently with some sharp instrument, but the character of the instrument is not disclosed. Prosecutor says that, as he passed out of the chophouse, appellant was behind the door and struck him, and when he got outside he found he was cut once in the left shoulder and once in the left breast; that after the first cut he turned, and, as appellant cut him the second time, he said, "I will kill you, you God damn son of a bitch!" that after he was cut he went to the hospital, and stayed three or four days, and after he left the hospital about a week he went back

there once to get his wounds dressed. This is all the testimony relating to the weapon used, or the character of the wounds. We cannot presume against appellant, in the absence of evidence, that the weapon used was a deadly weapon. The fact that, in connection with the infliction of the wounds, appellant may have threatened to kill prosecutor, might be proof of his desire, but would not be plenary proof of the character of the weapon he was using. He may have uttered such expressions, although he was simply assaulting him with his fist. *Wilson v. State*, 34 Tex. Cr. R. 65, 29 S. W. 41, was very similar to this, and we held that the deadly character of the weapon was not sufficiently proven. However, if the state had proven the nature of the wounds, so that their dangerous character was apparent, this, together with the proof that appellant was cut with some sharp instrument, might have sustained the conviction. The only proof on this subject comes from the prosecutor, and he merely says that he went to the hospital and stayed three or four days; went back again afterwards and had the wounds dressed. Nowhere are we furnished with evidence that the wounds were of such a serious character as endangered life, or that they demonstrated that the instrument used in their infliction was a deadly weapon. Certainly the state could have furnished some proof of the size of these wounds, their depth, extent, etc. But none was offered. We do not believe the evidence here presented shows an assault with intent to murder. See *Jobe v. State*, 1 Tex. App. 183; *Martinez v. State*, 35 Tex. Cr. R. 386, 33 S. W. 970; *Parker v. State* (Tex. Cr. App.) 53 S. W. 115; *McLendon v. State*, 66 S. W. 558, 4 Tex. Ct. Rep. 69.

Because, in our opinion, the evidence is not sufficient to sustain the conviction, the judgment is reversed and the cause remanded.

FINE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1903.)

SEDUCTION—CORROBORATION—DEFENDANT'S FAILURE TO TESTIFY—DISCUSSION BY JURY—INSTRUCTIONS.

1. Continuous association of defendant and prosecutrix for two years is not, alone, sufficient corroboration of her testimony as to their engagement, on a prosecution for seduction.

2. Discussion in the jury room of defendant's failure to testify is ground for reversal, though the jurors state that it did not influence them.

3. The court, if referring in its charge to defendant's failure to testify, should tell the jury not to consider or discuss such failure.

Appeal from District Court, Hood County; W. J. Oxford, Judge.

Will Fine appeals from a conviction. Reversed.

W. L. Dean and Estes & Douglass, for appellant. Jno. J. Hiner, and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of seduction, and his punishment assessed at confinement in the penitentiary for a term of four years.

Appellant insists that the corroboration of prosecutrix is not sufficient, even if it be conceded that her testimony makes out a case. An examination of the record shows that she testified that she became engaged to appellant, and about six months after the engagement she had intercourse with him. She says that she did so because he promised to marry her, and because he persuaded her; telling her that he was going to marry her, and that other people who were engaged to marry did the like. She is not definite as to the date when this occurred—whether in 1900, 1901, or 1902. She fixes the time, however, by the fact that one Straley worked at her father's, and from other testimony it appears that Straley worked there in the year 1900. The indictment charges the offense to have been committed in 1902. However, she relates that she continued to have intercourse with appellant almost continuously every week, and sometimes oftener, when she would meet appellant, until about Christmas, 1902. About that time she found herself enceinte, and wrote to appellant, who was then at Ft. Worth, about her condition. He came over, and she wanted him to marry her. He went back to Ft. Worth, telling her he would see if he could secure a house. Afterwards he came back and told her he could not, but that he would rent a farm, and they would marry and live on the farm. He went off after this, and she did not see him again until after his arrest. The only corroboration that we see in the statement of facts is that other witnesses testified that, from the year 1900 on up to 1902, appellant associated with prosecutrix, went to parties, religious occasions, etc., with her, and in fact he was almost the only male person who did associate with her. One other witness says that appellant told him on one occasion that prosecutrix was his girl. As was said in *Bailey v. State* (Tex. Cr. App.) 38 S. W. 185, in order to consummate the crime of seduction, the female must rely on the promise of marriage, yet this need not be contemporaneous with the act of carnal intercourse. If the parties were engaged before, and on account of this engagement, and because the female relied on the same, and loved the person to whom she was engaged, and under such circumstances appellant, by his wiles and artifices, procured carnal intercourse of such female, then the crime of seduction would be complete, although the promise to marry was not repeated at the time of the intercourse. In this particular case, according to the prosecutrix's testimony, she had been engaged to appellant about six months at the time she claims to have been seduced; and we may concede that, as to appellant having intercourse with prosecutrix, from the fact that he had continuous

opportunities to have had such intercourse, and, moreover, one witness testified that he saw them in the act of intercourse on one occasion, she is abundantly corroborated as to the intercourse. However, the main contention is that she is not corroborated as to any engagement or promise on the part of appellant to marry her. The only circumstance that tends in this direction is the continuous association between the parties for about two years. But it seems to us that this of itself is a very slight circumstance. Women often go in the company of men for months and years without an engagement to marry. This intercourse may be accounted for on the theory that the parties were having carnal intercourse with each other, as the testimony tends to show, for more than two years. This case would rather come under the decision in *Spenrath v. State* (Tex. Cr. App.) 48 S. W. 192, where we held that such continuous intercourse would serve to destroy the idea that the parties intended to marry, or that prosecutrix was relying on the promise of marriage when she first surrendered her virtue. We do not believe that the evidence in this record sufficiently corroborates the prosecutrix as to her engagement to marry appellant, and that she was induced, on account of this engagement and promise on his part to marry her, to have carnal intercourse with him. *Snodgrass v. State* (Tex. Cr. App.) 31 S. W. 366; *McCullar v. State* (Tex. Cr. App.) 36 S. W. 585, 61 Am. St. Rep. 847; *Gorzell v. State*, 63 S. W. 126, 2 Tex. Ct. Rep. 670.

Appellant also raises a question as to the misconduct of the jury. This matter was raised by motion. A contest was had, and the question tried by the court, the court overruling the motion for new trial based on this ground. An examination of the record on this point shows that the court was in error. By the testimony and affidavits of nearly all the jurors it is shown that the matter of the failure of defendant to testify was discussed and commented on in the jury room. However, the jurors concur in saying that it did not influence them. The decisions indicate that, where it is shown that the failure of defendant to testify is discussed and commented on in the jury room, the court will not speculate as to whether injury was done, but will reverse the case. *Tate v. State*, 38 Tex. Cr. R. 261, 42 S. W. 595; *Wilson v. State*, 39 Tex. Cr. R. 365, 46 S. W. 251; *Buessing v. State* (Tex. Cr. App.) 63 S. W. 318. In this connection we would observe that the court's charge on this subject is a little peculiar. He brought the attention of the jury to the matter by instructing them as follows: "The law allows defendant to testify in his own behalf, but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part." While this served to call appellant's failure to tes-

tify directly to the attention of the jury, it did not, in terms, tell the jury that they were not warranted or authorized to discuss or comment on the fact that appellant did not testify. If the court charged on this subject at all, it should certainly have been coupled with an instruction not to discuss or consider appellant's failure to testify.

For the errors discussed, the judgment is reversed and the cause remanded.

HILL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1903.)

RAPE—INSTRUCTIONS—REVERSIBLE ERROR—EVIDENCE—COMPLAINT—NECESSITY—CORROBORATION—WITNESSES—EXAMINATION—LEADING QUESTIONS.

1. The court has a sound discretion to permit leading questions when a witness shows disinclination to answer, or is inexperienced or timid.

2. In a prosecution for rape, when the evidence all showed that prosecutrix was not the wife of defendant, and the court stated in the first portion of the charge that the act must be committed upon another than defendant's wife, there was no reversible error in the omission of such statement in a subsequent portion of the charge, in which the jury were told that defendant would be guilty if he had had carnal knowledge of prosecutrix, and prosecutrix was under the age of 15 years.

3. In a prosecution for rape, the omission to state that penetration must be proved beyond a reasonable doubt was not error, when the law of reasonable doubt was subsequently given.

4. In a prosecution for rape, an objection to a charge that punishment would be assessed "at" death, instead of "by" death, is hypercritical.

5. In a prosecution for rape, when the state indisputably showed actual penetration, and defendant denied absolutely any injury upon prosecutrix, it was proper not to charge an aggravated assault.

6. A conviction of rape may be had on the uncorroborated testimony of prosecutrix.

7. In order to sustain a prosecution for rape, it is not necessary that the prosecutrix should have at once made complaint, and her failure to complain until two months after the outrage goes only to the weight of her testimony.

Appeal from District Court, Comal County; L. W. Moore, Judge.

Clement Hill was convicted of rape on a female under the age of 15 years, and appeals. Affirmed.

L. H. Blevins and H. G. Henne, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of rape upon a girl under the age of 15 years, and his punishment assessed at 5 years in the penitentiary.

The indictment substantially complies with the approved forms. White's Ann. Pen. Code, § 1101.

Bill No. 2 complains that while witness Rosie Conley, prosecutrix, was on the stand, the following questions and answers were

elicited: "Q. One evening were you passing by defendant's house? A. Yes, sir. Q. Did he pull up your clothes? A. Yes, sir. Q. Did he get on top of you? A. Yes, sir. Q. Please state to jury and court whether or not he put that private in you? A. Yes, sir. Q. In your private? A. Yes, sir. Q. Did it hurt you? A. Yes, sir. Q. You are not married, of course? A. No, sir. Q. Did he at that time drive the bus over there? A. Yes, sir." Appellant objected to all these questions and answers on the ground that they were leading and suggestive. The court qualifies the bill as follows: "The witness was very timid, and it was necessary, in order to develop the facts, that several leading questions be asked." Where a witness shows disinclination to answer questions, or is inexperienced or timid, as suggested by the court, it is within the sound discretion of the court to permit leading questions. At any rate, we see no injury to appellant.

Bill No. 4 insists that the court committed error in permitting witness Peter Newotny to testify that the day previous to the examining trial of defendant he had a conversation with prosecutrix, in which she told him that Clement Hill had assaulted her; "that he got this from good colored people. She [Rosie Conley] told him that he [Hill] called her in the house and raped her." The defense objected because hearsay, not in rebuttal, and defendant was not present. The court overruled said objections, and appends this explanation: "The statement 'that he got this from good colored people' was brought out on cross-examination by defendant's attorney." The record before us shows that this testimony was admissible. The same character of testimony is complained of in the fifth bill of exceptions.

Bill No. 7 complains of the following portion of the court's charge: "If you believe from the evidence that defendant did have carnal knowledge of said Rosie Conley, and if you further believe from the evidence that said Rosie Conley was then under the age of fifteen years, you will convict defendant of rape." Appellant objected because the charge failed to state that the female ravished must be another than the wife of defendant. The first portion of the charge, in defining rape, states that the same must be committed "upon another than the wife of the person," etc. The evidence all shows that prosecutrix was not the wife of defendant, and hence there is no reversible error in the omission complained of.

He also complains of this part of the charge: "In order to convict defendant, it must be shown by the evidence that her body was penetrated by his penis; and, if not so shown, you will acquit him." He contends that it does not state that penetration must be proved beyond a reasonable doubt, and because it does not plainly charge that the private parts of the female must have been penetrated by the male member or sexual or-

¶ 6. See Rape, vol. 42, Cent. Dig. § 33.

gan of defendant. The testimony shows an ordinary rape upon a child under 15 years of age, according to her testimony. The charge should have stated that the penetration must be into the female organ of prosecutrix, but, when this charge is construed with reference to the other portions, the error is clearly harmless. The court did give the law of reasonable doubt in a subsequent portion of the charge, and it was not necessary to repeat it in this connection.

Appellant also insists that the court erred in charging the jury, "You will assess his punishment at death;" insisting it should be, "You will assess his punishment by death." This is hypercritical.

There was no error in the court's failure to charge on aggravated assault, since, if the undisputed evidence for the state be true, there was actual penetration. Appellant's testimony denies in toto any character of injury upon prosecutrix.

He insists that the evidence is not sufficient, inasmuch as prosecutrix is not corroborated. The evidence is sufficient without any corroboration, under the decisions of this court.

Nor was it necessary that prosecutrix should at once divulge the outrage upon her person, in order to make a valid prosecution. The fact that she only did so two months after the outrage would only go to the weight of her testimony.

The judgment is affirmed.

WRIGHT v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1903.)

CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER—JURISDICTION—REASONABLE DOUBT—SIMPLE ASSAULT.

1. Defendant in a prosecution for assault to commit murder is entitled to an acquittal where there is a reasonable doubt whether the offense was committed within the jurisdiction of the court.

2. Defendant in a prosecution for assault to commit murder cannot be convicted of a higher grade of offense than simple assault where the offense consisted of pointing a pistol at another in an angry and threatening manner, with intent to alarm him, and under circumstances calculated to effect that object, without intending to shoot or shoot at him.

Appeal from District Court, Smith County; Tom C. Davis, Judge.

Cleveland Wright was convicted of aggravated assault, and appeals. Reversed.

Butler & Butler, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of aggravated assault, the penalty assessed being a fine of \$100, and 30 days' confinement in county jail.

Exception was reserved to the following portion of the court's charge: "If you do not find beyond a reasonable doubt that defend-

ant is guilty of an assault with intent to murder, you will acquit him of an assault with intent to murder, and next inquire whether he is guilty of aggravated assault; and if you find beyond a reasonable doubt that defendant pointed a pistol at W. H. Ashby in an angry and threatening manner, with intent to alarm him, and under circumstances calculated to effect that object, without intending to shoot or shoot at him, and it appears from the preponderance of the testimony that the pistol was so used, if you so find, in Smith county, Texas, or in Gregg county, Texas, within four hundred yards of the Smith county line, then you will convict him of an aggravated assault, and so say in your verdict." This charge is erroneous. If there is a reasonable doubt as to whether the offense was committed in Smith county, or within 400 yards of the line, appellant is entitled to an acquittal; and under no contingency, under the charge quoted, would appellant be guilty of a higher grade of offense than simple assault.

The judgment is accordingly reversed, and the cause remanded.

SPILLER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1903.)

HOMICIDE—ASSAULT—AGGRAVATED ASSAULT—EVIDENCE—SUFFICIENCY.

1. In a prosecution for assault with intent to murder, evidence examined, and held sufficient to raise the issue of aggravated assault, a charge on which should have been given.

Appeal from District Court, Galveston County; J. K. P. Gillaspie, Judge.

Polly Spiller was convicted of assault with intent to murder, and appeals. Reversed.

Marsene Johnson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for assault with intent to murder, and the state's evidence sustains the conviction. However, the testimony introduced for appellant suggests the issue of aggravated assault, which phase of the law should have been given. For the failure to submit this theory of the case to the jury, exception was reserved to the court's charge. In regard to this, it is shown there was animosity between appellant and the injured party, growing out of their rivalry for the affections of Will Spiller. It seems that the assaulted party, Eliza Jackson, had been playing the part of mistress to Will Spiller for several years, and had a child by him. At the time of the occurrence, Will Spiller and appellant were living in the same house, and unmarried, though they have subsequently married. Eliza Jackson objected to her child going into the house where Will Spiller and appellant lived, and to their giving it food, and seems to have been rather caustic and

incisive in her language towards Will Spiller and appellant; even threatening appellant with giving her a good beating, if, indeed, the threats were not of a more serious character. She seems to have been a larger woman than appellant, and appellant was afraid of her. On the occasion of the difficulty, appellant left home to go to a grocery store across the way, which led her by the gate leading into the residence of Eliza Jackson. That while upon the street, en route to the grocery store, a quarrel came up between the parties, and Eliza Jackson struck her, as some of the testimony shows, and undertook to knock her down, and that, in resenting this, appellant used a razor; cutting her two or three times with it. She accounts for having the razor by reason of the fact of the threats made by Eliza Jackson against her, and that she was afraid she would undertake to whip her or carry the threats into execution, and carried the razor for protection. We believe, under this state of facts, a charge on aggravated assault should have been given.

The judgment is reversed, and the cause remanded.

WASHINGTON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1903.)

BURGLARY—EVIDENCE—ADMISSIBILITY—REMARKS TO JURY—FAILURE OF DEFENDANT TO TESTIFY—CONTINUANCE—ABSENT WITNESSES—APPEAL—PROOF OF VENUE.

1. In a prosecution for burglary, an application for a continuance on the ground of the absence of a witness was properly denied where the witness was in the city of the trial up to the day before defendant asked a subpoena for him, and defendant's case had been called at the previous term, and defendant had had no process issued for such witness, and did not issue process until after it had been published in the daily papers that witness had removed from the city; the return of the officer showing that he had removed to Mexico.

2. In a prosecution for burglary, testimony of prosecutor and his wife that, when they entered their house on the night of the burglary, they discovered certain damage to their furniture, was properly admitted for the purpose of showing the condition in which the house was found just after defendant was seen running therefrom.

3. In a prosecution for burglary, testimony that witness told her husband (the prosecutor) where she had put the money in question (she not stating what she told her husband) was properly admitted.

4. In a prosecution for burglary, the district attorney, in closing, stated that he had proved that defendant was seen jumping from the window, and asked who had testified that he was not there, in making which statements he pointed his finger at defendant, who had not testified. There were no remarks of the district attorney as to defendant's not testifying for himself, and the court reprimanded him for his remarks, and cautioned the jury to disregard them. *Held*, that there was reversible error.

5. In a prosecution for burglary, the district attorney read to the jury from the indictment the date of its return, showing that the burglary took place on the 17th, and stated that the grand jury had indicted the negro on the

25th—"quick work to get a negro burglar." The jury were instructed to disregard the statement of the district attorney as to what the indictment showed as to when it was returned into court. *Held*, that there was no error.

6. Under the statutes providing that, where there is no issue made in the lower court, the presumption is that the venue was proven, defendant in a criminal prosecution must make an issue by bill of exceptions in the lower court where he insists that the venue was not proven.

Appeal from District Court, Travis County; George Calhoun, Judge.

Clarence Washington was convicted of burglary, and appeals. Reversed.

O. Dickens, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of five years.

Bill No. 1 insists that the court erred in refusing to grant appellant's application for continuance for want of the testimony of S. B. Lane. The bill shows appellant had a subpoena issued on October 3, 1903, which was returned not served; that appellant heard the district attorney state in open court that said witness was out of the state, but would return soon—was expected by November 16, 1903. Appellant expected to prove by Lane that said state's witness Wm. Barron told Lane some one had broken his furniture, but did not claim his house had been broken into for the purpose of theft, and also that said witness told Lane he did not know who had broken his furniture. The court appends this explanation: "Witness wanted by defendant had been a policeman of the city of Austin, and was in Austin up to the day before defendant asked subpoena for him. Defendant's case had been called at the term before, and defendant had no process issued for said witness, and did not issue said process for the witness until after it had been published in the daily papers that said witness had removed from Austin. The return of the officer shows that witness had removed to Mexico." There was no error in the action of the court overruling this application for continuance.

Bill No. 2 complains that Wm. Barron (prosecutor) was permitted to testify that on entering his home on the night of the alleged burglary he found the glass in the folding bed smashed, the slats in the bed broken, and the mirror in the dresser broken. Bill No. 3 complains that the state was permitted to prove by Hattie Barron (wife of prosecutor) that when they went into the house they found the dresser-glass broken—the blow was so hard that the back of it was knocked out—and that three slats in the bed were broken. Appellant objected to this testimony on the ground that the same was immaterial, irrelevant, calculated to inflame the minds of

¶ 6. See Criminal Law, vol. 15, Cent. Dig. §§ 2630, 2641, 2757.

the jury against appellant, and not proving any fact in the case for which appellant was being tried. Both bills were allowed, with this qualification: "The testimony was as to the condition in which the house was found just after defendant was seen running from the house, and was limited in the charge." This testimony was admissible for this purpose.

The fourth bill complains that the state was permitted to prove by Hattie Barron that she had told her husband she had put the bill of money in question in the box. In his qualification to the bill, the court says: "The district attorney asked witness if she told her husband where she had put the five-dollar bill, and the witness answered that she had; but witness did not state what she had told her husband, further than that she had told him." We see no error in the ruling of the court, as disclosed by this bill.

In the fifth bill, appellant complains that the district attorney, in his closing remarks to the jury, used the following language: "I have proved he was seen jumping out of the window, I have proved he was there, and where is his proof that he was not? Who has testified that he was not?" And in making these statements the district attorney pointed his finger at defendant. Defendant had not testified." The court qualifies the bill as follows: "The court reprimanded the district attorney for his remarks, and cautioned and instructed the jury to disregard all of his said remarks. There were no remarks of the district attorney as to defendant not going upon or taking the witness stand or testifying for himself." In the light of this explanation of the court, there is reversible error. *Brazell v. State*, 33 Tex. Cr. R. 333, 26 S. W. 723.

The district attorney, in his closing argument to the jury, after he had rested the case for the state, and after the defendant's attorney had argued the case, took the indictment, "and held it out to the jury, and, reading therefrom the date of its return by the grand jury, stated to the jury that the burglary took place on the 17th, and that the grand jury had indicted the negro on the 25th—quick work to get a negro burglar." To these remarks defendant excepted as being prejudicial to him and wholly improper; that, not being in testimony, the same was calculated to prejudice and inflame the minds of the jury against defendant. The court states "that the district attorney stated that the indictment showed the grand jury returned the same on the 25th inst., and the evidence showed that the offense was committed on the 17th inst. of the same month. On the objection of defendant's counsel, the jury was instructed to disregard the statement of the district attorney as to what the indictment showed as to when it was returned into court." In this there was no error.

Appellant's counsel, in argument before this court, insists that the evidence fails to show

that the venue of the offense was proven. Under the statutes of this state, where there is no issue made in the lower court on this question, the presumption is that the venue was proven. No issue was made in the lower court on this question. We hold that, the statute being constitutional, appellant must make an issue by bill of exceptions in the lower court, where he insists the venue was not proven. See *McGlasson v. State*, 38 Tex. Cr. R. 351, 43 S. W. 93.

The judgment is reversed, and the cause remanded.

SPARKS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 12, 1903.)

HOMICIDE—MURDER IN SECOND DEGREE—KILLING WRONG PERSON—SELF-DEFENSE—EVIDENCE—SUFFICIENCY—APPEAL—PREJUDICIAL ERROR.

1. Any error in a charge on express malice in a prosecution for homicide is rendered harmless by a conviction of murder in the second degree.

2. Where A. kills B., intending to kill C., he is guilty of murder in the second degree, provided the killing would have been murder in the first or second degree had C. been killed.

3. In a prosecution for homicide, evidence examined, and held not to raise the issue of self-defense.

Appeal from District Court, McLennan County; Sam R. Scott, Judge.

Joe Sparks was convicted of murder in the second degree, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, the penalty assessed being 15 years in the penitentiary.

In motion for new trial, the charge is criticised because of this statement: If "the facts and circumstances in the case show such a general reckless disregard of human life as necessarily includes the formed design against the life of the person slain, then, if so, the killing, if it amounts to murder, will be upon express malice." The criticism is that there were no facts introduced in evidence upon which the charge could be predicated, and that it was calculated to mislead the jury to defendant's prejudice. This contention is not well taken. The verdict of the jury shows that appellant was not prejudiced by this charge, because they convicted him of murder in the second degree, and not murder in the first, as they would be required to do if they found express malice. And a second reason is that, if there was any error, it passed out when appellant was acquitted of murder in the first degree.

Nor do we think there is any merit in the

¶ 1. See *Homicide*, vol. 26, Cent. Dig. § 720.

contention that the court erred in telling the jury that if appellant killed deceased, Anderson, intending to kill Sam Cogbin, the killing would be murder in the second degree, provided the killing had been murder in the first or second degree if Cogbin had been killed. The charge is correct, under the decisions in this state.

The charge seems to have been a rather favorable presentation of the law in behalf of appellant. The issue presented by the facts as relied upon by appellant was embodied in his special charge, which was included in the court's general charge, and given the jury, to wit: "Homicide is excusable when the death of a human being happens by accident, or misfortune, though caused by the act of another, who is in the prosecution of a lawful object by lawful means. The lawful act causing the death of another must be done by lawful means and in a lawful degree. Now, if you believe from the evidence that, on the night of the killing of Dave Anderson, defendant was a guest on the premises of said Dave Anderson, with his knowledge and consent, and that just prior to the killing defendant had Emma Hilliard, the stepdaughter of Dave Anderson, under his care, and if you further believe that defendant saw some one squatting in the back yard, and, not knowing that it was deceased, fired a pistol merely to frighten, but with no intention to hit, such person, his act would not be unlawful, and you will acquit defendant if you so find." Perhaps this was more favorable to appellant than the facts justified. Appellant's contention, as made by his own testimony, was that he heard some one in the back yard of the deceased, and went to ascertain who it was; that he found a party squatting down, and, believing it to be Sam Cogbin, who, he claims, had previously threatened his life, fired, as he states, to frighten him, as the man squatted down arose and began to approach him. He further states that he told deceased two or three times not to approach him. There are no facts which go to show that deceased was making any demonstration or doing anything towards carrying into execution any threat, even if it had been Cogbin, at the time appellant fired the shot; and his own testimony makes it clear that, after he fired the shot, he ascertained who his victim was, and accompanied him several steps towards his residence, and left his victim, went into a house near by and hid his pistol, and at first denied any knowledge of the homicide, but subsequently told the story above detailed. Cogbin was introduced, and denied making the threats, and further testified that his relation with defendant was pleasant and friendly; that, only a short time before the homicide, appellant was in his barber shop, and was shaved by him; and that he frequently shaved appellant after the imputed threats alleged to have been made. There seems to

have been no excuse for this killing, and the issue of self-defense, in our opinion, is not raised by the testimony.

The judgment is affirmed.

GIBSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 18, 1903.)

INCEST — WITNESSES — IMPEACHMENT — TESTIMONY BEFORE GRAND JURY — APPEAL — HARMLESS ERROR — INSTRUCTIONS.

1. Where, in a criminal case, the state cross-examines prosecuting witness as to her testimony before the grand jury, and she denies making certain statements there, the state can prove by the members of the grand jury and the district attorney that she made such statements.

2. Where prosecuting witness on the trial denied that accused was guilty, the state could place witnesses on the stand and prove contradictory statements made by the prosecuting witness before the grand jury; the testimony being on a material issue.

3. Where there is positive testimony of incestuous intercourse, a charge on the law of circumstantial evidence, while error, is harmless.

Appeal from District Court, Nacogdoches County; Thomas C. Davis, Judge.

Fayette Gibson was convicted of incest, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of incest, and his punishment assessed at confinement in the penitentiary for a term of four years.

While prosecutrix, Eliza Underwood, was testifying in behalf of the defendant, she stated that she had never had intercourse with appellant, and that he was not the father of her child; that the only person who had ever had intercourse with her was Will Davis. Bill No. 1 shows that the state, on cross-examination, was permitted to interrogate her as to her testimony before the grand jury. She denied making certain statements before the grand jury. Some she said she did not remember about. Thereupon the state proved by various members of the grand jury and the district attorney that she made these statements before the grand jury. In this there was no error. It was also proper for the court to permit the state to place the witnesses on the stand and prove the contradictory statements after laying the predicate, as above shown; her testimony and the questions asked her being upon a material issue. The court properly limited the impeaching testimony to the purpose for which it could be considered.

Appellant complains of the admission of testimony shown in bills Nos. 2, 3, and 4; but the court, in his explanation to these bills, states that there was no objection made at the time of the introduction of said testimony.

Appellant also insists the court erred in

presenting to the jury the law of circumstantial evidence. This is true, since the evidence is not at all circumstantial, but there is positive testimony to the incestuous intercourse. However, such a charge could not injure appellant.

The verdict of the jury is supported by the evidence. The judgment is affirmed.

VANN, alias VANCE, v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—PROVOKING THE DIFFICULTY—ARREST—MUNICIPAL CORPORATIONS—PROVISION IN CHARTER—INSTRUCTIONS—EVIDENCE—ADMISSIBILITY—IMPEACHING WITNESS.

1. A city charter and ordinances authorizing policemen to arrest without warrant, when an ordinance is violated in their view, is valid.

2. Though a qualification of an instruction on manslaughter excluding from the definition a case where the accused provoked a contest with the actual and apparent intention of killing is in accordance with the statute and is properly given on behalf of the state, an instruction should also be given on manslaughter without this qualification, where evidence conflicted as to whether accused provoked the conflict.

3. If an officer exercises his right to arrest, for violation of an ordinance, in a threatening and menacing manner, the person arrested is justified in resisting to the extent of taking life, if necessary to save his own life.

4. Where a policeman, in attempting an arrest, roughly attempted to pull a hackman off his hack, and the hackman shot, out of anger rendering his mind incapable of cool reflection, he would be guilty of no higher offense than manslaughter.

5. An instruction, on a trial for murder of an officer attempting an arrest, that, if the jury do not believe from the evidence that he was in good faith attempting the arrest for violation of an ordinance, and if it reasonably appeared that he intended to shoot the accused, the killing was justifiable, is objectionable in requiring the jury to find as an affirmative fact that the officer did not attempt the arrest in good faith.

6. One accused of murder, who claims that the act was in self-defense, is entitled to a charge on self-defense containing no restrictions as to the law on provoking the difficulty.

7. An instruction, on a trial for murder of an officer, that, if the jury do not believe that the accused provoked the difficulty with the intention of killing or doing serious bodily harm to the officer, and if they find that the officer had no authority to arrest the accused, and accused knew his lack of authority, and that the officer aroused in the accused sudden passion by an attempt to arrest him, etc., is objectionable as requiring affirmative findings on these points, while the accused is entitled to the benefit of any reasonable doubt.

8. A charge on provoking the difficulty should state what constitutes provoking the difficulty.

9. To defeat the right of self-defense by provoking a difficulty, the accused must have said or done something with intent to produce the occasion, or bring about the difficulty, which makes him responsible criminally.

10. One attacked by a policeman, independent of any attempt to arrest, had the same right to defend as against a private individual.

11. One's right to self-defense is unaffected by the relative strength and size of the parties, where the weapons used were six-shooters.

12. On a trial for murder, evidence of accused's remark immediately after the affray, to one who had seized him, that the deceased ought to be killed, that no one could pull him off his hack, was admissible as part of the res gestae.

13. Evidence, after predicate laid, that one had said to a witness, "It is a shame to murder a man like that," and he replied, "He ought to have been killed; I would kill any man that would try to pull me off my hack," is inadmissible, on the trial for the murder, to impeach the witness.

Brooks, J., dissenting.

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Jeff Vann, alias Jeff Vance, was convicted of murder, and appeals. Reversed.

J. M. Hurt, Wynne & McCart, and Bowlin & McCart, for appellant. O. S. Lattimore, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant (a hack driver) was convicted for the murder of A. J. Grimes (a policeman), and his punishment assessed at death. The statement of facts discloses that appellant had been arrested two or three times by deceased for violating the hack ordinance. By virtue of one of these arrests, under the writ of habeas corpus this hack ordinance was declared void. These matters engendered some ill feeling between deceased and appellant; in fact, the record discloses there seems to have been some feeling between the hack drivers on one side and the policemen on the other. The killing occurred just on the edge of what is known as the "Al Hayne Triangle," immediately west of the Texas & Pacific Railway Depot. Along the street west of said depot two street railway tracks are laid. The city council of Ft. Worth passed an ordinance prohibiting hack drivers, hotel runners, and kindred classes of people from taking their stand east of this street car track for the purpose of soliciting passengers who came in on the different railway trains. The theory of the state is that appellant took the stand within the prohibited circle and solicited passengers for his hack, and that deceased undertook to arrest him for this reason. This brought up the difficulty in which the policeman lost his life. The theory of the defense is that appellant did not take his stand within the prohibited circle, and that deceased did not undertake to arrest him, but undertook to wreak his vengeance on appellant for real or imaginary insults offered him during the conversation immediately preceding the homicide. The testimony is very voluminous—unnecessarily so—and a great deal of it is but repetition. The witness Matkins, for the state, locates himself near the scene of the homicide, at about 6:45 o'clock a. m. He says appellant came driving around Main street towards the hack

stand, and turned in towards where himself and deceased were standing, and drove up within probably 8 or 10 feet of the sidewalk. Deceased remarked to appellant, "Jeff, you are going to keep on running over there until you get another case filed against you." Appellant began backing up to the line, and remarked to deceased, "File it; God damn you, file it." By this time appellant had gotten his carriage backed out to the proper place, and deceased had walked probably 15 or 20 steps down the sidewalk away from appellant, and appellant remarked, "You are nothing but a God damned old jobber." Deceased checked up a little, turned rather facing appellant, when appellant again remarked, "That is all you are, you are a God damned old jobber; and if you want anything out of me you can get it." Deceased replied, "I will just place you under bond; I will place you under bond," and started over to appellant's hack. As he did so, appellant, who was sitting on his hack, arose to a standing position on the boot of his hack, drew a glove off his right hand, and stood in that position until deceased walked up to the side of his carriage to the left. Deceased said to appellant, "Jeff, sign this bond." As deceased approached appellant, he took out a bond; that is, he took some papers from his pocket—three or four; maybe more—selected one, and placed the others back; and said, "Sign this bond." Appellant looked down at him, and said, "I will sign nothing, God damn you; I will sign nothing." Deceased replied, "If you don't sign the bond you will have to go with me," and reached up and caught appellant on the pants leg, just above the knee, and said, "Get off and come with me; you will have to come with me." At this remark, appellant reached down to the cushion of his carriage, picked up a pistol, and said, "Here is the way I will come down," and fired at Grimes, who was standing right by the side of the wheel. Deceased dodged a little bit, and went back by the side of the hack, and as he did so appellant fired again, and as he reached the rear end of the hack he and deceased fired about the same time. The firing continued until deceased fell. According to this witness, appellant drove across the street railway track toward the depot, and after crossing this he was on the prohibited territory, some 12 feet or more. Appellant drove over to meet passengers. At the time of the shooting the head of appellant's horses were on the street car line, west of the track, as was this witness, his team being a little ahead of appellant's hack. This street railway track designated by the city ordinances is what these witnesses called the "dead line," east of which the hacks were prohibited going; and parties were interdicted coming nearer the depot than that unless the passengers spoke, and, if that occurred, the hackman had the right to go and get such passengers. Witness did not know whether

appellant received a signal from any of the passengers or not, but was under the impression they paid no attention to him. There were quite a number of hacks along this "dead line." This fairly presents the state's side of the case and the attending circumstances.

Battis testified, for defendant, that at the time of the difficulty defendant's horses were west of the street car track, standing facing east towards the depot, and appellant was on his hack. The first this witness noticed of the difficulty was when a train came in and some passengers came out from the depot. Appellant called to the passengers, and his team walked on the track; did not walk diagonally across the street, but a little south from a straight line; and appellant brought up his team and went to backing them. As he did, deceased hallooed at him, "Better get back across that line." Appellant said, "I am," and laughed. Deceased made a remark to the effect if he did not stay across there he would arrest him. Appellant told him he had not been across the line; and there were some other words spoken, but the witness did not understand what was said. There was some noise and trains running, and a street car passed also about that time. The next this witness noticed of deceased he was across the track right by the horses of appellant, close to the wheel of the hack, but he could not understand what either of them said. Deceased walked up by the side of appellant's hack and grabbed him by the coat, near the hip. Appellant sort of twisted a little bit, and deceased's hand slipped off appellant's coat, and there was a shot fired. This witness could not see deceased, after his hands slipped off appellant's coat, on account of the carriage of hackman Brooks; but there was a shot fired from that side of the hack, and appellant got his pistol and fired immediately afterwards—getting his pistol from under what this witness terms the "dickey seat" on the hack. "He [appellant] got that pistol immediately after the two shots I heard fired. There was not a great deal of difference between the two shots I heard fired; it was all done very quick." When the first shot was fired, appellant had nothing in his hands but his lines; but when that shot was fired, appellant got his gun from under the dickey seat. Grimes went towards the rear of the hack, and the firing continued until deceased was shot down. This witness did not hear appellant say, "You are nothing but a God damned old jobber."

Witness Brooks testified that he was a hack driver, and his hack was about 25 feet from appellant at the time of the difficulty, and there was no hack between his and appellant's; that appellant was at the stand when witness drove up; he heard something said between deceased and appellant. When the passengers came out of the depot he (witness) remarked, "Drive over and get you,

colonel, if you want a hack;" tapped his horses, and stepped over the car track. As he did this, appellant also started over just after this witness, "and cut his horses south in front of Jake Stine's team, standing perfectly still about 6 or 8 feet west of this street car line, and his horses were headed south, and he was after the same people that I was. He did not get them. Officer Grimes [deceased] was standing over on the sidewalk, and told Jeff if he did not look out he would arrest him. Jeff says, 'You are nothing but a jobber and a knocker,' and Grimes told him if he didn't look out he would arrest him. Jeff told him, 'You are a knocker and a jobber.' With that Grimes came on over to Vann's hack on the north side of his hack, and stopped about the singletree of the near horse, talking to him. He told him he would have to arrest him—he didn't know what for; and he says, 'For driving over there.' Jeff told him, 'I was not over the dead line.' And with that Officer Grimes wanted him to sign a bond, reached his hand down here in his pocket, and Jeff told him he would not do it. With that he moved towards Jeff's hack, and Jeff told him, 'Don't climb up here; don't climb up here.' At that Officer Grimes stooped over and threw his left foot on the hub, and before he put his foot up he pulled his gun out, had it up in this position, and Jeff stooped over the south side of his hack, and Officer Grimes took his foot down and stepped down—I suppose about six feet from the hack—and shot first. When he shot, Jeff then lifted up the dickey seat from the south side and pulled his gun out and shot at Officer Grimes." According to this witness, deceased shot again. At this time he placed appellant as standing up and Grimes going toward the rear end of the carriage, and about the time he reached the hind wheel both parties shot; and the officer, on reaching the rear end of the hack, shot through the glass in the back of the hack, and passed on to the other side of the hack, where the firing was renewed. He says when Grimes fired the first shot he (Grimes) was standing out from the carriage; appellant had nothing in his hand, but was standing up in the boot of his hack, and did not reach for his pistol until after the officer had fired the first shot.

Appellant took the stand in his own behalf. He says: About 6:30 o'clock a. m. he drove to the Texas & Pacific Station. That upon reaching the street car track his horses' front feet stopped about the middle of the west street car track. Deceased was standing across on the sidewalk, and remarked, "Get back there, or I will make a case against you." Appellant replied, "Wait until I cross the line before you make any case; you have got no right to make any case until I cross the line." "Deceased started and walked off, I should think a little north; and I says, 'You are nothing but a jobber, and you make a case if you want

to.' Deceased turned around and started south, and remarked, 'I will make you take that back,' stepped off the sidewalk," and came close up to appellant by the front wheel of his hack, and told appellant to get off his carriage. He declined to do it. Deceased reached up with his hand and caught appellant by the pants; he pulled loose from deceased, and deceased pulled his pistol and fired. As he fired, appellant got his pistol, and the deceased's second shot and appellant's first shot were close together, appellant's first shot going through the seat of the hack. He did not get his pistol entirely up before it went off. When deceased fired the second shot he was backing towards the north hind wheel of appellant's carriage, and was near the north hind wheel. Deceased passed on around the carriage to the southwest corner, and appellant shot over the carriage at him. Deceased shot through the back of the carriage at appellant, and appellant jumped off the hack, and as deceased came around the corner of the carriage they met, and appellant again fired, deceased firing about the same time; deceased fell.

There were other witnesses who testified pro and con as these already mentioned.

The charter of the city of Ft. Worth authorized the city council to pass ordinances of the character mentioned, and also authorized its policemen to arrest without warrant, whenever a violation of any of the city ordinances was committed in their view. My Brethren are of opinion that this clause of the charter and ordinances passed thereunder are valid. The writer does not agree with these views, and believes the ordinance cannot confer such power beyond the general state law.

There was a motion for continuance made by appellant, which was overruled, and quite a deal of newly discovered testimony attached to the motion for new trial. But as the case will be reversed upon other propositions, and these matters may not occur upon another trial as here presented, a discussion of them is pretermitted.

As we understand the testimony, the issues of murder, manslaughter, and self-defense are suggested. The question of killing under the theory of illegal arrest is also presented. If appellant had crossed what the witnesses term the "dead line" and had taken his stand with his hack in the prohibited territory, this act was in violation of the city ordinance. It may be seriously questioned, however, that he had done so, even from the state's standpoint. The witness Matkins, whose testimony is referred to above, says that appellant had crossed the dead line, and immediately began backing his hack until he got at the proper position. If this was all that appellant did, he was not in violation of the city ordinance; because he neither stopped nor took his stand within the prohibited territory. While he rushed across the dead line in his eagerness

for passengers, he immediately backed out; and this seemed to have been recognized by the officer himself, when he remarked to him, in substance, if he kept running across the dead line he would have another case against him, and by reply of appellant, "Wait until I cross the dead line." The provocation offered by appellant, if in fact it be a provocation, arose out of the remarks made by appellant to deceased that he was "nothing but a jobber and a knocker," or a "God damned old jobber and knocker," and that deceased "could make a case if he wanted to," continuing with his challenge to deceased to file a case against him if he desired. If appellant had not violated the ordinance, as he contends and his witnesses testified, then the officer had no authority to arrest, and was in the wrong when he threatened him with a case of prosecution. It was the duty of the officer, under the ordinance, if appellant had violated it, to arrest him, and his threat to do it seems to indicate that appellant had not violated the ordinance. If in fact appellant was not violating the ordinance, the officer was the first to use remarks that tended to bring on the difficulty; for, if appellant had not crossed the dead line and taken his stand in violation of the ordinance, the officer's remarks to appellant were uncalled for and unnecessary. There were two facts omitted in the above statement of the evidence, which are here stated: Each side produced testimony showing that the other had made threats of a serious character. While of a general nature, the threat by deceased included the hackmen, of which appellant was a member, and appellant's threats were against the policemen, and one witness said that he made a threat directly against deceased.

Appellant contends, and we think correctly, that he had the right to have a charge on manslaughter, unfettered by a charge on provocation with the apparent intention to kill; and also that, under the law and the facts, he was entitled to a clear and unequivocal charge on self-defense, unlimited by the law in regard to provoking a difficulty. After defining manslaughter, the court places this qualification upon it: "Though a homicide may take place under circumstances showing no deliberation, yet if the person guilty thereof provoke the contest with the actual and apparent intention of killing, or doing some serious bodily injury to deceased, the offense does not come within the definition of manslaughter." While this is the statutory law, and perhaps in this case was properly given, still appellant was entitled to a charge on manslaughter unfettered by this statute. While, perhaps, the court should have given this charge for the benefit of the state, at the same time he should have given a charge on manslaughter without this qualification. Certainly the appellant should have a clear unqualified charge on each controverted issue of fact.

And again, the charge on manslaughter is criticised, and a special charge requested, submitting appellant's theory of this difficulty. That is, if the officer had the right to arrest, and the killing grew out of this arrest, the act of the officer in arresting must not have been in a threatening and menacing manner. This charge should have been given, and it was error to refuse it. If appellant was violating the law, and deceased undertook to arrest him, and did it in the manner indicated in the testimony, by trying to jerk him from his hack, and failing to do this drew his pistol on him, the officer himself was in violation of law, and appellant had the right to resist it, and, if it became necessary to kill to save his own life from the onslaught of deceased when he drew his pistol and fired at him, he would have been justifiable. If he shot deceased out of anger, because he undertook to pull him off his hack under the circumstances detailed, and this rendered his mind incapable of cool reflection, he would not be guilty of any higher offense than manslaughter. This phase of the law of manslaughter was not presented by the charge and the special requested instruction refused.

The court gave several charges in reference to self-defense, which, from a casual inspection, are clearly erroneous. For instance, he charges the jury: "If you do not believe from the evidence that A. J. Grimes was in good faith attempting to arrest defendant, immediately before the difficulty in question, for an alleged violation of the city hack ordinance introduced in evidence; or if you believe that he was attempting to make such arrest, but further believe and find, under foregoing instructions, that he had no lawful authority to make such arrest; and further believe from the evidence that at the time defendant began to shoot at Grimes, if he did shoot at him, it reasonably appeared to defendant from act or acts then done by Grimes, or from some words coupled with his act or acts, that it was the purpose and intent of Grimes to shoot defendant with a pistol, and that defendant then began firing at Grimes for the purpose of preventing being shot by him; and if you do not believe from the evidence, beyond a reasonable doubt, that defendant willfully and intentionally provoked said difficulty, if he did provoke it, for the purpose of using unlawful violence upon Grimes—then you will find that the killing of Grimes by defendant, if he did kill him, was not an unlawful killing, but was done in his lawful self-defense, and therefore justifiable, even though you should further believe that said apparent danger to defendant, if any, was not real." Exception was reserved to this charge. It will be noted in the first statement of this charge that it required the jury to find as an affirmative fact that Grimes was not in good faith attempting to arrest appellant; in other words, it shifts

the burden of proof. Appellant is entitled to the reasonable doubt on every proposition where his life or liberty is sought to be taken. This, as every other charge given on self-defense, is limited and restricted by a charge on provoking the difficulty. While exception was not reserved to the paragraph of the court's charge following the one above quoted, still a special charge was asked and refused covering the error in that charge, and to the failure of the court to give the special instructions exception was reserved. This refusal was error, and the charge of the court sought to be corrected by this special charge was flagrantly erroneous.

Again, the court instructed the jury: "If you do not believe from the evidence that defendant provoked the difficulty in question with the apparent intention of killing A. J. Grimes, or doing him serious bodily injury; and if under foregoing instructions you find that said Grimes had no lawful authority to arrest defendant, and that defendant knew of such want of authority to make such arrest; and if you further believe from the evidence that immediately prior to the time defendant began firing at A. J. Grimes, he, Grimes, was attempting to arrest defendant, and that said attempt aroused in defendant sudden passion, as sudden passion is above defined," etc. As before stated, the jury are required here to find affirmatively from the evidence that appellant did not provoke the difficulty with the apparent intention of killing Grimes or doing him serious bodily injury; and they are further required to find affirmatively that Grimes had no lawful authority to arrest defendant, and that defendant knew of such want of authority to make such arrest, before they could acquit or reduce his crime below that of murder. It would take no reasoning to show this to be error. If there was a reasonable doubt upon either proposition, defendant was entitled to the benefit of it. That is, the jury should be required to find beyond a reasonable doubt that defendant provoked the difficulty; and, if there was a reasonable doubt as to whether Grimes had the authority to arrest or not, appellant has the benefit of such doubt. But this charge solves both doubts adversely to defendant, and required the jury to find affirmatively that neither existed before they could give him the benefit of the law.

In every charge on self-defense, appellant's right of self-defense was limited by a charge on provoking the difficulty. The charge is further criticised because it nowhere informs the jury what is necessary to constitute provoking the difficulty. The language is, as above quoted, "If the jury do not believe that defendant provoked the difficulty." Under all the authorities, and under the law, in order to constitute provoking a difficulty, there must be something said or done by the accused with intent to produce the occasion, or bring about the difficulty, which makes him responsible criminally. The jury are nowhere

told, in regard to the law of provoking the difficulty, that defendant must have said or done something which produced the occasion or brought about and provoked the difficulty. These matters were criticised in the court below, and special charges asked and refused. All the special charges, except No. 3, were directly applicable to the facts of the case, and should have been given. The last case decided by this court with reference to the court limiting throughout the charge on self-defense by a charge on provoking the difficulty is *Drake v. State* (at the present term) 77 S. W. 7. However, that case but follows the unbroken line of authority.

Independent of appellant's right to have a charge on self-defense growing out of his theory of illegal arrest, as well as a proper charge on manslaughter in that connection, defendant's evidence presents clearly and emphatically a case of self-defense from an attack made by the officer independent of the question of arrest. If deceased approached defendant's hack and undertook to pull him from it, and, failing to do this, began firing upon him with his six-shooter, appellant had the unquestioned right to defend and the further right to continue shooting until all danger to himself had passed. This issue was presented by the testimony.

Again, the court fettered appellant's right of self-defense by a charge on the relative strength and size of the parties. It would make no difference how large one may be, or how small the other; if the smaller one is shooting with a six-shooter, the other has a right to protect himself without any question as to the relative strength of the parties or their size. A six-shooter is as dangerous in the hands of a small man as in the hands of a robust person. *Hickey v. State*, 76 S. W. 920, 8 Tex. Ct. Rep. 579.

At the termination of the difficulty, Fulford and Witcher seized appellant; and it is left in doubt when appellant's last shot was fired, whether while they had hold of him, or immediately before they seized him. Fulford testified that he remarked, "Jeff, you have played the devil now." Appellant replied, "Damned big son of a bitch ought to be killed; there is no son of a bitch can pull me off my hack." Objection was urged to this that appellant was under arrest, having been seized by the officers. Under the unbroken line of authority in this state, this testimony was admissible as *res gestæ*. Witcher denied hearing this.

Judkins, after predicate laid to impeach witness Battis, was permitted to testify, as follows: "That he [Judkins] said to witness Battis, 'It is a shame to murder a man like that.' Battis replied, 'He ought to have been killed, and I would kill any man, God damn him, that would try to pull me off my hack.'" Judkins was permitted, after Battis denied these statements, to swear before the jury to this conversation. We think the exception was well taken. This was an opinion of

Judkins, gotten before the jury, as to his view of the homicide; and the answer to this, if Battis did make it, was not legitimate impeachment.

Objection was urged to the action of the court permitting the witnesses Nellie Carey and Lizzie Murray testifying, because it seems that they had been from under the rule in the courtroom part of the time, and had discussed their testimony and the facts of the case after being placed under the rule. This will not occur upon another trial, and is therefore not discussed.

As before stated, the questions arising on the action of the court refusing the continuance and overruling the motion for new trial are not discussed. The witnesses mentioned in both instruments may be present on another trial, and, if they are not, the question will come in an entirely different shape and under different environments.

For the errors discussed, the judgment is reversed and the cause remanded.

BROOKS, J. I dissent from the opinion of the majority, and do not believe there is any reversible error in this case. I may write my views later.

CRUSE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

HOMICIDE — ACCOMPLICE — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE — APPEAL — BILLS OF EXCEPTIONS — SUFFICIENCY — NEW TRIAL — MOTIONS — EXAMINATION OF JUROR — FORM OF QUESTION.

1. On appeal from a conviction of homicide, a bill of exceptions to the giving of any testimony of a witness which fails to show that the witness testified to anything is defective, and the ruling of the court cannot be reviewed.

2. On the submission of a motion for a new trial after conviction of homicide, a juror, when called as a witness, was repeatedly asked by the district attorney if he had expressed an opinion as to the guilt or innocence of defendant to a certain person at a time named; and, after some rather indefinite answers, the district attorney said, "This is an important matter, and you must be positive." *Held*, that the form of the question was not objectionable, on the ground that the witness would tell what he believed to be the truth, without having to be told that it was important.

3. A bill of exceptions presenting a ruling on the admission of dying declarations must show the predicate upon which the dying declarations were introduced, and, failing this, no error is shown in the ruling of the court.

4. Mere failure to tell of the commission of a crime does not make a party an accomplice.

5. In a prosecution for homicide, where dying declarations of the deceased, as well as the testimony of eyewitnesses, showed that defendant committed the crime, there is no cause for an instruction on circumstantial evidence.

6. On motion for a new trial after conviction of homicide, affidavits of defendant's counsel that a juror had stated that, on a vote as to defendant's guilt, six jurors rose, and that certain jurors had stated that they had a doubt as to

defendant's guilt, and did not know why defendant had been convicted, showed no ground for a new trial.

Appeal from District Court, Brazos County; J. C. Scott, Judge.

Lon Cruse was convicted of murder in the second degree, and appeals. Affirmed.

Sam R. Henderson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary.

The first bill of exceptions recites "that W. L. Houston, a witness for the state, was placed on the stand to testify, whereupon defendant objected for the reason that the evidence of said witness would tend only to prove that he did not commit the offense; that he was not indicted; that he could not be asked questions tending to criminate himself—if so, on motion of the court he would be protected and ordered not to answer, and that any question he would answer, tending to criminate himself, the court would instruct the jury to disregard; that if in fact he was the party who committed the homicide, and there was evidence tending to show he was, he would be prevented by the court from criminating himself; and that all the answers made by witness would be for the purpose of exonerating himself," etc. The above is a substantial copy of the bill. It does not show that the witness testified to anything, and hence is defective, and cannot be reviewed. The second bill is practically a repetition of the first.

Bill No. 3 presents the following: "On the trial and submission of the motion for new trial, with witness Phil Trant on the stand, this witness had been asked repeatedly by the district attorney if he had expressed an opinion as to the guilt or innocence of the defendant, and if he had so expressed himself to J. J. Cahill on May 18, 1903, and in reply the witness would say: 'I don't think I did. I'm satisfied that I did not.' He had been examined by the court on same, and had answered in the same way. The district attorney then says: 'Mr. Trant, this is an important matter, and you must be positive.' Witness answered: 'I am positive I made no such statement to J. J. Cahill.' To the form of the question defendant objected because witness was a man, and, being under oath, would tell what he believed to be the truth, without having to be told that the matter about which he was testifying was an important matter. The court overruled this objection." We see no error in the ruling of the court.

The fourth bill states that, during the argument of said cause, "counsel for defendant asked the court to strike out the evidence of the dying declarations of the deceased, because the evidence disclosed that the mind of deceased was not clear; that she was not

¶ 4 See Criminal Law, vol. 14, Cent. Dig. §§ 85, 1032.

in a condition when it was made, if ever, to make a true statement; that she had taken, according to the evidence of Dr. Reed, $\frac{1}{4}$ grain of morphia and .120 of a grain of atropine; that, while said dose was not toxic, yet it was sufficient to render the mind incapable of making a correct statement; that the witness Nagle stated he was there about 12:30 a. m., soon after the medicine had been administered; that the test he gave as to her ability to speak of what had happened was, she knew him; that Dr. Reed stated when he left she was talking in an incoherent manner. The court hearing and considering said request to strike out said dying declaration, whereupon defendant excepted, and tenders this his bill of exceptions." This is a verbatim copy of the bill. It will be noted that there is not an affirmative statement of fact that any such dying declaration was introduced, but simply the foregoing were the exceptions of appellant to the dying declaration. If the court admitted a dying declaration without a proper predicate, it would be proper practice to have a bill of exceptions to its admission, or if, through inadvertence, a dying declaration should be admitted without proper predicate, clearly it would be proper to have the same excluded by the court, and, failing to exclude it, appellant would be entitled to a bill; but a bill presenting this matter must show that the dying declaration was introduced, and it must show that proper predicate was not laid for its introduction. In other words, the bill should show the predicate upon which the dying declaration was introduced. This bill fails to do so. No error is shown in the ruling of the court.

Appellant also insists that the charge of the court was incomplete, in this: that the court failed to charge on accomplices. The eyewitnesses, Stearns, Driver, and Sanders, testified to the homicide, though they did not relate the facts until some time subsequent to the offense. There is nothing in their testimony, however, showing or tending to show that these witnesses were particeps crimines in the commission of the offense, or that they were connected with the offense, either before or after its commission, in such manner as to make them accomplices. Mere failure to tell of the commission of a crime does not make a party an accomplice. *Miller v. State*, 72 S. W. 996, 7 Tex. Ct. Rep. 324; *Giles v. State*, 67 S. W. 411, 4 Tex. Ct. Rep. 600; *Chittister v. State*, 33 Tex. Cr. R. 635, 28 S. W. 683; *Alford v. State*, 31 Tex. Cr. R. 299, 20 S. W. 553.

Appellant further insists that the court erred in failing to charge on circumstantial evidence. The dying declarations of the deceased, as well as the testimony of eyewitnesses, show that appellant committed the crime. This takes the case out of the realms of circumstantial evidence.

Appellant, in his motion for new trial, insists that the court erred in permitting Hous-

ton and Walker to testify, because they were not permitted to be asked by defendant any questions tending to criminate them. There is no bill verifying this.

Attached to appellant's motion for new trial is the affidavit of Cahill as to a statement made by the juror Phil Trant. This matter has been treated above. Witness Cahill swears to one state of facts, and the juror denies the same in toto. Appellant also attaches the affidavit of his counsel, who states that since the conviction of defendant, in conversation with H. G. Rhodes, said Rhodes stated that, in their deliberations when first in the box, on a vote as to the guilt or innocence of defendant, on motion being made that all believing defendant guilty to rise, six of said jurors rose; that Rhodes was a member of said jury; that in conversation with V. C. March, a juror, about the same statement was made as that by Rhodes, with the addition that, from his recollection, the juror Andrews always had a doubt in his mind as to the guilt of defendant. Attached to the motion is the affidavit of W. A. Reed, in substance, that on the day of the rendition of the verdict in the Cruse case, in conversation with Levi Battle, in answer to a question why defendant was convicted, said juror stated, in effect, that it was true he was convicted; that he did not know why he was convicted, because he had a doubt in his mind as to his guilt on the said day, and had a doubt in his mind as to the defendant's guilt. The above statements were controverted by the state to this extent: Phil Trant says he has read the affidavit of Cahill, attached to the motion for new trial, and that the same is wholly untrue and false and a fabrication. Following this is a long statement in the shape of testimony pro and con by witnesses, but the above is practically all that was secured from their testimony. We do not think there was any error in the action of the court overruling the motion for new trial.

We are of opinion that the evidence is sufficient to support the verdict of the jury, and we will not disturb their finding. The judgment is affirmed.

SIMPSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 9, 1903.)

RAPE—EVIDENCE—AGE OF PROSECUTRIX—FAMILY BIBLE—OPINION OF WITNESSES—ENGAGEMENT TO MARRY—TRIAL—ARGUMENT OF DISTRICT ATTORNEY—APPEAL—BILLS OF EXCEPTION—SUFFICIENCY—PREJUDICIAL ERROR.

1. In a prosecution for rape on a female under the age of 15 years, where the father of the prosecutrix testified that he entered the date of prosecutrix's birth in the family Bible within the year after her birth, and that the entry was correct—made by him in person—and that the Bible had been in his possession ever since, the Bible was admissible in evidence.

2. A bill of exceptions complaining that the state offered to prove a certain state of facts, but not affirmatively showing that the state did prove the facts, is defective.

3. In a prosecution for rape, where it was shown that defendant and another man had been together, talking to each other, before defendant went to the room of prosecutrix, evidence of the actions of the other man and the woman that he was with at that time was admissible.

4. In a prosecution for rape on a female under the age of 15 years, a witness may testify as to his opinion, based on observance of the prosecutrix's height, development, etc., at a time subsequent to the act and prior to the prosecution, as to the age of the prosecutrix.

5. In a prosecution for rape on a female under the age of 15 years, where prosecutrix had testified, without objection from defendant, that she was engaged to be married to him at the time he had intercourse with her, it was not error for the court to overrule an objection to a question as to when the prosecutrix had become engaged to marry defendant, when made without any request to withdraw or motion to exclude the evidence already in.

6. In a prosecution for rape on a female under the age of 15 years, where prosecutrix had testified, without objection, that at the time of the act she was engaged to be married to defendant, testimony as to when she became engaged to him was not prejudicial.

7. In a prosecution for rape, defendant testified, without objection, that he had known W. for some years, and was with him the night of the alleged rape, went to the room of the prosecutrix, took her across the street, and there met W. with a woman, and remained there for two or three hours, and that W. had been convicted and sentenced for rape in three cases. In closing to the jury, the district attorney stated that "defendant was running with W., a rapist," and that W. "is now under sentence to the penitentiary for a term of fifteen years. Birds of a feather will flock together." Defendant's counsel then stated that he would take a bill to the argument, and inquired of the court if there was any testimony on the subject. The court informed counsel that defendant had so testified; and counsel did not ask that it be withdrawn, or that the district attorney be prevented from using the argument. *Held*, that it was not error for the court to refuse to instruct that the jury would not consider the language of the district attorney for any purpose.

On Rehearing.

8. In a prosecution for rape on a female under the age of 15 years, it was proper to prove that defendant had promised to marry prosecutrix, and had assured her that he was not a married man, as showing the purpose and intent of defendant, and giving a reason for consent on the part of prosecutrix.

9. In a prosecution for rape on a female under the age of 15 years, where the state proved by prosecutrix that she was engaged to marry defendant, and that she did not know he was married, it was error to exclude testimony that prosecutrix had been notified that defendant was a married man.

Appeal from District Court, Hamilton County; N. R. Lindsey, Judge.

Fayette Simpson was convicted of rape on a female under the age of 15 years, and appeals. Reversed.

J. M. Carter, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of rape upon Mattie Lou Roberts, a girl under the age of 15 years, and his punishment assessed at confinement in the penitentiary for a term of 15 years.

The fourth bill complains that the court erred in permitting the family Bible of the father of the prosecutrix to be introduced in evidence. As a predicate for its introduction, the father testified that he entered the date of the birth of prosecutrix in this family Bible somewhere within the year after her birth, and that the entry was correct; the Bible had been in his possession all the while; and that he, in person, made this entry. This testimony was admissible.

Bill No. 5 complains that the state "offered to prove" by Mattie Lou Roberts the following: "Q. When defendant came in the room that night, was Amanda Ledwell there? A. No, sir. Q. Did any one come back there to the house with defendant when he came? A. No, sir. Q. How come Amanda Ledwell to leave the room? A. John Woods came in there after her." To which appellant objected because said evidence is irrelevant and immaterial, and calculated to prejudice the rights of the defendant before the jury, and further because any testimony as to what John Woods and Amanda Ledwell did is incompetent. The court qualifies the bill as follows: "That the evidence showed that John Woods and defendant had been together, talking to each other, immediately before defendant went to the room of the prosecutrix." This bill is defective, in that it states that the state "offered to prove." It does not affirmatively appear that the state did prove the facts above detailed, unless the explanation of the court, by inference, shows the same was proven. However, in our opinion, this testimony was admissible. Defendant and John Woods being together immediately preceding and being together at the time, we know of no rule of evidence that would exclude the acts of the parties occurring in the presence of defendant.

Bill No. 6 complains that the court erred in excluding the testimony of defendant to the effect that prosecutrix had been notified that defendant was a married man. Appellant insists this testimony is admissible in view of the fact that the state's testimony tended to show prosecutrix was deceived and deceived by defendant, who had led her to believe he would marry her. There was no error in the ruling of the court. It is a felony per se to have carnal knowledge of a female under the age of 15 years, with or without her consent, and with or without the promise of marriage, and it becomes immaterial whether prosecutrix thought defendant was a married man. The question of marriage is not an issue in this case. We held in *Smith v. State*, 68 S. W. 905, 5 Tex. Ct. Rep. 372, it was reversible error for the court to permit the state to prove defendant

¶ 3. See Criminal Law, vol. 14, Cent. Dig. § 10434.

was a married man. Clearly such testimony would not be admissible for defendant.

The seventh bill complains: "Defendant offered to prove by witness J. H. Herring as follows: 'Q. While Mattie Lou Roberts was before you as justice of the peace, did you observe her general appearance, manner, and conversation, her height, etc.? A. Yes, sir. Q. Did you observe her closely? A. Well, no; I do not know that I did. Q. With reference to her age, did you observe her closely? A. Yes, sir. Q. In your best judgment, based on the observations you made of her there, what is the girl's age?' To which counsel for state objected, and the court sustained said objection, and refused to permit said question to be answered by said witness." The court appends this qualification: "I wish to add to this bill my reason for the above ruling. The prosecutrix was before witness Herring in May, 1903. She was on the stand as a witness, and the jury could judge of her age from her appearance, it seemed to me, as well as the witness. I allowed the defense to prove by witnesses who had seen and observed prosecutrix years ago how old they then took her to be, but sustained the objection to the testimony on the ground that witness was not an expert, and had seen witness only a few months before the trial." Similar testimony was "offered by the defendant" from witnesses Keller and Read, as shown by bills Nos. 10 and 11. Each of these bills states that defendant "offered to prove." Neither of the bills states what the witness would have answered as to prosecutrix's age. So all of the bills are defective. However, we do not desire to be understood as holding it would not be proper for a witness to testify as to the physical appearance, physical development, and apparent age of prosecutrix at any time during the pendency of the prosecution. It is true, as the learned trial judge says, the testimony of a witness as to the physical appearance of prosecutrix prior to the prosecution is admissible, but we cannot agree to the proposition that a witness who had observed the physical development of prosecutrix could not take the stand and testify to his opinion as to her age. Suppose a prosecution is pending against an accused for rape upon a child under 15 years of age, and the testimony of the state is based solely upon the opinion of witnesses as to the age of prosecutrix, and there is no positive testimony going to show her age; that is, no witness testified he was present at the birth of prosecutrix. Clearly, under such a condition, the state would be permitted to put witnesses on the stand to testify, from the general development and general appearance of prosecutrix, as to her age. This being true, it follows that the defense could controvert this by similar testimony. In this character of prosecution, testimony of this sort would necessarily be resorted to pro and con in order to establish or refute the

case. But the bills before us are defective, inasmuch as the answers of the witnesses as to their opinion of the age of prosecutrix are not given, and we are left to conjecture to say what the answers would have been. By a long line of authorities, it has been held that we are not permitted to indulge presumptions to make bills of exception perfect.

Bill of exceptions No. 3 complains of the following: While prosecutrix, Mattie Lou Roberts, was on the stand, she was asked: "When had you become engaged to marry the defendant? A. The Sunday before May 17, 1903." To which appellant objected as to all the testimony of witness as to whether defendant had agreed or promised to marry her, because the same is immaterial, irrelevant, and calculated to prejudice the rights of defendant before the jury. The court appends this explanation: "The above testimony was given after prosecutrix had testified, without objection, that she was engaged to be married to defendant at the time he had the carnal connection with her. When the question was asked, defendant's counsel made the objection. There was no request to withdraw or motion to exclude the evidence already in, but the exception as above stated." Under the explanation of the court, we do not think there was any error in the ruling, even if it be conceded that the testimony is of a prejudicial character. However, we do not think it is.

By bill No. 8 it is shown: "The state offered to prove the following facts by witness Mattie Lou Roberts: 'Q. Had defendant ever called on you before? A. He had been to our house once before. Q. What had he said to you up to that time? A. He wanted me to marry him. Q. What did he say—whether or not he loved you? A. He said he loved me. Q. State whether or not you had consented to marry him? A. Yes, sir; I had. Q. What did he say, if anything, to you about being married? A. He said they all said he had been married, but he had not. Q. Did you believe what he said about that? A. Yes, sir.' To all of which defendant objected, because this is a prosecution for rape on a female alleged to be under the age of fifteen years, and not a prosecution predicated on force, threats, or fraud, and because immaterial, irrelevant, and calculated to prejudice the rights of defendant before the jury." It will be observed that this eighth bill says, "The state offered to prove." There is no certificate by the judge that such facts were proven, unless we indulge the presumption, which we will not do. This bill being defective, the same cannot be considered.

Bill No. 13 complains of the court's refusal of the following special charge, to wit: "You will not consider the language of the district attorney for any purpose, where he tells you that 'the defendant was running with John Woods, a rapist. John Woods is

now under sentence to the penitentiary for a term of 15 years. Birds of a feather will flock together.'" Defendant objected to this argument of counsel at the time it was made, and, the court having declined and refused to give said instruction, defendant excepted. The court appends the following explanation to the bill: "Defendant, when on the stand as a witness, testified that he had known John Woods for three or four years, and that he was in company with him at the oilmill the night of the alleged rape, after he (defendant) left the house of old man Ledwell's, and that he again, about midnight, met Woods in front of Woods' house, and there had a conversation with him, and that he (defendant) then went to the room of prosecutrix, and, after staying there 20 minutes, took prosecutrix, in her nightclothes, across the street to a vacant house, and there met Woods with Amanda Ledwell, and they remained there for two or three hours; that Woods had been convicted at this term of the court for rape in three cases, and sentenced. This testimony was given by defendant without objection. When the district attorney referred to it in his argument to the jury, counsel for defendant approached the court and stated that he would take a bill to the argument, and then inquired of the court if there was any testimony to that effect. The court informed counsel that defendant had so testified. Counsel said no more; did not ask that the testimony be withdrawn, or that district attorney be prevented from using the argument; and I refused to give the charge because the evidence was in the record without any objection." In view of the qualification of the court, there was no error in this ruling.

There was no error in the court's action overruling the application for continuance, as shown by the record before us.

No reversible error appearing in the record, the judgment is affirmed.

On Rehearing.

(Dec. 18, 1903.)

This case is now before us on rehearing. Appellant insists that we were in error in holding the eighth bill of exceptions defective, as set out in the original opinion. In this he is correct, as the bill contains this statement: "To the action of the court overruling said objections and admitting said evidence, defendant" excepted. Now, the question arises, was the testimony admitted of a character likely to injure appellant? We say not. It was germane and proper to prove that appellant had promised to marry prosecutrix. It was proper to prove that appellant assured prosecutrix he was not a married man. These are facts that could be legitimately used by the jury in measuring the amount of punishment to be inflicted upon appellant. This case can be distinguished from *Smith v. State*, 68 S. W. 995, 5 Tex. Ct.

Rep. 372. In *Smith's Case* there was no question but that prosecutrix knew Smith was a married man, and hence the fact of his marriage could only be used to prejudice him, and could not and would not throw any light upon the motive, animus, or additional mendacity of the act. If the fact was that defendant was not a married man, and he so represented to prosecutrix, this would be part, as it were, of the res gestae of the transaction, showing the purpose and intent of appellant, and giving a reason on the part of prosecutrix for consenting to the lascivious embrace of appellant. However, in view of the fact that this testimony is admissible, we deem it necessary to review bill of exceptions No. 6, as stated in the original opinion. In that, appellant insists that the court erred in refusing to permit him to prove that prosecutrix had been notified that defendant was a married man. In the original opinion we held this was not admissible. In this we were in error. If it was permissible on the part of the state to prove that prosecutrix was engaged to marry appellant, and to prove that she did not know he was married, clearly it was germane to that issue for appellant to prove that she did know that he was married. The fact of the engagement of appellant to prosecutrix could be used to intensify and increase the punishment. Certainly it was legitimate for appellant to disprove that portion of the testimony which goes to intensify the punishment. Hence it follows that the court erred in refusing to permit appellant to prove that prosecutrix had been notified that defendant was a married man. In this particular the original opinion was wrong.

The motion for rehearing is accordingly granted, and the judgment is reversed, and the cause remanded.

MAHONEY v. TUBBS et al

(Court of Civil Appeals of Texas. Dec. 19, 1903.)

SCHOOL LAND—SALE—ACTUAL SETTLER—WHAT CONSTITUTES—TITLE BOND GIVEN BEFORE SETTLEMENT—VALIDITY.

1. An actual settler on school land, who claims the right to purchase additional land, must not only have actually occupied and settled upon his land, but must intend to make it his home.

2. Under Act Feb. 23, 1900 (Laws 1900, p. 29, c. 11), as amended by Act April 15, 1901 (Laws 1901, p. 253, c. 88), governing the sale of unsurveyed school land, and under the statute governing the sale of school land generally, requiring an intending purchaser to swear that he is not purchasing for another, a title bond given by a prospective purchaser while the land is still vacant public domain is void, because it necessitates a false affidavit by such purchaser.

Appeal from District Court, Lubbock County: J. M. Morgan, Judge.

¶ 1. See Public Lands, vol. 41, Cent. Dig. § 542.

Action by H. O. Mahoney against Thad Tubbs and another. Judgment for defendants, and plaintiff appeals. Reversed.

Beatty & McGee, for appellant. J. Wilson Boyle and Kinder & Dalton, for appellees.

STEPHENS, J. The issues determined by the jury against appellant were thus submitted in the charge of the court: "Gentlemen of the Jury: In this case the plaintiff, H. O. Mahoney, sues the defendant, John Tubbs, in trespass to try title to one section of state school land, situated in Lubbock county, Texas, and known as section No. 38, Block JS. Plaintiff claims the land by virtue of his application to purchase the same as an actual settler on section No. 32 in block D5, and as additional land thereto. Plaintiff's application bearing date March 17, 1902. The defendant, John Tubbs, claims the land in controversy by virtue of his application to purchase the same as an actual settler on section No. 37, block JS, and as additional land thereto; his said application bearing date November 26, 1901. You are instructed that by the term 'actual settler in good faith' is meant one who actually occupies and settles upon land, intending to make it his. Now, bearing in mind the foregoing definition, if you find from the evidence that the plaintiff, H. O. Mahoney, was an actual settler on his home section, No. 32, Block D5, on the 17th day of March, 1902; and if you further find from the evidence that the defendant, John Tubbs, was not an actual settler on his home section, No. 37, Block JS, on the 26th day of November, 1901, you will find for the plaintiff, and, unless you so find on these two points, you will find for the defendant." In defining an actual settler to be one who actually occupies and settles upon land, "intending to make it his," the court erred, as assigned. The qualification made by the clause just quoted was misleading, for something more is required of an intending purchaser of school land than, as suggested by this charge, actual occupancy, with the intention of making the land his own. The purpose to make a home upon it by the settlement is as essential as the settlement itself. *Willoughby v. Townsend* (Tex. Sup.) 53 S. W. 581.

It is insisted, however, that the evidence conclusively established the validity of appellee's settlement and purchase. But we hardly think it was such, especially as to his intention in making the settlement, in respect to which the charge was erroneous, as to warrant the taking of that issue from the jury.

The rulings upon which the bond for title of Thad Tubbs, and other evidence offered by appellant in connection with it, to show an equitable title in himself, was excluded, seem to be sustained by the decisions of our Supreme Court in the following cases: *Lamb v. James*, 87 Tex. 485, 29 S. W. 647; *Cattle*

Co. v. Bedford, 91 Tex. 643, 44 S. W. 410, 45 S. W. 554. As the land was vacant public domain when the bond for title was executed, although it had been surveyed for or at the instance of Thad Tubbs under the act of February 23, 1900 (Laws 1900, p. 29, c. 11), the bond was unenforceable, according to these decisions, because it was void, either on the ground of public policy or for want of consideration. For a discussion of these cases, see the opinion of this court in *Johnson v. Blum*, 66 S. W. 461. It is difficult to see why the money paid Tubbs by appellant for the execution of the bond for title would not be a sufficient consideration to make it binding on him and his assignee, J. A. Tubbs, who was substituted for him in the land office, by way of estoppel, at least, if the contract were not against public policy. After all, in view of the provision in the act referred to, providing for the sale of unsurveyed school land, as well as in the amendatory act of April 15, 1901 (Laws 1901, p. 253, c. 88), and the act providing for the sale of school land generally, requiring an intending purchaser to swear that he is not purchasing for another, it seems more consonant with reason and sound construction to hold the bond for title in question, which seemed to make it obligatory on Tubbs to make a false affidavit, void for that reason, than for want of consideration.

For the error in the charge the judgment is reversed, and the cause remanded for a new trial.

ERWIN et al. v. ARCHENHOLD CO.

(Court of Civil Appeals of Texas. Dec. 6, 1903.)

OPENING DEFAULT—LIMITING HEARING TO MERITS—ADMISSION OF IMPROPER EVIDENCE.

1. An order setting aside a default judgment, providing that the case be opened for the purpose of hearing such matters of defense as go to the merits of the answer, and that the cause be tried on its merits, limits the hearing.

2. Admission of improper evidence over objection, even in a nonjury case, is ground for reversal, it not being reasonably certain that the result would have been the same had it not been admitted.

Appeal from McLennan County Court; G. B. Gerald, Judge.

Action by the Archenhold Company against O. P. Erwin and others. Judgment for plaintiff. Defendants appeal. Reversed.

J. R. G. Long and Hodges & Moore, for appellants. D. A. Kelley, for appellee.

KEY, J. This is a suit on account, resulting in a judgment for the plaintiff, and the defendants have appealed.

On the 6th day of May, 1903, the defendants having failed to file an answer, judgment was rendered against them by default for the amount sued for. On the 28th day of the same month they filed a motion to

set aside that judgment, and on the 8th day of June, 1903, the court entered an order in these words: "On this, the 8th day of June, 1903, came on to be heard the motion of the defendants herein to set aside the judgment by default rendered against them herein on the — day of May, 1903, and because the defendants alleged that they have made payments to the plaintiff not shown in the account sued on, it is ordered by the court that the case be opened for the purpose of hearing such matters of the defense which go to the merits of the defendants' answers, and that the cause be tried upon its merits upon the 17th of June, 1903." On June 17, 1903, the defendants filed their answer, which included a plea of privilege to be sued in Lamar county, and certain exceptions to the plaintiff's petition. These pleas were overruled, the trial court holding that the order made on the motion to set aside the default judgment did not open up the entire case, but limited the defendants to a hearing on the merits. That ruling was correct. The order referred to manifests an intention to grant the defendants a hearing solely upon the merits of the case, and to preclude the consideration of every question other than the amount, if any, of the defendants' indebtedness to the plaintiff. The court had the power to open up the entire case, or to restrict the further hearing as it did; and, it not appearing that it abused its discretion by imposing the restriction referred to, the defendants are bound by it.

Over objection of the defendants, one Mayer, a witness for the plaintiff, was permitted to testify as follows: "The reason why the amounts for which we gave credit do not correspond with the receipted bills produced by the defendant is that Abe Abrams told me [witness] that sometimes the defendant would pay part of the bill at one time and then finish it up later on, or probably pay some amount on another bill, and that he (Abram) would send us the amount on hand, but it would not correspond with the face of the receipted bill." Abe Abrams was the plaintiff's agent, and represented it in its dealings with the defendants; but the method resorted to in order to get his testimony before the court was so manifestly in violation of the rule which excludes hearsay evidence that counsel for appellee does not in this court contend that it was admissible. The contention now is that, the trial being before the court without a jury, and there being other evidence sufficient to sustain the judgment, the case should not be reversed. We understand the correct rule on that subject to be that, even in nonjury cases, the admission of improper testimony over objection will be ground for reversal, unless it is reasonably certain that the result would have been the same had the testimony complained of been excluded; and this case does not come within that class. The testimony under consideration was very important to the plaintiff, and, if it had been excluded, the

other testimony would have warranted, if not required, a decision for the defendants.

For the error indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

BOETTTLER v. TUMLINSON.*

(Court of Civil Appeals of Texas. Dec. 2, 1903.)

APPEAL—PERSONAL INJURY CASE—EVIDENCE—REVIEW OF VERDICT—INSTRUCTIONS—EXCLUSION OF ISSUES—RIGHT TO ALLEGE ERROR—ADDITIONAL INSTRUCTIONS—NECESSITY OF REQUEST.

1. On appeal, the most favorable inference the evidence will authorize will be indulged to support the verdict, and it will not be disturbed where there is sufficient evidence of appellee's negligence to warrant ordinary minds in differing, though the appellate court, sitting as triers of fact, might have reached a different conclusion.

2. Where all defensive issues are submitted, a defendant in a personal injury case cannot complain of a charge excluding issues as to negligence which are relied on by plaintiff.

3. Where a defendant in a personal injury case fails to request additional charges, he cannot complain of a charge correctly announcing the law and presenting favorably for him all defensive issues.

Error from District Court, Bexar County; S. J. Brooks, Judge.

Action by R. H. Tumlinson, by his guardian, against L. P. Boettler. Judgment for plaintiff, and defendant brings error. Affirmed.

P. H. Swearingen, for plaintiff in error.
J. D. Crenshaw, for defendant in error.

NEILL, J. R. H. Tumlinson, by his guardian, brought this suit against L. P. Boettler to recover damages for personal injuries alleged to have been inflicted by the latter's negligence. The defendant answered by pleas of not guilty, contributory negligence, and assumed risk. The trial resulted in a verdict and judgment in favor of plaintiff for \$4,000.

It is shown by the evidence that on the 14th day of September, 1900, plaintiff as a carpenter was in the employ of defendant as a contractor for the erection of the market house of the city of San Antonio. That while plaintiff was at work on the outside of the building the scaffold on which he was standing gave way, and he fell and was seriously injured. The scaffold was built on Wednesday by plaintiff and a fellow servant named Smith, under the directions of Scott Boaz, their foreman. It was constructed in this manner: Planks 2 inches thick, 12 inches wide, and 16 feet long were projected through windows from the inside about 4 feet outside of the building, one of such planks through each window and resting on its sill. On the inside of the building

*Rehearing denied January 6, 1904.

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 3522.

each plank was laid on a trestle, the end of the plank extending beyond about 12 inches. The trestles were about 18 feet high, and stood on the floor about 10 feet from the wall of the building. The outer end of each projecting plank was supported by an angle brace, which consisted of a strip of plank about 7 feet long, one end resting upon a ledge of the outer wall, and the other nailed underneath the plank about a foot from the end of it. All the planks, except one, were toe-nailed to the top of the trestle with sixteenpenny nails, the other one with eightpenny nails. Boards an inch thick were laid loose upon the outside projections for the workmen to stand on. This completed the scaffold. When Smith was toe-nailing the planks to the trestling with the sixteenpenny nails, and had so fastened all except one, Boaz told him that eightpenny nails were sufficient for the purpose, and that he would not be able to tear the scaffolding apart without injuring the trestles if toe-nailed with sixteenpenny nails. The plaintiff was on the outside of the building adjusting the angle braces when Smith was instructed by Boaz to use eightpenny nails in fastening the plank to the trestles, and did not hear such instructions given, and was ignorant of the fact that eightpennies were used in fastening any of the planks to the trestles. It was understood between him and Smith when they began the work that sixteenpenny nails would be used for that purpose, and, until after the accident, he thought the scaffold had been constructed in pursuance to such understanding. On Friday after the Wednesday the scaffold was constructed, the plaintiff was at work outside the building, standing on the end of the scaffold that rested on the plank fastened to the trestle with eightpenny nails, when the scaffold gave way beneath him, causing his fall and consequent injuries.

The evidence is uncontroverted that the eightpenny nails with which the plank was fastened were drawn from the trestling. And it is reasonably sufficient to show that eightpenny nails were insufficient to securely hold the projecting planks to the trestles, and that, if Boaz had exercised ordinary care, mechanical knowledge, and skill in and for the construction of a scaffold reasonably safe for the employes under his control to do their work upon, he would have known that such fastening with eightpenny nails would render the scaffold insecure and unsafe for the workmen. Therefore we conclude that the defendant was, through its vice principal, Boaz, guilty of negligence in having the plank which came loose from the trestle fastened thereto with eightpenny nails, and that such negligence was the proximate cause of plaintiff's injuries.

The evidence upon the question of negligence is conflicting, and our conclusion of its proof is in observance of the well-established principle that the most favorable inference the evidence will authorize should

be deduced in support of the verdict, for upon the whole evidence we cannot say there is no reason for ordinary minds to differ as to the conclusion of negligence *vel non*. *Ochoate v. Railway*, 90 Tex. 82, 36 S. W. 247, 87 S. W. 319; *Lee v. Railway*, 89 Tex. 583, 36 S. W. 63; *Railway v. Gasscamp*, 69 Tex. 547, 7 S. W. 227. That we would, if it were left to us to determine the question from the evidence as it appears in the record, have reached a different conclusion, does not authorize us to vacate the verdict. As long as the jury system prevails under a Constitution which guarantees the right of a trial under it shall be held inviolate, and makes a jury the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony, their decision of a disputed question of fact, when not impugned by passion, fraud, or prejudice, when there is testimony reasonably sufficient to support it, must stand against attacks made against it in an appellate court, though vigorous enough to shake the belief of the judges in the righteousness of the verdict. This much in regard to our conclusion of the defendant's negligence, which disposes of the assignment of error, urged by defendant's counsel with so much force and ability, that the verdict is unsupported by the evidence.

The allegation of negligence in plaintiff's petition is as follows: "That plaintiff was employed by defendant to do work on said house, and that he was ordered by defendant to go upon the scaffold at the south side of the second story of said building to do some carpenter work on the eaves of said house; that said scaffold was negligently and carelessly constructed, in that the inner ends of the scantling or plates, which projected out of the windows, and which supported the planks on which plaintiff had to stand and walk while doing said work, were not securely fastened; that said scantling or plates were so fastened by the orders of defendant, and without the knowledge of plaintiff; that defendant knew that said scaffolding was thereby insecure and unsafe, or he could have known it by the exercise of reasonable care and diligence; that plaintiff did not know, nor did he have reason to believe, that said scaffolding was insecure or unsafe." The court, after defining negligence, instructed the jury as follows:

"If you believe from the evidence that Scott Boaz, the foreman of defendant, Boettler, ordered the carpenter Smith to nail one of the planks of the scaffold, from which plaintiff fell, to the trestle inside with eightpenny nails, and that said Smith did so under and by reason of the direction of said Boaz; and if you further believe from the evidence that said Boaz was guilty of negligence in having said plank so fastened; and if you further believe from the evidence that while plaintiff was working on said scaffold the said fastening of said plank came loose, and thereby caused plaintiff to fall from said

scaffold and to be injured; and if you believe from the evidence that the negligence, if any, of said Boaz was the proximate cause of said injury—then you will find for the plaintiff, unless you find for the defendant under the charges hereinafter given you.

"If you do not believe from the evidence that said plank was so fastened by the order of said foreman Boaz, and that he was guilty of negligence in having it so fastened, and that such negligence, if any, was the proximate cause of plaintiff's injury, if any, you will find for the defendant.

"Or if you believe from the evidence that the plaintiff himself was guilty of negligence in the construction of said scaffold, and that such negligence, if any, proximately contributed to his injuries, if any, you will find for defendant; or if you believe from the evidence that either or any of the fellow servants with the plaintiff were guilty of negligence in the construction of said scaffold, and that such negligence, if any, proximately contributed to his injuries, if any, you will find for defendant; or if you believe from the evidence that when the plaintiff went upon said scaffold he knew it was unsafe for him to walk or stand thereon to do work, you will find for defendant."

The first paragraph quoted is assigned as error. The propositions asserted under it are: "(1) The charge is affirmative error, because it submitted to the jury an issue distinctly different from that made by the evidence. (2) The charge is error because it excluded from the consideration of the jury issues raised by the pleadings and supported by the evidence." In regard to the first proposition, we think there was ample evidence to support the allegations "that the inner ends of the scantling or plates which projected out of the windows, and which supported the planks on which plaintiff had to stand and walk while doing said work, were not securely fastened," and "that said scantling or plates were so fastened by the orders of defendant, and without the knowledge of plaintiff." It is only a charge which excludes an issue upon which a finding might be made favorable to the party complaining that can be taken advantage of on appeal. If an issue raised by the pleadings and evidence be excluded, which, either alone or in connection with other facts, might, if submitted, result in a verdict for the plaintiff, the defendant is not prejudiced by the charge. As to the plaintiff, however, the charge would be affirmative error, and render it unnecessary for him to ask a charge upon the issue, because it would be in direct conflict with that which the court had given. But if the charge given by the court is in itself unobjectionable, a party cannot complain of the failure of the court to give an instruction which he has neglected to ask. This we believe to be the rationale of the decisions upon charges excluding issues raised by the pleadings and evidence. *Chamblee v. Tar-*

box, 27 Tex. 140, 84 Am. Dec. 614; *Johnston v. Johnston* (Tex. Civ. App.) 67 S. W. 124; *Eppstein v. Thomas* (Tex. Civ. App.) 44 S. W. 894; *Smith v. Richardson Lumber Co.*, 92 Tex. 450, 49 S. W. 574; *Scott v. T. & P. Ry. Co.*, 93 Tex. 625, 57 S. W. 801; *Humphreys v. Edwards*, 89 Tex. 517, 36 S. W. 333, 434; *Bldg. Co. v. Jones*, 94 Tex. 497, 62 S. W. 741; *Beazley v. Denson*, 40 Tex. 433; *Wenar v. Stenzel*, 48 Tex. 489; *Stude v. Saunders*, 2 Posey, Unrep. Cas. 124. This may be illustrated by the case of *Scott v. T. & P. Ry. Co.*, supra: In that case plaintiff's evidence was sufficient to establish that fire was set out by sparks from an engine of defendant company, which raised a prima facie case of negligence, which entitled plaintiff to a recovery unless rebutted. This defendant was required to do by proving that the engine was equipped with the best-approved spark arrester, etc., and was carefully handled by its servants. The evidence tended to show defendant's servants negligent in allowing the escape of sparks sufficient to cause the fire. The charge excluded this issue raised by this evidence from the jury. There was a verdict for the defendant. It was held on appeal that the charge was erroneous by reason of such exclusion, in that it assumed and withheld from the jury an essential issuable fact which, if found in favor of plaintiff, would have entitled him to a verdict. The plaintiff alone was prejudiced by the error. Had the verdict been in his favor, the defendant could not have taken advantage of the error, because it was favorable rather than prejudicial to the company. Again, to illustrate from the case under consideration: There was evidence tending to show that the scaffold which was constructed by Smith and the plaintiff on Wednesday was, on Friday morning before the accident occurred (which was on that day), moved further back from the walls of the building to make room for the plasterers, and that after they had finished their work the scaffold was replaced, without knowledge on the part of plaintiff that it had been moved, by defendant's employees in its former position. It may have been found, had the issue been submitted, that it was negligence on the part of the defendant to have permitted the removal and replacement of the scaffold in the way it was done, and that such negligence caused the accident. Had the verdict been for the defendant, the plaintiff could have complained that the charge was erroneous in withholding such issue. But the defendant cannot complain, for under the charge the jury could only find against it upon the facts submitted in the first paragraph. If they were not proven, defendant was entitled to a verdict upon proof of any other facts, whether they showed negligence or not. For if the jury believed either that the plank was not so fastened by the order of Boaz, or, if it were, he was not guilty of negligence in having it so

fastened, they were bound by the charge to find for the defendant.

The paragraphs of the charge succeeding the one complained of submits every defensive issue pleaded by the defendant to the determination of the jury. It excludes no defensive matter nor issue raised either by the pleadings or the evidence. If the plaintiff or any of his fellow servants were guilty of contributory negligence, or if, when he went on the scaffold, he knew it was unsafe to walk or stand upon, the defendant, under the charge, was entitled to a verdict. If upon the issues of assumed risk, contributory negligence, or negligence of a fellow servant, the defendant deemed the charge too general, and desired a more specific presentation of them with a view to the evidence adduced upon the trial, he should have requested special instructions presenting such issues in consonance with his desire. But, having failed to prepare and request such charges, he cannot now be heard to complain of a charge that correctly announces the law and presents favorably to him every issue upon which plaintiff's action could have been defeated.

We believe that the court properly held, upon the evidence submitted upon the question of plaintiff's competency as a witness, that he was qualified to testify in his own behalf, notwithstanding some months prior to the date of the trial he had been adjudged insane. *Dist. of Columbia v. Arms*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618.

There is no error assigned or disclosed by the record requiring a reversal of the judgment, and it is affirmed.

BARNUM WIRE & IRON WORKS v. SELEY.

(Court of Civil Appeals of Texas. Dec. 16,
1903.)

SALES—BREACH OF WARRANTY OF QUALITY— SUIT FOR PURCHASE PRICE—RIGHT OF SET-OFF.

1. Where a contract of sale is accompanied by an express warranty of quality, the buyer may accept the article furnished without inspection, and, if it does not comply with the warranty, may afterwards offset his damages against the contract price.

Appeal from McLennan County Court; G. B. Gerald, Judge.

Action by the Barnum Wire & Iron Works against W. W. Seley. From a judgment affording insufficient relief, plaintiff appeals. Affirmed.

Davis & Cocke, for appellant. Jennings & Penry, for appellee.

STREETMAN, J. Appellant sued for the contract price of an awning furnished by it to appellee. Appellee claimed that he was not liable for the full contract price, because

the awning furnished was not of the kind and quality which appellant agreed to furnish. The contract price was \$270. In a trial before the court without a jury appellant recovered judgment for \$152.96 and interest. Appellant contends that the court erred in rendering judgment for less than the contract price. The contract was made in the following manner: Appellee desired an awning of a certain kind, and wrote to appellant, who was engaged in the manufacture and sale of awnings, with reference to it. Some correspondence followed, which led up to the following proposition, made in letter dated March 10, 1902, from appellant to appellee: "Replying to your favor of recent date, we will furnish one wrought iron canopy, as per enclosed blue print 12'-0" long next to building X 10'-0" wide, the roof to be made of corrugated iron painted complete ready to be put up for the sum of \$270 net cash, and if ordered this month, will allow the freight to your station. We will give you a strictly first-class job and hope to be favored with your order, which will have our prompt and best attention. We remain," etc. A blue print accompanied the letter. This proposition was accepted by appellee in a telegram and letter. An awning was shipped to appellee, and during his absence from Waco, through the agency of his son and a workman, was placed upon his hotel building, where it remained up to the time of the trial. There was evidence sufficient to sustain a finding that the awning shipped differed in some respects from the design shown in said blue print, and that it was not a first-class job, the material being defective, and the awning not being properly painted; and its value was not greater than the judgment rendered by the court.

The rule is well settled that, where a contract of sale is accompanied by an express warranty of quality, the buyer may accept the article furnished, and is not compelled to inspect the property, and, if it does not comply with the contract, he may afterwards recover damages for breach of the warranty; or, if the sale be on a credit, may offset such damages against the contract price. *Parks v. O'Connor*, 70 Tex. 389, 8 S. W. 104. We have concluded that the court was warranted in finding that the letter of appellant, forming the basis of the contract, constituted an express warranty of the quality of the awning. After fully completing the description of the article sold, the letter contains the following additional statement: "We will give you a strictly first class job and hope to be favored with your order, which will have our prompt and best attention." This appears to have been a positive affirmation, made by the vendor at the time of the sale, with respect to the subject of sale, which may have been intended to and may have operated as an inducement to the trade. It was not purely a matter of description or identifi-

¶ 1. See Sales, vol. 43, Cent. Dig. § 738.

cation. We need not determine whether the language itself, as a matter of law, created an express warranty. It was certainly sufficient, taken in connection with the facts proved, to justify the court in concluding as a matter of fact that it was so intended by the parties. While some of the defects may have been obvious, yet the others—for instance, the defective material—seemed to have been discovered only after the workman was engaged in putting it up; and, while there is some question as to whether even an express warranty will cover defects obvious and actually known to the buyer at the time he receives the property (Tiedeman on Sales, par. 195), we think the court was warranted in holding that under the facts shown the appellee had a right to rely on the warranty, and in this view of the case there was no error in allowing appellee to prove the reasonable market value of the awning and in rendering judgment for that amount, instead of the contract price. *Blythe v. Speake*, 23 Tex. 431; 28 Am. & Eng. Ency. Law (1st Ed.) tit. "Warranty."

There being no error in the judgment, it is therefore affirmed.

FURNEAUX et al. v. WEBB et al.*

(Court of Civil Appeals of Texas, Nov. 31, 1903.)

LANDLORD AND TENANT—PURCHASE OF PROPERTY BY LESSEE—TERMINATION OF SUBLEASE—FALSE REPRESENTATION.

1. Where a lease and a sublease are made "subject to sale," though the owner may sell to the lessee, such transaction would not terminate the sublease; and hence false representations by the lessee to his sublessee that he had so purchased, whereby he obtains possession, are not actionable.

Appeal from District Court, Archer County; A. H. Carrigan, Judge.

Action by J. H. Furneaux and others against Sidney Webb and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Hawkins & Haynes, Matlock, Miller & Dy-cus, and T. H. Marberry, for appellants. Montgomery & Hughes and Bomar & Bomar, for appellees.

SPEER, J. Appellants sued Sidney Webb and Samuel Scaling, composing the firm of Sidney Webb & Co., Sam Bellah, and L. M. Webb, to recover a large sum of money, as actual and exemplary damages for wrongfully depriving them of certain pasture lands in Archer county, Tex. Appellants held the lands under lease contracts with appellees Sidney Webb & Co., who in turn were the lessees of Morgan Jones. Both the original lease from Jones to Sidney Webb & Co., and the various subleases by Sidney Webb & Co. to appellants, were made "subject to

sale" of the land; and the alleged wrongful conduct of appellees consisted in obtaining possession of said lands from appellants by means of false and fraudulent representations that Sidney Webb and Sidney Webb & Co. had purchased the lands from the owners. The district judge peremptorily instructed the jury to return a verdict in favor of the defendants, which was done, and judgment accordingly was entered, from which this appeal is prosecuted.

There are many assignments, but, in the view we take of the case, no other one is material, if the eighteenth, complaining of the peremptory instruction to find for defendants, cannot be sustained. This assignment we have finally concluded should be overruled. The effect of the subject to sale clause in appellants' lease contract with Sidney Webb & Co. was that the same should be terminated upon a sale by the owners to any person other than the lessees, Sidney Webb and Samuel Scaling. It would not do to hold that Sidney Webb & Co., who had subleased the lands in controversy to Furneaux Bros., subject to sale by the owners, could themselves become the purchasers, and thereby put an end to the sublease and oust their tenants. The meaning of the contract was that appellants should hold under the sublease for its full period, unless the owners should make such sale of the lands as to put them beyond the control of Sidney Webb & Co. Any other construction would place it in the power of Sidney Webb & Co. to terminate their lease to appellants by becoming the owners of the land in fee simple, instead of a leasehold merely—a thing evidently inconsistent with the rights of the parties. Nor does this view in any wise lessen the chances of sale by the owners, as contended by appellants, by taking from them the prospects of a sale to Sidney Webb & Co. The owners would have a perfect right to sell to Sidney Webb & Co., and such action would, of course, terminate the lease to them, but it by no means follows that it would have that effect upon appellants' sublease. On the contrary, we think it would have no effect whatever. To Sidney Webb & Co.'s demand for the possession, the owners could reply that they already have possession through their tenants, by taking from them the prospects of a sale to Sidney Webb & Co. could not operate as a termination of the sublease to appellants) we think they (the appellants) mistook their legal rights when they voluntarily surrendered their lease and lands, and have no recourse upon appellees. In other words, the representations of appellees, to be actionable, must have been material, and such as, had they been true, appellants would have been justified in acting upon them. *Blythe v. Speake*, 23 Tex. 429; *Lemmon v. Hanley*, 28 Tex. 220; 23 Cent. Dig. col. 1687 (E). Here, as we have indicated, the representation that Sidney Webb or Sidney Webb & Co. had purchased the

*Rehearing denied January 2, 1904.

lands would not have called for their surrender by appellants, even if true; hence they became immaterial and not actionable. Moreover, we think the evidence conclusively shows that as to all the lands claimed, whether by Sidney Webb & Co. or L. M. Webb, the appellants, after knowing the full truth, and after being undeceived, if they ever were deceived, voluntarily consummated a contract based upon a sufficient consideration, which had the effect of terminating or waiving their lease to the lands in controversy.

Judgment affirmed.

WARD v. WARD.

(Court of Civil Appeals of Texas. Dec. 19, 1903.)

PARENT AND CHILD—CUSTODY OF CHILD—CHARACTER OF MOTHER—BILL OF EXCEPTIONS—WANT OF ALLOWANCE—EFFECT.

1. In a contest between a paternal grandfather and a mother for the custody of an infant, it is error to exclude the issue as to the mother's reputation for chastity, truth, veracity, and honesty.

2. A bill of exceptions which has not been approved or allowed by the court cannot be considered.

Appeal from District Court, Swisher County; Ira Webster, Judge.

Proceeding between W. M. Ward and Ollie Ward. From a judgment for Ollie Ward, W. M. Ward appeals. Reversed.

W. F. Kelley and Turner & Boyce, for appellant.

SPEER, J. This is a contest between the paternal grandfather, upon the one hand, and the mother upon the other, over the custody of an infant—a boy 4 years of age. The trial court awarded the custody to the mother, and while we are loath to disturb that judgment, yet a just appreciation of the rights of the minor, we think, compels us to remand the cause. Appellant pleaded, among other things, that the mother of the infant had "a bad reputation for chastity, truth, veracity, and honesty," and the trial court sustained a special exception to such allegation, and refused to hear evidence in its support. A parent's claim to the custody of an infant is of course ordinarily superior to that of any other person, but it is not alone to the right or wish of the parent we are to look in determining such question. Such right is not absolute. The interest of the child is the first consideration, and, if such parent is for any reason an unsuitable person to have its care, the custody should be awarded elsewhere. If the mother in this instance is a woman of bad reputation in the particulars mentioned, that fact should be considered by the court or jury in determining the award. A mother's reputation in these respects might be so notoriously bad as to render it altogether out of the question

that she should be permitted to rear her child when a better home is offered it. We have nothing to do with the weight of the proposed testimony in this case, but merely rule that the allegation should not have been stricken out, and that evidence should have been admitted in its support.

We cannot consider the bill of exception taken to the court's ruling in admitting the letter written to appellee by the deceased husband, for the reason that such bill does not appear to have been approved or allowed by the court. *Clitus v. Langford* (Tex. Civ. App.) 24 S. W. 325. In view of another trial, however, we doubt the admissibility of the evidence. It appears to be hearsay.

For the error discussed, we reverse the judgment and remand the cause.

OSTROM v. CITY OF SAN ANTONIO.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

INJURIES TO LAND—DAMAGES—ELEMENTS—EXEMPLARY DAMAGES—MUNICIPAL CORPORATIONS.

1. In an action for trespass to real property, the measure of damages is the amount which will compensate plaintiff for the injury done.

2. Exemplary damages, while allowable in certain cases for willful injury to land, cannot be recovered against a municipal corporation except under exceptional circumstances.

3. In an action against a municipal corporation for trespass on land, plaintiff cannot recover for vexation, humiliation, and annoyance.

Appeal from District Court, Bexar County; Jno. H. Clark, Judge.

Action by Sarah F. Ostrom against the city of San Antonio. From a judgment in favor of plaintiff for less than the relief demanded, she appeals. Affirmed.

Edw. Ostrom, for appellant. Webb & Goeth, for appellee.

NEILL, J. This is a suit brought by appellant to recover damages against the city for breaking her close and trespassing upon her land. Judgment was rendered in her favor for \$100, and she appeals from it.

The facts show the trespass complained of, but we cannot say the evidence shows greater damages than were awarded by the judgment. The appellant evidently is laboring under a misapprehension of the law as to the measure of damages in cases of this character. The general principle upon which compensation for injuries to real property is given is that the plaintiff shall be reimbursed to the extent of the injury to the property. *Sedg. on Damages*, § 932. And while exemplary damages may, in proper cases, be recovered for a willful injury to land (*Sedg. on Damages*, § 73), the case would be exceptional, indeed, when vindictive or more

*Rehearing denied January 6, 1904.

¶ 2. See *Municipal Corporations*, vol. 33, Cent. Dig. § 1564, 1768.

than compensatory damages can be recovered against a municipal corporation. Dill Municipal Corp. § 1284.

While the courts have pushed the doctrine of mental anguish very far in this state, it has never been held here or elsewhere, as we know of, that "vexation, humiliation, and annoyance" can be taken as elements of damages against a city for trespassing upon the lands of another.

The judgment is affirmed.

AUSTIN v. ESPUELA LAND & CATTLE CO., Limited.

(Court of Civil Appeals of Texas. Dec. 12, 1903.)

PUBLIC LANDS—VACANCY—CLAIMANT—TRESPASS TO TRY TITLE—EVIDENCE—ADMISSIBILITY—PATENT—DESCRIPTION—CONSTRUCTION.

1. In trespass to try title, the prima facie inference that the possessor is the owner of the property is entirely rebutted where such property is shown to be vacant public domain.

2. Defendant, conceiving that there was vacant public domain between certain surveys, according to their corrected boundaries, caused the vacant tract to be surveyed, and the field notes to be returned to the General Land Office, but, before the Commissioner had taken action thereon, was sued for trespass by a foreign corporation which had been in possession of the land for pasture purposes for about 15 years previously. It appeared that plaintiff claimed under a patent issued prior to the correction of the boundaries of the sections therein named, which showed plaintiff's tracts to be adjoining. On correction of boundaries, the tracts would not adjoin, and the opening thus made was the basis of defendant's claim. Held, that defendant was entitled to show that the land claimed as vacant was outside the corrected boundaries of the original survey.

Appeal from District Court, Dickens County; J. M. Morgan, Judge.

Action by the Espuela Land & Cattle Company, Limited, against C. E. Austin. From a judgment for plaintiff, defendant appeals. Reversed.

John A. Green, R. S. Holman, L. W. Dalton, and D. A. Holman, for appellant. Ed J. Hamner, for appellee.

STEPHENS, J. Appellee, a foreign corporation having permission to do business in Texas, brought this suit in trespass to try title to recover a large body of land in Dickens county, of which it had had possession for about 15 years, in a pasture of about 28,000 acres, including sections 1 to 8 in block A of Houston Tap & Brazoria Railway Company survey, and sections 387, 388, 402, 403, and 408 in block 1, Houston & Great Northern Railway Company survey, and the Burleson county school land, situated between the sections above mentioned in block A, on the west, and those in block 1, on the east. Appellant, conceiving that there was a vacancy of about one-half mile in width between the Burleson county school land and said sections 402, 403, and 408, caused the same to be surveyed, and

the field notes to be returned to the General Land Office, as provided by the act of April 15, 1901, and, before the Commissioner had taken action thereon, went immediately into possession of the land so surveyed, and remained there until he was ejected under sequestration process at the institution of this suit.

On the trial before a jury, appellant offered testimony tending to show the vacancy as claimed, which was excluded as immaterial because of appellee's long prior possession, and because appellant was held to be a mere trespasser. To this ruling, which resulted in a verdict and judgment for appellee, the principal error is assigned.

Undoubtedly the general rule is that prior possession of land affords such prima facie evidence of title as warrants recovery in trespass to try title against a mere trespasser, but this is a rule of evidence, merely, and the prima facie inference that the possessor is the owner of property is entirely rebutted where such property is shown to be vacant public domain. So it was distinctly held by the Court of Civil Appeals for the Third District in *Collins v. Cain*, 28 S. W. 544, in which a writ of error was refused. 30 S. W. xix. True, in *Walraven v. F. & M. National Bank* (decided by the Supreme Court) 74 S. W. 530, 6 Tex. Ct. Rep. 785, the construction given the healing acts of 1889 and 1891 in *Collins v. Cain* was overruled, and held not to have been consciously approved by the Supreme Court in refusing a writ of error in that case, but in no other respect was the opinion of the Court of Civil Appeals disapproved. Certain it is that the Supreme Court could not have considered the rule in question applicable to vacant public domain without disregarding the reason of the rule as given in the opinion of that court in *Watkins v. Smith*, 45 S. W. 560. However, in the case of *Yarbrough v. De Martin*, 67 S. W. 177, decided by the Court of Civil Appeals for the Fourth District, in which case, also, a writ of error was denied, it was held that "a mere trespasser, simply because he has possession, is not in a position to have the calls of a patent reformed, where by any reasonable construction of its calls the land appears to be covered by the patent." This case, therefore, might seem to sustain the ruling complained of, if by any reasonable construction the field notes of the Burleson county school land patent, under which appellee deraigned title, could be made to include the land in controversy. But this patent was issued long before block 1, Houston & Great Northern Railway Company survey, was corrected; and the excluded evidence tended to show that, as originally located, sections 402, 403, and 408 of this block, called for in the Burleson county school land patent, were placed on the ground about one-half mile farther west than the corrected field notes placed them. Evidently this patent, in calling for said sections, must have referred to the original location, and could not have referred to

the boundaries as established by the corrected work, which had not then been done. If then appellant could have shown that the land claimed to be vacant was clearly not within any of the calls of the Burleson county school land patent, but was entirely beyond them all, it seems to us that he should have been permitted to do so, since the decision in *Yarborough v. De Martin* would not be applicable, while that of *Collins v. Cain* would be.

We are not, however, to be understood, from what is stated above, as holding that appellant was a mere trespasser in taking possession of vacant land, if such it was, as an intending purchaser, who had caused it to be surveyed under the act of February 23, 1900, as amended April 15, 1901, which was quite liberal both in its spirit and provisions towards such purchasers, giving them the preference right, etc. His conduct was different from that of Hayes in *Adair v. Hayes* (Mo. App.) 72 S. W. 256, so much relied on, in which it was held that the land sought to be appropriated for grazing purposes by Hayes, as an intending purchaser, before it was ready for sale, and while it was still under valid lease to Adair, could not be thus prematurely appropriated in disregard of the rights of the lessee. If the land was vacant, appellant's possession interfered with the rights of no one, premature though it may have been.

Nor are we to be understood as approving by acquiescence the ruling, also complained of, sustaining a general demurrer, and the fourth special exception to the plea in reconvention for damages for the alleged wrongful procurement and use of sequestration process. This ruling was, perhaps, influenced by the view taken of the main question, so far, at least, as the general demurrer was concerned, while the objection raised by the special exception is such that it may be obviated by amendment on the next trial.

Because the court erred in excluding the evidence offered by appellant to show that the land in controversy was vacant public domain, the judgment is reversed, and the cause remanded for a new trial.

FLYNT v. EAGLE PASS COAL & COKE CO.

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

SALES—ACTION FOR PURCHASE PRICE—VENUE—PLEADING—WRITTEN CONTRACT—WHAT CONSTITUTES—LETTER.

1. A petition in an action for the purchase price of goods brought into the county of the seller's residence, which fails to allege that the buyer, residing in a different county, contracted in writing in the county where the action was brought, is cured by an amendment that, after the settlement of the balance due, he contracted in writing to pay the money sued for at the county seat of such county.

2. The Court of Civil Appeals will take judicial knowledge that Eagle Pass is the county seat of Maverick county.

3. Rev. St. 1895, art. 1194, provides that no inhabitant of the state shall be sued out of the county in which he has his domicile, except in certain instances; the fifth (subdivision 5) of which is where a person has contracted in writing to perform an obligation in any particular county, in which case suit may be brought there. *Held*, that a letter written by a debtor after an adjustment of accounts and the dishonoring of a draft drawn on him by his creditor, in which he stated that had he been at home he would have protected the draft, and that he would remit to the creditor in a few days, did not amount to the execution of a written contract in the county of the creditor's residence, so as to warrant suit therein.

Appeal from District Court, Maverick County; J. M. Goggin, Judge.

Action by the Eagle Pass Coal & Coke Company against H. C. Flynt. Judgment for plaintiff, and defendant appeals. Reversed.

Murray & Palmer, for appellant. Sanford & Douglas, for appellee.

NEILL, J. This suit was brought by appellee, in the district court of Maverick county, against the appellant to recover the sum of \$632.65.

The petition alleged that during the months of November and December, 1902, and the month of January, 1903, the plaintiff was engaged in selling coal from its mines in Maverick county, Tex.; that during the early part of November, 1902, plaintiff made arrangements with the defendant to ship him coal from Eagle Pass, in Maverick county, Tex., to San Antonio, in Bexar county, Tex., under a verbal agreement that defendant would sell said coal and collect the money for same, and remit the proceeds to plaintiff at Eagle Pass, Tex., at the end of each month, in compensation for which services the defendant was to receive one-fourth of the net profits of said coal sales, after deducting all expenses connected therewith; that, in pursuance of the aforesaid verbal agreement, a large amount of coal was shipped to defendant in San Antonio, Tex., during the months of November and December, 1902, and January, 1903, which coal defendant sold and collected the money for; that defendant failed to remit the proceeds of sales to plaintiff as was provided should be done by the aforesaid agreement, and there was due plaintiff by defendant, for said sales, on the 27th day of January, 1903, the sum of \$632.65; that on the 27th day of January, 1903, plaintiff and defendant adjusted their accounts under the aforesaid coal agreement, and it was by said agreement ascertained and agreed by plaintiff and defendant on said day that the defendant was indebted to plaintiff in the sum of \$632.65 for the coal furnished him by plaintiff under the aforesaid agreement, after making all deductions claimed by defendant for expenses incurred and compensation earned; that at the time of the settlement defendant verbally agreed to remit said sum of \$632.65 to plaintiff at Eagle Pass, Tex., on the 29th day of Jan-

¶ 2. See Evidence, vol. 20, Cent. Dig. § 31.

uary, 1903; that he failed and refused to remit said money, but in writing, on the 29th day of January, 1903, contracted to pay said money to plaintiff in Eagle Pass, Tex., shortly after February 1, 1903. That defendant has not paid said sum of money or any part thereof.

The defendant excepted to the petition upon the ground that it did not allege that he contracted in writing to pay plaintiff the sum sued for, or any part thereof, in Maverick county. He also pleaded in abatement his privilege of being sued in Bexar county, Tex., where he alleged he was domiciled when the alleged contract was entered into and the indebtedness accrued, and has continued as his domicile ever since. His plea negatived all the grounds under the statute that might confer jurisdiction on the court where the suit was instituted. The exception was overruled, the plea of privilege heard, which the court refused to sustain, and judgment was rendered for appellee.

The assignments complain of the court's overruling the exception to the petition, and of its failure to sustain appellant's plea of privilege. We think the defect in the original petition pointed out by the exception was cured by the averment in its amendment, "that defendant contracted in writing to pay the money sued for at Eagle Pass, Tex.," which we judicially know to be the county seat of Maverick county.

The undisputed evidence shows that the defendant was at the time of the commencement of this suit a resident of and had his domicile in Bexar county, Tex., and that he has continuously since the suit was filed had his residence and domicile in said county and state; that he never had at any time been a resident of Maverick county, Tex., or had his domicile in that county; that none of the exceptions to article 1194, Rev. St. 1895, would confer jurisdiction of this case on the district court of Maverick county, unless it be subdivision 5 of said article. The testimony upon the issue as to whether the case fell within fifth subdivision of the article referred to is as follows: In the early part of November, 1902, defendant entered into a contract with plaintiff to handle its coal in San Antonio, Tex., the plaintiff agreeing to ship him all the coal he could use, the defendant to collect for the coal sold, and, after deducting the expenses connected with the business, was to remit to plaintiff, at Eagle Pass, the cost of the coal and its part of the net profits. That no part of the contract was in writing, but it was simply verbal. Defendant testified that he never at any time contracted to pay plaintiff the sum of money sued for, or any part thereof, or any other sum, in Maverick county, Tex. In January, 1903, the settlement and statement of the accounts between the parties had in the city of San Antonio, Bexar county, Tex., and the account so stated between them showed an indebtedness on

the part of defendant of \$632.65. A memorandum in writing was made of this statement, and defendant promised to pay the amount due to the president of the Coal & Coke Company before he left the city of San Antonio, but failed to do so. After the president of the company returned to Eagle Pass he drew on defendant for the amount stated in the account, which draft was not paid, but was returned to the company. Afterwards, in the latter part of January, 1903, the president of the company received a letter from the defendant, in which he stated that he had just returned home and found the notice of the draft on him, and that if he had been at home he would have protected the draft; that he wanted to get his coal business straightened out, and, when he did, would want more coal; that he would see the wood company and all the other people who owed for coal, and collect from them, and remit to plaintiff a few days after the first. It is by this letter that plaintiff seeks in this case to avoid the general rule that "no person who is an inhabitant of this state shall be sued out of the county in which he has his domicile," and bring it within the fifth exception, which provides that, "where a person has contracted in writing to perform an obligation in any particular county, * * * suit may be brought either in such county or where the defendant has his domicile."

In our opinion, the letter referred to cannot be taken and considered as a contract in writing between the parties, binding the defendant to the performance of any obligation in Maverick county. Unless defendant contracted in writing to perform the obligation of payment there, his plea of privilege should have been sustained. It is essential to the validity of every contract that it should be based upon some consideration, and that its terms should be mutually agreed upon between the parties. No such consideration or agreement is shown, or can be shown, as would constitute the statements made by defendant in this letter a contract such as would authorize the maintenance of this suit in Maverick county against his plea of privilege. Therefore the court erred in not sustaining said plea, for which error the judgment of the district court is reversed and set aside, and this cause dismissed.

GALVESTON, H. & S. A. RY. CO. v. BROWN.*

(Court of Civil Appeals of Texas. Nov. 25, 1903.)

MASTER AND SERVANT—RAILROADS—INJURIES TO SERVANT—INSPECTION—DUTY OF SERVANT—ASSUMED RISK—KNOWLEDGE—PLEADING.

1. A brakeman injured by striking a post in dangerous proximity to the track while he was riding on the side of a freight car in the course

*Rehearing denied January 6, 1904.

of his employment owed no duty to inspect the premises of the railroad company and discover the dangerous proximity of the post.

2. In the absence of a plea of assumed risk in an action for injuries to a servant, the master is not entitled to a special charge submitting such issue.

3. Where, in an action for injuries to a servant, the evidence showed that plaintiff did not know of the dangerous position of the post by which he was injured, it was not error for the court to refuse to submit the issue of assumed risk.

4. Where a railroad brakeman was injured by coming in contact with a post maintained by the railroad company in dangerous proximity to the track, while he was riding on the side of a freight car in the performance of his duty, the maintenance of such post by the defendant constituted such negligence as entitled plaintiff to recover.

Appeal from District Court, Val Verde County; J. M. Goggin, Judge.

Action by Fred Brown against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Ellis & Love, for appellant. Joseph Jones, Henry L. Moore, and H. E. McMains, for appellee.

NEILL, J. This suit was brought by appellee against appellant to recover damages for personal injuries alleged to have been inflicted by the negligence of the latter. Appellant's answer consisted of a general denial and plea of contributory negligence. The trial resulted in a verdict and judgment in favor of the appellee for \$12,000.

The evidence shows that on the 2d day of July, 1902, the appellee was in the employment of appellant as a brakeman on one of its freight trains which was run over its road from Sanderson to Del Rio; that when the train reached Langtry, an intermediate station, its engine ran out on a spur track there and picked up a car for the purpose of placing it in the train; that, when the engine was returning with the car, appellee, in the discharge of his duty as brakeman, was riding on the side of the car, with one foot in the stirrup and the other on the oil box, holding to the handhold and brake wheel—which was the customary, proper, and ordinarily safe position—for the purpose of getting down and setting the switch when the engine should pass over it, so the car could be backed upon the main track and coupled to the train; that while riding in such manner, in the exercise of ordinary care, appellee was brought in violent contact with a fence post standing on appellant's right of way in dangerous proximity to said spur track, of which dangerous proximity he was wholly ignorant, whereby he was mashed and bruised, and seriously and permanently injured.

From these facts we conclude (1) that appellant was guilty of negligence in allowing the fence post to stand in such proximity

to its track as endangered its trainmen when in the discharge of the duties of their employment; (2) that such negligence was the proximate cause of appellee's injuries; (3) that appellee was guilty of no negligence proximately contributing to his injuries; and (4) that, by reason of the injuries inflicted by such negligence, appellee has been damaged in the amount found by the jury.

Conclusions of Law.

1. The appellee owed no duty of inspection to discover the dangerous proximity of the post to the track, which was due alone to appellant's negligence. *G., H. & S. A. Ry. Co. v. Mortson*, 71 S. W. 770, 6 Tex. Ct. Rep. 537; *G., C. & S. F. Ry. Co. v. Darby* (Tex. Civ. App.) 67 S. W. 446; *I. & G. N. Ry. v. Bearden* (Tex. Civ. App.) 71 S. W. 559; *Ry. v. Moore* (Tex. Civ. App.) 68 S. W. 559; *Houston Elec. Co. v. Robinson* (Tex. Civ. App.) 76 S. W. 209; *Ry. v. Oram*, 49 Tex. 341; *Bonner v. La None*, 80 Tex. 117, 15 S. W. 803; *Ry. v. Slinkard*, 17 Tex. Civ. App. 585, 44 S. W. 35; *T. & P. Ry. Co. v. Swearingen* (C. C. A.) 122 Fed. 204; *Anderberg v. Ry.*, 98 Ill. App. 207. Hence the court did not err in refusing special charge No. 1 requested by appellant's counsel.

2. The appellant, not having pleaded assumed risk, was not entitled to the special charge asked by its counsel submitting such an issue. *I. & G. N. Ry. Co. v. Harris*, 95 Tex. 349, 67 S. W. 815. Besides, the evidence did not warrant its submission, for it shows that appellee did not know of the post standing near the spur track. If, however, such an issue could be deemed to have arisen from the pleadings and evidence, it was properly submitted by the eighth paragraph of the court's charge. *Ry. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Ry. v. Bingle*, 91 Tex. 288, 42 S. W. 971; *Ry. v. McLane*, 24 Tex. Civ. App. 322, 62 S. W. 565; *Ry. v. Engelhorn*, 24 Tex. Civ. App. 326, 62 S. W. 561, 65 S. W. 68; *Ry. v. Harris*, 95 Tex. 346, 67 S. W. 315.

3. Our conclusions of fact dispose of the assignments which complain of the court's refusal to grant a new trial upon the ground that the verdict is excessive and not warranted by the evidence. The case of *Ry. v. Jones* (Tex. Civ. App.) 68 S. W. 190, is directly applicable to the question raised by these assignments.

There is no error in the judgment, and it is affirmed.

SANDERS et al. v. NORTH END BLDG. & LOAN ASS'N et al.

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

NOTES — ACTION ON — FORGERY — EVIDENCE — QUESTION FOR JURY — INSTRUCTION.

1. In actions at law the Supreme Court will not weigh the sufficiency of evidence, but merely determine whether there is any substantial evidence to support the verdict and judgment.

¶ 4. See Master and Servant, vol. 34, Cent. Dig. § 224.

2. In an action on notes purporting to have been made by a building association, where the defense was forgery, *held*, that there was sufficient evidence to support a verdict for plaintiff.

3. In an action on notes, where the defense was forgery, the admission of the testimony of a director of defendant to the effect that plaintiff had told him that he had invested money with the defendant was not prejudicial error, the court having strictly limited the inquiry of the jury to the question of the genuineness of the notes.

4. In an action on notes, where the defense was forgery, and the jury was limited to that question alone, the admission of an abandoned answer of defendant, wherein it set up want of consideration, was not prejudicial error.

5. In an action on notes purporting to have been executed by a corporation, the court instructed that the jury were not bound to consider the testimony of the president himself, to the effect that his signature was forged, as conclusive, but that they should take into consideration all the evidence. *Held*, that such instruction was not erroneous, as giving undue prominence to the testimony of such witness, who was not a party to the suit.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Action by Bernard Sanders and others against the North End Building & Loan Association. From a judgment in favor of plaintiffs, Mark R. Chartrand, receiver of the association, appeals. Affirmed.

Kinealy & Kinealy, for appellant. O. J. Mudd, for respondents.

MARSHALL, J. This is a suit upon five promissory notes, aggregating \$4,625, dated between February 8 and December 10, 1896, and alleged to have been signed by Charles James, the president of the defendant association. The answer is a plea of non est factum, verified as the statute requires. The reply is a general denial, coupled with a plea of estoppel, but upon the trial the court limited the case to the plea of non est factum. There was a verdict for the plaintiff for the amount claimed, with interest, from which the defendant appealed. The facts will be discussed in the opinion.

1. The principal contention of the defendant is that "there is no sufficient evidence to support plaintiff's case, and no merit in his claim." The question of whether the evidence is sufficient is for the jury and the trial court to decide. In actions at law this court looks to the evidence only far enough to determine whether there is or is not any substantial evidence to support the verdict and judgment. If there is any such substantial evidence, and the verdict is not such as to show on its face that it was the result of passion, prejudice, or misconduct of the jury, nor such as to shock the judicial sense of justice, this court will not interfere. "It is not enough that there is an insufficiency of evidence," and "the fact that the verdict is not such as the appellate court would have reached upon the conflicting evidence adduced will not warrant a reversal." *James v. Ins. Co.*, 148 Mo., loc. cit. 16, 49 S. W. 981. The de-

fendant tacitly concedes that there is some substantial evidence to support the verdict, but shows very persuasively that the great preponderance of the evidence is against the verdict. But the fact remains that there is some substantial evidence to support the verdict, and that the jury and the trial court decided against the defendant. So, under the rule that obtains in this court, the judgment will not be reversed on this ground.

The plaintiff sued on five promissory notes, aggregating \$4,625, which he alleged and testified represented money he had loaned to the association. The notes purported to be signed by Charles James as president of the association. The defense is that the signature of Charles James is a forgery. One Obert was the secretary of the association, and transacted the business with the plaintiff. In the fall of 1897 Obert defaulted and absconded. The solvency of the association was questioned, and the plaintiff became solicitous about his money. He went to see James about the matter, and told him he had the notes, and showed them to him, and asked him what he thought about them. James replied that they were as good as gold. James then left the plaintiff. The latter pursued the matter, however, and, overtaking James, said to him, "James, you know that you signed them notes?" James took the notes, went to the window, put on his spectacles, examined the notes, and said, "They might be a little bit different, but I can't swear I didn't sign it." The plaintiff further testified that the first suggestion he had that there was any question about the genuineness of James' signature was after Obert had absconded, and McCollum had been appointed secretary, and McCollum said it might be that James had not signed the notes, but that he supposed the association would have to pay them anyway, because Obert was secretary, and he had given them to the plaintiff. The plaintiff also testified that he showed the notes to Hilke, one of the directors of the association. For the plaintiff, one Lieb, a bookkeeper of the association, testified that the plaintiff frequently brought money to the office to be loaned to the association, and that he saw some of these notes to Sanders lying on Obert's desk. August Denning, the office boy of the association, testified that Obert frequently sent notes by him to James to be signed, and that he remembered one such note that was payable to Sanders, but could not say whether or not it was one of the notes in suit. The plaintiff also offered in evidence an abandoned answer of the defendant, in which the defendant pleaded a want of consideration for the notes. The notes were then offered in evidence, and were admitted, and handed to the jury for their inspection. The defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted. To sustain the issues on its part, the defendant called Charles James, the former president of the association, and had him identify his signature to nine

checks, and defendant handed the checks to the jury for inspection. He then testified that none of the notes in suit were signed by him; that Sanders showed him the notes just before Obert absconded, and he said to him, "I have my very serious doubts about this being my signature;" that up to that time he had heard nothing about any forgeries. On cross-examination he was shown a number of notes, some of which he said he had signed, and some he said he had not signed. At least one of the genuine notes was to the plaintiff, for some \$1,350. He said that the first he knew of these notes was when Hilke called his attention to them at a meeting of the directors held at his house, just after Obert was removed and McCollum was appointed, and that this occurred about two months before his conversation with the plaintiff about the notes. The defendant offered in evidence a resolution of the association constituting the president, vice president, and secretary a committee with authority to borrow money for the association, to be evidenced by notes executed by the president and secretary. The defendant also proved by Wiesbahn, an expert in handwriting, by Cummings, a former bookkeeper for James & Co., by McCollum, the secretary of the association, and by Richardson, a former partner of James, that the signatures to the notes in suit are not James' signatures. In rebuttal the plaintiff, over the defendant's objection, read the testimony of George Hilke, a director of the association, who, after testifying to the fact that the plaintiff originally had his money loaned to the North St. Louis Building Association, and afterwards changed it to the defendant association, said that the plaintiff told him about a year before the failure that he had these notes; that he did not show them to him until after the failure; that he did not know James' signature, and could not say whether these notes were signed by James or not. Upon this showing, it cannot fairly be said that there is no substantial evidence to support the verdict and judgment. The case made by the plaintiff in chief was by no means clear or strong or convincing, but there was evidence sufficient to take the case to the jury. The defendant identified and offered in evidence various checks signed by Charles James, and thereby afforded the jury a legitimate basis of comparison by which to judge for themselves whether the notes in suit were signed by James or not. Formerly only such writings as were properly in a case to prove some issue in the case, or for a legitimate purpose, and having a direct bearing upon the case, could be used as a basis of comparison by which to judge the genuineness of a paper or writing or signature that was in question in the case. *State v. Thompson*, 132 Mo., loc. cit. 325, 34 S. W. 31. But afterwards this rule was changed by statute, as it is now provided by section 4679, Rev. St. 1899, as follows: "Comparison of a disputed writing with any writing proved to the satis-

faction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." This provision of the statute was applied upon the second trial of the *Thompson Case*, supra, and it was contended that the act could not be constitutionally so applied, because it was passed after the commission of the act of the defendant then on trial, but this court held the contention to be untenable. *State v. Thompson*, 141 Mo., loc. cit. 416, 42 S. W. 949. This act was also considered by the St. Louis Court of Appeals in *Bank v. Hoffman*, 74 Mo. App. 203; and it was pointed out by Bond, J., in that case, that the act is a literal copy of the English act of 1854, and that under the English act it was the rule that the jury was entitled to make a comparison, and to judge therefrom as to the genuineness of the writing in dispute. The defendant therefore furnished the jury such a basis of comparison by introducing the checks signed by James that were conceded to be genuine; and the jury therefore had substantial evidence upon which to base a verdict, even if there had been none in the case before. The verdict may not be such as this court would have found if it had been the trier of the facts, but the jury returned it, the trial court approved it, there is substantial evidence to support it, and therefore this court will not interfere.

2. The admission of Hilke's testimony that Sanders told him he had his money invested in the North St. Louis Association, and drew it out and invested it in the defendant association, is assigned as error. Such testimony was clearly immaterial to any issue joined in this case, and should have been excluded. But it is incomprehensible how the defendant could have been prejudiced thereby. The court had drawn the line strictly, and had limited the inquiry entirely to the genuineness of James' signatures. The jury could not possibly have been so ignorant as to be influenced in the determination of that issue by any consideration of whether the plaintiff originally loaned his money to the North St. Louis Association or not. Jurors, at least so long as no doubts are raised by the record, must be presumed to have at least sense enough to see that such testimony had no bearing upon the only issue that was submitted to them in this case. This court does not believe this error materially affected the merits of this action, and under the statute (section 865, R. S. 1899) it is not reversible error.

3. The admission of the abandoned answer of the defendant, wherein want of consideration for the notes is pleaded, is assigned as error. This evidence was inadmissible, but its admission was not reversible error, in view of the manner in which the court restricted the issues that were submitted to the jury.

4. The second instruction given for the

plaintiff is challenged because it gives undue and unfavorable prominence to the testimony of James, whom it is said is not a party to this suit. The instruction is as follows: "No. 2. The jury are instructed that in determining the issue whether or not the signature 'Charles James,' appearing upon the notes in evidence, is the genuine signature of the president of the North End Building & Loan Association at the date of the said notes, you are not bound, by the fact that the witness Charles James is the person whose signature is under consideration, to consider the testimony of said James himself on this issue as conclusive or controlling; but you must consider the testimony of said James, and that of each and every other witness, bearing upon this issue, and give to such testimony and all the evidence such weight and credibility only as, in your judgment, and under your oath as jurors, you think the same entitled to. And in determining upon your verdict you must consider all the evidence, and every fact and circumstance in evidence before you; and if, after fully considering the testimony of all the witnesses, and all the facts and circumstances developed by the evidence, you are reasonably satisfied that said James, as president of said association, did sign the name 'Charles James' to said notes, then your verdict must be for plaintiffs." This instruction practically told the jury that, under the issue as to whether the notes were signed by James or not, his testimony was not conclusive, but that the jury must decide that issue according to all the evidence and facts and circumstances of the case. It would have been error for the court to refuse to so declare. The testimony of no witness is conclusive upon a jury. Under the issues, it was impossible that James should be anything else than prominent in the case, but it cannot be said that this instruction made him or his testimony "unfavorably" prominent.

This is the second appeal to this court of this case. *Sanders v. Chartrand*, 158 Mo. 352, 59 S. W. 95. Two juries have returned verdicts for the plaintiff in this case. There is nothing in the record to throw any doubt upon the honesty of the plaintiff's claim. No reversible error appears to have been committed in the second trial of the case. Under the practice of this court in such cases, the judgment of the circuit court must be affirmed. All concur.

STATE v. PYSCHER.

(Supreme Court of Missouri, Division No. 2.
Dec. 23, 1903.)

FORGERY OF DEED—AMENDED INFORMATION—ADMISSIBILITY OF HEARSAY EVIDENCE—GRANTOR'S INDEBTEDNESS TO DEFENDANT—INSTRUCTIONS—POSSESSION OF FORGED INSTRUMENT—PRESUMPTION—REASONABLE DOUBT—EFFECT OF ACKNOWLEDGMENT—SUFFICIENCY OF EVIDENCE.

1. Rev. St. 1899, § 2481, provides that the statute of jeoffailes shall apply to prosecutions by information, and any information may be

amended in form or substance by leave of court before trial. Section 2641 provides that, if a person indicted and imprisoned is not tried before the end of the second term held after indictment found, he shall be entitled to discharge, unless the delay was occasioned on his application, or by want of time to try the cause. An information for forgery was filed September 21, 1901, and on January 6, 1902, trial was had, resulting in a mistrial, and the cause continued to the March term, when a third amended information was filed. *Held* that, both at common law and under section 2481, it was proper to allow the filing of the amended information, and section 2641 had no application to the case.

2. Allowing the filing of an amended information is a matter of discretion, which the appellate court will not interfere with, unless it clearly appears that defendant has been deprived of some constitutional right, or other substantial privilege.

3. Where alleged error in statements made by the prosecuting attorney to the jury is not assigned in the motion for a new trial, it cannot be reviewed.

4. In a prosecution for forging a deed, statements, not part of the *res gestæ*, made by the grantor's heir, since deceased, to the effect that the grantor made the deed to defendant, are properly excluded as hearsay.

5. In a prosecution for forging a deed, evidence to show the grantor's indebtedness to defendant is properly excluded.

6. The fact that a state's witness had testified to defendant's statement that he had loaned the grantor money, and did not have a scratch of a pen to show for it, would not make such evidence admissible.

7. Where, in a criminal prosecution, a witness for the state, claimed to have a special interest in pressing the case, has been fully cross-examined thereon after testifying in chief, it is not error to refuse to permit similar cross-examination when the witness is called in rebuttal.

8. It is not necessary, in instructing in a criminal case, that a reference to each item of evidence introduced should be qualified by the phrase "beyond a reasonable doubt"; it being sufficient to give a general instruction on that subject, applicable to the testimony as a whole.

9. In a prosecution for forgery, the possession of the forged instrument, and claim of title thereunder, is evidence, and raises a presumption, that defendant was the forger, and it is proper to so instruct.

10. In a prosecution for forging a deed, an instruction that if the jury believed the instrument was forged, and that defendant had possession thereof, and claimed title thereunder, these facts would constitute evidence that he committed a forgery, and a further instruction that such facts raised a presumption that he forged the instrument, are not objectionable as comments on the evidence.

11. Where, in a prosecution for forgery, an instruction that defendant's possession of, and claim of title under, the forged instrument, constitute evidence that he was the forger, is qualified by the requirement that his possession shall not be satisfactorily explained, the instruction, and a following one that such facts raise a presumption that the defendant was the forger, are not objectionable because failing to state that defendant was not required to rebut the presumption beyond a reasonable doubt.

12. In a criminal prosecution, it is proper and sufficient, as a charge on reasonable doubt, to instruct that the law clothes defendant with a presumption of innocence, which attends and protects him until it is overcome by evidence of his guilt beyond a reasonable doubt, which means that the evidence must be clear, positive,

¶ 8. See Criminal Law, vol. 14, Cent. Dig. § 1301.

and abiding, and fully satisfy the minds and consciences of the jury; that it is not sufficient to justify a verdict of guilty that there may be a strong suspicion, or even probability of guilt, but the law requires proof producing a clear, undoubted, and entirely satisfactory conviction of guilt, the burden of establishing which is on the prosecution; and that, as the prosecution seeks a conviction on circumstantial evidence alone, the jury cannot convict unless the state has proven defendant's guilt beyond a reasonable doubt, by facts and circumstances consistent with each other and with his guilt, and absolutely inconsistent with any reasonable theory of innocence.

13. In a prosecution for forging a deed, an instruction permitting the jury to consider the fact that the acknowledgment was forged, in determining whether the deed was also forged, was not objectionable for not restricting the consideration of the acknowledgment to the question of intent on the part of defendant, as the purpose of the acknowledgment as evidence was not to show anything but the actual fact of the forgery of the deed.

14. In a prosecution for forging a deed, an instruction that, while the jury cannot find defendant guilty on proof that the acknowledgment was forged, yet, if the jury believe it was forged, and that the body of the deed was written by the same person, then, in determining whether the deed was a forgery, the forged acknowledgment can be considered along with other facts and circumstances, is not objectionable, as assuming that the acknowledgment was forged.

15. Evidence in a prosecution for forging a deed examined, and *held* to sustain a conviction.

Appeal from Criminal Court, Saline County; John A. Rich, Judge.

Simon E. Pyscher was convicted of forgery, and appeals. Affirmed.

W. C. Todd, Com P. Storta, W. G. Lynch, and S. B. Burks, for appellant. E. C. Crow and Sam B. Jeffries, for the State.

FOX, J. The original information in this case was filed by the prosecuting attorney of Saline county on the 21st day of September, 1901. Various amended informations and motions to quash the same were filed until the 11th day of March, 1902, when the third amended information was filed by the prosecuting attorney. This last amended information contains three counts. It is unnecessary to notice any other count than that upon which the defendant was convicted, to wit, the second count in the third amended information, which charges that the defendant unlawfully and feloniously caused to be forged and falsely made a certain deed, purported to be the act of one Katherine Kroecker, whereby the title to certain real estate therein specified was purported to be conveyed to the defendant. Upon this count, defendant was convicted, and his punishment assessed at 10 years in the penitentiary. The body of the crime is laid in Saline county, the date of its commission being October 26, 1899. Defendant filed a motion to quash the third amended information, and upon consideration it was overruled by the court. After conviction, motions for a new trial and in arrest of judgment were presented

and were overruled, whereupon an appeal was taken to this court.

The defendant, Simon Pyscher, worked for and lived at the home of a woman by the name of Katherine Kroecker for several years prior to December, 1899. Mrs. Kroecker owned a farm adjoining and comprising a part of what is known as the old part of New Frankfort, Mo., situated in Saline county. The farm consisted of something more than 68 acres. Mrs. Kroecker died in December, 1899, leaving a daughter, Anna Kroecker, as her only heir. Defendant administered upon the estate, Anna Kroecker being surety on his bond as administrator. Defendant filed an inventory of the real estate belonging to the deceased, Katherine Kroecker, and this inventory contained a list of the property claimed by defendant under the alleged forged deed. Defendant also had the real estate appraised for the purpose of obtaining an order of sale to pay the debts of the estate, and no claim seems to have been made to the property by him until after the death of Anna Kroecker, in February, 1901. After the death of Anna Kroecker, the probate court made an order requiring the defendant to give a new bond as administrator of the estate of Katherine Kroecker, deceased. Defendant failed to comply with the order requiring the new bond, and the court made an order removing him, and ordering the public administrator of Saline county (Mr. George M. Francisco) to take charge of the estate. Francisco, upon taking charge of the estate, went to defendant and asked him if he wanted to remain upon the place another year; evidencing a willingness to rent it to him. At the same time Dr. T. J. Sullivan went to see defendant, to ascertain whether or not he wanted to remain on the place another year; stating to him that, if he did not, he (Sullivan) intended to rent it if he could. The defendant in both instances said that he did not intend to remain there, but expected to remove to Oklahoma. No claim was made by him to any part of the land during either of the foregoing conversations. Defendant talked freely to Francisco about the land that belonged to the estate and its value, his estimate being that its rental value was about \$150 per annum. Taking defendant at his word, the public administrator rented the land to Dr. Sullivan, but, when Sullivan undertook to obtain possession, he was met by defendant with the proposition that the land did not belong to the estate, but that he (Simon Pyscher) held it by virtue of a deed executed to him by Mrs. Kroecker. It appears from the record that two suits were instituted against the defendant—one by Dr. Sullivan for unlawful detainer, and one in ejectment brought by the public administrator. It seems that the defendant made no claim to the property until after the death of Anna Kroecker, in February, 1901; his claim being that Mrs. Katherine Kroecker

owed him \$100, and, finding that she would not be able to repay him, executed the deed, with the understanding that, if the money was not paid, the deed should become effective. The deed claimed by the state to be forged was seen by Dr. Sullivan at the house formerly occupied by Katherine Kroecker, and was described by him as being an old blank form, which contained nothing but the name and signature of Katherine Kroecker, with no description of land, grantor, or grantee. It was shown by witnesses for the state that the body of the deed, including the acknowledgment, was written at a very recent time, while the signature, from the general appearance of the paper and the writing, had evidently been written for some time, on account of the ink having turned yellow. For the defendant, two witnesses (E. N. Snider and Clarence Pyscher, a brother of the defendant) testified that on the day before Katherine Kroecker died they were at her home, and that she called to the defendant to bring her a certain deed, which he did, and she then announced in their presence that, as defendant had been good to her, she intended to deed him a part of her land, and handed defendant the deed, and told him to put it away. These witnesses testified that the deed introduced in evidence, and alleged by the state to be forged, is the same deed that Mrs. Kroecker had and gave to the defendant while they were at her home. A. W. Thompson, Mrs. Caroline Zend, Joseph Zend, Joseph Genser, Mrs. Ellerbrecht, Emma Pyscher, and Samuel Pyscher all gave testimony tending to show that the deed was not a forgery. The acknowledgment to the deed was in the name of a man named F. H. L. Miller, who was a notary public, and lived in New Frankfort from 1866 to 1874; but his commission expired, as shown by the record in the county clerk's office, in 1874, and very little had been heard of him since that date. It appears that Miller had lived in the home of Mrs. Kroecker, and while there had left his notarial seal in her house; several persons having seen it a few days prior to the death of Mrs. Kroecker. In addition to the testimony above given, two or three witnesses were introduced as experts to testify as to the handwriting in the deed in question, and purporting to be forged. Those for the state testified that the body of the deed and the signature of the witness Snider were by the same hand, while other witnesses for the defense stated that they were written by different persons. In rebuttal of the testimony offered by defendant, the state introduced a number of witnesses contradicting and impeaching the witnesses testifying in behalf of defendant. At the close of the evidence the court instructed the jury upon the law as applicable to the facts developed from the testimony of the witnesses. The jury returned a verdict of guilty as charged in the second count of the information, and assessed defendant's punishment at impris-

onment in the penitentiary for 10 years. Motions for new trial and in arrest of judgment were duly filed, and by the court overruled, and defendant prosecutes this appeal, and the record is now before us for review. The instructions complained of will be given attention and discussed, in connection with other contentions of appellant, in the course of the opinion.

Opinion.

The errors assigned in this cause are briefly stated as follows: First, that it was error for the court to permit the prosecuting attorney to file three amended informations; second, it was error to allow the prosecuting attorney, in his opening statement to the jury, to refer to the statements of defendant made in an application for a continuance in a civil suit between Francisco and this defendant; third, that the court erroneously excluded the testimony of certain witnesses as to statements made to them by Anna Kroecker; fourth, that the statement of Katherine Kroecker, in which she "said to others that she owed Simon money," was improperly excluded; fifth, that the court committed error in refusing to permit counsel for appellant to propound certain questions to Dr. Sullivan, in respect to the interest manifested by him in the prosecution; sixth, it is complained that the court improperly declared the law upon the facts as disclosed in this case. We will dispose of the numerous contentions in the order in which they are named, as above stated.

The first assignment of error asserts that the court erred in permitting the prosecuting attorney to file three amended informations. Upon this proposition, we will say that it is undisputed that the state's officer has the right to prosecute upon informations duly filed, and that informations are amendable. This proposition is made clear in *State v. Vinso*, 171 Mo. 576, 71 S. W. 1034. In that case the court unqualifiedly approved the rule as announced in *Rex v. Wilkes*, 4 Burr, 2527. Gantt, J., said in the *Vinso* Case: "In *Rex v. Wilkes*, 4 Burr, 2527, all the precedents as to the amendment of informations were brought under review by Lord Mansfield, and the conclusion reached that at common law an information was amendable. In the course of his opinion he asks: 'And why should it not be amended? If it had not been amended, the Attorney General would have dropped this information, if he thought there was a slip in it, and have brought another. And this would have been more inconvenient to the defendant, and have harassed him more. He would have no benefit, and more vexation. This amendment avoids delay and saves expenses. * * * There is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves, but informations are as declarations in the king's

suit. An officer of the crown has the right of framing them originally, and may, with leave, amend in like manner as any plaintiff may do.' Now, it is obvious from the whole context of his opinion that Lord Mansfield recognized two methods of procedure by the crown officer: He could elect to file an entirely new information, or he could ask leave of the court to amend by interlineation or erasure the information already filed; and of course, in the latter case, especially after issue joined, notice should be given defendant of the amendment. In this case the prosecuting attorney had elected to file an entirely new information, and we have no doubt whatever of his right so to do, or of the propriety of the decision overruling the motion to quash, based on the ground that it was not allowable to amend an information. In *State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115, we held that 'information,' as used in our Constitution, means the common-law information, and, in the absence of statutory provisions to the contrary, the common-law practice prevails; and, we have seen, amendments proper were allowed at common law, as a matter of course, at any time before trial. *State v. White*, 64 Vt. 372 [24 Atl. 250]. It is made apparent from that case that at common law even informations were amendable, and our Legislature, to the end that no doubt might be entertained as to the right of the representative of the state to file amended informations, by express provision, authorizes and sanctions such practice, and lodges the enforcement of such right in the sound discretion of the court. Section 2481, Rev. St. 1899. This settles the question as to the right to file amended informations, and as to the number of amended informations which may be filed this must necessarily be left to the sound discretion of the court. While this discretion should be judiciously exercised, yet the appellate court should not interfere with the action of the trial court in the exercise of this discretion unless it clearly appears that the defendant has been deprived of some constitutional right guaranteed to him, or of some other substantial privilege or right, which would operate prejudicially to him in the trial of the cause. Counsel for appellant invite our attention to section 2641, Rev. St. 1899, as supporting the first contention urged. An examination of that section fails to disclose any application to the filing of amended informations. That provision treats of the rights of the defendant if he is not brought to trial before the end of the second term after the indictment is returned. Its purpose is to carry out the provision of the Constitution which guarantees a fair and speedy trial. The first information was filed in this case on the 21st of September, 1901. On January 6, 1902, a little over 90 days from the filing of the original information, the defendant was put upon his trial, which resulted in a mistrial, the jury discharged, and

cause continued to the March term, 1902, at which term the third amended information was filed, and defendant was tried and convicted. It is not pretended that the delay in this case was of such a character as to bring it within the terms of section 2641, *supra*.

The next error assigned, for which the reversal of the judgment is asked, is that the prosecuting attorney was allowed to make improper statements to the jury in respect to certain statements of the defendant contained in an affidavit for continuance in a civil case. This alleged error was not called to the attention of the trial court in the motion for new trial. The statements as made are not properly preserved; hence this error complained of is not before us for review.

It is next insisted that the court committed error in excluding the testimony offered by defendant as to statements made to the witness Mrs. Ellerbrecht. The offer, as made by counsel for defendant, is as follows: "We offer to prove by the witness, in a conversation she had with Anna Kroecker after the death of Katherine Kroecker, that Anna told her that her mother had given Simon a deed to the land, and showed her the deed, and told witness that Simon had been the best friend they had on earth—had been faithful in tending to their wants and looking after their affairs—and she was glad her mother had given Simon a deed to it, and she hoped that when she died Simon would get everything." Also the following offer was made to prove by Emma Pyscher certain facts: "We offer to prove by the witness that Anna Kroecker told the witness it was a deed from her mother to Simon for part of the land that her mother had given to Simon because Simon had always been good to her and to her mother, and waited on them, and she hoped when she died that they would give all of that to him; that they had no relatives to leave the property to when she was gone; that no one had been as good as Simon to them." Defendant's counsel made the following additional offer by witnesses McGuire and Samuel Pyscher: "We offer to prove by the witness on the stand that Anna Kroecker told him that her mother had given Simon a deed to this land; that Simon had been so good to them, and the best friend they had, and that a certain part of the land belonged to Simon, and she hoped at her death he would get the rest; that he had been the best friend that they had." The offer to make the proof by the witnesses mentioned, as above stated, is an effort to introduce, as evidence of a fact, the declaration of Anna Kroecker made to the witness. It must be kept in mind that this is not a civil suit between the defendant and Anna Kroecker, in which the title to this land is involved. She is not a party to this proceeding, and we think it is clear that her statements, made to these outside parties, do not fall within the rule that declarations

against interest are admissible. This is a criminal prosecution for forgery of a deed, and the vital fact at issue is the execution and delivery of the deed. The fact sought to be proven is that the deed charged to have been forged was a valid instrument, and was executed by Katherine Kroecker to the defendant for the purpose of conveying to him the land therein described. Does this fall within the exception to the general rule that hearsay evidence is inadmissible? We think not. The witnesses simply wanted to detail what Anna Kroecker said to them about the deed—that she said it was a deed from her mother to defendant. It is not pretended that these declarations were made at the time it is contended that her mother executed and delivered the conveyance. Everything that occurred at that time—conversations between the mother and defendant, and conversations or declarations by third parties present at the time—might well be said to be a part of, and explanatory of, the transaction. That is not this evidence. These hearsay statements are separate and independent of any particular subject or transaction, so as to make it a part of the *res gestæ*. The testimony does not fall within the rule announced in *State v. Gabriel*, 88 Mo. 631. In that case the statements admitted constituted “a natural and inseparable concomitant” of the principal fact in controversy. In other words, the statements formed a part of the act—were explanatory of the performance of it; but in this case the hearsay statements simply undertake to prove the principal fact itself—the validity of the deed charged to have been forged. The fact that Anna Kroecker was the heir of her mother, and interested in the real estate, does not make her statements to third parties competent, or any the less subject to be termed hearsay evidence. There was no error in the action of the court in excluding this hearsay testimony.

Complaint is made that the court erroneously excluded statements of Mrs. Kroecker that she had some money borrowed from defendant. There was no error in this action of the court. The vital question involved in the case is the forgery of a deed. The mere fact that she had borrowed money from defendant would not justify the inference that she executed a deed to land to pay it. If the deed was in fact executed by her, even though it was without any consideration, it would not be forgery. It was no part of the defense, and it was not necessary to show, that the deed was executed for a valuable consideration. On the other hand, the state introduced a witness who testified to the following conversation with defendant: “Q. I will ask you to state to the jury whether or not Simon Pyscher ever made any statement to you with reference to Mrs. Kroecker being indebted to him; if so, when? A. He come to my house to get a spring wagon to get a coffin for Mrs. Kroecker. He said: ‘I got

myself in a hell of a fix. I loaned that woman a hundred dollars, and have not got a scratch of a pen to show for it.’ That is all he said about the money question.” It is insisted that, if this testimony was competent, then the declaration of Mrs. Kroecker as to having money borrowed from defendant was equally competent. It will be observed that the testimony of the state on that subject does not undertake to do what counsel for defendant assert in their brief was done—“that the court, over the objections of defendant, let the state prove that she did not owe defendant any money.” It was just the reverse. The conversation introduced shows that the defendant did loan Mrs. Kroecker \$100. This testimony, doubtless, was not admissible for the purpose of showing or not showing any indebtedness, but for the sole purpose of proving the admission of the defendant that he did not have either a deed or a mortgage covering the land contained in the deed charged to have been forged.

It is next insisted that the court committed error in not permitting a cross-examination of Dr. Sullivan as to his interest in the prosecution. The record discloses that this witness had testified fully in chief for the state, and that counsel for appellant fully and most searchingly cross-examined him as to the part he was taking in the prosecution. After the defendant had rested his case, Dr. Sullivan was called in rebuttal, and it was then that appellant sought to recross-examine upon a subject which had been fully covered before. We do not think that there was any error in excluding this cross-examination. Courts, in the trial of causes, should grant full latitude in ascertaining the facts; but when a subject has been exhausted there must be a limit, and trials should not be retarded by repetitions in examinations that can shed no new light upon the controversy. Appellant, as the record fully discloses, had already shown that Dr. Sullivan was taking an active interest in the prosecution, and to simply have this repeated while he was on the stand in rebuttal could not add any force to what had previously been shown.

This brings us to the last contention in the case; that is, that the court erroneously declared the law to the jury. The second instruction is complained of. It is as follows: “(2) If the jury find and believe from the evidence that the defendant, at the county of Saline, in the state of Missouri, at any time within three years before the filing of the information in this case, to wit, November 27, 1901, caused or procured to be forged or falsely made the deed described in the information and read in evidence, or any part thereof (not including the acknowledgment of the same), purporting to be the act of one Katherine Kroecker, who was not then living, but had formerly lived and died in Saline county, Missouri, the name of said Katherine Kroecker being affixed to said deed, by which an interest in the lands described in

said deed and in the information purported to be transferred or conveyed to one Simon Pycher, and that the same was done feloniously (that is, wickedly and wrongfully), against the admonition of the law, and with intent on the part of the defendant to cheat and defraud, then you will find the defendant guilty under the second count of the information, and, so finding, will so state in your verdict, and assess his punishment at imprisonment in the penitentiary for a term of not less than ten years." There is no merit in the complaint against this instruction. It is insisted that it is erroneous because it fails to tell the jury that they must find the facts as enumerated in the declaration beyond a reasonable doubt. There is no necessity for, and the law of this state does not require, the application of the term "beyond a reasonable doubt" to each item of evidence introduced in the cause. It is sufficient to give a general instruction on that subject, applicable to the testimony as a whole. *State v. Good*, 132 Mo., loc. cit. 126, 83 S. W. 790.

It is earnestly insisted that instructions Nos. 4 and 5 are erroneous. They are as follows:

"(4) The court instructs the jury that if you find and believe from the evidence that the deed read in evidence and described in the information, or any part thereof (not including the acknowledgment of the same), was falsely made and forged, with intent to cheat and defraud, as defined in other instructions, and that the defendant had possession of the same in Saline county, Missouri, and that he made claim to the land described therein, or any part thereof, by virtue of and under said deed, then these facts constitute evidence that he committed the forgery of the same, or caused the same to be forged, and that he committed said forgery in Saline county and state of Missouri; and, unless he explains or accounts for his possession thereof in a manner consistent with his innocence, then these facts are sufficient to warrant the jury in finding him guilty of forgery, as charged in the information.

"(5) The court instructs the jury that if you find and believe from the evidence that the deed read in evidence and described in the information, or any part thereof (not including the acknowledgment of the same), was falsely made and forged, with intent to cheat and defraud, as defined in other instructions, and the defendant had had possession of the same in Saline county, Missouri, and that he made claim to the land described therein, or any part thereof, by virtue of and under said deed in said county of Saline, then such facts raise the presumption that he forged or caused the same to be forged in Saline county, state of Missouri, and that, unless such possession by the defendant of said deed and his claim thereunder are satisfactorily explained to the jury by the evidence in the case in a manner con-

sistent with the innocence of the defendant, then such presumption of guilt becomes conclusive."

These instructions correctly declare the law as applicable to the facts of this case. It must be kept in mind that this defendant is charged with forging a deed to certain real estate, from Mrs. Kroecker to himself. It certainly will not be disputed that if the defendant had the possession of the deed, he being the grantee in it, it raises a very strong legal presumption that he knew something about its execution. The court, in the instructions complained of, first, in plain and unambiguous terms, required the jury to find that the deed was forged with the intent to defraud, and then tells the jury that if the defendant was in the possession of this deed, claiming the land described in it, such possession raises the presumption that he forged the deed, and unless such possession is satisfactorily explained, in a manner consistent with his innocence, such presumption becomes conclusive, and will authorize his conviction. It must be conceded that if the deed in controversy was forged—and the jury were required to find that fact before indulging any presumptions—we can conceive of no state of facts which would raise a stronger presumption of guilt than the fact of possession of the forged instrument by the defendant, to whom the deed purports to be executed, and, coupled with this possession, claiming the land purporting to be conveyed. The possession of this deed by the defendant, and claiming the land described in it, if the jury first determine that the deed was forged, was sufficient to authorize a conviction. *State v. Haws*, 98 Mo. 188, 11 S. W. 574, 12 S. W. 126. The instructions now being discussed, while not strictly in accord with the approved precedents, are substantially correct. The court, in the instructions, fairly and fully submitted the question as to whether or not the deed had been forged. This being done, we think it is a clear legal proposition that if defendant had possession of the deed, and was claiming under it, it constituted strong evidence of guilt, and, unless explained upon some theory consistent with his innocence, authorized his conviction. It will also be noted that the possession of this deed, and defendant's claim under it, were not denied. It was his defense that the deed was not forged, but was a valid instrument, properly executed, and delivered to the defendant by Mrs. Kroecker. This issue was fairly submitted to the jury, and they found adversely to the defendant.

It is urged that instructions Nos. 4 and 5, being discussed, singled out certain facts, and were a comment on the evidence. An examination of them will demonstrate that they are not open to that objection. The distinction must be kept in view between singling out a particular fact, and a comment on the evidence which establishes that fact. In the trial of a cause the state or

defendant may offer testimony upon any particular fact, and it is not a comment upon the testimony to specially refer to that fact; but it would be otherwise if the court should undertake to refer specially to items of evidence, as to its weight, etc., in support of the proof of the fact itself. While it may be said that in *State v. Good*, supra, the learned judge announcing the opinion in that case said it was proper to add to that clause of the instruction which told the jury that the burden was upon the defendant to rebut the presumption arising from possession of stolen goods, "but not beyond a reasonable doubt," still we are of the opinion that the failure to add those words does not constitute error. The very terms of one of the instructions indicate that the defendant was not bound to rebut such presumption beyond a reasonable doubt, for the instruction only required that the possession be satisfactorily explained. While this instruction does not in express terms, it does in effect, tell the jury that it is not necessary to rebut this presumption beyond a reasonable doubt. To say to the jury that the possession must be satisfactorily explained falls far short of saying that it must be explained beyond a reasonable doubt. The law required of the defendant, if the deed was forged and found in his possession, to satisfactorily explain to the jury such possession, upon some theory consistent with his innocence, and the court so told the jury. When the court, in substance, said to the jury that a satisfactory explanation was all that was necessary, to the reasonably intelligent juror it conveys the idea that it need not be "beyond reasonable doubt."

Instructions in a cause should be construed as a whole, and we find that the court fully covered the question of reasonable doubt, as applicable to all the testimony, by the following full and fair instructions given at the request of the defendant:

"The court instructs the jury that the law clothes the defendant with the presumption of innocence, which attends and protects him until it is overcome by evidence which proves his guilt beyond a reasonable doubt, which means that the evidence of his guilt, as charged, must be clear, positive, and abiding, and fully satisfying the minds and consciences of the jury. It is not sufficient in a criminal case to justify a verdict of guilty that there may be strong suspicions or even strong probabilities of guilt, but the law requires proof by legal and credible evidence, of such nature that, when it is all considered, it produces a clear, undoubting, and entirely satisfactory conviction of defendant's guilt; and the burden of establishing the guilt of the defendant, as above referred, is upon the prosecution.

"The jury are instructed that the prosecution seeks a conviction in this case upon circumstantial evidence alone. The court therefore instructs you that you cannot convict

the defendant unless the state has proven his guilt from the evidence beyond a reasonable doubt, by facts and circumstances all of which are consistent with each other and with his guilt, and absolutely inconsistent with any reasonable theory of his innocence."

These two last-mentioned instructions were all that was necessary upon the subject of reasonable doubt. They are applicable to all the testimony in the cause, and it is the well-settled rule that it is not necessary, in declaring the law upon the facts in a criminal case, to specially declare that each fact must be proved beyond a reasonable doubt.

Instruction No. 8, which appellant insists is erroneous, is as follows: "The court instructs the jury that, although they cannot find the defendant guilty of the charge in the information upon proof that the acknowledgment to said deed was forged and fraudulently made, yet the jury are further instructed that if they believe from the evidence that the acknowledgment to said deed, and the name of the notary before whom the same purports to have been made, was forged, and that the body of the deed, containing the names of the grantor and grantee, and the description of the land conveyed in said deed, was written by the same person who wrote said acknowledgment, then, in determining whether or not the deed was a forgery, you have a right to consider the fact that the acknowledgment to said deed, and the name of the notary before whom the same purports to have been taken, were forgeries, along with the other facts and circumstances in evidence." It is insisted that this instruction is erroneous for the reason it does not restrict the purpose of the forgery of the acknowledgment to the question of intent on the part of the defendant. It is also urged that the instruction assumes the forgery of the acknowledgment. This contention is a misconception of the purposes of the acknowledgment. The testimony as to the forged acknowledgment and the introduction of the acknowledgment was not for the purpose of showing intent on the part of the defendant. If defendant in fact forged or caused to be forged the deed, it required no evidence of intent. The act itself carried with it the intent. But the evident purpose of showing the forgery of the acknowledgment—it being on the same paper, and so closely related to the deed—was that this fact might be considered in determining whether the deed had been, in fact, forged. The forgery of the deed was a fact that had to be proved in the case, and the testimony in respect to the acknowledgment was introduced, not for the purpose of showing intent on the part of defendant, but that it might be considered in the establishment of the important fact that the deed had been forged. An analysis of the instruction makes it apparent that this was the purpose, and also shows clearly that the fact that the acknowledgment was forged was not assumed

but the jury are expressly required, before considering it, to find that it was forged. While the defendant was not charged with the forgery of the acknowledgment of the deed, and the instructions all strictly guard his rights in that respect, yet, the acknowledgment being so closely connected with the deed, its forgery may shed light, in very important particulars, upon the investigation of the forgery of the deed itself. There was no error in this instruction, and the cases relied upon by counsel for appellant (*State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389; *State v. Bayne*, 88 Mo. 611) are not applicable to this instruction.

This brings us to the last contention in this case. That is, that the testimony is insufficient to support the verdict, and the court erroneously refused to give the peremptory instruction to find the defendant not guilty, as requested by counsel for appellant. While it may be truthfully asserted that the testimony in this cause is conflicting, yet this court cannot undertake to settle this conflict. Where there is no testimony to support a verdict, it is the duty of the appellate court to unhesitatingly say so; but on the other hand, where there is substantial testimony supporting the verdict of the jury, it is equally our duty not to disturb it. There was ample testimony in this case to warrant a conviction. The circumstances detailed were convincing, although it may be said, if the testimony of the defendant and other witnesses is to be credited, then the defendant is not guilty, and should have been acquitted. All the testimony was submitted to the jury. They were the sole and exclusive judges of the credibility of the witnesses, and of the weight to be attached to their testimony. They had the witnesses before them, and doubtless the usual and ordinary tests of their credibility were applied. The instructions of the court covered every phase of the case, and were full, fair, and exceedingly favorable to defendant. Hence we have reached the conclusion that the verdict of the jury should not be disturbed, and the judgment of the trial court will be affirmed. All concur.

FEHLHAUER v. CITY OF ST. LOUIS et al.
(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

LANDLORD AND TENANT—NEGLIGENCE—CELLAR DOORWAY—INJURY TO PEDESTRIAN—LIABILITY OF LANDLORD—LIABILITY OF TENANT'S SURETIES—LIABILITY OF CITY—INSTRUCTIONS.

1. Those who had guaranteed performance by a tenant of the usual covenants in his lease could not be held liable in an action against the tenant for injuries sustained by one by falling into an open cellar door, in the sidewalk in front of the premises.

2. Where there was no fault or defect in the construction of a cellar door in a sidewalk, the

owner of the premises, not in possession, but who had leased the same, was not liable for injuries sustained by a person by falling into the open door, unless the door and the manner of its use was per se a nuisance.

3. A cellar door in a sidewalk, the door being in good repair, and affording, when closed, a safe passway for those traveling on the sidewalk, is not a nuisance per se.

4. Where the facts were such that the court should have directed a verdict for defendant, a judgment in his favor will not be reversed because of error in the instructions.

5. In an action against a city and others for injuries received by plaintiff, owing to her having fallen into the open door of a cellarway in a sidewalk in the nighttime, *held*, that there was no evidence to show such a condition of things as to amount to constructive notice to the city of such use of the door as that by which plaintiff was injured.

6. An appellant cannot complain of instructions because inconsistent with instructions given in her favor, where the inconsistency is because of erroneous statements in her instructions.

7. A landlord is not liable for injuries sustained by one falling into the open door of a cellarway in the sidewalk in front of the premises, where the door was opened by persons not in his employment, and without his authority or consent.

8. Rev. St. 1899, § 731, giving the successor of a judge authority to sign a bill of exceptions, carries with it power to pass on a motion for a new trial.

Appeal from Circuit Court, St. Louis County; John W. Booth, Judge.

Action by Anna Fehlhauser against the city of St. Louis and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

L. Frank Ottoby, for appellant. W. B. Thompson, Kehr & Tittman, Chas. W. Bates, and Wm. F. Woerner, for respondents.

BRACE, P. J. This is an action for damages for personal injuries. The petition upon which the case was tried is as follows: "Plaintiff, for her third amended petition, states that at the times hereinafter stated the defendants Helena Wallhauser and Henry W. Wallhauser were the owners of certain premises fronting on South Second street, in the city of St. Louis, Missouri, being the northwest corner of South Second and Valentine streets, and known as No. 425 South Second street; that defendant Andrew W. Schrick was their lessee and tenant, and that he and the defendants John D. Graul, John Nester, and R. Thomas Nester are, and were at said times, the tenants in possession of said property and premises, and that the defendant the city of St. Louis is, and was at all of said times, a municipal corporation organized and existing under the laws of the state of Missouri; that at said times said South Second street, at said No. 425, and the sidewalks pertaining thereto, constituted public highways of said city. Plaintiff states that on the 14th day of June, 1897, the defendants Andrew W. Schrick, John D. Graul, John Nester, and R. Thomas Nester, then in possession of said premises, caused a cellar door in the sidewalk to be

¶ 1. See *Landlord and Tenant*, vol. 32, Cent. Dig. § 672.

opened, thereby causing an opening or excavation in the sidewalk in front of the premises aforesaid, owned by said defendants Helena Wallhauser and Henry W. Wallhauser, and leased of them by defendants Schrick and Nester; that said cellar door had been habitually left open for a long time prior thereto, and constituted a nuisance, and that the defendant the city of St. Louis knew, or by the exercise of ordinary care could have known, that said cellar door had been habitually left open, and was so open on said day; that it was the duty of all of said defendants to carefully guard and fence said opening or excavation, or to cause the same to be carefully guarded and fenced, so that the said street and sidewalk should be reasonably safe for the public, and for persons passing along and using the same. But plaintiff says that the defendants so carelessly and negligently conducted themselves in reference to the said opening or excavation caused by the leaving open of said cellar door that the same was left unguarded and without sufficient or any barriers to prevent persons passing by from falling into the same, and that the plaintiff on the said 14th day of June, 1897, about 8:30 o'clock p. m., while lawfully and properly passing along said sidewalk and street, stepped into the opening or excavation thus left by said open door, and was thereby violently precipitated upon the sidewalk, and seriously injured about her leg and person; that in consequence of such injuries she was confined to her bed for a long time, and has suffered great pain in body and mind, to her damage in the sum of \$2,500; that she was disabled for the performance of her usual or any labor, and has lost her earnings since said date, and will hereafter lose the same, to her damage in the sum of \$2,500; that she was compelled to incur large expenses for medicines and medical attendance, and will hereafter suffer the same, to her damage in the sum of \$1,000; and that she has been permanently crippled, has lost her limb, and is permanently disabled for the performance of her usual or any avocation, to her further damage in the sum of \$4,000, all as the direct result of defendant's negligence. Wherefore, by reason of the premises, plaintiff says that she has been damaged in the sum of ten thousand dollars (\$10,000), for which she asks judgment, with costs of suit." The separate answers of the defendants the city of St. Louis, John Nester, R. Thomas Nester, and John D. Graul each denied the allegations of the petition, and set up a plea of contributory negligence. The answer of defendant Schrick was a general denial, and the separate answers of the defendants Wallhauser were a general denial, and a plea that the premises were, at the time alleged in the petition, in the possession of the defendant Schrick as lessee, or some one under him as subtenant. Issue was joined by reply. A trial was had on March 23 and 24, 1900,

before Hon. Rudolph Herzel and a jury, in the St. Louis county circuit court, to which the case had been taken by successive changes of venue, from the St. Louis city circuit court, in which the suit was instituted.

The undisputed facts developed by the evidence are that on the 14th of June, 1897, the defendant Helena Wallhauser was the owner of the premises known as No. 425 South Second street. That theretofore, by a written lease duly executed by her and her husband, the defendant Henry W. Wallhauser, dated December 9, 1895, they had leased the premises to the defendant Andrew W. Schrick for a term of three years, beginning on the 1st day of January, 1896, at which date the said Schrick went into possession of the premises in pursuance of the lease. That afterwards, by written lease dated December 16, 1896, the said Schrick leased the premises to the defendant R. Thomas Nester for a term of one year and eleven months, beginning on the 1st day of January, 1897, and ending on the 30th day of November, 1898, and thereupon the defendants John D. Graul and John Nester executed their bond, in writing, guarantying the payment by said R. Thomas Nester of the installments of rent as they became due, and the performance of his other covenants under said lease. That thereupon the said R. Thomas Nester went into possession of the premises under said lease, and was in possession of the same on the 14th of June, 1897, when plaintiff was injured. The premises are situate on the northwest corner of Second and Sylvester streets. The first story was used by Nester as a grocery store and saloon. The grocery store, in the front room, opened on Second street. The saloon, in the rear rooms, opened on Sylvester street. Beneath both rooms there was a cellar, which was used for the purpose of storing beer and coal, and in which there was a water-closet. One way of reaching this cellar from the outside was a cellar door in the sidewalk on Second street, in front of the premises, and north of the front door. This cellar door consisted of two wooden lids working on hinges in a frame even with the surface of the sidewalk; the lids opening outward from the center, and, when open, resting flat upon the pavement, and when closed were fastened on the inside. This is the cellar door referred to in the petition. There was no defect in the cellar door of any kind, and for many years it had constituted a part of the sidewalk, and when closed was an entirely safe passway for travelers on the sidewalk. The cellarway was used only for the purpose of delivering barrels of beer into the cellar, and taking empty beer barrels therefrom. The next house, north of the premises, on Second street, was No. 423, occupied by Mrs. Obert, in which she carried on a bakery. The cellar door in the sidewalk was between the front door of the bakery and the front door of the grocery

store. The sidewalk was 9 feet wide, and the cellar door extended 4 feet 10 inches from the building into the sidewalk, and was about 4 feet 4 inches wide. Between 8:30 and 9 o'clock p. m. on the 14th of June, 1897, the plaintiff, an unmarried woman about 22 years of age, who was then, as she had been for several months previous thereto, in the employ of Mrs. Obert, in search of Mrs. Obert's baby, of whom she had charge, and who had escaped from her custody, stepped out of the bakery across the cellar door, which was then closed, stepped into the grocery store, and picked up her employer's baby, whom she found therein, immediately returned with the baby on her arm, and, stepping across the cellar door, as she had done a moment before, fell and hurt her leg, receiving such injuries as finally necessitated the amputation of the limb. The plaintiff, in her testimony, gives the following account of the accident: "I started to go south to Nester's grocery, right next to Obert's bakery, and passed over these two cellar doors, and they were both closed as I walked over them. I know that. That was the closest way to get to Nester's store. I was in Nester's store long enough to pick up the child, which I found behind the counter, which I don't think took a minute, and then I started back to the bakery the same way I had come, over the two doors. I didn't stumble. I fell. The north cellar door was open. It was thrown entirely back. I mean to say that this north cellar door was thrown completely over, lying flat on the sidewalk. It wasn't tilted up, but it was thrown entirely over. The south cellar door was in place, closed, and the north half of the pair of doors was entirely open. I didn't fall all the way into the opening. I stepped in with my right foot, and fell over the door. I don't know how far down my foot went. I didn't fall down into the cellar. As I fell, I saw a man with a light in the cellar. The cellar door was opened during the minute or two I was in Nester's grocery. Am positive they were closed a minute or two before the accident." The other evidence in the case, so far as necessary, will be noticed in the course of the opinion.

At the close of the evidence the court instructed the jury to return a verdict for the defendants Helena Wallhauser, Henry W. Wallhauser, Andrew Schrick, John D. Graul, and John Nester, refused to give similar instructions as to defendants R. Thomas Nester and the city of St. Louis, and, as to these defendants, submitted the issues to the jury on instructions. The jury thereupon returned a verdict for all of the defendants, and in due time plaintiff filed her motion for a new trial, which motion, coming on to be heard, was overruled on the 10th day of November, 1900, by Hon. John W. Booth, judge of said court, successor of Judge Herzel who died after the filing of the motion and before that

date, to which ruling plaintiff excepted, and thereupon, in due time, filed her affidavit for appeal, upon which an appeal was granted, with leave to file bill of exceptions within 60 days, within which time the bill signed by Judge Booth was filed.

The errors assigned for reversal are the giving of the peremptory instructions for defendants the Wallhausers, Schrick, and Graul, instruction No. 5 for defendant the city of St. Louis, instructions Nos. 2 and 3 for defendant R. Thomas Nester, and the overruling of the motion for a new trial by Judge Booth.

1. The court committed no error in instructing the jury to return a verdict in favor of the defendants Helena Wallhauser, Henry W. Wallhauser, Andrew Schrick, John D. Graul, and John Nester. As to Graul and John Nester, the only relation they sustained to the premises was that of guarantors of the payment of the rent, and the performance of the other covenants in the lease from Schrick to R. Thomas Nester. The lease contained only the usual covenants, and by their guaranty they assumed no duty to the plaintiff which could subject them to this action upon any known principle of law.

2. The relation of Schrick and the Wallhausers to the premises was that of a landlord whose tenant was in the actual occupation of the premises. The rule in such cases is that the "landlord's liabilities in respect of possession are, in general, suspended as soon as the tenant commences his occupation. But when injuries result to a third person from the faulty or defective construction of the premises, or from their ruinous condition at the time of the demise, or because they then contain a nuisance, even if this only becomes active by the tenant's ordinary use of the premises, the landlord is still liable, notwithstanding the lease." Taylor, Landlord & Tenant (8th Ed.) § 174. As there was no fault or defect in the construction of this cellarway and door, and it was in good repair and condition at the time of the demise to Schrick and from him to R. Thomas Nester, and at the time of the accident, the only possible ground upon which these landlords could be held liable to plaintiff's action would be on the ground that the cellarway and door were per se a nuisance, in the ordinary use to which they were adapted, and for which they were intended; and counsel for plaintiff so contends, but we do not think this contention can be maintained. In *Fisher v. Thirkell*, 21 Mich., loc. cit. 21, 4 Am. Rep. 422, decided in 1870, it was said by the Supreme Court of that state, per Christianity, J., speaking of such structures: "Judging from the reported cases, the usage or custom of constructing such work seems to have been in England, for a long period, as general as we know it has been in this country. And though we find many decided cases in the English books for private injuries caused by these structures being out of

repair, and indictments for obstructing highways and streets in a great variety of ways, we have been cited to no English cases, and have discovered none, in which such works have been held illegal in themselves, when properly and safely made, without any legislative permission or that of the municipal authorities. Their legality seems in all cases to have been assumed by the courts, without any showing of such special authority or any authority. They have been treated as nuisances when allowed to be out of repair, and private actions have frequently been sustained for injuries received in consequence; but we find no intimation of their original illegality, when safely and properly constructed. * * * And the same view seems to have been quite generally taken in this country outside of the state of New York." The learned judge, after citing many and reviewing some of the cases, adds: "There may be good sense and sound policy in the rule adopted in New York, making owners constructing such works liable as insurers against all injuries which may arise from them, irrespective of the question of negligence, but we do not think it is the sense or the policy of the common law." The sense and policy of the common law seem, however, to have finally prevailed, even in New York, for Judge Cooley, in laying down what he regards as the sound doctrine on the subject, says it is deduced from the later decisions of the Court of Appeals of New York. That doctrine, as he states it, is that "the abutter is entitled, as of right, subject to municipal and public regulation, to make any beneficial use of the soil of the street which is consistent with the prior and paramount rights of the public therein for street purposes. The right of the public to use the streets not only for travel and passage, but for sewer, gas, water, and steam pipes, and the like purposes, is, of course, paramount to any proprietary rights of the abutter. The abutter may, as a logical and necessary result, it is believed, whether the fee is in him or in the public, build, as of right, underground house vaults in the streets, subject, of course, to the paramount right of the public for street uses proper, when the two rights come into competition, and subject also to reasonable legislative, municipal, or police regulations as to location, mode of construction, and use of such vaults." 2 Dillon, *Municipal Corporations* (4th Ed., 1896) § 656b. That such structures are not unlawful and a nuisance per se, when properly constructed, in good repair, and affording, when closed, a safe passway for those traveling on the sidewalk, as was the cellar door in question, seems now to be the accepted doctrine in New York, as well as generally elsewhere. For still later authority, see 2 *Shearman & Redfield on Negligence* (5th Ed.) § 703; *Adams v. Fletcher*, 17 R. I. 137, 20 Atl. 263, 33 Am. St. Rep. 859; *Korte v. St. Paul Trust Co.*, 54 Minn. 530, 56 N. W. 246; *Whitty v.*

City of Oshkosh, 106 Wis. 87, 81 N. W. 992; *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. 188, 54 Am. Rep. 672; *Jorgensen v. Squires*, 144 N. Y. 280, 39 N. E. 373—to which numerous other cases might be added. And such is the recognized doctrine in this state. *Kirkpatrick v. Knapp & Co.*, 28 Mo. App. 427; *Gordon v. Peltzer*, 56 Mo. App. 599; *City of Memphis v. Miller*, 78 Mo. App. 67; *Jegglin v. Roeder*, 79 Mo. App. 429. The fact that the court, in *City of Memphis v. Miller*, supra, held that the particular cellar door in that case did not come within the operation of the rule neither impairs the force of the recognition thereof, nor furnishes a reason for its nonapplication in this case. Nor does the ruling in *Manuso v. Kansas City*, 74 Mo. App. 138, in which it was held that "if a landlord leases premises with a coal hole in the sidewalk out of repair, and a tenant permits it so to remain, both landlord and tenant will be liable, as well as the city, to the party injured by such negligence," since this cellar door was not out of repair. In fact, there is nothing in the Missouri cases cited by counsel for plaintiff, nor in any reported cases, impugning the doctrine, affording any pretext for not applying it to the case in hand. It follows that the court committed no error in instructing the jury to return a verdict in favor of these landlords.

3. Counsel for plaintiff contends that instruction No. 5 given for the city is erroneous and inconsistent with instruction No. 1 given for the plaintiff. In view of the verdict on the facts disclosed by the evidence, we deem it unnecessary to set out these instructions, for the reason that upon the evidence the court ought to have directed a verdict for the defendant city, and the judgment in its favor, being for the right party, ought not to be reversed for error in the instruction. The law in cases of this character is well settled in this state. In *Carrington v. City of St. Louis*, 89 Mo., loc. cit. 212, 1 S. W. 240, 58 Am. Rep. 108, it is thus stated: "It is the duty of the city to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon with ordinary care and caution. This duty and a consequent liability extends to those cases where the obstruction or unsafe condition of the street is brought about by persons other than agents of the city. *Bassett v. St. Joseph*, 53 Mo. 295 [14 Am. Rep. 446]; *Russell v. Columbia*, 74 Mo. 490 [41 Am. Rep. 325]. But in such cases it devolves upon the plaintiff to show that the city had notice of the defect, or ought to have had knowledge thereof by the use of reasonable care and watchfulness." Or as stated in another case (*Buckley v. Kansas City*, 156 Mo., loc. cit. 25, 56 S. W. 322): "The law is settled in Missouri that a city is bound to keep the sidewalks in a reasonably safe condition for public use, and that it is liable for injuries received from defects thereon of which it had actual notice, or which had ex-

isted for such a length of time prior to the accident as by the exercise of ordinary care it could have ascertained, and which it had a reasonable time to remedy. *Roe v. Kansas City*, 100 Mo. 190 [13 S. W. 404]; *Carvin v. St. Louis*, 151 Mo. 334 [52 S. W. 210]; *Baustian v. Young*, 152 Mo. 317 [53 S. W. 921, 75 Am. St. Rep. 462].” Now, applying these principles to the case in hand: The plaintiff claims that her injuries were caused by the unsafe condition of the sidewalk; that the unsafe condition was produced by one of the lids of the cellar door being open when she returned from the grocery store with the baby in her arms. She testifies that it did not exist a minute or two before, when she passed over it into the grocery store in search of the baby. The sidewalk was then in a perfectly safe condition, and the unsafe condition was produced during the few moments she was in the grocery store. There was no evidence tending to prove that the city had, or could have had, actual notice of this suddenly produced unsafe condition, and it had not existed for such a length of time prior to the accident that by the exercise of ordinary care the city could have ascertained its unsafe condition in time to have remedied it. So that a recovery against the city could not be predicated on the evidence of the plaintiff, either on the ground that the city had actual notice that the cellar door was open, or on the ground that it had been open long enough for the city to have ascertained that fact in time to have had it closed before plaintiff's injury. Nevertheless, it is contended that the city, by the exercise of reasonable care, could and ought to have known that the cellar door was open on this occasion, from the manner in which it had been habitually used for a long time prior to the accident. Unfortunately for this contention, there is not a particle of evidence tending to prove that this cellar door was ever open at the time of night when this accident happened, or that it was ever opened before by the persons in the manner or for the purpose for which it was opened on this occasion. The plaintiff herself, who for months previous to the accident had been living next door, was familiar with, and who testified as to, the manner in which this cellar door had been habitually used, and upon whose testimony reliance is placed to support this contention, testified that upon her return with the baby she did not look to see whether the cellar door was open or not, because no one would have expected it to be open at that time of night. If she, with her intimate knowledge of the manner in which the door had been previously used, had no reason to expect that it would be open, surely that manner could not have furnished the city authorities any reason to expect that it would be open. Moreover, the uncontradicted evidence in the case is that this cellarway was used only for the purpose of de-

livering barrels of beer from the brewery wagon, and returning the empty beer barrels to the wagon; that the door inclosing it locked on the inside, and the key was kept in the saloon; that, when the driver came with his wagon of beer, he drove beside the sidewalk, went into the saloon, got the key, went down into the cellar from the inside, went to this door, unlocked it, threw the two lids of the door up, and back upon the pavement, leaving the cellarway wide open, and through the opening thus made transferred the barrels of beer by means of a skid in the cellarway from the sidewalk into the cellar, and the empty beer barrels therein from the cellar to the sidewalk, and thence into his wagon; that during this operation no barriers or guards were placed around the opening. This was the habitual use of the cellar opening. If the plaintiff, in the exercise of ordinary care, had fallen into the opening while the sidewalk was being subjected to this habitual use, then there might have been some support for the contention that the use itself afforded some reason to the city authorities for expecting such a casualty, and the authorities cited in support of this contention might have some point. But that is not this case. There was a sharp conflict in the evidence as to whether the cellar door was open at all at the time plaintiff fell and received her injuries. The evidence of defendant tended to prove that it was not; that both lids of the door were closed, and children sitting on them; and that the plaintiff tripped in passing over the door, and fell on the door. The evidence of plaintiff, as heretofore stated, and the evidence of a colored man named Temmons, who testified, in substance, that after the plaintiff went into the store, and before she returned with the baby, he saw two men come out of the store and go in the cellar, leaving the north lid of the door open, and that when she came out and got hurt they were back in the cellar with a light, was the only evidence that the cellar door was open on the night in question, and the only evidence tending to show how it was opened or happened to be open on that night. If true—and for the purposes of this argument it must be so taken—it was the first time that it was ever so opened, and the first time that it was ever open at that time of night, so far as is disclosed by the evidence. And this evidence of the plaintiff shows affirmatively that it was not then opened, or left open, in accordance with the previous habitual use of the premises, as that use is disclosed by all the evidence, but that this was an unusual condition, suddenly and unexpectedly produced, having no connection with such previous use—a condition which the plaintiff did not anticipate, which no one else would have anticipated from such previous use, and with notice of which the city could not be charged—and it follows from

what has been said that the judgment for the city ought not to be reversed.

4. Instructions Nos. 2 and 3 given for the defendant R. Thomas Nester are as follows:

"(2) The jury are instructed that if they find from the evidence in the case the cellar doors in the sidewalk in front of the premises occupied by defendant Nester were constructed and maintained in a reasonably safe condition for passing over and upon said doors, and they further find that said doors, or either of them, were opened at or before the time of the injury complained of by plaintiff, by some person or persons not in the employ or service of the defendant Nester, without the knowledge or consent of defendant, or which by the exercise of ordinary care the defendant could not have known, then the jury will find for the defendant.

"(3) The jury are instructed that if they find from the evidence that plaintiff passed over the cellar door just before the accident, and at the time the door was reasonably safe and secure for passing over, and that, immediately after and just prior to the accident to plaintiff, some person or persons not in the employ of the defendant Nester, without the authority or consent of defendant Nester, opened said door, and that defendant had no knowledge of said door being open, or by reasonable care could have discovered that said door was open, then plaintiff cannot recover against defendant, and the jury will find for said defendant Nester."

It is contended that these instructions are erroneous because in conflict with instruction No. 1 for plaintiff, and because there was no evidence upon which to base them. We see no error in these instructions. If in conflict with plaintiff's instruction aforesaid, which was an omnibus instruction, including both the city and this plaintiff, it is because of error in that instruction in favor of the plaintiff, of which she cannot complain, and there was evidence on which to base them, in that there was evidence tending to show the relation which the parties who opened the cellar door sustained to the premises.

5. Finally it is contended that Judge Booth, the successor of Judge Herzel, had no power to overrule the motion for a new trial. This point was directly passed upon in *State ex rel. Cosgrove v. Perkins*, 139 Mo. 106, 40 S. W. 650, the latest deliverance of this court on the subject, in which we held that the statutory power to sign a bill of exceptions (Rev. St. 1899, § 731) carried with it the coincident power to pass upon a motion for a new trial, and we see no good reason for departing from this construction of the statute.

Finding no reversible error in the record, the judgment of the circuit court will be affirmed. All concur, except MARSHALL, J., not sitting.

STATE v. DUNN.

(Supreme Court of Missouri, Division No. 2.
Dec. 9, 1903.)

HOMICIDE — INSANITY — EVIDENCE — UNCONTROLLABLE IMPULSE — EXPERTS — HYPOTHETICAL QUESTIONS — ARGUMENT OF COUNSEL.

1. Where, on a prosecution for murder, the evidence showed that deceased was sitting in a buggy, when defendant, standing in front of the buggy, discharged both barrels of a shotgun toward him, and that 11 shot were taken from the leg of deceased, and 10 from his breast, a contention that it was a physical impossibility for deceased to have been killed as claimed by the witnesses was without merit.

2. An expert witness may not be asked his opinion on a hypothesis including facts not shown by the evidence.

3. In stating a hypothetical question to an expert witness, it is competent for the examiner to assume as a fact a matter which has been testified to, though it was controverted by other witnesses.

4. On an issue as to the sanity of an accused, it is proper to include in a hypothetical question to a witness facts which have been testified to by the accused himself.

5. Where, on an issue as to the sanity of an accused, the trial court erroneously refused to permit a hypothetical question to defendant's expert to include facts testified to by defendant himself, but subsequently, during the examination of the expert, defendant's statements were included in the hypothetical question to the witness, the original error was cured.

6. Where, on a prosecution for murder, the defense was insanity, and the court excluded from a hypothetical question put to defendant's expert an assumption that there was no motive for the shooting, but there was substituted in the question an assumption that deceased and defendant were "close personal friends," the exclusion was not error.

7. On a prosecution for murder, where the defense was insanity, *held*, that the evidence showed no insanity such as constitutes a defense to crime, but merely an "uncontrollable impulse."

8. Where, on a prosecution for murder, a witness testified that defendant at the time of the crime staggered when he walked, and another witness stated that he was decidedly intoxicated, and there was evidence that he had taken three drinks that day, there was sufficient evidence to justify the jury in believing that he was more or less intoxicated.

9. On a prosecution for murder, it is not necessary to prove a motive.

10. Where, on a prosecution for murder, the defense was insanity, it was proper to refuse to receive evidence of a physician that defendant had told him some days prior to the crime that he believed himself going crazy.

11. On a prosecution for murder, the defense was insanity, and it was claimed by the defense that there was no motive. The state proved by various witnesses that a feeling of enmity had existed between the parties for more than a year, and a witness testified that defendant told him that he never wanted deceased to cross his path; and the witness was about to state the nature of the trouble, when the court ruled that he would not permit it to be shown further. *Held*, that it was not error for counsel for the state, in his argument to the jury, to say that there was some mysterious feeling of jealousy between the defendant and deceased, which, under the law, the state was not permitted to show.

12. In a criminal case, it was within the discretion of the court to permit counsel for the state to introduce evidence of which he had

¶ 3. See Criminal Law, vol. 14, Cent. Dig. § 1072.

learned after the state had rested its case in chief.

13. On a prosecution for murder, evidence considered, and *held* sufficient to sustain murder in the first degree.

Appeal from Criminal Court, Buchanan County; B. J. Casteel, Judge.

Mark Dunn was convicted of murder in the first degree, and he appeals. Affirmed.

B. M. Lockwood and Myron S. Martin, for appellant. E. C. Crow and C. D. Corum, for the State.

GANTT, P. J. This is an appeal from a conviction of murder in the first degree. The defendant was indicted in the criminal court of Buchanan county for the murder of Alfred M. Fenton on the 20th day of July, 1902. The indictment is sufficient and in the ordinary form. It is not questioned by defendant. The facts out of which this prosecution grew are, in substance, as follows:

On the night of the homicide the defendant was in Rushville, a town in Buchanan county. About 8 o'clock he was in conversation with Hally Conrad, Wez Yazel, Hally Chitwood, Luther Moberly, and perhaps other young men of that town, about 80 or 40 feet from Dr. Culver's drug store, in said village. Jeff Fenton, a brother of the deceased, was walking along the street, and, as he approached the above-mentioned group of young men, the defendant was swinging a 38 Colt's revolver on his finger, and, turning to Jeff Fenton, said: "Hold on a minute. Wait a minute and take a drink with me." Fenton replied that he did not care to take a drink, but the defendant insisted, and, to prevent trouble, Fenton drank with him. After so doing, defendant pulled Jeff Fenton by the shoulder, and told him he liked him and his brother Alf, and would die for them; that, although they had once had hard words, he had since worked for them, and was friendly to them now, and expected to remain so. Soon, however, this friendly tone changed, and he demanded to know of Jeff Fenton where his brother Alf was. Jeff attempted to excuse himself, saying he must go and take his wife and child home, to which defendant replied, "No you won't, G—d d—you! you will never take them home again," and placed his hand in his shirt bosom and started to draw his pistol; but Moberly, a deputy sheriff, stepped in and said, "Consider yourself under arrest," and at the same time took defendant's pistol from him. He resisted the officer, and the latter called on Conrad to assist in arresting him. In attempting to subdue defendant, Moberly struck him with the revolver. They took him to a justice of the peace—Esquire Allison. The justice ordered him under arrest, and directed the officer to go after Jeff Fenton to make the complaint against defendant for disturbing the peace, and placed defendant in charge of Conrad and Merritt. They, however, released the defendant, who

threatened to go home and get his gun and kill both Moberly and Jeff Fenton; that he would kill Moberly if it took him a thousand years. During the time they were at the house of Allison, the justice, defendant was very violent and abusive. Mrs. Allison begged him not to use such language, as her mother was old and infirm, and it would frighten her. At this time defendant had his trunk at the house of Mrs. Mary Stanton, where he stayed a portion of his time; and when Conrad released him he went to Mrs. Stanton's, got his shotgun, and left her house. Returning towards the business portion of the town, and carrying his gun in both hands, he met Charles Webb and Robert Page, and drew the gun on them and asked who they were; and, when they told him, he said, "All right; go on." Further on he halted Rev. Mr. Chapman, and demanded to know who he was, and, when he ascertained, said, "Oh, it's the preacher, is it?" and, asking to be excused, passed on down the street. After this he stopped Virgil Morrison about opposite the home of Luther Moberly, and thrust his gun in his face, but, when he discovered who it was, released him, saying: "I am hunting Luther Moberly or Jeff Fenton. I don't give a damn which one it is. I shall go and get them. I have got it in for them, and, by G—d! I am going to kill them"—and then started down the street. He also stopped other citizens in the same manner, and, when he found out who they were, said he was looking for Moberly or Jeff Fenton. Finally he came to where Jeff Fenton, Hally Chitwood, A. F. Shane, and others were standing. He went up to Jeff Fenton, working his gun, and said, "Who is that?" Fenton replied, "It is me, Mr. Dunn." Defendant then asked, "Jeff, have you got anything against me?" to which Fenton answered, "Nothing in the world, Mr. Dunn." After turning to the others, and finding out who they were, he said, "That is all right." About this time Alf Fenton, the deceased, Charles Sampson, and Cy Fisher drove up in a buggy. The defendant inquired of Jeff Fenton if that was not Alf's buggy, and Jeff said it looked like it. The defendant thereupon stepped out from the shade of the trees in which he was standing, and stopped the horse. He asked, "Is that you, Alf?" and Alf answered, "No," and started the horse; but the defendant stopped him again, whereupon Fisher and Sampson got out of the buggy. The defendant asked Alf Fenton who the parties were who had jumped out of the buggy, and he told him Fisher and Sampson. He then told them to get back, and Alf also requested them to do so, and they did so. The defendant then pointed his gun at Alf Fenton, placing the muzzle near to his face; and the latter caught the gun and attempted to push it away, whereupon defendant shot him twice, and Alf Fenton fell out of the buggy, and was heard to say, "Oh, you have killed me. What did

you do it for?" Fisher had jumped from the buggy, and he knocked Dunn, the defendant, down. To his brother, Alf Fenton said: "Mark Dunn killed me, and I don't know what he done it for. Let me kill him before I die." The deputy sheriff, Moberly, came up, arrested defendant, and took him away. The defendant was not hurt but implored those around him not to kill him, saying he had killed Alf Fenton, but that Moberly was the cause of it. The deceased was unarmed at the time he was shot. There was an unloaded gun in the bottom of the buggy in which he, Fisher, and Sampson were riding. This gun had been obtained a little while before at the house of George Sanders, who testified it was not loaded at the time they got it, and Sampson testified they had not loaded it afterwards. The body of the deceased was searched immediately after the shooting, in the presence of a number of persons, and no weapons found on him. The post mortem disclosed two gunshot wounds on the body of deceased—one on the right side, about an inch below the navel, from which the surgeon took ten shot. The other was in the left leg, and contained 11 shot. There was evidence tending to prove defendant was intoxicated on the evening of the homicide. Different witnesses testified to seeing him drink. Morgan says he staggered. Rev. Mr. Chapman says he was "decidedly intoxicated."

The evidence tends to show there had been a former difficulty between the Fentons and defendant. In January, 1902, which was six months prior to the killing, while on a hunt in Arkansas, he told Fred Franklin that if Alf or Jeff Fenton ever crossed his path he would kill them; and two years before he had told one Herman Yazel, in a conversation which took place in an old brick building in the village of Rushville, that, if he and Alf or Jeff Fenton ever came together, he would "git him." At another time, while the defendant and William Stigers were painting on the Christian Church in Rushville, he told Stigers that he had had trouble with the Fentons, and never wanted them to cross his path. In June, 1902, a month prior to the killing, the defendant made the remark that he would kill Alf and Jeff Fenton if they ever crossed his path, and asked Charles Van Hooser to take the Fentons to Reub Sampson's, so that he might have an opportunity to kill them and get away. At still another time the defendant said, in the hearing of Norville Johnson, that Alf and Jeff Fenton had done him wrong, and he would get them, and get them right; and on the day of the killing, at about 11 o'clock in the forenoon, he told this same Norville Johnson that, if he should do anything the law would handle him for, it would be something they would hang him for. The defense was that of insanity.

The defendant is about 36 years old, married, and has a wife and one child. Was

married August 25, 1901. He is a painter by trade. For two or three weeks prior to July 20, 1902, defendant was at work at his trade, painting the house of George Huff, near Hall's Station. His wife testified that on July 14th, or thereabouts, he came home sick, being unable to prosecute his work further; complaining of severe abdominal pains and pains in his head. These continued with such severity that defendant's wife and her family all became alarmed because of his complaints, condition, and peculiar acts. A physician (Dr. Jones) was called on Tuesday of the week prior to this alleged murder, and, after examining defendant, pronounced him to be suffering from lead colic and lead poisoning. Defendant's condition remained the same, practically without change, the entire week. During this week, as he had for some time prior to this and continuously, defendant suffered from acute insomnia; being unable to sleep, on an average, more than three hours per night, and on some nights not at all. On Sunday morning, July 20th, after passing a restless and sleepless night, defendant arose about 9 o'clock, and, after eating a light breakfast, went down to the village, where he spent the forenoon with several young men, among whom was Jefferson Fenton. No trouble or incident of note occurred during the forenoon. Defendant took dinner with Hally Conrad, at Mrs. Stanton's, Conrad's mother. After dinner Conrad and defendant drove to the country and returned, and defendant went to a ball game on the outskirts of the village, where he acted as score keeper. Alfred Fenton, the deceased, was there. There was evidence that the only drink defendant was seen to take was one taken by him after coming from the ball game, at the rear end of a saloon in a vacant lot, when some 12 or more all drank from a pint bottle. Dr. Jones, who was called to see defendant on Tuesday prior to the homicide, on Sunday found him suffering from neuralgia of the stomach, which was the only symptom of lead poisoning he observed in defendant at that time. The physician prescribed a small tablet, composed of capsicum and myrrh, while at the house, and followed this with a prescription of pepsin and bismuth, and they had the desired effect. Next morning defendant was so much better that no further call by the physician was required. On Saturday defendant was at the physician's house, and made a contract to paint it for him. Defendant was perfectly rational that day. The defendant testified he had had lead poisoning twice before in his life—once at San Francisco and once at St. Joseph—and recovered each time.

Dr. Jno. M. Dunsmore, of St. Joseph, an expert, and a graduate of Trinity College, Canada, who had made nervous diseases a specialty for four years, testified that on the 8th of November, 1902, he examined the defendant in the jail at St. Joseph, at the request of his attorneys, to ascertain his men-

tal condition. Had had no previous acquaintance with defendant. He found him to be a physically sound man; no heart lesions; no organic trouble of the lungs or any other important function of the body. His skin was the only thing that indicated ill health. It was yellow, but he had been in jail there for more than three months, removed from the sunlight, and with little exercise. He examined his mouth for a blue-black mark, which he had expected to find, but was unable to discover it. As to his mental condition, the defendant struck the doctor as being an intelligent, sharp, shrewd man. He answered correctly, his memory was good, and he observed nothing in defendant to indicate anything wrong about him mentally. He then went to Rushville at a later date with one of defendant's attorneys, and saw Dr. Jones, and inquired as to defendant's personal history. After that investigation into his personal history, he made a further investigation into his physical condition, and discovered, to use his language, "a slight condition noticeable of arterio sclerosis, or in other words, it means a hardening of the arteries, which I arrived at simply by compression of some of the most superficial arteries which one could feel with the finger, and the arteries were inclined to roll beneath the finger, which indicated a hardening of the arteries or arterio sclerosis." From his examination, he could not form an opinion as to the nature of the disease, if any, defendant might have suffered from; could not form a diagnostic opinion from his personal examination. The doctor then gave a disquisition on lead poisoning, sometimes vulgarly called "painter's colic"—how it brought on indigestion, insomnia, and arterio sclerosis, and hallucinations; describing how the system of one working with white lead or a painter would gradually absorb the lead, and would result in loss of appetite, followed by headache. Then follows dyspepsia, stomach troubles, and costiveness. Then the blue lines on the gums appear, due to the absorption of the lead into the system. Sometimes painter's palsy or drop wrist ensues, and he finally deduced a lead insanity, which is not a constant mania, but is fitful. It comes and goes. When he is removed from the lead, he comes back to himself. A hypothetical question covering all the facts detailed in evidence, beginning with defendant's return from Huff's to the home of his father-in-law, down to and including the killing, was submitted to Dr. Dunsmore, and he was asked as to his opinion of the sanity or insanity of the prisoner at the time of the homicide. His answer was that, assuming the defendant did not take proportionally more liquor than his companions did out of the bottle from which they drank—assuming that he was not under the influence of liquor—he would answer this way: "That, from the symptoms that you have given in your question, I would say he was tempo-

rarily insane, but that it is not necessary that he would be continuously insane from the attack of lead colic, but it would be my impression that at the time he was mentally aberrated, provided, always, he had not sufficient liquor in him to make him intoxicated. The exciting cause would simply be the condition of the brain as the result of the detrimental influences to the nerve centers at the culmination of this lead poisoning or colic, and the cerebral symptoms coming after. The disease lying dormant there had culminated, and that was the cause." As to the blows given him by Moberly, he did not think they were sufficient to add any other exciting cause, but they might accentuate it to a degree—to a delirious state. On cross-examination this witness testified that he had practiced medicine five years. Was in charge of a private hospital for nervous troubles. That he had only one case of lead poisoning in this hospital. That he noticed no dyspeptic condition. Did not examine defendant's urine, and did not find any albumen in it. Could not tell whether he was constipated. Did find slight sclerosis of the arteries, which is common among men addicted to intoxicants and old men. Saw no signs of hallucinations or of epilepsy. No organic trouble with his heart, but a slight hypertrophy. Nothing the matter with his liver or kidneys. Would not say there was a distinct blue line on the gums. Nothing the matter with the organs of respiration or vision. His examination, in a word, led him to the conclusion that the defendant was mentally sound and right.

The defendant testified in his own behalf that he learned the occupation of painting when about 15 years old, in Iowa and St. Louis. He then served as a waiter in a hotel one winter in Kansas City. He then worked at his trade for a year or so in Kansas and Colorado, and then went to the Indian Territory, and was a cowboy, and then went back to paper hanging and painting for about 18 months. He gave that up, and worked in a coal mine and hauled logs. After that, in the spring of 1893, he came to St. Joseph, Mo., and again served as a waiter awhile, and then went to painting again for a paint contractor, and followed that for 18 months. He then left St. Joseph, and went South as an advertiser of Pond's Extract and Horseshoe Tobacco Company. The advertising business took him south into Texas, New Mexico, and on to California. In San Francisco, in 1894, he had painter's colic, and quit work there and returned to St. Joseph. Was sick about 2½ months in San Francisco. Had cramps in his stomach, lost his appetite, and became very poor in flesh, but he got well. After returning to St. Joe he took to painting again, and then went South, remaining only a short time in one place at work. He then returned to Atchison, Kan., in 1898, and got work under a contractor, and painted the Bethel Schoolhouse in Buchanan county, and after

that got a job at Hall's Station to paint a house, and that occupied all the summer and fall. He purchased a hunting outfit, and spent that winter on the bar, shooting ducks and geese. In the spring worked at carpenter's trade and painting until July, 1899. He then went to Rushville to live, and from that on, till this difficulty, followed house painting, for a living. While in St. Joseph had colic and cramps again, and had to quit work for four or five days. Took whisky and Jamaica ginger, and lived on milk. Got well, and had no more trouble till he was taken sick in San Francisco. After he went to Rushville to live, he boarded with John Fenton, a brother of deceased, and later on with Mrs. Stanton. Remained with her until he was married, in 1901. Lived with his wife's parents awhile, and then kept house about two months, and broke up, and took his wife to her father's house, and went to Arkansas, and was gone four or five months. With him on that trip were several young men—Fred Fenton, Ollie Jones, Jake Merritt, Hally Chitwood, Tom Harding, Fred Franklin, and Burt Hudson. All the others returned home, and left defendant and Franklin in the camp. Defendant explained his conversation with Franklin on that trip. He admitted making a threat to kill Alf Fenton, but says it was conditional that, if Fenton attempted to shoot him, he would kill him. He testified in regard to his condition during the week preceding the homicide that he suffered extreme pain from the colic, became frightened, lost consciousness, and told them to send for whisky and Jamaica ginger. Could not get the ginger. Sent for Dr. Jones, and remembers his coming, but did not know when he left. The doctor prescribed. Was in bed most of the week. Felt better on Saturday, and went to see the doctor about painting his house for him. Has no recollection of going home Saturday night. The first he recalls is that Sunday morning he found himself at Mrs. Stanton's. Sat and read while she went to church. Went up into the village, loafed around, and finally went to dinner with Hally Conrad. After dinner he and Conrad drove out to look at a piece of corn. Came back and went to ball game, and kept the score. Head pained him so he thought he would have to get some one to take his place. After returning to town, a crowd of young men got a pint of whisky, and he took a drink out of it behind the saloon. Some one then produced a half pint, and he took another drink. That morning he took a drink with deceased out of a bottle the latter offered him. That Sunday afternoon he got a pistol from Chitwood. He had the privilege of trying it, and he got it so as to try it next day as he went to work. That evening he was showing Jeff Fenton the pistol, telling him how it should balance on your finger, etc., when Moberly came up and told him he was under arrest. He didn't know Moberly was an officer, and resisted arrest, and Moberly struck him over the head. After that he re-

membered nothing of the occurrences detailed by the other witnesses, leading up to and including the shooting of Alfred Fenton by defendant, until, he says, when he recovered consciousness, he was lying in an alley by Luther Moberly. That he found his head was bloody, and inquired of Moberly how it happened, and Moberly told him he hit him over the head to keep him from shooting Jeff Fenton, and told him he had shot Alf Fenton with his shotgun, and defendant denied it. Then Gillinan came, and was talking to Moberly about a team, and he learned that he was going to take defendant away. At his request, Moberly took him by his home, and on the way he inquired of Moberly about his shooting Alf Fenton, and Moberly told him he did, but he had to do it; that Alf drew a pistol on him, and defendant had to shoot him. Moberly advised him that his only defense should be self-defense. The court instructed on murder in the first and second degrees, the law as to insanity as a defense, and drunkenness, the competency of defendant and his wife as witnesses, the credibility of witnesses, and the form of the verdict. Other facts may be noted, if deemed necessary, in the course of the opinion.

1. The first contention of defendant, that it was a physical impossibility for defendant to have shot and killed deceased in the manner detailed by the state's witnesses, is without merit, independent of his plea of insanity. The evidence disclosed that the defendant was armed with a double-barreled shotgun; that deceased was in a buggy with Cyrus Fisher and Charles Sampson; that defendant halted the horse and inquired if that was Alf, whereupon deceased first answered "No," and attempted to drive on, but defendant again halted him, and this time deceased then admitted it was he. The testimony then shows that both Fisher and Sampson fled from the buggy before defendant began to fire at deceased. The evidence tends strongly to show a struggle on the part of deceased to prevent defendant shooting him. The defendant alone was armed with a double-barreled gun. He was seen to discharge both barrels, and Alfred Fenton received two wounds at the time. Out of one the surgeon extracted 11 shot, and out of the other 10. Without a recapitulation of all the testimony on this point, it is sufficient to say that it leaves not a reasonable doubt that defendant shot and killed Alfred Fenton as charged in the indictment.

2. The defendant was a witness in his own behalf, and testified at considerable length as to his sickness from lead poisoning in St. Joseph and San Francisco, and during the week prior to the homicide at Rushville. He detailed his symptoms, such as excessive pains in his stomach, insomnia, want of appetite, nervousness, and loss of memory, etc. Dr. Dunsmore testified as a witness for defendant. A hypothetical question based in part upon the testimony of the defendant was propounded to him. The counsel for

the state objected to the question because many of the facts assumed were not in evidence. The court did not sustain this objection, as made, but held that it was improper to the extent that it was based upon evidence given by the defendant himself, and this is urged as error by the defendant. It is obvious that the hypothetical question propounded included much that had not the slightest tendency to throw any light one way or the other upon the sanity or insanity of defendant. An expert, moreover, cannot be asked his opinion on a hypothesis having no foundation in the evidence. On the other hand, as the jury must determine the truth of any testimony offered before them, it is competent to assume as a fact matters testified to, even if controverted by other witnesses. *Russ v. Ry. Co.*, 112 Mo. 45, 20 S. W. 472; *Smith v. Ry. Co.*, 119 Mo. 246, 23 S. W. 784. The ruling of the criminal court that the facts which the evidence of the defendant tended to prove could not be incorporated in the hypothetical question propounded to the expert cannot be sustained. Doubtless this ruling made during the trial was predicated upon the decision of this court in *State v. Soper*, 148 Mo., loc. cit. 234, 49 S. W. 1007, wherein it was held that physicians could not give opinions touching a defendant's sanity based on statements made by him concerning his previous personal history, because such statements were hearsay; but in that case, as the opinion shows, these statements were not under oath—a proposition entirely sound—but in this case the defendant's statements were under oath, and evidence in the case. Clearly, we think, they were not to be excluded merely because they were testified to by defendant. But conceding that the facts to which defendant testified should not have been rejected solely because given in evidence by him, the further question arises whether their omission was prejudicial. In other words, were they, by themselves, or in conjunction with other facts testified to by other witnesses, the basis for an opinion by an expert as to his sanity or insanity? The defendant, in substance, testified that in 1893, while following his profession as a painter in the city of St. Joseph, he was seized with abdominal cramps and pains; that prior thereto he had severe headaches, and suffered more or less from insomnia; that following the cramps he fell into convulsions, during which time his shoulders and head were drawn backward; that this attack was followed by sickness for five days, during which he lived chiefly on milk; that he completely recovered from that illness. He then went into the advertising business, and in 1894 landed in San Francisco. There he was taken with cramps, which drew him backwards. Called in a physician, who diagnosed his case as painter's colic. Suffered severe pains in his head, and would become unconscious. Got very poor, because he couldn't eat. He got

well of that sickness, and came back to St. Joseph, and then went South again, and traveled around until 1898, when he returned in the spring to Atchison, Kan. After that he lived on the river bar, and fished and hunted for a living, until he took up his abode in Rushville, where he continued to live until the homicide, save when on fishing trips to Arkansas. It is apparent from the very circumstantial account given by defendant of his travels, occupation, and places he visited that there was no loss of memory occasioned by either of his sick spells. The defendant had recovered entirely from these sick spells, and had no recurrence thereof for nearly eight years, and during that time had not followed his trade regularly. In two respects the evidence so far fails to establish that chronic lead poisoning which the experts testify may result in insanity: First, there is wanting that constant use or contact with the lead which will result in lead poisoning; and, second, it is evident from the quick recovery in each spell that the disease in defendant, if at all, had not reached that stage in which it had affected the brain, because the expert testified that when it resulted in mental affection it involved the tissues of the brain, and that they degenerated, and this was a permanent condition, and yet this same expert found this defendant, by actual examination, to be a bright, shrewd, intelligent man, physically and mentally sound, and none of the indicia which he would expect in lead poisoning present in his case; and yet it was on his evidence alone that the defense of insanity rested. So far as the court excluded this evidence as to the two attacks of sickness in St. Joseph and San Francisco, from which defendant had entirely recovered as early as 1894, it can be safely asserted that they could not have formed a basis for the expert's opinion, according to his own theory. The defendant's counsel then changed his question, and omitted all reference to the sickness of defendant at St. Joseph in 1893, and at San Francisco in 1894, and began with his personal history some three years prior to the homicide; and, while the court had ruled he could not base his question on defendant's evidence, it is plain that he substantially stated every fact to which defendant had testified that bore even the slightest relation to his sanity or insanity. Not only is this our conclusion from a careful reading of the hypothetical question in connection with defendant's own testimony, but such was the view of the learned judge of the criminal court, because, after a recapitulation of the facts assumed to be in evidence, down to and including the arrest of defendant by Moberly, the deputy sheriff, and while he was in charge of Merritt and Conrad, the record recites that at this point the judge said: "Now, all this is based upon what the defendant said himself. Proceed, though, with your question." But one construction

can be placed, then, upon the court's action; and that is that while he was of opinion, as he had first ruled, that it was not competent to include in the hypothetical question facts testified to only by defendant, he had so far modified his views as to permit the question, though based on defendant's evidence. So much of the question as contains facts detailed after defendant's arrest by Moberly, and after Moberly struck him, could not have been based on defendant's evidence, because he testified positively that after the lick by Moberly everything was a blank, until he recovered consciousness after the homicide, and found himself lying in an alley, just before they took him to jail. So that while the court in fact announced an incorrect rule, and at first excluded the sworn statements of defendant in the framing of the hypothetical question propounded by defendant, it, in effect, reversed itself, and permitted so much of defendant's statement as really had any bearing on the case to be incorporated in the amended question. Our conclusion is that, by thus permitting defendant's statement to be made the basis of the question, the criminal court corrected its own error, and defendant has no just cause of complaint on that ground; and, moreover, it is apparent that no harm resulted to defendant, anyway, because the expert testified he was insane, if not intoxicated, and he could have done no more if the first question had been allowed.

3. One other objection urged is that the court excluded from the hypothesis of defendant that there was no motive for defendant's shooting deceased. When counsel for the state urged this objection the court remarked that there was no evidence except defendant's that there was no motive, but "there was evidence showing there was no ill feeling." Mr. Martin, counsel for defendant, said: "Why, the testimony shows that these men were the best of friends. The Court: Why, of course, you have proven that fact; but, as to whether there was a motive, I don't think the testimony shows that. I don't think that assumption ought to be made to the physician. Mr. Martin: Now, I understand that the doctor can assume that these men were close personal friends? The Court: Yes; I have stated that." After all, it is but another way of assuming there was no motive. If the expert was in fact one competent to pass upon a psychological question, he certainly would assume that a man's close personal friend would have no motive to kill him, in the absence of a motive assumed in the question. No possible injury could have resulted to defendant from substituting the words "that the men were close personal friends" for the words "that there was no motive for the killing." This exception must be overruled. To the hypothetical question thus propounded, Dr. Dunsmore made this answer: "Provided that this prisoner did not take proportionately more liquor than the others did [there being evi-

dence that he took at least three drinks from bottles that day, and no evidence how much he took at a drink]; that he didn't take a lion's share of the liquor, probably consuming a half pint on the two occasions—assuming that he was not under the influence of liquor, I would answer the question this way: That, from the symptoms that you have given in your question, I would say that I believe the man was temporarily insane, but that it is not necessary that he would be continuously insane from that attack of lead colic, but it would be my impression that he was mentally aberrated." In other words, sane up to the very moment of firing the deadly shots, insane when he fired them, and sane immediately afterwards. This court has on two occasions repudiated such a doctrine. It is the doctrine of "uncontrollable impulse," which this court has expressly disapproved. *State v. Pagels*, 92 Mo., loc. cit. 317, 4 S. W. 931; *State v. Soper*, 148 Mo., loc. cit. 237, 49 S. W. 1007; *State v. Levelle*, 34 S. C. 131, 13 S. E. 319, 27 Am. St. Rep. 799. And this is the only kind of insanity which could find support in this evidence. This defendant was sane enough to make contracts for painting houses on both Saturday and Sunday, and excite no suspicion that he was "aberrated." He was sane enough to keep the score of a baseball game up to 5 o'clock that afternoon; of sound enough mind at 8 o'clock that night to point out the defects in a revolver he had been trying to purchase; was sane enough to question the authority of Moberly as an officer to arrest him, and to threaten to kill Moberly for striking him, and, when released, to go to Mrs. Stanton's and get his double-barreled gun, load it, and start out to find Moberly, and sane enough to discriminate in favor of those he met when he was hunting for Moberly; was sufficiently sane a moment after the killing to beg the friends of Alfred Fenton not to kill him, and to ascribe his act to the fault of Moberly. In view of the positive testimony of Dr. Jones and Dr. Dunsmore as to the actual mental condition of defendant when they visited him and examined him, and in view of the absence of all the symptoms which Dr. Dunsmore testified should be present to enable a physician to diagnose an ailment as chronic lead poisoning when he examined defendant in the jail after the homicide, we are impressed with Wharton's observation in his work on Criminal Evidence (section 420) to the effect that "when, expert testimony was first introduced, it was regarded with great respect. An expert, when called as a witness, was viewed as a representative of the science of which he was a professor, giving impartially his conclusions. Two conditions have combined to produce a material change in this relation: In the first place, it has been discovered that no expert, no matter how learned or how incorrupt, speaks for his science as a whole. Few specialties are so small as not to be torn by factions, and often the smaller the specialty the

bitter and more inflaming and distorting are the animosities by which these factions are possessed. Peculiarly is this the case in matters psychological, in which there is no hypothesis so monstrous that an expert cannot be found to swear to it on the stand, and to defend it with vehemence when off the stand. 'Nihil tam absurde dici potest, quod non dicatur ab aliquo philosophorum.' Cicero, De Div. 11.58." The doctor very properly qualified his opinion by assuming that defendant was not intoxicated. Conceding that, if intoxicated, defendant's conduct could readily be accounted for without attributing it to aberration or insanity. There was ample evidence to justify the jury in believing defendant was more or less intoxicated. Morgan says that he staggered when he walked, and Mr. Chapman says he was decidedly intoxicated. In addition to this, he was seen to, and himself testified that he did, drink three times out of bottles that day. The jury doubtless took this view of the case.

4. As to the failure to prove a motive, it has been so often ruled that it was not necessary to do so that it is sufficient on this point to cite some of the cases: *State v. McLaughlin*, 149 Mo. 33, 50 S. W. 315; *State v. David*, 131 Mo. 381, 33 S. W. 28; *State v. Foley*, 144 Mo. 620, 621, 46 S. W. 733. But in this case there was evidence of an old quarrel, and threats by defendant to kill deceased and his brother if they ever crossed his path.

5. Again, it is insisted that the court erred in striking out of Dr. Jones' evidence that defendant told him some days prior to the homicide that he (defendant) believed he was going crazy. This was a self-serving statement of defendant, no part of the *res gestæ*, and a mere conclusion of defendant. It was properly excluded.

6. During the argument, Mr. Motter, one of the counsel for the state, said, "There was some mysterious feeling of jealousy between the defendant and Alfred Fenton, the deceased, which, under the law, the state was not permitted to show." Exception was taken to this. To appreciate this assignment, it should be recalled that the state had proved by various witnesses that a feeling of enmity had existed for more than a year prior to the homicide; and, when the witness Wm. Stigers was on the stand, he testified that, when he and defendant were painting a church in Rushville, defendant had said that he never wanted Alf and Jeff Fenton to cross his path. Pressed by counsel for defendant, he stated that defendant and the Fentons had had some trouble. It was over the witness' trouble, and defendant had sided with witness; and the witness was about to state the nature of the trouble, when the court stopped him, and ruled he would not permit that trouble to be shown further. It is obvious that it was to this Mr. Motter referred. He was combating the theory of the defense that no motive had been shown. He was clearly within the line of legitimate argument when he stated that

the court had not allowed them to go into the particulars of that old quarrel. We think this remark did not constitute reversible error.

7. As to reopening the case, it was within the discretion of the court to permit counsel for the state to introduce evidence of which he had learned after the state rested in chief. This is well-settled law.

In view of the whole record, we find no reversible error. The instructions were full and fair. Indeed, they have not been assailed, and we see no cause for interfering with the verdict of the jury. There was ample evidence, if credited by the jury—and it was—to sustain the verdict of murder in the first degree.

The judgment is affirmed, and the sentence which the law pronounces must be carried into execution, and it is so adjudged.

BURGESS and FOX, JJ., concur.

REYNOLDS v. FAUST et al.

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

FRAUDULENT CONVEYANCES—SUIT TO SET ASIDE.

1. As, under Rev. St. 1839, §§ 3398, 3399, a conveyance to defraud creditors may be set aside at the suit of a creditor, a complaint by a purchaser of land to set aside a prior mortgage, alleging merely that the mortgage was given to defraud creditors, and not alleging that he was a creditor, states no cause of action.

Appeal from Circuit Court, Cape Girardeau County; Henry C. Riley, Judge.

Suit by James G. Reynolds against Thomas M. Faust and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Wilson Cramer, for appellant. Frank E. Burroughs, for respondents.

MARSHALL, J. This is a bill in equity to remove a cloud upon the title to a certain lot of ground in the city of Cape Girardeau, being a part of lot 1, range E, having a front of 42 feet on Broadway or Harmony street, by a depth northwardly of 99 feet, and for an injunction to restrain the defendants from foreclosing the deed of trust on the land, which is the cloud complained of. The petition alleges that the plaintiff is the owner in fee of the premises; that he acquired an undivided three-fourths interest therein from the former owners of that interest, Alfred Minton, William H. Minton, and James H. Thompson; that the other one-fourth interest was owned by Benjamin R. Hempstead, and that on March 12, 1896, he conveyed the same to his wife, Bettie D. Hempstead; that subsequently the plaintiff instituted a suit against Benjamin R. and Bettie D. Hempstead for the partition of the land; and that a decree in partition was entered, the land was sold, and the plaintiff became the purchaser thereof, and received a sheriff's deed, un-

der which he claims title, and is now in possession of the land. The petition then charges that on January 13, 1896, Benjamin R. Hempstead, "for the pretended purpose of securing to the defendant Robert L. Taylor the payment of a certain promissory note for \$3,000, alleged to have been executed by the said Benjamin R. and Bettie D. Hempstead to said Robert L. Taylor, payable twelve months after date, executed and delivered to the defendant Thomas M. Faust, as trustee, a certain deed of trust, conveying, among other parcels of land, the undivided interest in the premises heretofore described." It is then alleged that at the request of Taylor the trustee, Faust, advertised the property for sale under the deed of trust. The petition then proceeds as follows: "And plaintiff further states that the said deed of trust is fraudulent and void, and is a voluntary conveyance, without consideration, made and contrived by the said Benjamin R. Hempstead and the said Robert L. Taylor for the purpose of covering up the property of the said Benjamin R. Hempstead from his creditors; and said alleged promissory note is likewise without consideration, and was executed and delivered by the said Benjamin R. Hempstead and Bettie D. Hempstead to said Robert L. Taylor, and accepted by him, in pursuance of such fraudulent design and purpose. And plaintiff states that he purchased in good faith and for full value at said partition sale all of the right, title, and interest of the said Benjamin R. Hempstead and Bettie D. Hempstead in and to said premises; that the said deed of trust, which was recorded in the land records of said county on the 15th day of January, 1896, in Book T of Trusts and Mortgages, at page 68, is a cloud upon his title; that the contemplated sale by said trustee, Thomas M. Faust, of the undivided one-fourth interest in said premises so conveyed to him by the said Benjamin R. Hempstead, is for the benefit and at the instance of the said Benjamin R. Hempstead and Bettie D. Hempstead, and will operate as a fraud upon the rights of plaintiff, and cast a further cloud upon the title." The prayer of the petition is that the deed of trust be canceled as a cloud on the title, and that Taylor and Faust be enjoined from attempting to foreclose the same. The defendants interposed a general and special demurrer to the petition, the court sustained the demurrer, the plaintiff refused to plead further, judgment was entered for the defendants, and the plaintiff appealed.

The contention of the plaintiff is that the deed of trust from Hempstead to Taylor was intended to defraud Hempstead's creditors, and that the plaintiff is a subsequent purchaser from Hempstead, and, as such, has a right to have the fraudulent deed of trust canceled. The statute of 13 Elizabeth, c. 5, § 2 (2 St. at Large, p. 588), declared all conveyances, etc., made with intent to delay, hinder, or defraud creditors "to be clearly

and utterly void, frustrate and of none effect," but limited it "only as against that person or persons, his or her heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any ways disturbed, hindered, delayed or defrauded." This statute was passed in 1570, and it was provided that the act should "endure unto the end of the first session of the next parliament," but the act was afterwards made perpetual. 29 Eliz. c. 5. Afterwards, in 1585, the act of 27 Eliz. c. 4 (2 St. at Large, p. 636), was enacted, by which conveyances intended to delay, hinder, or defraud purchasers were declared "to be utterly void, frustrate and of none effect." Our statute (section 8398, Rev. St. 1899) declares every conveyance made to hinder, delay, or defraud creditors or purchasers, "as against said creditors and purchasers, prior and subsequent, to be clearly and utterly void." And section 3399, Rev. St. 1899, provides: "No such conveyance or charge shall be deemed void, in favor of a subsequent purchaser if the deed or conveyance shall have been duly acknowledged or proved and recorded, or the purchaser have actual notice thereof at the time of the payment of the purchase money, unless it shall appear that the grantee in such conveyance or person to be benefited by such charge was party or privy to the fraud intended." In *Wineland v. Coonce*, 5 Mo. 296, 32 Am. Dec. 820, it was said that our statute is made up of the English statutes of 13 and 27 Elizabeth; and it was there further said, "The act does not say what sort of a subsequent purchaser shall not be affected by it—whether a subsequent purchaser of the fraudulent vendor or vendee—but must apply and be applied to the purchasers of the vendee, where there is one, rather than to the purchasers of the fraudulent vendor, after he has already parted with all his interest, for the act declares that as to him his title is forever gone, unless creditors know of the fraud and pursue it in time." And accordingly, upon the faith of the prior English and American decisions, it was held, as stated in the headnote, that "a bona fide purchaser, for a valuable consideration, from a fraudulent grantee, without notice of the fraud, shall hold the property against the creditors of the fraudulent grantor." In *Howe v. Waysman*, 12 Mo., loc. cit. 174, 49 Am. Dec. 126, this court, per Scott, J., said: "It was contended that, although creditors might avoid such conveyances, yet there is no reason for conferring the same privilege upon a subsequent purchaser. In 4 Kent's Com. 464, it is said that it is now the settled American doctrine that a bona fide purchaser for a valuable consideration is protected under the statutes of 13 and 27 Eliz., as adopted in this country, whether he purchases from

a fraudulent grantor or a fraudulent grantee, and that there is no difference in this respect between a deed to defraud subsequent creditors and one to defraud subsequent purchasers. The cases of *Anderson v. Roberts*, 18 Johns. [515, 9 Am. Dec. 235], and *Bridge v. Eggleston*, 14 Mass. 245 [7 Am. Dec. 209], maintain the same doctrine." In *Craig v. Zimmerman*, 87 Mo., loc. cit. 478, 56 Am. Rep. 466, this court, per Black, J., said: "A bona fide purchaser for a valuable consideration from a fraudulent grantor is not affected by the fraud in this prior conveyance. *Wineland v. Coonce*, 5 Mo. 296 [32 Am. Dec. 320]; *Howe v. Waysman*, 12 Mo. 169 [49 Am. Dec. 126]; *Gordon v. Ritenour* [87 Mo.] 54. But he must be a bona fide purchaser, as well as for valuable consideration. Rev. St. 1890, § 2505; *Bump on Fraud. Con.* (3d Ed.) 492; *Story's Eq.* § 484." In *Gordon v. Ritenour*, 87 Mo., loc. cit. 61, this court, per Black, J., said: "The doctrine is now very well settled that a fraudulent conveyance will not, at the instance of creditors, be vacated, to the prejudice of a bona fide purchaser from a fraudulent grantee. *Waite on Fraud. Con.* § 387; *Howe v. Waysman*, 12 Mo. 169 [49 Am. Dec. 126]; *Wineland v. Coonce*, 5 Mo. 296 [32 Am. Dec. 320]." In *Bonney v. Taylor*, 90 Mo. 63, 1 S. W. 740, the prior decisions were reviewed, and the distinction between our statutes and the statutes of Elizabeth were pointed out; and it was held, as stated in the headnote, that "a voluntary deed to land, made with intent to hinder and delay creditors, is not void as to a subsequent purchaser where it had been filed for record, or the purchaser had actual notice of it, unless the grantee therein was party or privy to the fraud intended by the grantor. Rev. St. 1879, § 2498," now section 3399, Rev. St. 1890. "A subsequent purchaser can only defeat a deed for fraud by showing that the fraudulent design was entertained toward him. It will avail him nothing to prove a design to defeat existing creditors." In *Evans v. David*, 98 Mo. 405, 11 S. W. 975, this court, per Brace, J., reaffirmed *Bonney v. Taylor*, 90 Mo. 63, 1 S. W. 740, and again held, as stated in the headnote: "A voluntary deed to land, made with intent to hinder and delay creditors, is not void as to a subsequent purchaser where it had been filed for record, unless the grantee therein was party or privy to the fraud intended by the grantor. A subsequent purchaser can only defeat a deed for fraud by showing that the fraudulent design was entertained toward him."

These cases establish the law to be, first, that conveyances in fraud of creditors are void, and can be set aside at the instance of creditors alone, for they alone are injured; second, that conveyances in fraud of subsequent purchasers of either the fraudulent grantor or of a fraudulent grantee are void as to such purchasers, and can be set aside only at the instance of such purchasers, for they alone are injured; third, that if the

fraudulent deed is recorded, or the subsequent purchaser has actual notice of it, at the time he pays the money, he cannot have the fraudulent deed set aside, unless he alleges and proves that the grantee therein, or person benefited thereby, was party or privy to the fraud intended; fourth, that subsequent purchasers cannot have a conveyance set aside on the ground that it was in fraud of the creditors of the fraudulent grantor, but they must allege and prove that the fraudulent conveyance was intended as a fraud upon subsequent purchasers. See, also, 14 Am. & Eng. Enc. Law (2d Ed.) pp. 283-285, 461.

Apply these rules to the case at bar, and the problem is easily solved. The plaintiff is not a creditor of Hempstead, the maker of the alleged fraudulent deed of trust to Taylor. Even conceding all he claims, he is only a subsequent purchaser from Hempstead, and even this is not entirely free from doubt. The charge of the petition is that the deed of trust was made by Hempstead with intent to hinder, delay, and defraud his creditors. There is no allegation in the petition that the deed of trust was intended by Hempstead to hinder, delay, and defraud subsequent purchasers. And it may well be said that in making the deed of trust Hempstead did not have in mind the perpetration of a fraud upon subsequent purchasers, for he made no subsequent conveyance of the land to the plaintiff, but, on the contrary, he conveyed it to his wife, and she does not charge fraud in this respect; and he cannot be said to have anticipated that the plaintiff would acquire the other three-fourths interest in the premises, and would institute a suit for the partition of the land, and would buy the land at the partition sale. There is no charge of any such intention in the petition. The charge is only a contemplated fraud upon his creditors, and the plaintiff is not a creditor.

As this conclusion disposes of this case, it is unnecessary to notice the other points in the case. The judgment of the circuit court is right, and it is affirmed. All concur.

HOUSSELS v. JACOBS.

(Supreme Court of Missouri, Division No. 1.
Dec. 28, 1903.)

SALE OF CATTLE—ASSIGNABILITY OF CONTRACT—CREATION OF PARTNERSHIP—AGREEMENT TO ASSUME INDEBTEDNESS—NECESSITY OF PAYMENT BY ORIGINAL DEBTOR.

1. Plaintiff's assignor executed a written contract of sale to defendant's firm, covering certain cattle, in consideration of the firm's assumption of one-half of an outstanding note to a third person, and promise to execute a note for the remainder of the consideration. The firm was to pay one-half the expense of feeding and shipping, and to execute its note for the latter amount. In the event that sufficient funds were not realized from a sale of the cattle to liquidate all of its indebtedness, the firm was to execute its note for the unpaid amount. The management and disposition of

the cattle were committed to plaintiff's assignor. *Held* that, as plaintiff's assignor in fact cared for and sold the cattle, the clause committing their management and disposition to him, even if involving personal confidence, did not prevent his assignment of the contract to plaintiff.

2. The contract did not create a partnership between plaintiff's assignor and the firm, as the idea of a community in profits and losses, as such, was excluded therefrom.

3. It was immaterial to plaintiff's recovery on the contract that the note, one-half of which was assumed by the firm, had not been paid by plaintiff or his assignor.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Robert Houssels against William H. Jacobs. From a judgment for plaintiff, defendant appeals. Affirmed.

T. N. Robertson and J. K. Hansbrough, for appellant. Percy Werner, for respondent.

BRACE, P. J. This is an appeal from a judgment of the St. Louis City circuit court in favor of the plaintiff in an action by attachment for the sum of \$7,629.93, from which the defendant appeals.

The petition, omitting caption, is as follows: "Plaintiff says that at the times hereinafter mentioned the defendant, W. H. Jacobs, and one Louis A. Snow were partners, together doing business under the firm name and style of W. H. Jacobs & Co., and that defendant is not a resident of the state of Missouri; that heretofore, to wit, on the 15th day of October, 1899, the said W. H. Jacobs and said Louis A. Snow, as such partners as aforesaid, entered into a contract in writing with one J. H. Houssels, whereby, in consideration of the sale unto them, to wit, said Jacobs and Snow, as such partners, of a one-half interest in twenty-two hundred and thirty (2,230) head of steers, then located in the pens of the Consumers' Cotton Oil Company, at Little Rock, in the state of Arkansas, the said Jacobs and Snow, as such partners, agreed to pay therefor unto the said Houssels the sum of \$36,237.50; that, in part payment of the price by them as aforesaid agreed to be paid for said cattle, the said defendant and said Snow, as such partners, agreed to assume the payment of one-half the amount of a certain note, amounting to the sum of \$46,066.28, together with the amount of one-half the interest on said note, at the rate of eight per cent. per annum, from and after the 4th day of October, 1899, until the payment of the said note. Plaintiff further says that in and by said agreement the said Jacobs and Snow, as such partners, further agreed that for the amount of the price of the one-half interest in the cattle aforesaid, above the amount of said note, they would execute and deliver unto the said Houssels a promissory note, to be paid out of the proceeds of the sale of said cattle when the same had been sold and disposed of. Plaintiff further says that in and by

said agreement the said J. H. Houssels undertook and agreed to feed the said cattle, and the said Jacobs and Snow, as such partners, promised and agreed with said Houssels to pay unto him one-half of the cost of such feeding, together with interest at the rate of eight per cent. per annum on all sums of money which the said Houssels might advance and pay for them on account of the cost and expense of such feeding; that in and by the said agreement the said defendant, Jacobs, and the said Snow, as such partners, agreed to assume and pay one-half of a certain freight bill for the transportation of the said cattle from the town of Vernon, in the state of Texas, to the city of Little Rock, Ark., the amount of such freight bill being in said agreement stated to be approximately the sum of \$4,225.50. Plaintiff further says that by the said agreement the said defendant, Jacobs, and Snow, as such partners as aforesaid, further agreed that in the event their one-half interest in the said steers should not realize a sufficient amount of money, upon the sale thereof, to liquidate all of the above-mentioned indebtedness, then that they would execute and deliver unto the said Houssels their promissory note for the amount of such deficiency, and that in said agreement it was provided that the said note should become due and payable on or before the 1st day of April, A. D. 1900, and also that the said note should be amply secured. Plaintiff further says that in said agreement it was also provided that the management and disposition of the said cattle should be vested in the said J. H. Houssels. Plaintiff says that the said agreement was subscribed by the said J. H. Houssels and by the said firm and partnership of W. H. Jacobs & Co.; said defendant W. H. Jacobs then and there signing the said firm name thereto in behalf of the said firm. Plaintiff says that thereafter, to wit, on the 3d day of December, 1899, the said J. H. Houssels transferred and assigned all of his interest in the above contract unto the plaintiff, whereby this plaintiff became the owner of all the interest of the said J. H. Houssels in and to the said agreement; and plaintiff says that he is now the owner and holder of the said interest, and entitled to all of the rights of the said J. H. Houssels therein, and that he is further entitled to enforce the said contract as completely as the said J. H. Houssels might have done if he had not made the assignment aforesaid. Plaintiff further says that the said Jacobs and Snow, as such partners, have not kept and fulfilled the promises, agreements, and stipulations by them made and entered into in the contract aforesaid, and have failed to perform their said promises and undertakings, in this, to wit: First, that they did fail to pay the one-half of the note aforesaid, of \$46,066.28, mentioned in said contract, and did fail to execute and deliver to the said J. H. Houssels or to this plaintiff their promissory note.

or any other obligation, for the amount of the remainder of the price agreed to be paid by them, as above stated, for a one-half interest in the cattle aforesaid, and, next, in that they have entirely failed and neglected to pay the amount of one-half of the freight for the transportation of the cattle aforesaid from Vernon, Texas, to Little Rock, Arkansas, as agreed by them, or any part of the cost of feeding said cattle. Plaintiff further says that, in virtue of the right in said contract given to and vested in the said J. H. Houssels to manage and dispose of the said cattle, said J. H. Houssels has sold and disposed of the same. Plaintiff says that upon such disposition of the cattle aforesaid there was realized therefor only the sum of \$81,941.80, and that the half interest of the said firm of W. H. Jacobs & Co. in said proceeds was the sum of \$40,970.90; that the said J. H. Houssels paid the freight for transporting the said cattle, to wit, the sum of \$4,326.10; that he also paid for feeding the said cattle, and labor for handling the same, the sum of \$17,286.06, and that said Houssels also paid for interest on the note aforesaid the sum of \$2,241.66; that the said firm and partnership and the said defendant, Jacobs, individually, became indebted unto the said Houssels for the amount of one-half of the said moneys by him paid for freight, labor, feeding, and interest, to wit, in the sum of \$11,928.91; that the said partnership and the said W. H. Jacobs individually being indebted and bound unto the said Houssels for the price of the one-half interest in the cattle aforesaid, to wit, the sum of \$36,237.50, said partnership and said Jacobs individually became, and at the time when said cattle were disposed of were, indebted unto said J. H. Houssels and unto this plaintiff, as his assignee, in the total sum of \$48,164.40; that after applying to the said indebtedness the amount of one-half of the proceeds of the said cattle, to wit, the said sum of \$40,970.90, there still remains due and owing by the said firm of W. H. Jacobs & Co. and by the said W. H. Jacobs individually, under the terms of said contract, the sum of \$7,193.51, which amount of money this plaintiff says he is entitled to have and recover of the said defendant herein, in virtue of the assignment to him as aforesaid by the said J. H. Houssels. The particulars of said debt are shown in the account annexed, marked Exhibit A. And the plaintiff further says that inasmuch as the said firm of W. H. Jacobs & Co. and the defendant have failed and refused to execute a note for the amount of the said indebtedness, with security, as in said contract provided, an action has accrued to him to presently recover from them the amount of the indebtedness mentioned; and the plaintiff accordingly prays judgment for the said sum of \$7,193.51, together with lawful interest thereon, and also for the costs of this action." The answer is a general denial. The

case was tried before the court without a jury. There was no conflict in the evidence, which tended to prove all the material allegations of the petition.

The contract between the parties, recited in the petition, and the assignment thereof, is as follows:

"State of Texas, County of Wilbarger—ss.: This contract entered into between J. H. Houssels, party of the first part, and W. H. Jacobs & Co., consisting of W. H. Jacobs and L. A. Snow, parties of the second part, wherein said party of the first part, for and in consideration of the sum of Thirty-six thousand, two hundred thirty-seven and $\frac{50}{100}$ (\$36,237.50) dollars, has sold unto the parties of the second part an undivided one-half interest in twenty-two hundred and thirty head (2,230) of steers, now located in the pens of the Consumers' Cotton Oil Company, Little Rock, Arkansas.

"Said consideration of Thirty-six thousand, two hundred and thirty-seven and $\frac{50}{100}$ dollars (\$36,237.50) to be paid as follows: Said parties of the second part hereby assume the payment of one-half of a certain note or notes amounting to Forty-six thousand sixty-six and $\frac{25}{100}$ dollars (\$46,066.28), and payable to the Evans-Snyder-Buel Company of St. Louis, Missouri, together with one-half the interest on said sum of money from the 4th day of October, 1899, at the rate of 8 per cent. per annum until paid. For the remainder of said consideration for one-half interest in above-mentioned steers, the parties of the second part do hereby agree to execute to the said party of the first part their certain promissory note to be paid out of the proceeds of said cattle when same are sold. Said party of the first part agrees to feed out said cattle at his own expense, and said parties of the second part agree to pay to the said party of the first part one-half of all expenses paid or that may be paid by said party of the first part with 8 per cent. interest on same.

"It is further agreed by the said parties of the second part to assume one-half of the freight bill on the said 2,230 head of cattle from Vernon, Texas, to Little Rock, Arkansas, numbering eighty cars, amounting to \$4,225.50, giving their note from date of shipment for \$2,112.75, being their one-half of the freight; that the expense bill for such expenses be attached to said notes. It is further agreed by the party of the second part, that in the event that when all of their one-half interest in said steers has been sold, there is not sufficient funds derived from said sale to liquidate all the above-mentioned indebtedness, then the said parties of the second part are to execute to the said party of the first part their promissory note for such unpaid amount. Said note to become due and be payable on or before the 1st day of April, 1900, and amply secured.

"The management and disposition of said cattle is vested in Mr. J. H. Houssels, party of the first part. By our respective signatures

this contract is entered into and agreed upon in consideration of the aforesaid stipulations.

"Witness our respective signatures, this, the 15th day of October, 1899. J. H. Houssels. W. H. Jacobs & Co. By W. H. Jacobs."

The assignment on said contract is as follows:

"For value received, I transfer the within or above contract to Robert Houssels. December 3, 1899. J. H. Houssels."

At the close of the evidence the defendant asked the following declarations of law:

"(1) If the court shall believe and find from the evidence that the contract sued on involved the relation of personal trust and confidence reposed by W. H. Jacobs & Co., one of the contracting parties thereto, in J. H. Houssels, the other contracting party, and that the assignment of all his interest in the contract by said J. H. Houssels to plaintiff was made while the contract was still executory, then said assignment, not alleged or shown to have been made with the knowledge and consent of W. H. Jacobs & Co., was void as to them, and plaintiff acquired no right of action on said contract against defendant, and the verdict and judgment herein must be for defendant.

"(2) If the court shall believe and find from the evidence that the contract sued on contemplated a business adventure undertaken for the common and joint benefit and gain of the parties thereto, to be mutually shared by them as principals, then said contract created a partnership between W. H. Jacobs & Co. and J. H. Houssels, the parties thereto; and if the court shall further believe and find from the evidence that the assignment and transfer of all his interest in said contract by said J. H. Houssels to plaintiff was made while said business adventure was still in progress, then said assignment operated a dissolution of said partnership, and plaintiff acquired no such interest in said contract by said assignment as entitled him to maintain this suit, and the verdict and judgment must be for defendant.

"(3) Under the pleadings and evidence, the verdict must be for defendant."

The court gave Nos. 1 and 2, and refused No. 3. To the refusal of the court to give declaration No. 3, the defendant excepted, and this is the only exception taken or saved, and the only error assigned.

The defendant contends that the court committed error in refusing this instruction, for three reasons: First, because the contract forming the basis of the suit involved a relation of personal trust and confidence reposed by W. H. Jacobs & Co. in J. H. Houssels, and hence was not assignable, without the consent of Jacobs & Co., on December 3, 1899, the same being then still executory; second, because the contract constituted the parties thereto partners, and the assignment to plaintiff ipso facto dissolved the partnership, and, the partnership ceasing by reason of the assignment, the contract perished with it, except for the purpose of an accounting between the

parties thereto; third, because it is neither alleged in the petition, nor shown by the evidence, that the Evans-Snyder-Buel Company note was ever paid.

These objections are purely technical, and this appeal is entirely without merit. The undisputed evidence is that the said J. H. Houssels duly performed his contract in manner and form as therein provided; that, having done so, he rendered to the defendant an itemized statement of the account between them, showing that the proceeds of the sales of the undivided interest sold to Jacobs & Co., after payment of the freight and expenses there provided for, failed to meet the liabilities therein incurred by them. In the sum of \$7,193.51. The correctness of this account has never been questioned or impugned by the defendant, whose only excuse for not paying was that he was not able to pay, accompanied by an offer of a smaller amount. That his obligation to pay was assignable is readily disclosed by a brief analysis of the contract. By the first paragraph of the contract, J. H. Houssels, sole owner of the cattle, made an absolute and unconditional sale of an undivided one-half interest therein to Jacobs & Co. for the sum of \$36,237.50, which amount the said Jacobs & Co. agreed to pay to said J. H. Houssels for such interest in manner and form as thereafter provided. The consideration for which Jacobs & Co. incurred this liability was not anything to be done or performed by J. H. Houssels in futuro, but for the interest which Jacobs & Co. then acquired in the cattle by the contract, and by virtue of which the cattle became the common property of the said J. H. Houssels and Jacobs & Co. as co-owners, but not as copartners. The remaining portions of the contract have to do solely with the means by which the obligations of Jacobs & Co. under this contract were to be met and discharged, but in no way qualify those obligations, or change the relations the parties sustained to each other. It is true that by the last paragraph of the contract the management and disposition of the cattle were given to J. H. Houssels, and, if this was a matter of personal confidence, it was in fact personally discharged by him in accordance with the terms of the contract, and to the satisfaction of the defendant, and he has no ground of complaint on that score, in any view that may be taken of the contract. Moreover, neither the right thus given, nor anything done in pursuance thereof in accordance with the terms of the contract, could convert their common ownership into a copartnership, for, as is well said in 22 Am. & Eng. Encycl. of Law (2d Ed.) pp. 53, 54: "It is clear that the common ownership of property does not of itself create any partnership between the owners of the property, though they use it for the purpose of making gains; and they may even, without becoming partners, agree among themselves as to the management and use of the common property, and the application of the product of its use. But an agreement to employ the

common property in a joint venture, in which the owners share in profits and losses as such, will constitute a partnership." The idea of a joint venture, and a community in profits and losses as such, is sedulously excluded from this contract. While it provides for a disposition of the cattle, it deals simply with the undivided shares of Jacobs & Co. therein, and the proceeds thereof, and provides that such proceeds shall be applied to the discharge of their liabilities as set forth in the contract, and, if they should be insufficient for that purpose, then Jacobs & Co. were to execute their note for the amount of such deficiency. With the profits and loss, as such, of both or either of the co-owners, the contract had nothing to do. There is no reason in law or in fact why this contract was not assignable.

As to the third objection, it is only necessary to say that the fact that it did not appear that the Evans-Snyder-Buel Company note had been paid is a matter of no consequence to the defendant. It is not claimed or pretended that Jacobs & Co. or the defendant ever paid that note or any part of it, or in fact ever paid a cent in any manner of any of the liabilities incurred by them under this contract. So far as any obligation was incurred by them in regard to that note, it was created solely by this contract, and its satisfaction by the payment of the judgment herein will satisfy all the obligations of that contract.

The judgment of the circuit court is affirmed. All concur.

BROOKS v. SCHULTZ, Tax Collector.

(Supreme Court of Missouri. Dec. 9, 1903.)

TAXATION—CONSTITUTIONAL LIMITATION OF RATE—TAX FOR LIBRARY—STATUTES—CONSTRUCTION.

1. Const. art. 10, § 11, provides that for city and town purposes the annual tax rate on property in cities of the third class shall not exceed 50 cents on the \$100 valuation, provided that the rate of taxation for school purposes may be increased by a majority vote of taxpayers, which restriction shall apply to taxes of every description; section 1 declares that the taxing power may be exercised by municipalities under authority granted by the General Assembly; and section 10 declares that the General Assembly shall not impose taxes on cities for city purposes, but may give the municipalities authority so to do. A city of the third class having already levied a tax of 50 cents on the \$100 by a majority vote of taxpayers, under Rev. St. 1899, § 6466, as amended by Act March 1901 (Laws 1901, p. 84), levied an additional tax for library purposes. Held, that the library tax was invalid, inasmuch as Const. art. 10, § 11, means that no additional tax shall be levied for any purpose, and is a limitation on the power of the General Assembly as well as on that of municipal corporations, and the library was not a school purpose.

In Banc. Appeal from Circuit Court, Cape Girardeau County.

Action by James F. Brooks against Gustave Schultz, as tax collector of the city of Cape Girardeau. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Frank E. Burrough, for appellant. R. B. Oliver and B. F. Davis, for respondent.

VALLIANT, J. In September, 1902, Mr. and Mrs. Louis Houck, of Cape Girardeau, offered to establish at their own expense in that city a free public library, and to that end to donate to the city a certain lot, and to erect thereon a library building, and equip it with furniture and books, at a cost, exclusive of the value of the lot, of not less than \$30,000, on condition that the city should levy annually a tax of 2 mills on the dollar valuation of taxable property in its jurisdiction for the support of the library. The proposition was accepted by the city authorities, who, acting as directed in section 6466, Rev. St. 1899, caused an election to be held, at which a majority, but not two-thirds, of the votes cast were in favor of levying the proposed tax. The tax of 2 mills on the dollar was accordingly levied for this purpose. That levy was in addition to a tax of 50 cents on the \$100 imposed by the city authorities for general revenue purposes. Cape Girardeau has a population of 6,000, and is a city of the third class. The plaintiff in this suit, who is a resident of that city, owning taxable property therein, paid the tax of 50 cents per \$100 levied for general revenue, but refused to pay the 2-mill tax for library purpose, whereupon the defendant, who is the city tax collector, seized certain personal property of the plaintiff, with intent to sell the same to pay the library tax. The plaintiff, by this suit in replevin, took the property out of the tax collector's hands. At the trial it was conceded, and is now conceded, that the plaintiff was not entitled to recover if the tax was valid. The court held the tax to be valid, and rendered judgment for the defendant, from which judgment the plaintiff appeals.

Section 6466, Rev. St. 1899, amended by the act of March, 1901 (Laws 1901, p. 84), confers upon cities of this class authority to levy a tax of 2 mills on the dollar valuation of taxable property in its jurisdiction for the special purpose of establishing and maintaining a free public library, upon the conditions and in the manner provided in that section. The tax in question was levied in conformity with the requirements of that statute, and it is conceded to be valid if it is not beyond the limit of taxation prescribed by the Constitution. Section 11, art. 10, of our Constitution, ordains that "taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for state and county purposes. * * * For city and town purposes the annual rate on property * * * in cities and towns having less than ten thousand and more than one thousand inhabitants * * * shall not exceed fifty cents on the hundred dollars valuation."

Then follow provisions limiting the rate of taxation for school purposes, but prescribing that that rate may be increased when a majority of the voters who are taxpayers, at an election, assent thereto, and that the rate for county or city may be increased to raise a fund to erect public buildings when two-thirds of the qualified voters vote therefor. That clause of the section above quoted limits the power of the city literally only in the matter of levying taxes for city purposes; that is, for general revenue. It does not, in express words, forbid the levying of additional taxes for a public library. It leaves fair room for the contention now made by the learned counsel for respondent that, whilst the city cannot go beyond the limit there named for its general revenue, it may, if the Legislature so authorize, levy a special tax for a purpose local to the city, but not for city purposes; that is, not for general revenue to carry on the city government. We would incline to that interpretation if it were not for the concluding clause of the same section, which is, "Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing or bonds which may be issued in renewal of such indebtedness." That clause was intended to prevent the interpretation now attempted to be put upon the preceding clause, and to declare that the power of the city to levy taxes for any purpose whatsoever was limited to 50 cents on the \$100 valuation of taxable property except as therein or elsewhere in the Constitution authorized. It is not suggested that the particular tax in question is within the purview of any other clause or section of the Constitution authorizing taxation.

It is contended on behalf of respondent that section 11 of article 10, just quoted, is not a limitation on the power of the General Assembly, but only on that of the county, school district, or municipal corporation, and as to them only a limitation on the power of taxation by that section conferred upon them. The proposition is that section 11 of article 10 confers directly on counties, school districts, cities, and towns authority to levy taxes to the limit therein specified; that that authority they may exercise independent of the will of the General Assembly; and that, in addition thereto, they may impose such taxes as the General Assembly may authorize. That is a misconception of that section. There is no language therein which is susceptible of the meaning that governmental power is conferred on counties, school districts, and municipal corporations independent of the Legislature. The first sentence in the section only points out the character of property subject to taxation, and lays a restriction in the matter of assessing its value. All the rest of the section is negative in form, and is, in effect, a declaration that, beyond a certain limit, taxation shall not go.

The provisos, though in form permissive, are but exceptions to the restrictions which they follow. Section 1 of article 10 declares: "The taxpaying power may be exercised by the General Assembly for state purposes, and by counties and other municipal corporations under authority granted to them by the General Assembly, for county and other corporate purposes." Section 10, art. 10, is: "The General Assembly shall not impose taxes upon counties, cities, towns and other municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Then follows, in immediate connection, section 11, which we have above discussed. The three sections, read together, mean that the General Assembly may authorize such corporations to levy taxes within the limits specified, but not beyond the limit, unless otherwise in the Constitution specified. In the case before us the city had already levied a tax of 50 cents on the \$100 valuation of taxable property in its jurisdiction. That was the limit of its taxing power, and therefore this special tax of 2 mills on the dollar for library purposes is illegal, unless it can be brought, as respondent seeks to bring it, within the exception which authorizes, under given circumstances, an increase in the rate of taxation for school purposes. The city has not proceeded in this matter in the capacity of a school district, nor has it asked the people in a school district to vote on the proposition to increase the taxes to support the public schools in the city. There is no suggestion of that purpose in the record. The school purposes mentioned in section 11, art. 10, of the Constitution, are purposes of the public schools required to be established by article 11 of the Constitution, not all purposes that may be educational in their character. A public library is an educational institution, but it is not a public school, in the common sense of that term, nor in the sense in which it is used in our Constitution. This tax cannot be sustained on that ground.

The tax is illegal, and the plaintiff was entitled to recover. The judgment is reversed, and the cause remanded, to be retried according to the law as herein expressed. All concur.

SMITH et al. v. SOVEREIGN CAMP OF WOODMEN OF THE WORLD.

(Supreme Court of Missouri, Division No. 2
Dec. 23, 1903.)

BENEFICIARY ASSOCIATION—FORFEITURE OF CERTIFICATE—NONPAYMENT OF DUES—EXCUSE—NOTICE OF MEMBER'S SICKNESS—EVIDENCE—INSTRUCTIONS—PLEADING—DEPARTURE.

1. Where the petition alleged that deceased was a member in good standing, at the time

of his demise, of a beneficiary association, and the answer alleged that he had been suspended for nonpayment of dues, allegations of the reply that he was unconscious at the time the last dues were payable, and that written notice of his sickness had been given the order, and it was its duty to pay the dues, do not constitute a departure for which the reply should be stricken out.

2. The admission of improper testimony without objection does not render proper the admission of subsequent testimony to the same effect over objection.

3. Where the constitution and by-laws of a beneficiary association provide that, if fees are not paid when due, the member's certificate shall be void, and continue so until payment, such nonpayment works a forfeiture without action of the lodge, notwithstanding the member was delirious and unconscious when they became due, unless he had some lawful excuse for not paying them.

4. The forfeited certificate of a member of a beneficiary association cannot be renewed after his death where the constitution and by-laws suspended it ipso facto for the nonpayment of an assessment.

5. The custom of the clerk of a local camp of a beneficiary association of accepting the dues of members in good health five days after they become due, being in accordance with the constitution and by-laws of the order, is no evidence of a waiver of payment when due by a sick member.

6. Where the by-laws of a beneficiary association provide that the local camp shall pay the dues of a sick member, provided he shall notify the clerk in writing, such notice may be written and signed by any one knowing the facts.

7. Where the by-laws of a beneficiary association provide that, if a member become sick and unable to pay his dues, the local camp shall pay them, provided he shall notify the clerk of the disability, the notice is insufficient where it does not state that he is unable to pay them.

8. Where a notice required by the by-laws of a beneficiary association should state that the member was sick and unable to pay his dues, an instruction submitting the question whether such a notice was given was erroneous, where the notice relied on contained no reference to the member's inability to pay the dues.

9. Where an instruction calls attention to evidence that the clerk of a local camp of a beneficiary association received his mail at a certain office, and that a notice was addressed to him at that office, and states that these circumstances may be taken into consideration, to determine whether the notice was received, and the jury, if they so find, may infer that the notice was received, it is erroneous, as being a comment on the evidence.

10. The proposed amendment to the state Constitution (article 2, § 28) providing that, in the trial by jury of civil cases in courts of record, three-fourths of the jury concurring may render a verdict, has been legally adopted, and become a part of the Constitution.

Appeal from Circuit Court, Cooper County; Jas. E. Hazell, Judge.

Action by William Smith and others against the Sovereign Camp of the Woodmen of the World on a beneficiary certificate. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Brome & Burnett and J. W. Jamison, for appellant. J. F. Rutherford, for respondents.

BURGESS, J. Defendant is a fraternal beneficiary association, incorporated under the laws of the state of Nebraska, issues cer-

tificates in the nature of life insurance policies on the lives of its members in the nature of life insurance, and is authorized to transact business as such association in this state. There was a local camp of defendant order at the village of Gooch Mill, in Cooper county, Mo. One J. E. Smith was a member of said camp, and held a beneficiary certificate of defendant, by the terms of which, upon the death of said member while in good standing in defendant order, the plaintiffs in this suit were entitled to receive an amount not to exceed the sum of \$2,000, based upon the proceeds of one assessment of all members of defendant order. Smith died on January 6, 1900. His beneficiaries instituted this suit for recovery of the amount specified in said certificate. The suit is brought upon the theory that the deceased at the date of his death was a member in good standing of defendant order, and that he had paid all dues and assessments levied against him, and that his certificate was in full force and effect. By its answer, defendant denied the good standing of the deceased, denied that he had paid assessments and dues as required, and affirmatively averred that the deceased failed to make the payment of assessments and dues due from him and payable to the clerk of the local camp on or before the 1st day of December, 1899. And that "at the time of the death of said Smith he had not paid the said assessments and dues, and that at the date of his death said Smith was and had been suspended from said order, and all rights and benefits under and by virtue of his beneficiary certificate, and his membership had been, and was, absolutely forfeited, and said beneficiary certificate was null and void, and the plaintiffs had no rights thereunder." To the answer plaintiffs filed a reply, in which it is stated that deceased [became sick and unconscious, and that on the 2d day of December, 1899, while in that condition, he was suspended by the local camp; that prior to his suspension, and while sick, he had served said camp with notice, as provided by by-laws and constitution of defendant, of such sickness, and that it thereupon became and was the duty of said local camp to pay his assessments and dues, and that, if it failed to do so, it was not the fault of said deceased; and that defendant is estopped from denying that said dues were not paid]. Defendant filed a motion to strike out this part of the reply included in brackets, upon the ground that it constituted a departure from the cause of action declared upon in the petition. This motion was overruled, and defendant excepted.

At the trial the application of deceased for membership in defendant order, together with the beneficiary certificate, and such sections of the constitution and by-laws of defendant order as bear upon the issues involved, were read in evidence. By a stipulation read in evidence on behalf of defendant, it was ad-

mitted that in the month of October defendant levied an assessment against all members, known as No. 108, and that the same was due and payable by each and every of such members during the month of November, 1899, and on or before December 1, 1899; that said assessment was regular in every respect, and that under it there was due from said deceased, upon the certificate named in plaintiff's petition, the sum of \$1; that there were due from him emergency fund dues in the sum of 10 cents, and camp dues in the sum of 15 cents; and "that said deceased failed and neglected to pay any and all of said amounts on or before December 1, 1899." It is further admitted that the amounts so due were never thereafter paid, and that said Smith also failed to pay assessment No. 109, levied upon all members of defendant order in good standing, and due and payable on the 1st day of January, 1900. Plaintiffs introduced testimony tending to show that on the 27th day of November, 1899, C. E. Smith, a brother of the deceased, wrote to B. F. Bedwell, the clerk of the local camp of defendant order, the following note: "Gooch Mill, Mo., Nov. 27, 1899. Mr. B. F. Bedwell—Dear Sir: I am requested to notify you that my brother Jasper is sick, and I wish you would see how his standing in the lodge is; fix his dues up all O. K., and I will settle with you. Yours respectfully, C. E. Smith"—and that he inclosed the same in an envelope, which he stamped and directed to the said Bedwell, at Gooch Mill, and then placed same in said post office. Defendant objected to the reading of said notice in evidence for the reason that it was wholly insufficient as a notice under the constitution and by-laws of defendant's order, and for the further reason that the mere depositing of the letter in the post office was not sufficient. These objections the court overruled, and defendant excepted. Over the objections of defendant, plaintiffs were permitted to introduce evidence tending to show that the said deceased was delirious and unconscious during the greater part of the time of his last illness, to which ruling of the court defendant also excepted. Lottie Smith, widow of the deceased, was a witness on behalf of defendant, and stated, in substance, that her husband was first taken sick on Tuesday before Thanksgiving, in November, 1899. Tuesday before Thanksgiving, was the 28th day of November. She testified further that on Monday, the day before, which was on November 27th, her husband was at Boonville. This was the day on which C. E. Smith says he wrote and mailed the letter to Bedwell. She also stated that C. E. Smith did not call to see his brother until more than a week after he became sick. Dr. Wilson, who was a witness on behalf of plaintiffs, testified that he was first called to visit deceased on November 29th. B. F. Bedwell, who was a witness on behalf of the defendant, testified

that he was clerk of the local camp of defendant order; that he resided within four or five miles of the town of Gooch Mill, which was his post office, but that he never received the letter alleged to have been mailed to him November 27, 1899, until the 1st day of February, 1901, when it came to him inclosed in another envelope, bearing the postmark of the Boonville, Mo., post office, accompanied by an anonymous note written on a scrap of brown paper, saying: "I found this in the road between Gooch Mill and Overton." Witness further testified that he had never heard anything about a written notice until he received said paper on Friday before the day of trial. He also testified that on the 27th day of November, 1899, the correct name and postmark of the post office at Gooch Mill was "Gooch Mills"; that the name of the post office and the stamp was changed about the 1st day of July, 1900, to "Gooch Mill"; that the envelope which purported to have been mailed to him on the 27th day of November, 1899, and to inclose the notice hereinbefore mentioned, bore the stamp of "Gooch Mill." The envelope was also introduced in evidence, and the postmark thereon was unmistakably "Gooch Mill." He further testified that thinking it strange a letter would be mailed on the 27th of November, 1899, and not received until the 1st of February, 1901, he compared the postmark on a number of old envelopes which he had, and which passed through the post office at Gooch Mills immediately before and after the said 27th day of November, 1899. A number of these envelopes bearing the postal stamp were introduced in evidence by defendant. With respect to his course of dealing in accepting payment of assessments and dues from members of the camp after they became due on the 1st day of the month, said witness testified that he had until the 5th of the month in which to make his report to the Omaha office, and that if a member came before him in good health before the forwarding of his reports in any month, and paid his assessments and dues, it was his custom to accept payment, and to report such member in good standing; that the members of the lodge knew that if they came before him in good health after the 1st of the month, and before the forwarding of his reports for that month, he (Bedwell) would receive their dues and report them in good standing. Evidence on behalf of plaintiffs tending to show that on the 16th day of December, 1899, there was a discussion among the members at a meeting of the local camp of the illness of the said Jasper Smith was admitted over the objections of the defendant, and defendant excepted.

At the close of all the evidence, defendant asked a peremptory instruction to the effect that, under all the evidence, plaintiffs could not recover, and the verdict of the jury must be for the defendant. This instruction was refused by the court, and defendant duly ex-

cepted at the time. The court then gave to the jury seven instructions. To the giving of Nos. 2, 3, and 4, defendant, by counsel, duly excepted at the time.

Instructions Nos. 2 and 3 are as follows:

"(2) If the jury find that the said J. E. Smith, now deceased, had paid his dues and assessments to defendant, and was in good standing up to and including the 1st day of December, 1899, and that on said date dues and an assessment were due defendant from said Smith, and that on or prior to said date said Smith became sick and unable to pay said assessment and dues on the 1st day of December, 1899, and that on or prior to said date he notified, in writing, the clerk of the defendant's local camp at Gooch Mills of the said disability, then it was the duty of said local camp to pay said assessment and dues. And in determining whether said notice was given to the clerk of said camp, if you find that B. F. Bedwell was the clerk of said camp, and that he was in the habit of receiving his mail at the post office of Gooch Mills, Missouri, and that on or before the 1st day of December, 1899, said Smith caused a notice in writing, stating his condition and inability to pay said assessment, to be properly addressed, stamped, and placed in the post office for said Bedwell, these are circumstances which may be taken into consideration in determining whether such notice was received by said Bedwell, unless said inference is overthrown by the other testimony.

"(3) If the jury find that Smith, on or prior to the 1st day of December, 1899, was sick or disabled, and while in that condition was unable to pay his assessment and dues to said defendant order; that he caused notice in writing to be given to the clerk of the local camp at said Gooch Mills, Missouri, as stated in the foregoing instruction No. 2, then the clerk of said camp had no right to report said Smith suspended for the month of December, 1899; and if defendant order did so suspend said Smith under these circumstances, and refuse to reinstate him, such facts constitute no defense in this case; and if you find that said Smith was suspended by the defendant under such circumstances, and while so suspended said Smith died, the defendant is liable to plaintiffs for the amount specified in said beneficiary certificate, and the jury will so find."

The jury returned a verdict for plaintiffs in the sum of \$2,063.33½, upon which judgment was rendered. Upon a poll of the jury, it was found that only nine of their number had agreed upon the verdict. In due time, defendant filed motion for new trial, which was overruled, and defendant granted an appeal to this court. Thereafter, more than four days after final judgment, but during the same term of court, defendant filed its motion, supported by affidavits, to set aside the order overruling its motion for a new trial, and to reinstate the same, upon the ground of newly discovered evidence. This

motion was also overruled, and defendant excepted.

It is insisted by defendant that as the petition alleged that the deceased was in good standing with the order at the time of his demise, and in the reply to the answer of defendant that he stood suspended, these allegations are inconsistent and irreconcilable, and the new matter in the reply constituted a departure from the cause of action declared upon in the petition, and therefore defendant's motion to strike out should have been sustained. The answer, among other things, by way of defense, alleged that "there was duly and legally levied by the proper officers of defendant, in conformity with the constitution and laws of defendant, upon all of the members of the association, one assessment for the month of November, 1899; and by the constitution and laws of said order, and by the terms of his said agreement so as aforesaid fully set forth, it became and was the duty of said J. E. Smith to pay to the clerk of said Gooch Mills Camp, on or before the 1st day of December, 1899, the amount of said assessment No. 106 charged against his certificate, to wit, the sum of one dollar, and the monthly camp dues for the month of November, 1899, being the sum of \$——, and the sum of ten cents, being the emergency fund dues above mentioned, yet said J. E. Smith failed and neglected on or before the said 1st day of December, 1899, to pay to the clerk of said camp the said several sums above mentioned, in the manner provided by the constitution and laws of said order, and by reason thereof said J. E. Smith became and was on the 1st day of December, 1899, suspended from said order, and his beneficiary certificate became and was wholly null and void." It is manifest from the pleadings that the suspension of deceased was first raised by the answer, and in the reply thereto it is alleged that deceased was in fact suspended as therein alleged; and in explanation of such suspension, and why it should not be a valid defense to this action, the facts and circumstances connected with it, and which brought it about, are set forth in the reply. It was therefore no departure from the cause of action declared upon in the petition, and the motion to strike out was properly overruled.

A point is made upon the action of the court in admitting evidence tending to show that deceased was delirious and unconscious during his last sickness, defendant contending that his condition was no legal excuse for the nonpayment of dues and assessments imposed upon deceased as a member of the order. It was stipulated between the parties that in the month of October, 1899, the defendant, by its proper officers, and in accordance with its constitution and laws, duly and legally levied upon all the members of defendant associations in good standing after November 1st one beneficiary fund assessment, which said assessment was designated and known as as-

assessment No. 108, and was due and payable by each and every of said members during the month of November, 1899, and on or before December 1, 1899; that said assessment was duly and legally promulgated, and notices of the same sent to the clerks of all the camps of defendant in the manner and form as by its constitution provided; that the amount of said assessment due from deceased, J. E. Smith, upon the certificate mentioned in plaintiffs' petition, and payable on or before December 1, 1899, was the sum of \$1; that the amount of emergency fund dues which was provided by the constitution and laws of defendant, due and payable from said Smith during the month of November (being on or before the 1st day of December), was the sum of 10 cents; that the sovereign camp general fund dues due and payable from the said deceased during the month of November, and on or before the 1st day of December, was the sum of 15 cents; that the camp general fund dues due and payable by said deceased for the said month of November, and on or before the 1st day of December, was the sum of — cents; that said deceased failed and neglected to pay any and all of said amounts on or before December 1, 1899; that there had been levied for the month of October an assessment in like amount as that for November, and the amount of emergency fund dues, sovereign camp general fund dues, and camp dues in like amount were due and payable from said deceased on or before the 1st day of November; that said deceased did pay all of said amounts, and never thereafter was there anything paid by him, or for him by any person, to the defendant or its officers. By the constitution and by-laws of the order, all certificates of insurance issued by it become null and void upon the failure of the assured to pay to the clerk of the camp, on or before the 1st day of each month, dues and assessments levied against him; and for failure to do so he stands suspended, and is not entitled to any benefits of the order. But plaintiffs say that defendant ought not to be heard to complain in this court of the ruling of the trial court in this regard, because the first objection made to this character of testimony was to the testimony of the witness Charles E. Smith, when two witnesses had previously given similar testimony without objection by defendant, and cross-examined by it with respect to the same matter. Plaintiffs rely upon the case of *Grocery Co. v. Smith*, 74 Mo. App. 419, as sustaining their positions. In that case it was said: "Nor do we think any harmful error was committed by the court permitting a witness to answer a question as to the value of the goods attached, since the same evidence had gone in without objection at an earlier stage of the trial. Conceding that, as an original proposition, such evidence was improper, it was not a substantial error materially affecting the merits of the controversy, in the circumstances of this case." It thus appears that the court thought that the ruling of the trial court was

erroneous, but it refused to reverse the judgment, upon the ground that the error was not a substantial one, affecting the merits of the controversy, in the circumstances of the case. And while we think the judgment in the case at bar should not be reversed because of the ruling of the court, under the circumstances of the case, we are unprepared to give assent to the proposition that because a party to a suit sits by, and, without objection, permits a witness introduced by an adverse party to testify to matters which are inadmissible in evidence, and cross-examines him with respect to such matters, he is thereby estopped from thereafter in the same case objecting to the same kind of evidence when offered. While plaintiffs admit that the assured did not pay his assessment on December 1, 1899, which evidently operated a forfeiture of his policy, notwithstanding he was delirious and unconscious when it became due (2 *Beach on Insurance*, § 981; *Carpenter v. Centennial Mutual Life Association*, 68 Iowa, 453, 27 N. W. 456, 56 Am. Rep. 855; *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765), unless its payment was waived by the order, or there was some good and lawful excuse for not paying it, the assured was suspended from the time default in the payment was made. The constitution and by-laws of the order expressly provided that if the admission fees, dues, or beneficiary fund assessment levied against the person named in the certificate shall not be paid to the clerk of his camp, as required by the constitution and laws of the order, the certificate shall be null and void, and continue so until payment is made in accordance therewith. But plaintiffs contend that notwithstanding these provisions the assured did not become suspended by reason of his failure to pay his assessment on the 1st day of December, 1899, but, in order to that end, some action must have been taken by the board in that regard, and cite *Puhr v. Grand Lodge*, 77 Mo. App. 47, as supporting this contention; but the constitution and by-laws of the order in that case expressly provided that members who did not pay their assessments at the legal time should be notified by the grand secretary or accountant of the lodge of the date of the lodge session that, in case they did not pay their assessments in arrears in the course of the next following month, they would at the last meeting in that month be stricken from the membership list of the mortuary fund, while no such provision is contained in the charter of defendant. This case does not, therefore, sustain plaintiffs' contention. *Lewis v. Benefit Ass'n*, 77 Mo. App. 586, is also relied upon by plaintiffs, but that case is bottomed upon the case of *Puhr v. Grand Lodge*, supra, and for the same reason is not in point in the case in hand. On the other hand, it was held in *Borgraefe v. Knights of Honor*, 22 Mo. App. 127, that under a law of a benevolent society which makes the nonpayment of assessment for a given period after notice operate as a suspension, ipso facto, of the de-

linquent member, it is not necessary that the suspension should be judicially determined by any judicatory act of the order. The same rule is announced in *Hogins v. Supreme Council*, 76 Cal. 109, 18 Pac. 125, 9 Am. St. Rep. 173. Nor can such certificate be renewed after the death of the assured in case the constitution and by-laws of the association suspend the beneficiary certificate, ipso facto, by the nonpayment of the assessment. *Harvey v. Grand Lodge*, 50 Mo. App. 472.

Another insistence by plaintiffs is that Bedwell, who was clerk of the camp for eight years, had, by his course of dealing, established a custom of receiving from the members of the order their dues and assessments long after the time required by the law of the order, and by reason thereof induced the assured to believe that he was not required to pay his assessment and dues on the 1st day of the month, and in consequence thereof waived the forfeiture. Bedwell testified, in substance, that he reported deceased suspended on the 2d of December, 1899; that if, after the 1st day of the month, and before he had forwarded his reports for that particular month, a member came before him and tendered payment while in good health, he would accept payment and report him in good standing. Section 115 of defendant's by-laws expressly confers authority upon the clerk to accept dues and assessments when so tendered by a member while in good health. There was no waiver, therefore, of any condition or requirement of defendant's constitution and by-laws, or of the contract of the deceased, through any act of the clerk of the local camp. The acceptance by him of assessments, under the circumstances, was compliance with, and not a modification or waiver of, defendant's law. This being true, it is unnecessary to cite authorities showing that the clerk, under the constitution and by-laws of defendant, was without power or authority to bind the company, or to waive any provision of its law, by a course of conduct in accepting the payments of assessments of delinquent members.

Plaintiffs seek to avoid the fact of a forfeiture for nonpayment by showing what they claim to be a compliance with section 126 of defendant's by-laws, entitled "Indigent Sick Members," by which it is provided, in effect, that if a member in good standing shall become sick, and while in that condition shall be unable to pay his dues and assessments, he shall not be suspended, but it shall be the duty of the local camp to pay them, provided he shall notify the clerk of his camp, in writing, of said disability each month before he becomes delinquent. The sufficiency of the notice in this regard is challenged upon the ground that it is wholly insufficient to comply with defendant's by-law, in that there is nothing upon the face of it which indicates that the deceased had authorized or had any knowledge of it. It is true that the by-laws provide that if he

(the assured) shall notify the clerk of his camp, in writing, of his disability to pay his assessments each month before he becomes delinquent, the camp will pay them for him; and the notice in question is signed by his brother C. E. Smith. We are not, however, inclined to place upon it the strict construction contended for by defendant, but, being in the interest of the assured, we think any person knowing the facts may give the notice, and sign his own name to it; otherwise, if a member of the order should be so unfortunate as to become unable, by sickness or disease, to give such notice under his own signature, or to direct it to be done, he would forfeit his policy, which we are satisfied was never contemplated or intended by the order, but that any written notice calling the attention of the camp to the condition of the assured, and his inability to pay, no matter by whom given, is all that is required. Moreover, the notice says, "My brother Jasper is sick, and I am requested to so notify you," and then requests the clerk to see how his standing in the lodge is, and to fix his dues up. The inference to be drawn from the language in which the notice is couched is that the request mentioned therein was by the assured. But the notice nowhere says that the assured, by reason of sickness or disability, was unable to pay his assessment and dues, and in this respect does not comply with the by-laws. It was only under these conditions that the camp had the authority to draw an order for a sufficient sum each month to keep the assured in good standing during his illness, but in no case could such an order be drawn for the benefit of any member who was delinquent. The notice was, we think, insufficient.

From what has been said, it is immaterial whether the clerk of the camp received the notice or not, and therefore unnecessary to pass upon that question.

Instruction No. 2 given by the court is erroneous, in that it assumes that the assured became sick and unable to pay his assessment and dues on the 1st day of December, 1899, and that on or prior to said date he notified, in writing, the clerk of the defendant's local camp at Gooch Mills of the said disability, where there is nothing said in the notice with respect to, or indicative of, the inability of the assured to pay. It is erroneous for the reason that it submits to the jury the construction of a written instrument, to wit, the notice, which was for the court, and not the jury. *Comfort v. Ballingal*, 134 Mo. 281, 35 S. W. 609, and authorities cited. Moreover, it is misleading and comments on the evidence, in that it calls the attention of the jury to specific facts in evidence, and then tells them that "these are circumstances which may be taken into consideration, whether such notice was received by said Bedwell, and they may from said facts, if they so find, infer that the letter was received by the said Bedwell, unless

said inference is overthrown by other testimony." *Kaiser v. South St. Louis Mutual Life Insurance Co.*, 7 Mo. App. 579; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506.

There is no merit in the point made in the motion for new trial that the joint and concurrent resolution of the Fortieth General Assembly of the state of Missouri submitting for adoption to the qualified voters of the state an amendment of section 28 of article 2 of the Constitution of the state of Missouri, providing that, in the trial by jury of all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict, was not legally adopted, and has not become a part of the Constitution of the state. *Gabbert v. Chicago, R. I. & P. Ry. Co.*, 171 Mo. 84, 70 S. W. 891.

There was no error committed in overruling the motion to set aside the order overruling defendant's motion for a new trial and to reinstate the same.

For these intimations, the judgment is reversed, and the cause remanded. All of this division concur.

STATE ex rel. TOWN OF CANTON et al. v. ALLEN, State Auditor.

(Supreme Court of Missouri. Dec. 9, 1903.)

MUNICIPAL CORPORATIONS—CHARTER—ELECTRIC LIGHT PLANT—PUBLIC AND PRIVATE LIGHTING—SPECIAL ELECTION—RESOLUTION—ORDINANCE—PROPOSITION TO VOTERS—AMBIGUITY—CONSTITUTIONAL LAW—STATUTES.

1. Under Rev. St. 1899, § 6276 (Laws 1873, p. 210), providing that the legislative authority of cities of a certain class shall "order" an election to be held for the purpose of testing the sense of the qualified voters on propositions to become indebted, or to increase the debt thereof, an order or resolution passed with the same formalities as an ordinance is by the city's charter required to be passed is sufficient for the purpose.

2. A resolution of a city council ordering an election for the purpose of testing the sense of the qualified voters on a proposition to increase the debt of the city, requiring 15 days' previous notice of the election, is complied with by publication of the notice on the 4th, 11th, and 18th of the same month in a weekly newspaper; 19 days having elapsed from the time of the first insertion and the election.

3. The proposition submitted for the purpose of testing the sense of the qualified voters of a city was to increase the debt by issuing bonds for the purpose of constructing, maintaining, and operating or purchasing an electric light plant to supply the city and all persons therein with light; thereby authorizing the town to increase its debt by issuing bonds. *Held*, that an objection that this was equivalent to two propositions—one, to increase the debt by issuing bonds for the purpose of constructing, maintaining, and operating an electric light plant, and the other, to increase the debt by issuing bonds for the purpose of purchasing an electric light plant already in the town—and that the two propositions, being submitted together, made it impossible for any voter, by his vote, to say which of the two propositions he favored or opposed, is without merit.

4. A resolution of a city council providing for a special election to test the sense of the qualified voters thereof on a proposition to in-

crease the city's debt designated a voting place in each of the four wards of the city. There was an ordinance then in force requiring all special elections to be held in one place, to be designated by the mayor. *Held*, a mere irregularity, which would not invalidate the election, or discredit the bonds issuable as the result of such election.

5. A city ordinance ordering the issuance of bonds, and providing that the bonds are to be issued and the taxes levied and collected for the purpose of enabling the city to erect, maintain, and operate or purchase an electric plant for furnishing light to all persons and corporations residing and doing business therein, is not in contravention of Const. art. 10, § 1, providing that the taxing power may be exercised by municipal corporations for corporate purposes; nor section 3, limiting the levying and collection of taxes for public purposes only; nor section 10, empowering the General Assembly to vest in cities the power to assess and collect taxes for municipal purposes.

6. Act March 23, 1897 (Laws 1897, p. 49), entitled "An act to enable cities, towns and villages operating under special charters and containing ten thousand inhabitants or less to issue bonds for" various specified purposes, and also "the purpose of constructing or purchasing waterworks and electric light plants, is not in contravention of Const. art. 4, § 28, providing that no bill, except general and free public school appropriation bills, shall contain 'more than one subject, which shall be clearly expressed in the title'."

7. Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, is not violative of Const. art. 2, § 20, forbidding the taking of private property for private use.

8. Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, is not violative of Const. art. 10, § 8, requiring taxes to be levied.

9. Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, is not violative of Const. U. S. art. 1, § 10, nor Const. Mo. art. 2, § 15, forbidding the passage of any law impairing the obligation of contracts, though an ordinance authorizing the issue of bonds for such purpose is passed while private persons, to whom had been granted an exclusive franchise, were operating a plant for that purpose, and the franchise had several years to run.

10. Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, and authorizing the exercise of the right of eminent domain, is not violative of Const. art. 2, § 20, forbidding the taking of private property with or without compensation, unless by consent of the owner, except for private ways of necessity, drains, and ditches.

11. Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, and authorizing the acquisition of property for the purpose by purchase or the exercise of the right of eminent domain, is not violative of Const. art. 2, § 21, forbidding the taking of private property for public use without just compensation.

12. Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, is not violative of Const. art. 2, § 30, providing that no person shall be deprived of property without due process of law.

In Banc. Mandamus by the state, on the relation of the town of Canton and others, against Albert G. Allen, state auditor. Writ granted.

Arthur Hilbert and W. M. Hilbert, for relator. E. C. Crow, Atty. Gen., Sam B. Jeffries, and R. W. Ray, for respondent.

BURGESS, J. On the 15th day of June, 1903, the relators filed in this court their petition for a writ of mandamus directed to Albert O. Allen, state auditor of Missouri, commanding him to make or cause an examination to be made in order to ascertain whether the law was complied with in the issuance of certain bonds to the amount of \$10,000, issued by said city, for the purpose of constructing, maintaining, or rating, or purchasing an electric plant to supply the town of Canton, and all persons and parties therein, with light, and if upon such examination it be found the law has been complied with in the issuing of said bonds, to register the same, and to certify by indorsement thereon that all the provisions of the laws of the state authorizing their issue have been complied with. The defendant Allen, valued the issuance of the writ, and made his return thereto.

The relators, in their petition, stated that the town of Canton now is, and was at the time of all the transactions therein mentioned, a municipal corporation containing less than 10,000 inhabitants, organized under a special charter—an act of the General Assembly of the state of Missouri approved March 19, 1873 (Laws 1873, p. 208); that F. W. Benbow is mayor of said town, and his co-relators are members of the board of trustees of said town; that the defendant, Albert O. Allen, is the auditor of the state, and as such, when bonds are voted and issued by municipal corporations for the purpose of constructing, maintaining, and operating or purchasing an electric plant to supply such city or town, and all persons and parties therein, with light, it was and is his duty, when the bonds are presented to him, with the proper proof that the law has been complied with in the issue of such bonds, to register them in a book or books provided for that purpose, and to certify by indorsement on such bond or bonds that all the conditions of the law authorizing their issue have been complied with.

"Your relators further state that, in pursuance with the authority given them by the laws of the state of Missouri, desiring to test the sense of the qualified voters of the town of Canton on a proposition to increase the indebtedness of the town by issuing ten thousand dollars in bonds for the purpose of constructing, maintaining, operating, or purchasing an electric plant to supply the town of Canton, and all persons and parties therein, with light, they caused fifteen days' previous notice to be given by publication in a newspaper printed and published in the town of Canton of an election to be held on the 23d day of September, 1902, for the purpose of testing the sense of the qualified voters of the town of Canton on a proposition to increase the bonded indebtedness of the town of Can-

ton by issuing ten thousand dollars in bonds for the purpose of constructing, maintaining, and operating or purchasing an electric plant to supply the town of Canton, and all persons and parties therein, with light, which said order of notice was made on September 2, 1902, by the board of trustees, and approved by the mayor, a copy of said order is as follows: 'It is hereby ordered by the board of trustees of the town of Canton, state of Missouri, that a special election be held in the several wards in the town of Canton, county and state aforesaid, on the 2d day of September, A. D. 1902, to wit: First Ward, T. J. Maggard & Son's office; Second Ward, at the Canton House sample room; Third Ward, at the sheriff's office in courthouse; Fourth Ward, at Thomas W. Furlong's office; Fifth Ward, at Starr & Zahn's Lumber Company office—for the purpose of testing the sense of the qualified voters of said town of Canton upon a proposition to increase the debt of the town of Canton by issuing bonds of said town to the amount of ten thousand dollars for the purpose of constructing, maintaining, and operating or purchasing an electric light plant to supply said town of Canton, and all persons and parties therein, with light; said bonds to be known and designated as electric light bonds of the town of Canton, state of Missouri. All of said bonds shall be dated on the 1st day of October, A. D. 1902, and shall bear no greater rate of interest than four per cent. per annum, payable semiannually, and having annexed thereto interest coupons. Said bonds and interest-bearing coupons to be made payable to bearer at Citizens' Bank of Canton, at Canton, Missouri. All of said bonds shall be of the denomination of five hundred dollars each, and to be numbered from 1 to 20 inclusive. Said bonds to become due as follows: Number one to be due five years from date, number two to be due six years from date, number three to be due seven years from date, number four to be due eight years from date, number five to be due nine years from date, number six to be due ten years from date, number seven to be due eleven years from date, number eight to be due twelve years from date, number nine to be due thirteen years from date, number ten to be due fourteen years from date, numbers eleven to twenty inclusive to be due twenty years from date. Said bonds numbers eleven to twenty, inclusive, or one or more of them, in order of their numbering, may be paid on the 1st day of October of any year after ten years from the date hereof, at the option of the said town of Canton, which option shall be exercised by the board of trustees of the town of Canton, for and in behalf of said town, by giving notice in writing to said Citizens' Bank of Canton, in the town of Canton, Missouri, at least ten days before the first day of October of any such year. At said election the voters shall vote by ballot, and those voting in favor of the increase of the debt of the town for the purpose of constructing, maintaining, and operating or pur-

chasing an electric light plant to supply said town of Canton, and all persons and parties therein, with light, shall have printed on their ballots: "For Increase of Debt. Yes." And those voting against the increase of the debt of the town for the purpose of constructing, maintaining, operating, or purchasing an electric plant to supply said town of Canton, and all persons and parties therein, with light, shall have printed on their ballots: "For Increase of Debt. No." It is further ordered that at least fifteen days' previous notice shall be given of the election herein ordered by publication in the Canton News, a weekly newspaper published in the town of Canton; said notice to be signed by the mayor and attested by the town clerk.

"Relators further inform the court that after said election, an ordinance duly passed by the board of trustees of the town of Canton, signed by the mayor, attested by the clerk, and published, declared the result of said election to be that the following proposition was carried and adopted by the vote and assent of two-thirds of the qualified voters of the said town of Canton voting at said election, as certified by the judges and clerks of said election to the board of trustees of the said town of Canton, and as counted and cast up by the town clerk, in the presence of the board of trustees, on September 24, 1902. Said ordinance is as follows:

"Ordinance No. 107.

"An ordinance declaring the result of the special election held in the town of Canton on the 23rd day of September, A. D. 1902, and providing for the issuing of bonds of said town of Canton for the purpose of constructing, maintaining and operating or purchasing an electric plant to supply the town of Canton and all persons and parties therein with light.

"Be it ordained by the board of trustees of the town of Canton, Missouri, as follows:

"Section 1. At a special election held in the town of Canton on the 23rd day of September, A. D. 1902, under and in accordance with the statutes of the state of Missouri, in such case made and provided, the following proposition was carried and adopted by the vote and assent of two thirds of the qualified voters of said town voting at said election as certified by the judges and clerks of said election to the board of trustees of said town of Canton and as counted and cast up by the town clerk in the presence of said board of trustees on the 24th day of September, A. D. 1902, which proposition was as follows to-wit: To increase the debt of the town of Canton by issuing bonds of said town to the amount of ten thousand dollars for the purpose of constructing, maintaining and operating or purchasing an electric plant to supply said town of Canton and all persons and parties therein with light thereby authorizing the town of Canton to increase the debt of the town of Canton by issuing the

bonds of the town to the amount of ten thousand dollars.

"Sec. 2. There are hereby ordered to be issued bonds of the town of Canton in the name of the town in the amount of ten thousand dollars.

"Sec. 3. Said bonds to be known and designated as electric light bonds of the town of Canton, state of Missouri. All of said bonds shall be dated the first day of October, A. D. 1902, and shall bear no greater interest than four per cent. per annum payable semi-annually and having annexed thereto interest coupons. Said bonds and interest coupons to be made payable to bearer at Citizens' Bank of Canton at Canton, Missouri. All of said bonds to be signed by the mayor of the town and by the clerk of the town and each bond shall have affixed thereto the corporate seal of the town and interest coupons shall be signed by the mayor and the town clerk. All of said bonds shall be of the denomination of five hundred dollars each and to be numbered from 1 to 20 inclusive. Said bonds to become due as follows: Number one to be due five years from date, number two to be due six years from date, number three to be due seven years from date, number four to be due eight years from date, number five to be due nine years from date, number six to be due ten years from date, number seven to be due eleven years from date, number eight to be due twelve years from date, number nine to be due thirteen years from date, number ten to be due fourteen years from date, numbers 11 to 20 inclusive to be due twenty years from date. Said bonds from numbers 11 to 20 inclusive or one or more of them in order of their numbering may be paid on the first day of October of any year after ten years from the date thereof, at the option of the said town of Canton, for and in behalf of said town, by giving notice in writing to said Citizens' Bank of Canton in the town of Canton, Missouri, at least ten days before the first day of October of any such year.

"Sec. 4. The board of trustees shall annually levy and collect on the value of all property within the town of Canton taxable by law, a tax of one tenth of one per centum, or so much as may be necessary for the purpose of paying the interest coupons on said bonds as they may mature, which said amount shall be paid in cash. Said tax shall be known as electric light interest tax; and said board of trustees of the town of Canton shall annually levy and collect on the value of all property within the town of Canton taxable by law, a tax not exceeding one tenth of one per centum, to be known as electric light sinking fund, which shall constitute a sinking fund to pay off, cancel and redeem the principal of said bonds whenever the same shall mature or be called in for redemption, and said tax shall be paid in cash.

"Sec. 5. Said bonds shall be registered as provided by law, a copy of this ordinance

shall be printed on the back of each of said bonds and shall be referred to in the body of said bonds, and shall be considered a part thereof. Upon the back of each bond shall be printed a certificate to be signed and certified by the Auditor of the state of Missouri, stating that the law has been complied with in the issue of the within bond and that it has been duly registered in his office as is required by law.

"This ordinance shall be in force from and after its publication.

"Approved on this 24th day of September, A. D. 1902. F. W. Benbow, Mayor of Town of Canton.

"Attest: E. F. Henderson, Town Clerk."

"Said relators further inform the court that thereafter, in pursuance with the authority given them by the laws of the state of Missouri, they issued bonds of the town of Canton, in the name of the town of Canton, to the amount of ten thousand dollars, for the purpose of constructing, maintaining, and operating or purchasing an electric plant to supply the town of Canton, and all persons and parties therein, with light; that in the issuing of said bonds they complied with all the laws of the state of Missouri made and provided for the issuing of bonds for the purpose of constructing, maintaining, and operating or purchasing an electric plant to supply the town, and all persons and parties therein, with light. Relators further inform the court that they presented the bonds so issued to the State Auditor, Albert O. Allen, for registration, and paid the said Albert O. Allen, State Auditor, the requisite fee for registering the same, and submitted to him the proper proof that they had complied with all the requirements of the law in the issuing of said bonds. Although your petitioners have complied with the law made and provided in such case and for such purpose, the said respondent, as Auditor for the state of Missouri, has refused, and still fails and refuses, to register said bonds, and to indorse on them a certificate setting forth that they have complied with the law made and provided for issuing bonds for the purpose of constructing, maintaining, and operating or purchasing an electric plant to supply the town, and all persons and parties therein, with light; that by reason of the premises your relators have been, and still are, prevented from exercising their rights, in constructing, maintaining, and operating or purchasing an electric plant, and they have no remedy in the premises by or through ordinary process or proceedings by law. Wherefore they pray this honorable court to award against the said respondent, Albert O. Allen, State Auditor, a writ of mandamus, commanding the said State Auditor, Albert O. Allen, to make an examination, or to cause an examination to be made, in order to ascertain whether the law has been complied with in the issuing of said bonds, and if,

upon such examination, it is found that the law has been complied with in the issuing of said bonds, to register the same, and to certify by indorsement thereon that all the provisions of the law of the state of Missouri authorizing their issue have been complied with, and for such other process and remedies as may to the court seem just and equitable."

The Auditor, in his return, admits all the allegations in the petition, down to and including that paragraph, which reads as follows:

"Respondent further admits that the bonds so authorized under the purported election and notice thereof, and the ordinance so attempted to be passed, were executed by said relator and presented to the respondent for registration."

The return then proceeds as follows:

"Respondent further avers that, soon after the said bonds were filed with him for registration, he, as State Auditor aforesaid, made an examination of the proof submitted with said bonds, and upon said examination found that relators had not complied with all the requirements of the law authorizing their issuance by relator the town of Canton, and their registration by respondent as State Auditor, for the following reasons:

"That by section 1 of article 2 of said charter of the town of Canton, which is a special and public act, the corporate powers and duties of said town are vested in the mayor and board of trustees. That because of said charter provisions said town could exercise no corporate powers, except by the co-ordinate action of the mayor and board of trustees of said town. That said election was ordered by the board of trustees of said town, instead of by the co-ordination of the mayor and board of said town. Because the holding of said election was never authorized or ordered by an ordinance of said town duly passed by its board of trustees, and duly signed by its mayor, and published in a newspaper published in said town within thirty days after its passage. That said special election, under the law, could not be ordered except by an ordinance of said town of Canton theretofore duly passed by its board of trustees, and duly signed by its mayor, and published in a newspaper published in said town within thirty days after its passage, and that said special election was illegal and void.

"Because at least fifteen days' notice of said special election was not given in a newspaper published in said town, or in any other way. Because at said special election the proposition voted on and declared by said ordinance to be carried and adopted by the assent of two-thirds of the qualified voters of said town voting at said election held as aforesaid was as follows, to wit: 'To increase the debt of the town of Canton by issuing bonds of said town to the amount of ten thousand dollars for the purpose of con-

structing, maintaining and operating or purchasing an electric light plant to supply said town of Canton, and all persons and parties therein, with light, thereby authorizing the town of Canton to increase the debt of the town of Canton by issuing bonds of the town to the amount of ten thousand dollars.' That said so-called proposition contained two propositions—one; to increase the debt of the town by issuing its bonds to the amount of ten thousand dollars for the purpose of constructing, maintaining, and operating an electric plant to supply the town, and all parties and persons therein, with light; the other proposition, to increase the debt of the town by issuing its bonds for said sum for the purpose of purchasing an electric plant already in said town to supply said town, and all persons and parties therein, with light. That said two propositions being contained together in one made it impossible for any voter, by his vote, to say which of the two propositions contained in said so-called proposition he favored or opposed. Because said manner of submission rendered it impossible for any voter to vote for or against the proposition he favored or opposed, said election was illegal and void.

"That although said town, by its ordinance, declared that the said election authorized it to issue the bonds described in said petition, and heretofore referred to, in said amount, and ordered said bonds, in said amount, number, and description, to be issued, it did not by said ordinance say whether said bonds were to be issued for the purpose of obtaining the means with which to construct, maintain, and operate an electric plant to supply said town, and all persons and parties therein, with light, or whether said bonds were to be used to provide the means with which to purchase the electric plant which now is, and for many years has been, constructed and operated in said town, to be used to supply the said town, and all persons and parties therein, with light.

"That at said special election held as aforesaid a voting precinct was established by said town and its officers and agents in one place in each of the five wards in said town, and the voters residing in said ward, respectively, were required to vote at the voting place in each one of the five wards of said town, respectively, and votes were actually cast in one place in each of the five wards in said town at said special election held as aforesaid. That an ordinance of said relator the town of Canton, in full force and effect when said special election was held (the same being section 3, c. 3, of the Revised and Amended Ordinances of 1887 of said town), printed in book form by said town, requires 'all special elections to fill a vacancy occurring in the office of mayor, recorder or marshal, or held for any other purpose, to be held at one place in said town, such place to be designated by the acting mayor.' The special election was therefore illegal and

void, because in violation of said ordinance; there being no other ordinance regularly passed and published providing for the places at which said election should be held.

"Because said ordinance of the said town, passed as aforesaid, ordering the issuing of said bonds, and providing for said tax of one-tenth of one per centum to pay the principal of said bonds, contravenes section 1 of article 10 of the Constitution of Missouri, and also contravenes section 3 of said article 10 and section 10 of said article 10 of the Constitution of Missouri, in this: that it provides that the bonds aforesaid are to be issued, and the taxes aforesaid are to be levied and collected, for the purpose of enabling said town to erect, maintain, and operate or purchase an electric plant, with which not only to light the streets, alleys, and public places of said town, but also to erect poles along the streets, alleys, and public places in said town, and string the same with wires for furnishing electric light to all persons and corporations residing and doing business in said town, which is not a public purpose, not a corporate purpose, nor a town purpose, and therefore is in contravention of said sections 1, 3, and 10 of article 10 of the Constitution of Missouri.

"Because the pretended authority for holding said election and issuing said bonds is an act of the General Assembly of the state of Missouri, entitled 'An act to enable cities, towns and villages operating under special charters and containing ten thousand inhabitants or less to issue bonds for the purpose of macadamizing, paving, guttering, curbing and improving streets and constructing public sewers within such cities, towns and villages, and for the purpose of constructing or purchasing water-works and electric light plants, with an emergency clause,' approved March 23, 1897 (Laws 1897, p. 49), which said act contravenes section 28, art. 4, of the Constitution of Missouri, in this: that said title contains more than one subject, and in this: that said law provides that the municipal corporations named in the title to said act shall have power and authority to issue their bonds, and construct, maintain, and operate or purchase electric plants with which to supply such cities and towns, and all persons or parties therein, with electric light for private consumption, while there is nothing in said title to indicate that said act was intended to give said cities and towns authority to purchase an electric light plant with which to engage in manufacturing and supplying electric lights for private consumption to persons and corporations residing or doing business in such city or town.

"Because said act of the General Assembly of the state of Missouri approved March 23, 1897, and entitled as aforesaid, contravenes sections 1, 3, and 10 of article 10 of the Constitution of Missouri, because the same provides that the cities and towns mentioned therein shall have power and authority to

issue their bonds to construct, maintain, and operate electric plants, not only to supply such cities and towns with electric light for their streets, alleys, and other public places, but also to supply all private persons and parties therein with electric light for private consumption, which is not a corporate purpose, nor a public purpose, nor a town purpose, and said act of the Legislature therefore contravenes said section 1 of said article 10 of the Constitution of Missouri, by which the Legislature of this state is prohibited from granting to municipal corporations power to levy taxes for any other than corporate purposes, because said section 3 of said article 10 of said Constitution provides 'that taxes may be levied and collected for public purposes only.' Because said section 10 of article 10 of the Constitution of Missouri prohibits the General Assembly from passing any law giving authority to any town to levy taxes for any other than a public purpose.

"Because said act of the General Assembly of the state of Missouri of March 23, 1897 (Laws 1897, p. 49), contravenes section 20 of article 2 of the Constitution of Missouri, in this: that it authorizes the municipality therein named to provide electric plants to be owned by the municipality, with which to supply such municipality, and all persons and parties therein, with light, and provides that for the purpose of doing so, said municipalities may issue bonds to provide means for paying for such plants, which said bonds, and the interest thereon, shall be paid by taxing the citizens of such town and their property, and also the property of nonresidents of said town therein situated. That the erection of a plant with which to supply private persons and parties with electric light, for their private use and consumption, and paying for the same by taxation, is taking private property for private use, in contravention of said section 20 of article 2 of the Constitution of Missouri.

"Because said ordinance of said town of Canton authorizing the issue of said bonds as aforesaid contravenes said section 20 of said article 2 of the Constitution of Missouri, in this: that it authorized the issue of bonds by said town of Canton for the purpose of raising means to provide an electric plant to be owned by the town and operated by it, with which to supply such town, and all private persons and parties therein, with electric lights, and provides that said bonds, and the interest thereon, shall be paid by taxing the citizens of such town, and their property, and also the property of nonresidents of said town, situated therein. That supplying electric light to private persons and parties is a private use, and that raising money by taxation to provide a plant with which to supply electric light to such private persons and parties for their private use and private consumption is taking private property for private use, in contravention of said section 20

of article 2 of the Constitution of Missouri.

"Because said act of the General Assembly of March 23, 1897, violates section 3 of article 10 of the Constitution of Missouri, which declares that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, in this: that the electric light plant proposed to be erected by said town with the proceeds of the bonds sought to be registered, which said plant would be used not only to supply electric light for the streets and public places of said town, but also to supply electric light to all private persons and parties therein for private consumption, would not and could not be taxed for state, county, or municipal purposes, while the electric light plant which now is, and was at the time said special election was held, and which was and is owned by a private corporation of this state, and is engaged in the electric light business in said town, and is, and for a long time past has been, under contract to furnish electric light to many of the citizens of said town, must and will be compelled to pay taxes to the state, county, and also to the town of Canton.

"Respondent states that on the 3d day of September, 1891, the relator town of Canton granted a franchise right for an electric light plant to be erected, maintained, and operated within the corporate limits of said town for the period of twenty years from said date, and therein granted authority for the use of the streets, alleys, and public grounds of said town for the erection of the poles, wires, and other necessary appliances, and provided that the franchise therein granted should not be exclusive. Said franchise also provided that the setting of poles and the stringing of wires should be under the control of the mayor and the board of trustees, and that the company to which said right was granted, its successors and assigns, should furnish the said town of Canton with incandescent and electric lights, as the town might thereafter contract for, of thirty-two candle power, at not exceeding one dollar and fifty cents per month per light, from dark until midnight (moonlight schedule), and that said company so operating under said franchise should furnish to the residents of said town incandescent and electric lights for commercial and domestic purposes, as may be thereafter contracted for, of sixteen candle power each, at not exceeding the following rates: One 16 candle power lamp, per month, seventy five cents; two 16 candle power lamps, seventy cents each per month; three or four 16 candle power lamps, sixty-five cents each per month; five to twelve 16 candle power lamps, sixty cents each per month; all night lamps, ninety cents per month, or the same lights shall be furnished by meter at not exceeding one cent per hour per light of 16 candle power.

"And respondent further says that, soon after the granting of said franchise, the com-

pany to which it was granted, or its successors and assigns, constructed an electric light plant in accordance therewith, and has used and exercised said franchise right from said time to the present day, and is now so using and exercising, and that said franchise has yet several years to run before its expiration, and said town, by ordinance, having induced the company to construct a plant as aforesaid, and to expend large sums of money in its improvement and extension, is without authority to construct an electric light plant for the furnishing of light to the inhabitants of said town for domestic and commercial use; that said act of the General Assembly approved March 23, 1897, does not apply in so far as it affects towns, cities, and villages in this state so situated and conditioned, only to the extent of giving said town authority to purchase the electric plant previously constructed under and by virtue of the franchise grant therefrom; and that said town was without authority, under said act, to construct an electric light plant to furnish domestic and commercial lighting, so long as said franchise is in force, for the reason that it places the burden of taxation upon a certain business to support and maintain a competitor in that business, deprives persons and corporations of property without due process of law and without just compensation, and impairs the obligations of contracts, contrary to the provisions of sections 15, 20, 21, and 30 of article 2 of the Constitution of Missouri, and section 10 of article 1 of the Constitution of the United States.

"Respondent further states that he holds the said fee paid to him by relator for the registration of said bonds with the understanding and upon condition that it shall be returned to the said relator as soon as or whenever it is judicially determined that said bonds are not eligible for registration, and that said money is held by him with the full knowledge, understanding, and agreement of said relator, and that respondent is now, and always has been, ready and willing to return said money to relator upon demand, regardless of the understanding for which it is being held.

"Respondent, for further return, denies each and every allegation in the petition not herein expressly admitted or denied.

"Wherefore, respondent having fully answered as to his official conduct in the premises, and having shown that said bonds are not eligible to registration, he asks to go hence with his costs."

Relator filed reply to the return of the respondent, in which it denied all affirmative allegations therein.

The relator the town of Canton was organized under a special charter (Laws 1873, p. 210), and by the provisions of section 6275, Rev. St. 1899, which applies to such towns, is conferred the authority to issue its bonds to construct, maintain, and operate or purchase waterworks and electric plants to sup-

ply such cities or towns, and all persons and parties therein, with water and light. And by the following section (6276) it is provided that, for the purpose of testing the sense of the qualified voters of such city or town upon a proposition to become indebted or to increase the debt thereof by issuing bonds for the purpose mentioned in the preceding section, the council, trustees, or other legislative authority of such city or town shall order an election to be held, of which not less than 15 days' previous notice shall be given by publication in some newspaper published in such city or town. Such election shall be held, and judges and clerks thereof appointed, as in case of other elections in such city or town, or in such manner and under such regulations as may be prescribed by ordinance. Such special elections may be held at the time and place of a general election, and the judges, clerks, and other officers of such general election may act as judges, clerks, and other officers of such special election. At an adjourned meeting of the board of trustees of the town of Canton held at the office of the mayor of said town on September 2, 1902, it was ordered by said board that a special election be held in the several wards in said town on the 23d day of September, 1902, at four places in the four different wards in said town, for the purpose of testing the sense of the qualified voters of said town upon a proposition to increase the debt of said town by issuing its bonds to the amount of \$10,000 for the purpose of constructing, maintaining, and operating or purchasing an electric plant to supply said town, and all persons and parties therein, with light.

It is claimed by respondent that there was no ordinance ordering the election, and that as it was held in pursuance of an order, only, of the board of trustees, it is void. It is true, as contended by respondent, that by section 16, art. 6, Laws 1873, it is provided that the style of all ordinances shall be, "Be it ordained by the board of trustees of the town of Canton." But the order of the board in question does not pretend to be an ordinance, nor was it necessary that an ordinance should have been passed for the purpose, but an order of the board was all that was necessary; and it is expressly so provided by section 6276, supra, in accordance with whose provisions the order was made, and is therefore valid. It may be conceded that a resolution will not take the place of an ordinance where an ordinance is required by charter, or, if such requirement is implied, by necessary inference. But in case where an ordinance is not expressly required by the charter or statute, but is silent on the subject, a resolution duly passed has been held equivalent to a formal ordinance. *Merchants' Union Barb Wire Co. v. Chicago, Burlington & Quincy Ry. Co.*, 70 Iowa, 105, 28 N. W. 494. In that case it was said: "In our opinion, the city may grant the right of

way in the streets to a railroad company, which is simply permission to construct the railroad thereon, under prescribed restrictions, by resolution or vote duly recorded. There exists no necessity for expressing this grant by authority by ordinance, as the statute (Code 1873, § 464) conferring authority upon a city to authorize or forbid the construction of railway tracks in its streets does not prescribe the manner of exercising the authority—whether by ordinance, resolution, or vote duly recorded. The statute being silent upon this subject, the authority may be exercised by resolution duly passed, or vote duly taken, appearing in the proper record of the city. *Van Vorst v. Jersey City*, 27 N. J. Law, 493; *City of Quincy v. Chicago*, B. & Q. R. Co., 92 Ill. 21; *Sower v. Philadelphia*, 85 Pa. 231; *First Municipality v. Cutting*, 4 La. Ann. 335; *State v. Henderson*, 38 Ohio St. 644. We conclude that the resolution authorized defendant to construct the side tracks." In the case at bar we are not called upon to go that far, as it is expressly provided by defendant's charter that, for the purpose of testing the sense of qualified voters of said city for the purpose heretofore indicated, "the council, trustees, or other legislative authority of such town or city shall order an election to be held," etc. The record affirmatively shows that the order or resolution was passed with the same formalities as an ordinance is by the defendant's charter required to be passed, and is of the same force and effect as an ordinance. *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088.

It is said that the writ should be dismissed because 15 days' notice of said special election was not given in a newspaper published in said town, or in any other way. The resolution required that 15 days' previous notice should be given of the election by publication in the *Canton News*, a weekly newspaper published in the town of Canton. It appears from the record that the notice of the election was published in the *Canton News*, a weekly newspaper published in said town; the first insertion being made on September 4, 1902, the second on the 11th, and the third on the 18th, of said month, while the election was held on the 23d day of the same month; 19 days having elapsed from the time of the first insertion and the election. It was held in the case of *German Bank v. Stumpf*, 73 Mo. 311, that, where a deed of trust required 30 days' notice of sale to be given by publication in a daily paper, 30 days must intervene between the first publication and the day of sale, but, while it is customary and prudent, it is not essential, that the notice appear in every issue of the paper. The same rule is announced in *Re Wooldridge*, 30 Mo. App. 612, *Nishnabotna Drainage District v. Campbell*, 154 Mo. 151, 55 S. W. 276, and *Kellogg v. Carrico*, 47 Mo. 157. It therefore seems that the no-

tice was published in conformity with the resolution.

The proposition voted on at said election, and declared by an ordinance of the town to be carried and adopted by the assent of two-thirds of the qualified voters thereof voting at said election, contained the following: "To increase the debt of the town of Canton by issuing bonds of said town to the amount of ten thousand dollars, for the purpose of constructing, maintaining and operating or purchasing an electric light plant to supply said town of Canton and all persons and parties therein with light, thereby authorizing the town of Canton to increase the debt of the town of Canton, by issuing bonds of the town to the amount of ten thousand dollars." It is argued by the respondent that there were submitted to the vote of the people by this order two propositions—one, to increase the debt of the town by issuing its bonds to the amount of \$10,000 for the purpose of constructing, maintaining, and operating an electric light plant to supply the town, and all parties and persons therein, with light; the other, to increase the debt of the town by issuing its bonds for said sum for the purpose of purchasing an electric plant already in said town to supply it, and all persons and parties therein, with light—and that said propositions being submitted together made it impossible for any voter, by his vote, to say which of the two propositions he favored or opposed, in consequence of which said election was void. In support of this position, respondent relies chiefly upon the case of *McBryde v. City of Montesano*, 7 Wash. 69, 34 Pac. 559. The propositions submitted to the voters in that case were two, which were entirely different and distinct propositions—one, to fund \$20,000 of an old debt; the other, to borrow \$5,000 for future use. But they were submitted as one, and it was held that they could not be united, so as to have one expression of the voter answer both propositions. There is a marked distinction between that case and the one at bar, in this: In that case there were clearly two distinct propositions, having different objects in view, while in the case in hand the proposition submitted to the voter was to increase the bonded indebtedness of the town to purchase or erect an electric light plant. The same end was intended to be accomplished, but in two different ways, to be determined upon by the board of trustees in the exercise of their discretion. The proposition submitted to the voters was the exact proposition that they were called upon to decide, and in a way that could not mislead any one; and while it is, in all probability, true that some of the voters might have wished to vote for the erection of the plant, and others to purchase a plant already erected, and they did not have the chance to express their views in this regard, we do not think that such fact invalidates the election that was held, or the bonds that were issued by the town in pursu-

ance thereof. *Thomson-Houston Electric Co. v. City of Newton* (C. C.) 42 Fed. 723.

It seems that the town of Canton is divided into four wards, and by ordinance a voting place was designated in each ward at which the election was held, while another ordinance of the city, then in force, required that all special elections be held at one place in said town, to be designated by the mayor. It is said by respondent that the special election was therefore illegal and void, because in violation of said ordinance. There is no pretense that the election was fraudulent, or that the result was not a fair expression of the people. It was nothing more than an irregularity, and should not, under the circumstances, be held to invalidate the election or discredit the bonds. *State ex rel. v. Town of Westport*, 116 Mo. 582, 22 S. W. 888, and authorities cited; *Light & Magnetic Water Co. v. City of Lebanon*, 163 Mo. 246, 63 S. W. 809.

The point is made that the ordinance ordering the issuing of said bonds contravenes section 1 of article 10 of the Constitution of this state, and also section 3 of article 10 and section 10 of said article 10, in that it provides that the bonds are to be issued and the taxes levied and collected for the purpose of enabling said town to erect, maintain, and operate, or purchase, an electric plant with which not only to light the streets, alleys, and public places of said town, but to string the same with wires for furnishing electric light to all persons and corporations residing and doing business in said town, which is not a public purpose or a town purpose, and therefore in contravention of said sections 1, 3, and 10 of article 10 of the Constitution of this state. In passing upon a similar question in *Thomson-Houston Electric Co. v. City of Newton*, supra, it was said: "It has been the uniform rule that a city, in erecting gasworks or waterworks, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use." And the statutes of this state now place electric light plants in the same position, their object and purpose being the same (that is, for the protection of the lives and property of all its citizens), which is manifestly a public purpose, and is none the less so because it authorizes the erection of poles along the streets, alleys, and public places in said town, and the stringing the same with wires for furnishing electric lights to all persons and corporations residing and doing business in said town. By the right to erect and maintain is implied the authority to do everything absolutely necessary, to that end, which in no way conflicts with the Constitution.

It is asserted that the act of 1897 is in contravention of section 28, art. 4, of the state Constitution, in this: That the title to said act contains more than one subject, and in this: that said law provides that the municipal corporations named in the title to said

act shall have power and authority to issue their bonds, and contract, maintain, and operate or purchase electric plants with which to supply them, and all persons and parties therein, with electric light for private consumption, while there is nothing in said title to indicate that said act was intended to give said cities and towns authority to purchase an electric light plant with which to engage in manufacturing and supplying electric light for private consumption to persons and corporations residing and doing business in such city or town. With respect to the first proposition we are unable to agree, and are clearly of the opinion that everything in the act is germane to and congruous with the title to the act. Its title is broad enough to cover all of its provisions, and, they being in consonance therewith, the objection is not well taken. As to the other objection, the power to purchase electric light plants by towns having special charters is expressly given by section 6275, supra.

With respect to the other constitutional questions presented by the return, they are of the same character and upon the same lines as those upon which we have passed, and for like reasons the contentions are untenable.

There is no merit in the affirmative defense set up in the answer. Our conclusion is that the writ should be made peremptory. It is so ordered. All concur.

CITY OF ST. LOUIS v. GALT.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

MUNICIPAL CORPORATIONS—ANTI-WEED ORDINANCE—CONSTITUTIONAL LAW—TAKING OF PRIVATE PROPERTY—DUE PROCESS OF LAW—EVIDENCE.

1. Evidence that there were weeds on defendant's premises from four to five feet high, and about one-third were sunflowers, is sufficient to sustain his conviction for violation of an ordinance forbidding any one to allow a growth of weeds on his premises over one foot high, and providing that the term "weeds" shall include all rank vegetable growth which exhales unpleasant and noxious odors, and also high and rank vegetable growth that may conceal filthy deposits.

2. An ordinance making it a misdemeanor to permit a growth of weeds is not violative of Const. art. 2, § 4, providing that government is intended to promote the general welfare of the people, and that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry.

3. To prohibit one from permitting a growth of weeds on his premises is not a taking of his property, within Const. U. S. Amend. art. 5, prohibiting such taking without just compensation.

4. A conviction for violation of an anti-weed ordinance in the ordinary courts, with right of appeal, is due process of law, within Const. U. S. Amend. art. 5, providing that no person shall be deprived of life, liberty, or property without due process of law.

5. Const. art. 9, §§ 20-25, granting to the city of St. Louis the right to adopt a charter subject to the laws and Constitution of the state, and a provision in a charter so adopted giving the power to declare, prevent, and abate

nuisances on private property, give power to pass an ordinance forbidding the owner of premises from permitting a growth of weeds.

Appeal from St. Louis Court of Criminal Correction; Willis H. Clark, Judge.

Action by the city of St. Louis against Smith P. Galt for violation of the weed ordinance. From a judgment of conviction, he appeals. Affirmed.

Smith P. Galt, pro se. Chas. W. Bates and Wm. F. Woerner, for respondent.

MARSHALL, J. The defendant is the owner of a certain lot in the city of St. Louis. He was proceeded against and fined in the police court for a violation of sections 608 and 612 of the municipal code of that city, which sections are commonly known as the "Weed Ordinance," and are as follows:

"Sec. 608. Any owner, lessee, or occupant, or any agent, servant, representative or employee of any such owner, lessee or occupant having control of any lot of ground, or any part of any lot, who shall allow or maintain on any such lot any growth of weeds to a height of over one foot, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, to be recovered for the use of the city of St. Louis, before any court having competent jurisdiction."

"Sec. 612. The words 'weeds' as used herein shall be held to include all rank vegetable growth which exhale unpleasant and noxious odors, and also high and rank vegetable growth that may conceal filthy deposits."

He appealed to the court of criminal correction, where he was tried anew, and again found guilty, and from that judgment he appealed to this court.

The abstract of the record shows that upon the latter trial the following proceedings were had: First. The defendant admitted the ownership of the lot, and that he had received a notice from the city health commissioner that a nuisance, in the form of weeds, existed on his lot, and requesting him to abate the same. Second. "The city offered evidence tending to prove that at the time said notice was issued and served there were weeds on the said premises from four to five feet high, and about one-third were sunflowers. The city offered in evidence said sections 608 and 612 of City Ordinance No. 19,991, approved April 3, 1900, supra, to the admission of which defendant objected on the ground that the same were incompetent, as said sections are invalid and void, as the city had no authority or power to pass the same under its charter, and also the same are a violation of sections 4, 20, art. 2, of the Constitution of Missouri, and articles 5 and 14 of the amendments to the Constitution of the United States. The said objection was by the court overruled, and defendant then and there excepted to the action of the court in overruling said objection, and said sections

were read in evidence. That was all the evidence in the case, and the court found the defendant guilty, and adjudged against him a fine of ten dollars and costs." Third. That the defendant filed a motion for a new trial, which was overruled, and he appealed.

Upon this showing, the defendant assigns two errors: First, that there was no evidence to support the finding of the court; and, second, that the city had no power to enact the ordinance upon which this case rests, and that it violates sections 4 and 20 of the Constitution of Missouri, and articles 5 and 14 of the amendments of the Constitution of the United States.

1. The first assignment of error is untenable. The testimony is not preserved by a bill of exceptions or presented by an abstract of the record. The record only shows that "the city offered evidence tending to prove that at the time said notice was issued and served there were weeds on said premises from four to five feet high, and about one-third were sunflowers." The record does not show that the defendant objected to the introduction of such evidence, nor that the court ruled adversely to him upon such proposition. The defendant, however, challenges, not the admissibility of the testimony, but its probative force, by assigning as a ground for a new trial, and as error, that there was no evidence to support the finding; and the particular reason given for the contention is that the evidence does not show that the weeds that were shown to be upon his lot exhaled unpleasant and noxious odors, nor that they were high and rank. The record shows that there were weeds upon the lot, and that they were four or five feet high, and that the notice to abate them was dated on July 10th. So that there is positive evidence that the weeds came within the definition of the terms "weeds," as employed in the ordinance, so far as being "high" is concerned; and, from the time of the year when the offense is charged to have occurred, the trial court was justified in inferring that weeds that were four to five feet high were rank, and also that rank weeds, of the height specified, will exhale unpleasant and noxious odors. But aside from this, the ordinance does not purport to give an exclusive definition of what shall be taken to be within the term "weeds," but, on the contrary, only attempts to include certain things within the meaning of that term, which possibly might not otherwise be commonly understood to be covered by the term, and leaves the term to speak for itself as to all other things. The word "weed" has a common, everyday meaning to the mind of every man. It may also have a technical meaning to the botanist or the chemist. It is a nuisance to the farmer, the gardener, or the owner of a well-kept lawn, notwithstanding that some weeds may contain valuable medicinal properties, which, when extracted, may be of benefit and profit to mankind. But it is a fact of common in-

formation, of which courts may properly take judicial notice, that a high, rank growth of weeds in a populous community has a strong tendency to produce sickness and to impair the health of the inhabitants, and so may be a nuisance in such locality, notwithstanding they may be comparatively innocuous in the country, when far away from human habitation. The defendant quotes the definition of "weed" as given by the Century Dictionary, as follows: "Any one of those herbaceous plants which are useless and without special beauty, or especially which are positively troublesome. The application of this general term is somewhat relative. Handsome but pernicious plants, as the ox-eye daisy, cone flower, and the purple cow-wheat of Europe, are weeds to the agriculturist, flowers to the æsthetic. There are also plants that are cultivated for use or beauty, as grasses, hemp, carrot, parsnip, morning-glory, become weeds when they spring up where they are not wanted. The exotics of cool countries are sometimes weeds in the tropics." Webster's International Dictionary defines the word "weed" as follows: "(1) Underbrush; low shrubs. (2) Any plant growing in cultivated ground to the injury of the crop or desired vegetation, or to the disfigurement of the place; an unsightly, useless, or injurious plant." Adding in this connection: "The word has no definite application to any particular plant or species of plants. Whatever plants grow among corn or grass, in hedges, or elsewhere, and are useless to man, injurious to crops, or unsightly or out of place, are denominated weeds. (3) Fig.: Something unprofitable or troublesome; anything useless." It is manifest, therefore, that the city ordinance did not intend to restrict the lexicographer's definition of the word, nor to give an exclusive meaning to it. So that the defendant may have been guilty of a violation of section 608, by permitting weeds, as they are commonly known to mankind and to the lexicographers, to grow on his lot, although such weeds may not fall within the inclusive definition of section 612 of the municipal code of St. Louis.

But with truly rural instincts, and with a commendable and lively recollection of his boyhood days and tastes, the defendant eloquently objects to the sufficiency of the evidence to convict him of wrongdoing, because, he says, the evidence shows that one-third of the weeds on his lot were sunflowers—the emblematic flower of our sister state, Kansas; "the queen of our mother's garden"; the flower that has been immortalized by Moore in the lines:

"The heart that has truly loved never forgets,
But as truly loves on to the close;
As the sunflower turns to her God, when he sets,
The same look that she turned when he rose."

If, in the exercise of the police power conferred upon the city by the state, the city has offended against the poetic, the æsthetic, or the rustic tastes of the defendant, or has

blurred in even the smallest degree his memory of his happy boyhood days, then the court should closely scrutinize the act of the city, and protect the rights of the defendant, being therein restrained only by a proper observance of the principles that underlie the wholesome doctrine of, "Sic utere tuo ut alienum non lædas." A critical analysis of the evidence, however, fails to convince the impartial mind that either the ordinance or the evidence was leveled at the famous, emblematic flower, which is so sacred to the defendant. The offense proved would be just the same if the sunflowers be eliminated from consideration, and, if the defendant had obeyed the notice from the health commissioner by cutting the weeds and leaving the sunflowers, he would probably not have been proceeded against, or at any rate would not have been the appellant in this case.

2. The second error assigned challenges the power of the city to enact the ordinance in question, and claims that it violates sections 4 and 20 of article 2 of the Constitution of Missouri, and the fifth and fourteenth amendments to the Constitution of the United States. These are grave defects in the ordinance, if the claim is well taken.

The fourth section of article 2 (the Bill of Rights of our Constitution) is as follows: "That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyments of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails of its chief design." The point that this police regulation of the city violates this provision of our organic law has at least the refreshing merit that it is a variation from the grounds upon which such city ordinances are usually attacked, but it is unfortunate for the defendant that this contention is not open to a more extended consideration than can be given to it in this case, because it has been firmly settled by the decisions in this state that the rights preserved to the individual by this section are held in subordination to the rights of society. *State v. Addington*, 12 Mo. App., loc. cit. 217, 77 Mo. 110; *St. Louis v. Meyrose, etc., Co.*, 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474; *State v. Beattie*, 16 Mo. App., loc. cit. 145; *City of Chillicothe v. Brown*, 38 Mo. App. 609. Therefore the right of the defendant to grow weeds upon his city lot is subordinate to the right of society that he shall not do so, because he would thereby endanger the health of others.

Section 20 of article 2 of our Constitution prohibits the taking of private property for private use, with or without compensation, without the consent of the owner, except for private ways of necessity, or for drains for agricultural or sanitary purposes. The defendant invokes this guaranty. The appar-

ent infirmity underlying this contention is that the ordinance does not take or authorize any one to take the defendant's property, but only regulates his use of his property so as not to injure others. The same contention was held to be untenable in *Green v. Mayor, etc., of Savannah*, 6 Ga., loc. cit. 13, where a city ordinance forbidding the growing of rice within the limits of the city of Savannah was held to be within the police power conferred upon the city by the state. The ordinance in question, therefore, does not violate the Constitution of Missouri.

The fifth amendment to the Constitution of the United States, invoked by the defendant, prohibits the taking of private property for public use without just compensation, and provides that no person shall be deprived of life, liberty, or property without due process of law. Enough has already been said to show that the defendant is not deprived of his property for public use or at all, and therefore he is not within the protection of the federal Constitution in this regard. The fact that the defendant is here upon appeal from a judgment of a lower court, where he had exactly the same kind of a trial that is accorded to every other person similarly offending, is answer complete to his claim that he has not had the benefit of due process of law. "Due process of law" means according to the settled course of judicial proceedings, and such process may be regulated by the laws of the several states. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 4 L. Ed. 629; *Andrus v. Insurance Co.*, 168 Mo., loc. cit. 162, 67 S. W. 582; *Cooley's Const. Lim.* (6th Ed.) p. 431.

This leaves only for consideration the question whether the state has conferred upon the city the power to pass the ordinance involved in this case. The Constitution granted to St. Louis the right to adopt a charter, subject only to the limitation that it should be subject to, and in harmony with, the Constitution and laws of the state. Const. art. 9, §§ 20-25. Pursuant to this grant of power, St. Louis adopted its charter, which gave it the power "to declare, prevent and abate nuisances on public and private property, and the causes thereof"; "to secure the general health of the inhabitants by any means necessary"; and "to pass such ordinances not inconsistent with the charter as may be expedient, in maintaining the health and welfare of the city." Charter St. Louis, art. 3, § 26, pars. 6, 14. Speaking of the power conferred upon St. Louis by this charter, this court, in *Fernenbach v. Turner*, 86 Mo., loc. cit. 420, 56 Am. Rep. 437, said: "None of the objects sought to be secured by municipal government are of more importance than the health of the inhabitants, and hence, to that end, we find that such extensive powers were conferred upon the defendant." (The defendant Turner was the street commissioner

of the city, but the city was also a party defendant.) Of course, even under such broad powers, it is not competent for the city to declare that to be a nuisance which is not, and cannot, from its nature, be, a nuisance in fact. *St. Louis v. Heitzberg Packing & Provision Co.*, 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551, 64 Am. St. Rep. 516. But if the object to be accomplished is conducive to public interests and to public health, especially in the exercise of its public power, the courts will accord to the city a liberal discretion both as to the ends sought and to the means employed. *Lawton v. Steele*, 152 U. S., loc. cit. 140, 14 Sup. St. 499, 38 L. Ed. 385; *Powell v. Railroad*, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253; *State v. Layton*, 100 Mo., loc. cit. 497, 61 S. W. 171, 83 Am. St. Rep. 487; *Fernenbach v. Turner*, 86 Mo., loc. cit. 421, 56 Am. Rep. 437. It is a matter of common knowledge that decaying vegetable matter produces disease. One of the definitions of "malaria" given by Webster's International Dictionary is: "3. (Med.) A morbid condition produced by exhalations from decaying vegetable matter in contact with moisture, giving rise to fever and ague and many other symptoms characterized by their tendency to recur at definite and usually uniform intervals." To prevent such a condition in a populous community is one of the chief objects of municipal government, and is fully authorized by the police power conferred upon St. Louis by the provisions of the charter quoted. *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *St. Louis v. Fischer*, 167 Mo. 654, 67 S. W. 872. Cities require many police regulations that are wholly unnecessary and would be intolerable in the country. *Ex parte Cheney*, 90 Cal. 617, 27 Pac. 436; *Slaughterhouse Cases*, 16 Wall. 86, 21 L. Ed. 394. And many things are a nuisance in a city which are harmless in the country. Every man who selects urban life and holds city property necessarily incurs liabilities and gives up certain natural rights that do not pertain to life or property in the country. *Green v. Savannah*, 6 Ga., loc. cit. 11; *Ex parte Cheney*, 90 Cal. 617, 27 Pac. 436. What is a nuisance is a relative question, oftener than it is an abstract fact. Blackstone was wise in not attempting an explicit, invariable definition, and in confining himself to general terms. He said a nuisance is "anything that worketh hurt, inconvenience, or damage." 3 Black. Com. 216. 21 Am. & Eng. Enc. Law (2d Ed.) p. 682, says: "A nuisance is literally an annoyance, and signifies, in law, such a use of property or such a course of conduct as, irrespective of actual trespass against others, or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom." Wood on Nuisances (3d Ed.) § 1, gives substantially the same definition, and adds: "It is a part of the great social compact to

which every person is a party—a fundamental and essential principle in every civilized community—that every person yields a portion of his right of absolute dominion and use of his own property in recognition of and obedience to the rights of others, so that others may also enjoy their property without unreasonable hurt or hindrance. This is an essential rule, a wise provision of the law, and one that is for the mutual protection and benefit of every member of society.” It is upon this principle that quarantine laws, health regulations, and general welfare rules are bottomed. A man may be willing to run the risk of disease by permitting his premises to be in an unsanitary condition, but he has no right to subject his neighbor to such risks. He may be willing to run the risk of personal inconvenience or injury by maintaining any dangerous agency upon his premises, but he cannot lawfully subject his neighbor to such risks. The notes to the text of 21 Am. & Eng. Enc. Law (2d Ed.) p. 682 et seq., contain a great number of cases illustrative, but not all comprehensive, of the principle under discussion. The power to prevent nuisances—to provide for the general health—is as broad as the necessity for its exercise. The ordinance in question strikes at a cause that is known to operate against the public health, and it is therefore a valid exercise of the police power conferred upon the city of St. Louis.

The judgment of the lower court is affirmed. All concur.

SCHOOL DIST. OF PLATTSBURG v. BOWMAN et al.

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

TAXATION—PARTNERSHIP PERSONALTY— PLACE OF ASSESSMENT.

1. Notwithstanding Rev. St. 1899, § 9121, providing that all personal property situated in a county other than the one in which the owner resides shall be assessed in the county of residence, and the owner, in listing the same, shall state its locality, personalty belonging to a partnership is to be assessed at the domicile of the firm (i. e., where it does business), rather than in proportionate parts at the residences of the several owners.

2. Rev. St. 1899, § 9182, providing that no partner shall be required to list or return any property of the firm, or balance due him, “the property, effects and credits . . . being listed by any other partner,” does not require that partnership property be assessed to the individuals composing the firm in the proportion that each owns, but means that, where partnership property has been listed for taxation by a firm member, the individual members shall not be assessed upon their interests in the firm.

Appeal from Circuit Court, Clinton County;
A. D. Burnes, Judge.

Action by the school district of Plattsburg against Phillip V. Bowman and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. S. Herndon, for appellant. Sandusky & Sandusky, for respondents.

MARSHALL, J. This is an action by the school district of Plattsburg, Clinton county, a body politic, under article 2, c. 154, Rev. St. 1899, against the defendant Bowman on his bond as assessor of taxes for Clinton county, and against the other defendants as the sureties on his bond, to collect, as damages, certain taxes for the year 1900 which it is alleged were lost to the plaintiff by the act of the assessor in assessing certain tangible personal property, consisting principally of cattle, which was owned by several different partnerships, to the partnerships and in the school districts in the county in which the partnerships respectively did business, and in which the cattle actually were when assessed, instead of assessing to each of the partners his proportionate interest in the partnership property in the school districts in which each of said partners resided. All of the property has been assessed to the respective partnerships. The only question is, which school district is entitled to the tax—that in which the partnership does business and in which the property is actually located, or that in which the partners reside—and, if the partners reside in different school districts, whether the proportionate interest of each partner in the partnership property should be assessed to each partner in the school district in which each resides. The circuit court entered judgment for the defendants, and the plaintiff appealed.

Primarily the assessment and collection of taxes are proceedings in rem. Therefore, where the property is actually located is the place where the assessment is made and the tax collected. It is, of course, competent for the Legislature to prescribe where personal property shall be assessed and taxed, and, when the Legislature has so prescribed, such regulations must be followed. But when the statute is silent the ordinary rules of law must obtain. The property here involved is partnership property, and the owner of such property is the partnership. The individuals composing the partnership have an interest in the partnership property. That interest can only be accurately determined by an accounting. The partnership may be wholly insolvent, so that the individual's interest would amount to nothing, after the debts are paid. But the tangible property of the partnership is subject to taxation irrespective of whether the firm is solvent or insolvent. There is therefore a marked difference between partnership property and the individual interest of the individuals in the partnership property. In a legal sense, the partnership is the owner of the property, while the members have an interest in the partnership. The general rule of law is that partnership property is properly assessed in the name of the partnership, and not in the names of the individuals composing the partnership, in the proportion of the interest of each in the partnership. 1 Cooley on Taxation (3d Ed.) p. 659, thus states the rule: “The property of

a partnership is generally with much propriety required to be taxed at the place where the partnership business is carried on, and it may be assessed in the firm name, even after the death of one of the partners, if the business is continued in the firm name by the surviving partner for the purpose of winding it up. The assessment should be joint, and is a charge upon those only who were partners at the date when it is made." 1 *Desty on Taxation*, p. 298, § 62, says: "The firm, and not the individual members of it, is, for the purposes of taxation, considered as owner of its property, and it is to be assessed therefor. Even where parties reside in different districts, the firm property is taxable at the place where the business is conducted." The *American & English Enc. Law* (1st Ed.) p. 152, lays down the rule as follows: "The state may authorize the taxation of the interest of a partner at his domicile, even though the business is conducted in another state. Generally, however, the place where the business is carried on is designated as the place where the personal property of the partnership is to be taxed. It has been held that, if the statute is silent, personalty will be taxed at its actual situs, on the ground that a partnership can properly have no domicile. The Legislature can always designate the place where the partnership is situated as the place of taxation." Thus the general rules of law appear well settled that primarily property is assessed and distrained for taxes at the place where it is actually located, and that the firm, not the individuals composing it, is, for the purposes of taxation, considered as owner of the property, and that the property is taxable at the place where the business is conducted. The fact that in suits against a partnership the members must be sued individually, and at the place of their residence, does not bear upon this proposition, for that is a question of practice, while the question here is one of taxation.

The proposition as to the assessment of partnership property is one of first impression in this court. The plaintiff contends that section 9121, Rev. St. 1899, requires partnership property to be assessed against the members in proportion to their interest in the firm, and in the county or counties in which such members reside. That section provides: "All personal property, of whatsoever nature and character, situate in a county other than the one in which the owner resides, shall be assessed in the county where the owner resides; * * * and the owner, in listing, shall specifically state in what county, state or territory it is situate or held." This section undoubtedly changes the general and original rule above pointed out, that tangible personal property is assessable and taxable where it is actually located, and makes it assessable where the owner resides. The courts have nothing to do with the wisdom of this change in the

rule. The Legislature had power to so prescribe, and the courts must enforce the law. But this section does not attempt to change the other rule of law, that the firm, and not its members, is considered the owner of the property, for the purposes of taxation. In fact, the Legislature of this state does not appear to have ever considered the question of the assessment and taxation of partnership property, and, the statute being silent, the general rules of law must be enforced. The firm must therefore be regarded as the owner of tangible personal property, for the purposes of taxation. The firm being the owner, it follows, even under section 9121, Rev. St. 1899, that the property must be assessed to the firm where it resides. But it is said that a firm can have no domicile. This is true, except for the purpose of taxation, and for such purposes its place of business is its domicile. It seems reasonably clear, however, that the Legislature did not have in mind partnership property when it enacted section 9121, and that that section is properly referable only to property owned by an individual. And this being true, the statute must be deemed to be silent as to the assessment and taxation of partnership property, and therefore the general rules of law pointed out must be held to obtain.

Counsel for defendants refer to section 9182, Rev. St. 1899, which provides, *inter alia*, "Nor shall any partner be required to list or return any property, liability or supposed balance of said partnership due him, the property, effects and credits of said partnership being listed by any other partner." The meaning of this provision is not very clear. But manifestly it cannot mean that partnership property must be assessed to the individuals composing it in the proportion that each holds, for, if that be so, there could be no sense in excusing any one member from listing his share thereof; nor could it be imagined that any one partner would list it all, and thus make himself liable for the tax due by his copartner. The only reasonable interpretation that can be put upon this provision is that, where the partnership property has been listed for taxation by any member of the firm, the individual members shall not be assessed upon their interest in the firm, for the tangible property has already been listed.

It is perfectly plain that, in the very nature of things, the attempt to assess to each individual member of a firm his proportionate interest in the firm's property would lead to endless confusion. In the first place, to be just and accurate, it would require an accounting to ascertain what the interest of each partner was. In addition to this, if such interest was to be assessed to each member in the county where he resided, and not where the property was actually located, more confusion would result. For if the firm was composed of three members, one of whom lived in St. Louis, and the other two

in New York, and if the partnership property was located in Cole county, and the partnership business was carried on in that county, one-third of the property would be assessed in St. Louis, and one-third of the taxes arising from the property would go to St. Louis; and, as the other two parties were nonresidents, the other two-thirds of the partnership property would have to be assessed in Cole county, or not at all. Thus the county in which the property was located, and which furnished the police and governmental protection to the property, would lose one-third of the taxes that ought to go to it. And if none of the members of the firm lived in the county where the business was carried on, and where the property actually was located, the county that afforded such governmental protection would lose all the taxes arising from the property. It may be said this would result in no injustice in the long run, and that the matter would even itself up, and it may be also truly said that the Legislature has power to so arrange the matter; but, in the face of such conditions, it must clearly and satisfactorily appear that the Legislature so intended, before the general rule of law, that experience has shown to be so just and so simple, will be deemed to have been abolished.

In the case at bar the property was assessed to the firm as owner, and at the place of business of the firm, and where the property was actually located. No part of this property was located in the plaintiff school district, but the members of the firm each properly listed his individual property where he resided. Assuming that for school taxes each school district in a county bears the same relation to the other school districts in the same county that each county in the state bears to the other counties in the state with respect to the assessment of taxes, it nevertheless follows that the circuit court properly held that the assessments involved in this case were legally and properly made, and that the plaintiff was not entitled to recover.

The judgment is affirmed. All concur.

CLARK v. MISSOURI, K. & T. R. CO.

(Supreme Court of Missouri, Division No. 1.
Nov. 25, 1903.)

MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—CARRIAGE OF STOCK—ESCAPE OF ANIMALS—DANGEROUS NATURE—PLEADING—ANSWER—ADMISSION OF ANSWER—USE BY PLAINTIFF—USE OF PART—PROXIMATE CAUSE—CARRIERS—NOTICE OF CHARACTER.

1. Under Const. art. 6, § 6, as amended in 1884, providing in substance that where one of the judges of the St. Louis Court of Appeals is of opinion that a decision of that court is in conflict with a decision of the Supreme Court or of any Court of Appeals, the cause shall be certified to the Supreme Court for determination, as in case of ordinary appellate process, the jurisdiction of the Supreme Court to determine the entire appeal does not depend upon the fact that there is in reality any such con-

flict, but depends on the fact that one of the judges of the Court of Appeals deemed such conflict to exist.

2. A railroad section hand attempted to round up a Texas steer which had escaped from a wreck, and, being attacked by the steer, was injured. In an action against the railroad, plaintiff's theory was that the particular steer was of a dangerous character, which was known to defendant and unknown to plaintiff, and of which plaintiff should have been warned. An answer of defendant, which had been amended and abandoned, admitted that Texas cattle were wild and vicious, and that when confined and excited they were more dangerous than usual, which quality of Texas steers was a matter of notoriety, especially among railroad men. Held, that plaintiff was not entitled to recover on the theory that defendant's answer admitted all Texas cattle to be fierce naturally, and hence the steer in question to be such, so as to render it unnecessary for plaintiff to prove the character of steer in question to have been known to defendant, inasmuch as plaintiff could not for his own purpose separate such admission from the further allegation as to the general notoriety of the character of Texas cattle.

3. It appeared that, when plaintiff and his companions started to round up the steer, plaintiff armed himself with a club as big as his arm, and six or seven feet long, and plaintiff testified that, when they came upon the steer in question, he "acted wild" and ran along the track; that the morning was foggy, so that he could not see the steer when one of his companions called that the steer was coming; and that a moment afterwards the steer appeared coming towards him. Held, that the plaintiff had knowledge as to the character of the steer at the time he was placed in peril.

4. Plaintiff, a railroad sectionman, together with others, was endeavoring to round up a Texas steer which had escaped from a wrecked train. Plaintiff was on the railroad track when a companion called that the steer was coming. Plaintiff stood where he was, not being able to see the steer, because of fog. The steer emerged from the fog heading towards plaintiff. He struck at him with a club, and the steer passed on, but plaintiff ran down the embankment of the road, and was precipitated into a pit and injured. Held, that the failure of the railroad to warn plaintiff of the vicious character of the steer was not the proximate cause of the injury.

5. A common carrier is not chargeable with notice that Texas cattle carried by it are dangerous and vicious and liable to injure employees.

Appeal from Circuit Court, Montgomery County; E. M. Hughes, Judge.

Action by Pleasant W. Clark against the Missouri, Kansas & Texas Railroad Company. From a judgment in favor of plaintiff. defendant appeals. Reversed.

Geo. P. B. Jackson, for appellant. E. Rosenberger & Son and J. D. Barnett, for respondent.

MARSHALL, J. This is an action for personal injuries. The plaintiff recovered \$2,500 damages in the circuit court, and the defendant appealed to the St. Louis Court of Appeals, where the judgment was affirmed; but, as one of the judges of that court was of opinion that the decision therein was in conflict with certain previous decisions of this court and of the Courts of Appeals, the cause was certified to this court for deter-

mination, pursuant to section 6 of the amendment of 1884 to article 6 of the Constitution, and by that section it is made the duty of this court to rehear and determine the cause "as in case of jurisdiction obtained by ordinary appellate process." The respondent has filed a motion to remand the cause to the St. Louis Court of Appeals because he claims that an analysis of the cases with which the decision of the Court of Appeals in this case was deemed by said judge of said court to conflict shows that no such conflict exists. But this motion must be overruled, because the jurisdiction of this court in such cases does not depend upon the fact that there is in reality any such conflict, but depends solely upon the fact that one of the judges of the Court of Appeals deemed such conflict to exist. This court may be fully satisfied that there is no such conflict, but it cannot remand the case, because the Constitution makes it the duty of this court in such cases to rehear and determine the cause as in case of jurisdiction obtained by ordinary appellate process.

The injury complained of was received near Marthasville, in Warren county, on May 10, 1897. The plaintiff was a section hand in the employ of the defendant. A freight train of the defendant was wrecked. One of the cars contained Texas steers. That car was broken open, the steers escaped, and the section gang, of which the plaintiff was a member, was summoned to the wreck. Some of the steers remained near the wreck. Most of them went towards the east, and one went towards the west. The section gang in charge of the part of the road where the accident occurred was composed of Otto Housman, foreman, his two sons, Jim and George, and the plaintiff. When the plaintiff reached the scene of the wreck, he and Jim Housman were ordered to go with the station agent, Walker, and gather up the cattle and put them in the cattle pens at Marthasville. They first put up those that remained near to the wreck, and then took horses and went after those that had gone east, and found them and put them in the pens. Then the foreman told his two sons, Jim and George Housman, and the plaintiff, that one of the steers had gone west, and directed them to go after it and drive it back to the pens. They obeyed the order and went. This preliminary statement is made to facilitate an understanding of the nature of the negligence charged against the defendant. The negligence charged in the petition is this: "That one steer, known as a Texas steer, was very wild and vicious, and very dangerous to handle, and by reason of having been in said wreck, and being bruised and otherwise injured, and greatly frightened and excited, its wild, vicious, and dangerous character was greatly increased. That plaintiff had no experience in such work, and was uninformed as to the danger attendant upon it, and was wholly ignorant

of the dangerous, wild, and vicious character of said steer, or of the circumstances aforesaid, which had greatly increased the same. That all of said facts were well known to the officers and servants of the defendant, under whose control this plaintiff was at the time, or by the exercise of ordinary diligence said facts might have been known to them. That nevertheless the said servants of the defendant in charge of said work negligently, carelessly, and wrongfully ordered and directed plaintiff to drive said Texas steer into the pens of defendant at said station of Marthasville. That, being so ordered and required to do said work, and being ignorant as aforesaid of the danger attendant upon the same, and relying upon defendant that it would protect plaintiff, and not expose him to unnecessary danger, this plaintiff undertook to assist in said work. That while doing so, and without any fault on plaintiff's part, this plaintiff was viciously attacked and set upon by said Texas steer, whereby plaintiff's life was greatly endangered, and that, in attempting to escape from said animal and save his life, he fell over a steep and precipitous bank, and was greatly injured," etc. The answer admits the wreck, the escape of the cattle, the plaintiff's relation to it as section hand, and that after the wreck the plaintiff was engaged in clearing up the wreck and in looking after and caring for the cattle, and avers that such work was within the line of the plaintiff's ordinary duty as a section hand. The answer then proceeds as follows: "Defendant farther states that a large part of its business is the transportation of Texas cattle from Texas to points in Missouri and elsewhere; and defendant admits that all Texas cattle are, by nature, wild and vicious, and dangerous to handle, and that such qualities of Texas steers, as a class, is a matter of general notoriety and of common knowledge among all persons. Farther answering, defendant says that there is always more or less risk and hazard connected with the duties of a section hand, and especially in and about the work necessary to be done in cases of wreck, and in the matter of collecting and restraining Texas cattle which may have escaped therefrom, all of which is, and at the time mentioned in the petition was, a matter of general notoriety, and of and concerning which the opportunity to know was open to all persons alike." The answer then pleads assumption of risks, a general denial of all matters alleged and not admitted, and contributory negligence, in that the plaintiff unnecessarily, carelessly, and recklessly assaulted the aggravated steer mentioned in the petition, and in like manner placed himself in front of and near the steer, and refused to move, when he could easily have done so and have averted the injury. The reply denies all the allegations of the answer not admitted, and then pleads specially that, when he was directed to drive the

steer into the pens, it was dark, and not yet daylight; that he had not seen the steer, and was ignorant that he was a Texas steer, or that he was dangerous and vicious and had been injured and was excited, and made wild and dangerous by the wreck, but that the defendant well knew such facts; that, when he was directed by the foreman to go after the steer, he obeyed, without any knowledge that the duty required was attended by any danger, and that immediately upon discovering the steer it charged upon the plaintiff, and he had no opportunity to escape; that he made no attack upon the steer, but only attempted to ward off the attack of the steer upon him; and that the animal's attack upon him was instantaneous upon plaintiff's discovery of the animal and the flight of the plaintiff.

In addition to the facts set out in the preliminary statement supra, the trial developed the facts to be as follows:

When Jim and George Housman and the plaintiff started on foot, west along the railroad track, to look for the steer that had gone in that direction, the plaintiff armed himself with a club, concerning which the plaintiff testified as follows: "Q. What did you take the club for? A. I very often take a club if I am after stock. Q. How big was the stick? A. A good big one. Q. Tell the jury how big it was? A. I suppose as big as my arm, and maybe bigger. Q. How long was it? A. Six or seven feet. Q. You got that when you started from Marthasville? A. Yes, sir. Q. And carried it all the way up there? A. Yes, sir. Q. And carried it to defend yourself against that steer? A. If I needed it. Q. You thought you might need it? A. I didn't know. Q. There was a danger that you might need it, and you prepared yourself for the danger that might overtake you? A. I prepared myself that far; yes, sir."

Jim and George Housman and the plaintiff went west along the railroad track for about 2 miles, and there discovered the steer in a field, about 200 yards from the track. They went into the field after him, and the plaintiff says the steer "acted wild," and ran out of the field onto the railroad track, and thence eastwardly towards Marthasville. They followed. Jim was in front, then came George, and lastly the plaintiff. The evidence varies as to the distances between the three. It was about 6 o'clock in the morning, and was quite foggy. The plaintiff says they had gone on the track "about two telegraph poles" when Jim, who was leading, cried out, "There he comes," and jumped off onto the north side of the track. The plaintiff says he heard this warning from Jim, and saw him jump, but he did not hear any warning from George, who was closer to the plaintiff than was Jim, but he says he saw George also jump off of the track. George says he also warned the plaintiff that the steer was coming. The plaintiff says that

when he first saw the steer he was 25 or 30 feet from him, and was coming at him "with his head tucked down as hard as he could come"; that he started to the north side of the track, and the steer also started in that direction, and that he then started towards the south side of the track, and, as the steer started also toward the south side of the track, he struck the steer with the club he was carrying, and the steer veered off towards to the north and passed by him, and he ran down the side of the railroad embankment, and jumped into the borrow pit that was near the bottom of the embankment, and which was muddy; and that his feet stuck in the mud, and he injured his knee.

There is no substantial difference between the testimony of the plaintiff and that of Jim and George Housman as to what occurred at the time of the accident, except that George says he also warned the plaintiff of the approach of the steer, and the plaintiff says he did not hear George's warning, and except as to the distances between the three at the time the steer came back towards the west; and these differences are not material or controlling in this case.

At the place where the accident occurred, the track was on an embankment about 15 feet high. The embankment was about 20 feet wider at the bottom than it was at the top. At the bottom of the embankment there was level strip of land about 12 or 15 feet wide, and beyond that there was quite a large borrow pit (that is, a place from which earth had been taken to make the embankment), which was about 2 feet deep. The side of the borrow pit towards the track was sloped, so as to enable the scrapers to haul the earth out of the pit and place it on the embankment. The bottom of the pit was muddy. The plaintiff says that when he ran down the embankment it was so steep that his body gained so great a momentum that he could not stop on the level ground at the bottom, nor could he change his course, and that he therefore jumped some 6 or 7 feet out into the borrow pit, and his feet stuck in the mud, and he was injured. Jim Housman said that when he ran down the embankment it was so steep that he could not stop on the level at the bottom, and that he, too, ran into the borrow pit, and went into the mud up to his ankles, and that threw him down face foremost in the mud. He also says that, when the plaintiff hit the steer with the club, the steer went past the plaintiff, and went on towards the west, and that the plaintiff then turned and ran down the embankment.

Touching the steers, the plaintiff testified that they were all quiet, except the one that went west, and he "acted wild" and ran from them when they found him in the field. This is the only evidence there is in the case to support the allegation of the petition that this particular animal was wild and vicious and dangerous to handle, and by

reason of the wreck such condition was greatly increased.

The foreman, Otto Housman, testified that the conductor of the train came to his house and waked him up. He was asked: "Q. Did he tell you anything about the steers? A. Yes, sir; he told me when I got to the toolhouse, and the men was there, he says, 'You must look out. There's a lot of Texas steers out here,' he says; 'they might get after you or hurt you some way. Be careful.'" Touching the warning given to the plaintiff, he testified on direct examination: "Q. Tell the jury what you told Mr. Clark and your sons when you told them to go west? A. I told them to go on up after that steer and get him if they could, and, as they went off, I told them to be very careful and see that he didn't hurt them or get hurt. I told them to look out for him. That was the same as to warn them to be careful—that they might get hurt." On cross-examination he was asked: "Q. Now, you say you said something to them about being careful? A. Yes, sir; when they started off, they were some little distance, and I happened to think about speaking, and I said, 'Be careful.' I don't know whether they heard me. I spoke to them. I guess they were as far as to the back seat of the house here, and I spoke out pretty loud, but I don't know whether they heard me. Q. What did you say? A. I said to 'be careful about that steer. He might hurt you.' Q. But you don't know whether they heard you? A. I don't know whether they heard me. They never made any halt or turned back or anything, and I kept on with my work." The plaintiff, in rebuttal, said the foreman said nothing except to get the steer. Jim Housman was not asked about the matter, but George Housman was, and he said he did not hear the said warning.

George Housman testified that his father sent him to wake the plaintiff, and that he did so. He then testified as follows: "Q. What did you do and what did you see of the plaintiff when you woke him. A. I got up and fixed my lantern, and started out, and the boss told me there was a car load of Texas cattle wrecked—I would have to watch out—and told me to tell the rest of the men when I told them, and I did so. Q. Did you tell that warning to Mr. Clark? A. Yes, sir. Q. Where and when? A. Right at the door. Q. What door? A. In his house, and he wanted me to wait and go with him; and I told him 'No,' I had to go and wake some of the other men—the other gang. Q. That is the gang east? A. Yes, sir."

Touching the plaintiff's knowledge of the character of this particular steer, Jim Housman testified that, as he and the plaintiff were going west on the track in search of the steer, they met two little girls going east towards the German School, and further said: "Q. What occurred when you met them? A. As we met them, I told them to be careful.

They was Germans, and couldn't understand Americans very well, and I told them, and they didn't quite understand me, and Mr. Clark told them the same thing, and they answered and went on. Q. What did he tell them? A. He told them to be careful and watch out; there was a mad or wild steer—something of that kind—and he might run over them and hurt them, or something."

In rebuttal the plaintiff said he did not remember this conversation with the little girls, and also said Jim Housman did not warn him about the steers, nor did any one else.

Touching the plaintiff's knowledge of Texas steers as a class, the plaintiff testified that he had heard of Texas cattle, and he knew that the defendant carried a great many on its road, but that he had never heard that as a class they are dangerous and vicious. He was then asked: "Q. On the former trial, when you testified, didn't I ask you this question about Texas cattle: 'You knew, as a rule, they are a vicious sort of animal?' 'It seems that way.' 'I am speaking of what you know personally?' 'I heard it was so.' Did you answer that way before? A. Probably I did." On redirect examination the plaintiff testified as follows: "Q. Mr. Clark, I don't know whether I asked you what, if anything, you had ever heard before this wreck as to the character of Texas steers? A. I never heard nothing about them until afterwards. I heard a good deal about them afterwards. Q. I will get you to state to the jury if you knew anything of the characteristics of these cattle? A. No, sir; I never was about them. Q. State whether you knew anything of their vicious habits? A. No, sir; I knew nothing about them at all. Q. Had you ever heard it discussed in the neighborhood? A. No, sir." On recross-examination the plaintiff testified as follows: "Q. Now, on the former trial I want to ask you in that connection if you wasn't asked the question, and didn't answer it in this way, with reference to what you had heard before this: 'Had you ever heard of Texas cattle before that day?' 'Yes, sir; often heard of them.' 'Heard people talk about them?' 'Yes, sir.' Did you state that? A. Don't remember."

With respect to the character of Texas steers as a class, the plaintiff read in evidence the first and second amended answers of the defendant. The several answers differ only in this respect: that the prior answers after the words, "and it admits that Texas cattle are, by nature, wild, vicious, and dangerous to handle," contained the additional words, "and that when confined in cars, or when surrounded by conditions liable to produce excitement, as by the wreck of a train, they are liable to become excited and more wild and vicious and more dangerous than ordinary." All the answers then proceed with the words "that such qualities of Texas steers is a matter of general notoriety." The prior answers followed this aver-

ment with the words "especially among men employed upon railroads and engaged in the transportation of such animals," while the last answer followed said averment with the words "and of common knowledge among all persons."

Bearing upon the question as to whether it was within the line of the plaintiff's duty to go after the cattle, the plaintiff testified as follows: "Q. You had been working at that time about four years on the section? A. Yes, sir. Q. When other wrecks had occurred on the road there on that section or other sections, you, with the other sectionmen, had been called on to come and help clear them up? A. Yes, sir. Q. It is a part of the duty of the sectionmen to help take care of wrecks? A. Yes, sir. Q. And look after the freight and property of the train? A. I don't know anything about the property. I never was in a cattle wreck. I was in a wreck where some hogs was, once, and we taken care of them. Q. They sent you after them? A. Yes, sir. Q. When you testified before, didn't you say it was a part of the duty of the sectionmen to help get up the wreck and take care of the property on the wrecked trains? A. I said it was a section hand's duty to take care of the wrecks; yes, sir. Q. And look after the property? A. Well, we never had anything of that sort to do only one time—only handling freight. Q. There was no other men employed by the company to do that sort of work—only the sectionmen? A. Not that I know of. Q. When the hogs was out, they sent you, and you did it? A. Yes, sir. Q. And when the cattle got out, and they sent you, you done it? A. No. Q. Was it, or not, a part of your duty? A. It ought not to be. Q. Maybe a great many things ought not to be that way. Was it a part of your duty? A. I don't think it ought to be. I don't know whether it was or not. Q. You knew the railroad company depended upon you, as one of the sectionmen, to help do that? A. I didn't know they depended on me to hunt up Texas cattle. Q. Was it outside of your duty? A. Yes, sir; I believe it was. Q. Why did you do it? A. Because the foreman notified me. Q. Was it his duty to notify you of something you ought not to do? A. I don't know. Q. Was it part of his duty, or not, to order you to get the cattle? A. I suppose he thought so. Q. What did you think at the time? (Objection.) Q. If you thought it wasn't your duty, why did you do? (Objection.) Court: He can say why he did so and so. A. When you work on the track, you either have to go, or quit, when you are notified. Q. He is the one to determine what you do? A. Yes, sir. Q. If he sends you out there, it is a part of your duty to go? A. You have to go, or quit. Q. That makes it a part of your duty? A. I reckon, if he says so."

At the close of the plaintiff's case, and again at the close of the whole case, the defendant interposed a demurrer to the evi-

dence, which was overruled, and exception saved. Various instructions were given and refused, and, as stated, after a verdict for the plaintiff the defendant appealed.

At the threshold of this case the crucial question is presented whether the petition states a cause of action, or, if so, whether the evidence makes a case for the jury. In the first place, the plaintiff was in the employ of the defendant as a section hand. There was a wreck, including a car loaded with Texas steers. The steers escaped from the car and scattered. Conceding it was within the line of duty of a section hand to clear away the wreck, and, in the doing of it, to gather up and care for freight, the plaintiff admits that on the occasion of a prior wreck of a train containing a car load of hogs, which escaped, as a part of his duty he assisted in gathering them up and putting them in pens, and he also admits that he knew of no one else connected with the road whose duty it was to collect and pen up the Texas steers; but he expresses the opinion that it was outside of his duty to do so, and that he did it on this occasion only because the foreman ordered him to do it, and says he supposes the foreman thought it was a part of the plaintiff's duty, and that he obeyed the order, because, in railroad work, one must obey the orders of the foreman, or quit. Therefore it was either within the line of the plaintiff's duty, and the foreman had a right to give the order, and the plaintiff cannot recover, because it was a risk incident to the service, or else it was not within the line of the plaintiff's duty, and the foreman had no right to demand the service, and no right to bind the principal for damages received by the servant in consequence of acts required by the foreman which he had no right to require. And it will not help the case to say that it was a new employment by the foreman, for a new service, entirely outside of, and different from, his employment as a section hand. For, if it was such a new service, and the servant voluntarily entered upon it, he assumed the risks ordinarily incident to such service. The learned counsel for the plaintiff evidently realized this, for they endeavored to avoid these difficulties when they drew the petition. The petition is based upon the idea that it is ordinarily within the line of duty of a section hand to assist in gathering up even Texas steers that have escaped from a wrecked car, but that the defendant is liable in this case for the reason that it ordered him to go after and pen up this particular steer, which was wild and vicious and very dangerous to handle, and greatly frightened and excited by reason of having been in the wreck, all of which was known to the defendant, or could have been known to it by the exercise of ordinary care, and which was wholly unknown to the plaintiff, and that the plaintiff relied upon it that the defendant would not expose him to unneces-

sary danger. It will be observed that the petition does not in express terms charge the defendant with negligence in failing to warn the plaintiff of an unusual or extraordinary risk or peril arising out of the service, of which the defendant was aware and the plaintiff was ignorant; but this must have been the intention of the pleader, for without this the petition states no cause of action whatever. And the case was tried below on the theory that this was the proper construction to put upon the petition, and it was not attacked in any way, but both sides introduced evidence upon the theory without objection from the other. The case will therefore be so treated here.

The first postulate, therefore, is that ordinarily it is within the line of duty of a section hand to assist in clearing away a wreck and in gathering up the freight, and, if the freight happens to be Texas steers, to gather them up and put them in pens. This resolves this case into the narrow question whether the defendant is liable to this plaintiff because it knew this particular steer was wild, vicious, and dangerous, and greatly frightened and excited by reason of the wreck, and the plaintiff was ignorant thereof, and that the defendant failed to warn the plaintiff of such facts when it sent him after the steer, and that such failure of the defendant to warn the plaintiff was the direct and proximate cause of the injury. This, of course, assumes that it was within the line of the plaintiff's duty to go after the steer, even though it was wild, vicious, and hard to handle, and that the sole negligence of the defendant was a failure to notify the plaintiff of the character of this particular steer. Counsel for the defendant has furnished the court with an exhaustive treatise, replete with citations of cases, upon the liability of a person for injuries inflicted upon others by animals *feræ naturæ* which he has in his possession, and by domestic animals; the general rule deducible from the authorities being that every one is charged with notice of the nature and propensity to inflict injury, of animals *feræ naturæ*, and, therefore, if one keeps such animals in his possession he is liable for damages done by them, without express proof of knowledge of the nature of the animal, but that as to domestic animals a scenter must be alleged and proven. The chief difference between counsel in this case is the application of the general principles of law to the concrete case in hand. The primary disagreement is as to whether Texas steers are *feræ naturæ* or domestic animals. The plaintiff contends that the defendant's prior answers in this case admitted that "Texas cattle are by nature wild and vicious and dangerous to handle, and that when confined in cars, or when surrounded by conditions liable to produce excitement, as by the wreck of a train, they are liable to become excited, and more wild and vicious and more dangerous than

ordinary; that such qualities of Texas steers is a matter of general notoriety; especially among men employed upon railroads and engaged in the transportation of such animals," and that the defendant, therefore, is liable in this case, because it had in its possession such animals; and that, as the defendant admits that all Texas steers are wild, vicious, and dangerous to handle, it was not necessary for the plaintiff to show that the defendant knew that this particular steer was wild, vicious, and dangerous. But while so contending as to the defendant, the plaintiff says he cannot be charged with notice of the character of Texas steers as a class, nor as to the character of this particular steer. Or otherwise stated the plaintiff's position is that the defendant is bound by the admissions of its abandoned answer, and that the plaintiff can introduce them against the defendant so as to bind it, but that the plaintiff is not bound or affected by such admissions; that is, that one party litigant can use such parts of a pleading filed by his adversary as affect his adversary injuriously and benefit the party so introducing such admission, but that such party can reject such other parts of his adversary's pleading as make in favor of his adversary and against himself. In other words, that he can split up his adversary's pleading, and use dismembered parts thereof as an admission against him, and discard such parts as affect injuriously the party so introducing it. This is a misapprehension. An admission of one's adversary must be taken as a whole. The good must go with the bad. One who seeks to use an admission of his adversary must take the admission cum onere. Viewed in this light, the answers of the defendant tend to show that Texas cattle as a class, are *feræ naturæ* and vicious, dangerous to handle, and liable to inflict injury, and, as the whole includes the sum of all its parts, so this particular steer, being one of such class, was vicious and dangerous, and therefore it was not necessary for the plaintiff to prove the character of this particular steer, for the defendant had admitted that it knew such character already. But while this is true, it does not make out a case for the plaintiff, for the reason that the admission says that "such qualities of Texas steers is a matter of general notoriety, especially among men employed upon railroads and engaged in the transportation of such animals," and the plaintiff was employed upon railroads, and therefore he knew, both from that fact, and because all men know those things that are matters of general notoriety, that all Texas steers—this particular steer included—are vicious and dangerous to handle. Hence both the plaintiff and the defendant, according to this hypothesis, were equally informed of the character of this particular steer, and the defendant cannot be held liable for a failure to give the plaintiff a warning as to such fact; for plaintiff already knew it. It is man-

ifest, therefore, that upon this theory the plaintiff is not entitled to recover; and counsel for plaintiff practically concede this when they take the position that they are entitled to split up the admission, and use only such parts as affect the defendant injuriously, and not be bound by such parts as affect the plaintiff injuriously.

The plaintiff, however, does not take the position that Texas cattle, as a class, are wild, vicious, and dangerous to handle. The petition evidently implies the converse to be true, and attempts to take the particular steer out of the general class, and to hold the defendant liable because this particular steer was of that character, which the defendant knew, and the plaintiff did not, and the defendant failed to warn the plaintiff of that fact. It is true, the plaintiff admitted in one breath that he had testified on the former trial of this case that he had heard that all Texas steers are vicious and dangerous, and in the next breath said he did not remember whether he had so testified or not, and that upon this trial he said he had never heard or known anything about such cattle before the accident. It is also true that the plaintiff called witnesses to testify as to the character of Texas steers, one of whom said they are, as a class, vicious and dangerous, and the others said they are generally quiet and inoffensive unless they are attacked or become unusually excited. It is also true that the plaintiff testified that he found all of the other steers that were in this wreck quiet and easy to handle, and that when they came upon this particular steer he "acted wild" and ran away from them, and that he first went east upon the railroad track, and when they were following him he turned and came west again, and that when he saw him he was coming towards him "with his head tucked down as hard as he could come," and that he continued to come, notwithstanding the usual cries to cattle that were employed by Jim Housman, and notwithstanding the plaintiff stood in his way with a big club in his hand. It is also true that the plaintiff denied that he heard the warning given to them by the foreman when they started after this steer, and also denied that George Housman warned him as to all the steers (not this one in particular) when he woke him, and cautioned him that they might hurt him. But even if all this be accepted as true in this case, it still is not sufficient to make the defendant liable. The plaintiff's right to recover under the pleadings, as hereinbefore construed, and under the evidence adduced, depends upon the predicates that the defendant knew that this particular steer was vicious and dangerous, and that the plaintiff was ignorant of it, and that the defendant was negligent in not warning the plaintiff of that fact, and that such fact and failure were the direct and proximate cause of the injury. The record is absolutely destitute of any evidence that either the de-

fendant or the foreman had any knowledge whatever that this particular steer was in any respect different from any of the others, and the plaintiff himself says the others were quiet. The evidence shows that the only information that the foreman had was that the conductor told him when he got down to the toolhouse that there were a lot of Texas steers out, and warned him to be careful, as they might get after him and hurt him. But this related to all the steers, as a class, and not to this particular steer. So that this would be insufficient to support the allegations of the petition that this steer was different from the Texas steers as a class. Aside from this, the foreman who testified as to this warning of the conductor said in the same answer that "the men was there." "The men" could only refer to the section gang, that was composed of the plaintiff and the two sons of the foreman.

This is the sum of all the testimony there is in the record of any attempt to charge the defendant with knowledge of the character of this particular steer, and the testimony was not a part of the plaintiff's case in chief, but was brought out on the cross-examination of the defendant's witness, and was not before the court when the court overruled the demurrer to the evidence at the close of the plaintiff's case. In fact, up to that time there had been no attempt whatever to prove that the defendant had any knowledge as to this particular steer, but the plaintiff had relied upon the admission in the defendant's abandoned answers, which have been above analyzed and discussed, and found insufficient to make out a case. So that the record discloses the fact to be that the plaintiff wholly failed to prove in chief that the defendant knew that this particular steer was different from any of the others, or that he was vicious or dangerous, and that the plaintiff was ignorant of that fact, and that the defendant was negligent in failing to warn the plaintiff of that fact, and that such failure was the direct and proximate cause of the injury; and the defendant's evidence did not help out the plaintiff's case. On the contrary, it not only appears from the physical facts adduced by the plaintiff in his case in chief that the plaintiff knew or believed that all Texas steers are vicious and dangerous, and that, before the moment when the plaintiff was placed in any peril by this steer, he knew he had "acted wild" when they had previously found him in the field. For upon no other hypothesis can the fact be accounted for that when he started after this particular steer he armed himself with a club as big as his arm, and six or seven feet long. Aside from all this, however, the plaintiff knew more about this particular steer than the defendant or the foreman did, for a sufficient length of time before he was placed in peril, to be as much upon his guard as he could possibly have been if he had had warning. For the plaintiff himself testified

that when they found this steer in the field he "acted wild." Now, wild animals are dangerous, and domestic animals may become dangerous when so excited as to act wild. But whether or not an animal that does act wild is vicious and dangerous, the very fact that it does act wild is sufficient to put a man of ordinary prudence upon his guard, and cause him to take all available means to prevent being injured by such animal. The fact, therefore, is undisputed, that the plaintiff armed himself with a big club when he was sent after this steer, and that he found out that the steer "acted wild." The fact is also undisputed that Jim Housman was in the lead, next came George Housman, and the plaintiff came last, and that they were on the railroad track, which at that place was on the top of a 15-foot embankment, which was so steep that when one ran down it the momentum of the body carried the person over the level space at the foot of the embankment and into the borrow pit. These were the positions of the parties and the condition of the locus in quo at the time of the accident. Jim Housman cried out, "Here he comes;" hallooed to the steer as men usually do when driving cattle. The steer kept coming towards him, and Jim jumped off of the track, and ran down the embankment into the borrow pit, and his feet stuck in the mud, and he fell on his face. George Housman also jumped off of the track and ran down the embankment, but it does not appear whether he too was precipitated into the borrow pit. George also gave the warning of the approach of the steer. The plaintiff says that he heard Jim's warning, but did not hear George's. Assume that this is true. The fact is that, after Jim gave the warning, George had time to jump off of the track and out of danger before the steer reached him. George was nearer to Jim and to the steer than the plaintiff was. Yet the plaintiff says he did not have time to get out of the way before the steer came upon him. This is a manifest error, for George was nearer to the steer than he was, and George had time to get out of the way, and therefore it must have been that the plaintiff had time to do so. But instead of doing so, the plaintiff stood still on the track until the steer came upon him. Then he moved towards the north side of the track, and the steer moved in the same direction. He then moved towards the south side of the track, and, when the steer tried to come over to that side also, he struck him, or struck at him, with the big club, and the steer veered towards the north side of the track, passed the plaintiff, and went on towards the west, and the plaintiff ran down the embankment, jumped into the borrow pit, got stuck in the mud, and hurt his leg. It is too plain to admit of serious discussion, upon such a state of facts as this, that the plaintiff had more knowledge than the defendant had as to the character of this particular steer at the time he was placed in

peril, and also that the plaintiff had as much notice or warning to look out for danger as if the defendant had known of the character of this particular steer; and had warned the plaintiff thereof before he started after him. It is also beyond doubt that, if the plaintiff had been so warned, it would have made no difference in this case, because, with the precautions the plaintiff had taken to protect himself against this steer, and with his knowledge that this steer had "acted wild," and with Jim's warning cry, and with the knowledge that both Jim and George had jumped out of the way of the steer, the plaintiff failed to do as they had done and seek a place of safety, but stood still until the steer came upon him. And even after all this the plaintiff drove the steer away from him, and did not run down the embankment until after the steer had passed beyond him, and all danger from the steer was gone.

It is quite true that the conduct of persons in the face of imminent peril is not to be judged as strictly or as harshly as it would be if no such danger was impending. But the thought here present is that at the moment when the plaintiff was placed in peril he knew as much as he could have known if the defendant had known and warned him of the character of this steer, and that his conduct was not different from what it would in all human probability have been if he had been so warned. It is also manifest that the failure of the defendant to give such a warning was not the direct or proximate cause of the injury, but that the injury was the result of the plaintiff's own conduct in not getting off the track and out of the way of the steer, as Jim and George did, or of the plaintiff's unnecessarily running down the embankment after the danger was passed. Aside from all this, however, if the embankment was so steep that, when one ran down it, the momentum of the body became so great that he could not stop on the level at the bottom, and was necessarily precipitated into the borrow pit, then it is not perceivable what bearing the failure to give notice or warning would have in this case. For if with warning the only thing one could do was to run down the embankment, and if running down the embankment necessarily produced such results, then the same result would ensue if one ran down the embankment in consequence of or without such a warning, and therefore the failure to give the warning could not be the direct and proximate cause of the injury. This is illustrated by the experience of Jim Housman. He says he had warning that there were some Texas steers out, and that he must be careful, or he might get hurt. He had no warning as to this particular steer, because neither the defendant nor the foreman knew anything about this particular steer. With this warning in mind, and the steer upon him on the railroad track on the top of the embankment, he did the only

thing he could do—he was not armed with a club, as the plaintiff was—he ran down the embankment; and the momentum was so great that he could not stop at the bottom, but he was precipitated into the borrow pit. He went into the mud up to his ankles, and he was thrown on his face. Thus he did with notice exactly what the plaintiff says he did without notice. They both went into the borrow pit, and got stuck in the mud. The only difference between them was that one was hurt, and the other was not. So that it conclusively appears that the result to the plaintiff would have been exactly the same whether he had notice or not, and, in addition to this, that the defendant and the foreman knew nothing about this particular steer, but that at the time of the accident the plaintiff knew more about this steer than they did. The plaintiff's right to recover is made by the petition and the theory adopted by the parties for the trial of the case to depend upon the knowledge of the defendant and the ignorance of the plaintiff of the character of this particular steer, and the negligence of the defendant to give the plaintiff proper warning thereof, and upon the failure to give such warning being the direct and proximate cause of the injury; and the case made by the plaintiff, or taken as a whole, fails to make out a case, and therefore the trial court should have sustained the demurrer to the evidence, and have directed a verdict for the defendant.

The plaintiff contends, however, that the nature of the defendant's business is such that it knows, or has the opportunity to know, or could by the exercise of ordinary care have known, the character of Texas steers. Even if this was true of such steers as a class, it would not be true as to any particular steer. But it is not true that a common carrier is charged with notice of the character of the freight it transports. That contention was set at rest by the decision of the Supreme Court of the United States in the Nitroglycerin Case (*Parrot v. Wells, Fargo & Co.*, 15 Wall. 524, 21 L. Ed. 206).

This conclusion makes it unnecessary to consider the other errors assigned. The judgment of the circuit court is reversed, and, as the ends of justice would not be subserved by ordering a new trial, the cause is not remanded. All concur.

JONES et al. v. KANSAS CITY, FT. S. & M. R. CO.

(Supreme Court of Missouri. Dec. 9, 1903.)

MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—INSTRUCTIONS—ACTION FOR DEATH—ACTION BY WIDOW—STATUTES—PARTIES—MISJOINDER—DEMURRER—MOTION FOR NEW TRIAL.

1. The joinder of an improper or unnecessary party plaintiff, which renders the petition insufficient to support a judgment, can neither be waived nor cured, but can be brought up on motion in arrest or during the trial.

2. The improper or unnecessary joinder of a party plaintiff, the defect not being fatal to recovery, is to be deemed waived if not demurred to, or if defendant pleads to the merits after the overruling of a demurrer, and the insertion in the answer, or in a motion for a new trial, of an objection to the joinder, does not remove the waiver.

3. Gen. St. Kan. 1889, par. 4518, provides that the personal representative of one killed by wrongful act may sue therefor, and that the damages must inure to the benefit of the widow and children. Paragraph 4519, § 422a, provides that where the residence of a party killed by wrongful act is in another state the action may be brought by the widow or next of kin. Mo. Rev. St. 1899, § 547, provides that when a cause of action has accrued by the laws of any other state the action may be brought in Missouri by the person or persons entitled to the proceeds; and section 541, Practice Act (Rev. St. 1899, p. 238), provides that the trustee of an expressed trust may sue in his own name without joining the beneficiary. *Held*, that the widow of a resident of Missouri killed by wrongful act in Kansas might sue alone in Missouri, without joining the child of herself and deceased.

4. In a suit by a widow for the wrongful death of her husband in Kansas, the joinder of the child of herself and deceased was an unnecessary step, not constituting such a defect as could be taken advantage of after a plea to the merits.

5. Where a statute gives the widow of one killed by wrongful act a right of action for the death, for the benefit of herself and children, and the widow sues, the petition naming the plaintiffs as the widow, for herself, and as next friend of her child, the child is not, by a strict construction of the petition, made a party plaintiff to the suit, inasmuch as a suit by an infant must run in the name of the infant.

6. A locomotive engineer does not assume the risk of cars which, having escaped from a siding, are untended on the main track, where they are liable to be run into by a regular train.

7. Where a locomotive engineer is killed by his train running into untended cars on the main track, they having escaped from a siding, the burden is on the railroad to show freedom from negligence.

8. Where a railroad engineer is killed owing to his train running into untended cars on the main track, they having escaped from a siding because of their having been negligently secured, such negligence is not that of fellow servants, it being the duty of the master to use reasonable care to prevent such an escape.

9. Where railroad cars on a siding escaped to the main track, in an action for the death of an engineer, caused by his train colliding with the cars, it was to be presumed that there was something defective with the brakes or their setting.

10. Where railroad cars standing on a siding, with brakes properly set, are driven upon the main track by a storm of such extraordinary violence that it could not reasonably have been anticipated, the railroad is not liable for injuries to an employe occasioned by the cars being on the main track.

11. In an action for the death of a railroad engineer owing to cars on a siding having escaped to the main track, the court instructed that, if the jury believed that the cars would not have escaped except for an unusually violent storm, defendant was not liable. *Held*, that the instruction presented the defense of a storm, severe beyond anticipation, as favorably to defendant as it could have asked.

12. In an action against a railroad for the death of a servant occasioned by cars escaping to the main track from a siding, evidence con-

¶ 6. See *Master and Servant*, vol. 34, Cent. Dig. § 556.

sidered, and held sufficient to justify the jury in finding that the brakes had not been properly set.

13. In an action against a railroad for the death of a servant, owing to cars escaping to the main track from a siding, the fact that there was no derailing switch did not show negligence per se.

14. Evidence as to the existence and use of derailing switches was proper.

15. In an action against a railroad for the death of a locomotive engineer owing to his train colliding with cars that had escaped to the main track from a siding, the fact that he had continued in defendant's service knowing that there was no derailing switch at the siding in question did not show contributory negligence as a matter of law.

16. The question whether the siding without a derailing switch was a reasonably safe appliance was one for the jury.

17. The court instructed that if the jury believed that defendant negligently failed and omitted to fasten and secure the cars, whereby they escaped, etc., plaintiff was entitled to recover. Defendant claimed that the words "fasten and secure" rendered the instruction erroneous, as imposing the duty of making the car incapable of getting loose. The evidence relative to fastening cars referred to brakes and blocks, and the instruction complained of was followed by one defining the word "negligence," and the jury were instructed that defendant was only bound to use reasonable care, using ordinary appliances, and that they should take all the instruction together. Held, that the instruction was not erroneous, since, even standing alone, it was not susceptible of the meaning claimed, and especially not so in view of the other instructions.

18. The cars not having been blocked, and there having been no derailing switch, and plaintiffs' evidence having tended to show that it was not unusual for cars to be blocked on a side track, and that derailing switches were in common use, and defendant's evidence tending to show that blocks were not ordinarily used when the brakes were well set and the cars on a level track, and that derailing switches were not ordinarily used on such a track, and that they were of doubtful utility, an instruction that the jury might consider the appliance and means in common use was not erroneous on the ground that there was no evidence of appliances in general use and not in use at the place in question.

19. In an action against a railroad for the death of a locomotive engineer owing to his train having collided with cars that had escaped from a siding, there was evidence that the accident resulted from an unusual storm, and the jury was instructed that if such were the case plaintiff could not recover, and that, if the death were caused by an ordinary peril incident to the business, plaintiff could not recover. The court instructed that, in determining whether defendant used reasonable care to confine the cars, the jury might take into consideration the appliances and means, if any, which were adopted and in common and general use at the time for that purpose, at similar places, by prudently and properly conducted railroads. Held, that the instruction was not erroneous as omitting any reference to assumed risk.

20. In an action for wrongful death under Gen. St. Kan. 1889, par. 4518, giving the widow and children the right to damages, the court instructed that in assessing damages, if the jury found for plaintiff, they should assess the damages with reference to the pecuniary loss sustained by the wife and child, by fixing the same at such sum as would equal the probable earnings of the deceased, taking into consideration his age, business capacity, experience, habits, health, and energy, during what would probably have been his lifetime, and by adding

the same to the value of his services in the attention to and care of his family and the education of his child, in all not to exceed the sum of \$10,000. Held that, while it was subject to the interpretation that it gave as the measure of damages all wages deceased would probably have earned, without taking into consideration natural contingencies, and without considering that part of his earnings, at least, would not necessarily or naturally have been given to his wife and children, it was not reversible error in view of the verdict for \$5,000, and Rev. St. Mo. 1899, § 865, forbidding reversal for any error not materially affecting the merits.

21. It was proper for the jury to take into account what deceased was earning, his capacity to earn, and probable duration of his life, the contingencies to which his life was subject, and estimate how much of his earnings would probably have inured to his wife and child, and what the pecuniary value of his services to them would have been.

22. In an action against a railroad company for the death of a servant owing to cars escaping to the main track from a siding, there was no error in admitting evidence that derailing switches were in use in other side tracks on this road, nor in admitting in evidence the printed rules of the company regarding the precautions to be taken to prevent cars escaping from a side track.

In Banc. Appeal from Circuit Court, Jackson County; Jno. W. Henry, Judge.

Action by Mary Jones, individually and as next friend of Mary Jones, an infant, against the Kansas City, Ft. Scott & Memphis Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

L. F. Parker and Pratt, Dana & Black, for appellant. William Moore and James A. Reed, for respondents.

VALLIANT, J. David R. Jones, who was the husband of the plaintiff Mary and the father of the infant Mary, was a locomotive engineer in the service of the defendant, and was killed in a railroad accident at La Cygne, a station on defendant's road, in the state of Kansas, which accident was caused, as plaintiffs allege, by the negligence of the defendant. The right of action is based on the following statutes of Kansas: Paragraph 1251, Gen. St. Kan. 1889, as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees to any person sustaining such damage." Also section 422, c. 80, Gen. St. 1868, known as paragraph 4518, Gen. St. Kan. 1889, as follows: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars and must inure to the exclusive benefit of the widow and children, if any, or

next of kin, to be distributed in the same manner as personal property of the deceased." Also paragraph 4519, Gen. St. Kan. 1889, also designated section 422a, as follows: "Be it enacted by the Legislature of the state of Kansas, that in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section 422 of chapter 80, Gen. St. 1868, is or has been, at the time of his death in any other state or territory, or when being a resident of this state, no personal representative is or has been appointed, the action provided in said section 422 may be brought by the widow, or where there is no widow, by the next of kin of such deceased." The plaintiff is Mary Jones the widow, suing in her own right, and the same Mary in the capacity of next friend duly appointed, suing in behalf of the other Mary, an infant 5 years old, the only child of the deceased. The negligence charged in the petition is that the defendant placed on its side track at La Cygne three freight cars, and negligently failed to perform its duty in that connection in the following particular, viz.: To fasten and secure the cars on the side track; to keep the brakes properly set and the cars properly blocked; to provide the cars with sufficient brakes, in good order, to hold them in place; to provide the ends of the side track with safety or derail switches or other devices of the kind usually provided by railroads at such places, and in common use at such places, to protect the main track from loose cars, and to prevent cars when not under control from passing from the side track to the main track. The petition states that in consequence of this failure of duty on the part of the defendant the three freight cars mentioned were suffered to escape from the side track and run loosely and unattended to and upon the main track, where they came into collision with the locomotive engine which the plaintiff's husband was operating, drawing a freight train, and in consequence thereof he received injuries of which on the next day he died. The answer of the defendant was, first, a plea that the infant Mary was not a proper or necessary party to the suit; second, a general denial; and, third, a plea of contributory negligence, to which was a reply of general denial. Upon the trial the plaintiff made the formal proof of her appointment as next friend of the infant, and that she was the widow, and the infant the only child, of the deceased. Concerning the accident the testimony for the plaintiff tended to show as follows: At La Cygne the defendant's road runs north and south. On a side track at that station, on the evening of June 25, 1897, there were several freight cars stationed. Of these the one farthest south was a coal car loaded with ties, next north, after a space of 200 or 300 feet, was a stock car, and attached to it on the north end was a box car. From the north end of the switch to a point beyond where the box car and stock car stood it was

slightly upgrade. From the stock car to the coal car it was nearly level, beyond the coal car to the main track it was slightly downgrade, and the main track was downgrade from the end of the switch to the place of the accident. Between 8 and 9 o'clock on the evening of the day named a storm of wind, rain, and hail came from the northwest, which drove the three cars down the side track out on the main track, and down it for a distance of a mile, at which point a locomotive drawing a freight train, going north, came forcibly in collision with the coal car and caused a wreck of the engine. The plaintiff's husband, who was the engineer in charge of the locomotive, received severe injuries of which he died the next day. It was a dark night; the engine was running at the usual rate, facing the wind and rain. The train was running on its schedule time, and had the right of way; the deceased was in the discharge of his regular duty. It was a severe but not an unprecedented storm; the damage done by it in and around the station was not serious. No houses or trees were blown down. Storms as severe were not so unusual in that vicinity as to be beyond expectation. This switch track was not equipped with what in the testimony was called a "derail switch," although a considerable number of side tracks of defendant along that part of its road between Ft. Scott and Kansas City did have that equipment. A "derail switch" is a device which when set will cause a car running loose on the side track to run off its rails to the ground before reaching the main track, and it is contrived to prevent accidents of this kind. The testimony for plaintiff also tended to show that the brakes were not set on the three cars that escaped, and that they were not blocked or otherwise fastened. These three were the only cars of those on that side track that night that were driven out by that storm. The testimony for the defendant tended to prove that the three cars in question were supplied with good and sufficient brakes, that the brakes were set, and that, as set, they afforded all the security required for holding the cars in place under ordinary conditions, or conditions that might reasonably be anticipated. That the storm was of such unusual force that it could not have been reasonably anticipated. That the device called the derail switch was not usually used in side tracks level or nearly so as this was, but only where the grades were steep. That a derail switch was not only not necessary, but not desirable, in a side track like this. That such a switch had its own difficulties and drawbacks, which rendered its usefulness in the long run questionable. The case was given to the jury under instructions which will be hereinafter discussed. The trial resulted in a verdict and judgment for the plaintiff for \$5,000. The defendant appeals.

1. It is assigned for error that the minor child of the deceased was not a proper or necessary party. There was a demurrer to

the petition on that ground, which was overruled, whereupon the defendant filed an answer in which it set up the same objection to the petition. The defect, if it was such, appearing on the face of the petition, could be reached only by demurrer, unless it was such a defect as affected the validity of the cause of action, rendering the petition insufficient to support a judgment, in which case the defect could be neither waived nor cured, but could be brought up on motion in arrest or during the trial. But if it was not a defect fatal to the right of recovery, if it was one that could be waived, it will be deemed to have been waived unless it was brought to the attention of the court by demurrer, and unless, if the demurrer was overruled, the defendant declined to plead to the merits. Pleading to the merits after such a demurrer is overruled waives the right to complain of the ruling. The insertion in the answer of a clause which was only a repetition of the demurrer did not avoid the effect above stated of answering over. Nor can that consequence be avoided by inserting in the motion for a new trial, as was done in this case, that the court erred in overruling the demurrer. The petition, the demurrer, and the judgment of the court on the demurrer constitute a part of the record proper, and that judgment is reviewable without exception, whereas the motion for a new trial relates to matters only that are preserved by the bill of exceptions. Unless, therefore, the alleged defect of parties in this case is of such a nature as to defeat the right of action, the point is not properly before us for review.

The defect, as stated in the demurrer and in the answer, is that the infant Mary Jones "is not a proper or necessary party." If she is merely an unnecessary party, she may be dropped at any time (Patterson, Mo. Code Pleading, 956, 1001; Powell v. Banks, 146 Mo. 620, 48 S. W. 664) without affecting the rights of the other plaintiff who is a necessary party. There is no obscurity in the meaning of the term "not a necessary party." It means that the suit can proceed just as well without her, and in that event, if her presence has the effect to hinder or burden the case, she may be dropped. But the meaning of the term "proper party" is not so clear. The word "or," which the pleader has here used, may be used in two forms. In one it corresponds to either, and in that sense the term "proper or necessary" would mean "either proper or necessary," that is, one or the other. In the other form it means to express the same thing alternatively in different words; in that sense the term "not proper or necessary" would imply that it was not proper, that is, not necessary. The latter is probably the sense in which the pleader used the term. If it is not used in that sense, then there is nothing to show what was meant by saying that the infant was not a proper party. If she was merely an unnecessary party, her presence in the case is

not such a defect as would justify a reversal of the judgment.

Appellant takes the position that the infant cannot maintain the suit because the Kansas statute does not confer on her the right of action, and that the widow alone cannot maintain it because she is not alone entitled to the proceeds. To sustain this position, appellant relies on *McGinnis v. Mo. Car & Foundry Co.* (Mo. Sup.) 73 S. W. 586. In that case it was held by this court that the liability created by a statute of Illinois, similar in character to that created by the Kansas statute with which we are now concerned, could not be enforced in this state at the suit of one who was not authorized by the statute of Illinois to maintain the suit. The Illinois statute conferred the right of action on the personal representative, that is, the executor of the will or administrator of the estate of the deceased, and it was held that, the liability and the right of action being created by statute, only the person to whom the statute gave the right could maintain the suit; and if, as in that case, the foreign statute gave the right to one whose authority extended not beyond the limits of his state, he could not sue here. It was also held in that case that our statute (section 548, Rev. St. 1899) which undertook to authorize the appointment of a person in this state—other than the person specified in the foreign state—to maintain the suit, was invalid. The Kansas statute, however, on which this suit is based, differs, in the feature we are now considering, from the statute of Illinois. The Kansas statute declares the liability, gives the right of action to the personal representative of the deceased, specifies that the damages to be recovered shall inure to the exclusive benefit of the widow and children or next of kin, and then provides that where the deceased is not a resident of the state the suit may be maintained by the widow, or, if there is no widow, then by the next of kin. The right of the widow, therefore, to maintain this suit is in line with the law laid down in *McGinnis v. Foundry Co.*, above mentioned. The damages to be recovered are to inure, according to the express terms of the statute, to the exclusive use of the widow and children or next of kin. Therefore, when the administrator sues and recovers, he does so, not for the use of the estate in general, but for the use of the beneficiaries named. He is, in effect, created by the statute a trustee of an express trust for the use of the widow and next of kin. And if there is no administrator, or if the deceased was not a resident of Kansas, the widow may sue. But when she sues and recovers, it is not for her own use alone, but for the use of herself and the children or next of kin. She thereby becomes the trustee of an express trust, so created by the statute which created the liability.

It is argued in behalf of appellant that although the widow, by the law of Kansas, may sue alone, yet by force of our statute (section 547, Rev. St. 1899) she cannot do so because she is not alone entitled to that which may be recovered. The language of our statute is: "Whenever a cause of action has accrued under or by virtue of the laws of any other state or territory, such cause of action may be brought in any of the courts of this state, by the person or persons entitled to the proceeds of such cause of action: provided, such person or persons shall be authorized to bring such action by the laws of the state or territory where the cause of action accrued." That statute was intended to aid a resident of this state in availing herself of the provisions of the foreign statute, and it should be construed as an enabling, not as a disabling, statute. It was intended to confer a right, not to restrict one. If by the law of Kansas the widow had the right, our statute was not designed to take it from her. This construction renders that section of our statute in harmony with section 541 of our Practice Act (Rev. St. 1899, p. 238), which provides that a trustee of an express trust may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. But whilst a trustee of an express trust may sue in his own name without joining the person for whose benefit the suit is prosecuted, he is not forbidden to join the beneficiary, and, if he does so, the most that can be said in criticism of the act is that it was unnecessary. In the case at bar, the widow and her child were the sole beneficiaries of the suit, so declared by the Kansas statute, and by the same statute the widow was authorized to sue and recover for the benefit of herself and her child. She might have sued alone as trustee of the express trust, using apt words to show her authority; and, if she has joined the child with her in the suit, it was a useless act, but it has impinged no one's rights. Strictly construing the petition herein, the child has not been made a party to the suit. When a suit is prosecuted in the name of an infant, it must run in the name of the infant, as plaintiff, by its guardian or next friend, and not in the name of the guardian or next friend for the infant. The infant is the plaintiff, not the guardian or next friend. An executor or administrator sues in his own name because the title is in him, but the title to the infant's property or choses in action is not in the guardian or next friend, but in the infant. In this case, if the infant was a necessary party, the petition would be subject to criticism, because the plaintiffs are named in the petition as Mary Jones for herself and the same Mary as next friend to the child, the legal effect of which, when taken with the other averments of the petition, is that the plaintiff is Mary Jones, as widow, suing for herself, and the

same Mary suing as trustee of an express trust for her child. The statute of Kansas gives her the right to sue in that capacity, and our statute does not abridge that right.

2. The refusal by the court of the instructions asked in the nature of a demurrer to the evidence is assigned as error. As the foundation for their theory on this branch of the case, the learned counsel for appellant state three propositions, viz., that the burden is on the plaintiff to prove, first, negligence on the part of the defendant, second, the specific negligence charged, and, third, that the negligence was the proximate cause of the injury; and to these they add that, in the beginning, the plaintiff is met by the presumptions, first, that the master has performed his duty, and, second, that the catastrophe was the result of the usual and ordinary hazards incident to the business, the risk of which the servant assumed when he entered into the service. The proposition that the burden is on the plaintiff to prove his case is conceded, and that the presumption is in the defendant's favor in the beginning follows as a corollary. It is also beyond dispute that there are dangers incident to the business of operating a locomotive on a railroad, even when the business is conducted with due care on the part of both master and servant; that of such dangers the servant assumes the risk, and, if he is injured through an accident that is incident to the business, without fault of the master, he cannot recover. Proof, therefore, of the mere fact that the servant was injured in the master's service is not sufficient to make out a prima facie case for the plaintiff. To that extent the authorities cited in the brief for appellant sustain those propositions. *Yarnell v. R. R.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Murphy v. R. R.*, 115 Mo. 111, 21 S. W. 862. But when cars are found running loose and unattended on the main track at a time and place when and where they are liable to cause the wreck of a regular train, it cannot be said that the danger so incurred is one of the usual and ordinary hazards incident to the business. It is not a usual and ordinary occurrence in a prudently managed business for cars to be found running loose in that manner; it does not ordinarily occur unless some one has neglected his duty; and it is not, therefore, a risk assumed by the servant. And since it is an occurrence not likely to happen in the orderly course of business, when it does happen, and a servant is injured in consequence, it calls for an explanation. Upon whom does the burden of making the explanation devolve? It devolves either on the injured servant or on the master. If it was the duty of the injured servant to attend to those cars on the side track, to see that they did not escape, then the burden of making the explanation devolved on him. But if he had nothing to do with securing the cars in their position on the side track, if his duty

related only to the operation of the locomotive engine, then there is no explanation due from him.

The question of the negligence of a fellow servant does not enter into this case, because, as was shown by the pleadings and proof, the statute law of Kansas makes the railroad company liable to a servant for the consequences of the negligence of a fellow servant. But, even at common law, the negligence charged in this case was not the negligence of a fellow servant. It is the master's duty to furnish the servant reasonably safe appliances and a reasonably safe field of operation. This duty, of course, in an extensive business, the master cannot attend to in person, must intrust to servants, but the servants to whom it is intrusted act in the master's place and perform his duty, and if they are negligent it is his negligence. It is necessary to observe a distinction between the

performance, on the one hand, of the work for which the business is undertaken, and the furnishing, on the other, of the appliances and field of operation with which and in which to do the work. In the one, the servants are working for a common master; in the other, the master, either per se or per alium, is performing his duty to his servant. And, whether he acts per se or per alium, if he fails to exercise reasonable care, he is negligent. It was the duty of the master in this case to use reasonable care to prevent those cars escaping, and therefore, when they were found running loose, so as to imperil the life of the servant who was in the due performance of his duty, the presumption is the master did not use reasonable care to hold its cars on the side track, and the burden is on him to prove that he performed his duty in this respect; it devolves on him to explain the occurrence.

It was not attempted, on the part of the defendant, to prove the cars with good brakes, and the brakes properly set, were liable to escape under conditions that might reasonably be anticipated. On the contrary, when confronted with the fact that the side track was not equipped with a derail switch, the defendant offered testimony to prove, and now contends, that with good brakes, and the brakes properly set, the cars were secure under ordinary conditions. But if the brakes were not set or the cars blocked, they were liable, under ordinary conditions, to do just what these cars did. Therefore, when it was shown that they did escape, the presumption arose that there was something wrong, whether with the brakes or their setting. The defendant, to meet this presumption, undertook to prove that the cars, although the brakes were set, were driven out by a storm of such extraordinary force that it was not to have been reasonably anticipated. If that was the fact, the plaintiff was not entitled to recover (*Stoher v. Ry.*, 105 Mo. 192, 16 S. W. 591; *McPherson v. Ry.*, 97 Mo. 255, 10 S. W. 848; *Brash v. St. Louis*, 161 Mo. 433, 61 S. W. 808), and the jury were so instructed. That there was a

severe storm on that occasion is shown by the evidence on both sides, and that these cars were moved out by the wind is a natural inference. Whether the wind was strong enough to have moved them if the brakes had been set, was an open question. That it was an unprecedented storm, even the evidence of the defendant can hardly be said to prove; that it was a storm of such unusual violence as that it could not have reasonably been anticipated by one whose duty it was to take measures to guard against storms, is a fairly debatable proposition under the evidence. There were no substantial buildings or large trees blown down. The photographs which defendant put in evidence, which were taken shortly after the storm, show little, if any, effect of the wind. There was evidence to the effect that storms of as great force, though not frequent, were to be expected, and that sometimes storms of greater severity had occurred in that vicinity. There was a reference by one of defendant's witnesses to a cyclone cellar, to which his thoughts turned when this storm arose, but to which he did not find it necessary to go on this occasion. The reference only goes to show that a cyclone cellar was a contrivance not unknown to people in that vicinity. Although the storm was severe, yet, if it was such a storm as common experience taught people in that vicinity to expect, it was the duty of the defendant to have expected it, and to have made reasonable provision to guard against its effect. The testimony as to the force of the storm, and as to its being the cause of the accident, was conflicting. So far as the questions relating to the force and effect of the storm were involved, the case was given to the jury under the following instruction: "If you believe from the evidence that the cause of the cars being on the main track was an unusually violent storm, and that, if there had not been such a storm, they would not have run out, then the defendant was not in law at fault for their being there, and, without regard to other questions in the case, you should find your verdict for defendant." That instruction presented that feature of the case to the jury in at least as favorable light as defendant could have asked. After the verdict of the jury under that instruction, the defendant has no right to ask an appellate court to say that the cause of the accident was an unusually violent storm, unassisted by any negligence of the defendant.

On the charge in the petition that the brakes were not set, the testimony was conflicting. Appellant argues, in reference to this feature of the case, as though the only evidence in support of the charge was that by one witness who testified that, as he passed the coal car which was loaded with ties, he tested the brake by giving it a kick with his foot, and discovered that it was loose. This, he said, he did from force of habit, having formerly been in the railroad business, and accustomed to apply that test in his in-

spection of cars to see if the brakes were set. We infer from the testimony of one of the defendant's witnesses that it was not a usual manner of examining the brakes. He testified that he kicked a brake on one of these cars in passing, and thereby found it firmly set. But that was not the only, nor was it the best, evidence that the brakes were not set. The fact that the cars went out by the force of a wind which the jury found was not sufficient to have drawn them out if the brakes had been set, tends to show that they were not set.

The defendant's testimony tended to show that this coal car was loaded with ties about 8 o'clock in the afternoon, and left on a part of the side track which was nearly level, and that, before leaving it, the foreman set the brakes. It was later in the afternoon or evening, probably 7 or 8 o'clock, when, according to the plaintiff's witness, he kicked the brake and found it loose. The defendant's testimony in reference to the brakes on the two other cars was not so positive. One witness passed within a few feet of them, and looked at them as he passed, and the brakes seemed to be set. He did not get on the cars or touch the brakes. Another witness testified that he came in on a freight train that afternoon, and, as they had to leave some cars on the side track, it became necessary to shove these two cars which were then standing farther north, to the position in which they were finally left, and they did so. He testified that the two cars were coupled together, that the brake on the south end of the north car was set, that the cars were shoved by the train without first loosening the brake, and that the brake held the wheels on one end of the car so that they did not turn. He left the cars in that condition. So that, according to his testimony, there was but one brake set on those two cars when he left, and there was no evidence that any one set the brakes after he left. According to this witness, those two cars were switched or shoved by the train with that brake set, and they were left without any further setting.

One of defendant's expert witnesses, referring to the loaded coal car, said that a jar such as would be made by the two other cars coming against it would be apt to loosen the brake on the coal car. It is just as reasonable to infer that the jar these two cars received in switching would loosen the one brake which was set. That was the substance of the defendant's testimony as to the setting of the brakes on those two cars, and it was far from convincing. At best, there was only one brake set, and that had been subjected to the shock incident to switching. If the jury reached the conclusion that the brakes were not properly set on those two cars, we can find no fault with their verdict. Those two cars were empty cars. They presented to the wind a broad surface, and were compara-

tively easily moved. Coming with the force of the wind against the loaded coal car, even if the brakes on the latter were set, would probably loosen them, and, as the grade was from that point down, the cars would easily move down the track. The fact that there was no derail switch there was not per se negligence, and it was not so treated by the court. Since the law imposes on the master no higher degree of care than that which it denominates "reasonable," it does not require him to furnish absolutely safe, or even the best known, appliances. Yet when his conduct in this respect is on trial, it is proper for the jury to know what appliances are in common use in that kind of business. It has been said by a very high authority that in the operation of a dangerous business the master is guilty of negligence if he fails to furnish the best well-known and reasonably attainable improvement. *Mather v. Rillston*, 156 U. S. 391, ²⁰ Sup. Ct. 404, 39 L. Ed. 404. We do not understand that case as laying down any stricter rule in reference to the master's duty in that respect than that he was to do all that a reasonably prudent master, mindful of the dangerous character of his business, would ordinarily do to protect the lives of his servants. That is the law in this state.

We do not, therefore, say that the defendant in this case was negligent because the side track was not equipped with a derail switch, although it is quite plain that if it had been so equipped this accident would not have occurred. And before passing this point, we may as well say now (since it is the only foundation for the plea of contributory negligence) that the maintaining of the side track without the derail switch was not such an obvious danger as to authorize the court to pronounce the act of the locomotive engineer in continuing in the service negligence, as a matter of law. If the danger was not obvious to the master, it was not obvious to the servant. Therefore, as it affects both the master and the servant, the question of whether the side track without the derail switch was a reasonably safe appliance was a question for the jury. If the master, in the exercise of his right to choose between two appliances, chooses the one less safe, the fact should make him the more careful to properly use the one he selects.

Under the evidence in this case, the trial court did right in refusing the instructions looking to a nonsuit.

3. Appellant complains of the following language in instruction 1 given for the plaintiff: "The court instructs the jury that if you believe and find from the evidence that * * * on or about said date the defendant placed or had on its switch or side track at La Cygne, Kan., three certain freight cars, and negligently failed and omitted to fasten and secure said cars on said switch or side track, and that by reason of said

negligent failure and omission, if it was negligent, said cars escaped from said side-track, etc., then your verdict should be for plaintiffs." The objection is to the words "fasten and secure," and it is argued that these words imply the duty of making the cars absolutely incapable of getting loose. Even standing alone, the instruction would not have been liable to the meaning. The greater part of the evidence for both plaintiff and defendant related to the subject of fastening and securing the cars on the side track by means of brakes and blocks. It was shown that sometimes, when brakes were not considered sufficient, blocks were used, but, when the brakes were sufficient, blocks were not used. All the fastening or securing that the jury had heard about was by means of brakes and blocks, and they could not have interpreted the instruction as meaning that it was the duty of the defendant to have anchored the cars with chains. The instruction uses the term "negligently failed," and it was followed by an instruction defining the word "negligent." Another instruction for plaintiff distinctly told the jury that the defendant was not bound to use any particular device to prevent the cars from escaping, but only reasonable and ordinary care, taking into consideration appliances and means in common use. The instruction given at the request of defendant also made it impossible for a jury of ordinary intelligence to have given the interpretation to the words "fasten and secure" that appellant apprehends was given them. Those instructions on this point were to the effect that the jury must not look to any one instruction alone, but all the instructions were to be taken together; that they must look to the evidence alone for the facts; that the defendant did not owe its servant any duty to make his surroundings absolutely safe; but, in that respect, to use only "such care as a reasonably careful employer would use in regard to the place where and the appliances with which he had to work. And so, if you believe from the evidence that defendant used such care with regard to its tracks and cars, and that, in spite of it, the collision took place, there was no one in law to blame therefor, and your verdict must be for the defendant." We discover no error in plaintiff's first instruction.

Appellant, in its brief, says that the second instruction for plaintiff is erroneous, but does not specify the particulars in which it is so, and we perceive none.

The third instruction for plaintiffs is complained of because it says: "And in determining whether it [the defendant] did use reasonable and ordinary care in that regard, you may take into consideration the appliances and means, if any, which were adopted and in common and general use at the time for that purpose, at similar places, by prudently and properly conducted railroads." The argument is that there was no evidence

tending to show that there was any appliance in general use which was not in use by the defendant at this place. The evidence for the plaintiff tended to show that it was no unusual occurrence for cars to be blocked on a side track. That evidence was answered by the defendant with evidence tending to show that, when the brakes were good and well set and the track level, blocks were not ordinarily used. On the part of the plaintiff the evidence tended to show that derail switches were in common use on this and other railroads. This evidence was met by the defendant with expert evidence tending to show that such switches were not used when the side track was as nearly level as this was, and that they were of questionable utility anyway. The court would have been compelled to have usurped the province of the jury, and have decided those questions of fact in the defendant's favor, before it could have refused the plaintiff's third instruction. It is also contended that the instruction was erroneous in omitting to call the jury's attention to the risk assumed by the servant when he went into the business. There was nothing in the evidence on which to predicate a hypothesis that the accident was the result of a condition ordinarily incident to the business, unaided by the negligence of the master. The storm theory was the only real defense in the case. If the storm was not of such unusual violence that it could not reasonably have been anticipated and its effects guarded against, then the cars would not have been found running wild, unless the ordinary precautions to hold them in place had been neglected. There was evidence tending to show that the accident resulted from the effect of such an unusual storm, and the jury were instructed, in very clear language, to render their verdict for the defendant if they found that to be the fact. And, in another equally explicit instruction, the jury were told that, if the death of plaintiff's husband resulted from one of the ordinary perils incident to the business, she could not recover. Appellant has no cause to complain of the third instruction.

The instruction as to the measure of damages is as follows: "The court instructs the jury that if you find for the plaintiffs you should, in assessing their damages, assess the same with reference to the pecuniary loss, if any, sustained by the wife and child of the deceased: First. By fixing the same at such sum as you may believe and find from the evidence would equal the probable earnings of the deceased, taking into consideration his age, business capacity, experience, habits, health, and energy, during what would probably have been his lifetime. If he had not been killed. Second. By adding these to the value of his services in the attention to and care of his family and the education of his child, in all not to exceed the sum of ten thousand dollars (\$10,000)." It is complained of that instruction that it gives as the meas-

ure of damages, all the wages that the deceased would probably have earned during the period of his life expectancy, without taking into consideration natural contingencies, and without considering that part of his earnings, at least, would not necessarily or naturally have been given to his wife and children. The instruction is liable to that interpretation, although in the first paragraph the jury are told that they must assess the damages with reference to the pecuniary loss, if any, sustained by the wife and child. Reading all the clauses of the instruction together, they may be construed to mean that the jury are to calculate from the evidence the probable amount of earnings of plaintiff's husband if he had lived the full period of his life expectancy, then to estimate how much of that amount would probably have inured to the benefit of the wife and child, and to that add the pecuniary value of the husband's and father's personal service in the care, maintenance, and rearing of his family. But since the instruction, as given, is liable to the construction appellant puts upon it, we cannot give it our approval for a precedent. The evidence showed that the plaintiff's husband's life expectancy was 32 years, and that he was, at the time of his death, earning \$1,500 a year. At that rate he would have earned, in the full period of his life, over \$40,000. The plaintiff was not entitled to all the wages her husband, on that basis, would have earned. It was proper for the jury to take into account what he was earning, his capacity to earn, and probable duration of his life; but they ought also to take into account the contingencies to which his life was subject, and estimate, as best they could from the evidence, how much of his earnings would probably have inured to his wife and child, and what the pecuniary value of his services to them would have been. Of course, the estimate on either of these points must to a great extent partake of the nature of conjecture, but, as we have no more certain means, we must make the wisest use we can of the means we have. But, although we cannot approve the instruction, we do not feel justified in reversing the judgment on that account, because it is very apparent that the jury did not put on it the construction appellant does, since they rendered their verdict for only \$5,000, when, under the instruction, they were at liberty to assess the damages as high as \$10,000, that being the limit of the Kansas statute. No one can say, under the circumstances of this case, that \$5,000 was too much for the loss of the husband and father of this family.

We are expressly forbidden by statute to reverse a judgment for an error not "materially affecting the merits of the action." Section 865, Rev. St. 1899. The court refused several instructions asked by defendant, and the refusal of them is assigned as error. But what we have already said expresses our views on those instructions, and

discussion of them would be, in the main, a repetition of what has gone before. There was no error in admitting evidence that derail switches were in use in other side tracks on this road, nor in admitting in evidence the printed rules of the company regarding the precautions to be taken to prevent cars escaping from a side track. On the whole record, we find no error "materially affecting the merits of the action."

The judgment is affirmed.

BRACE, GANTT, and FOX, JJ., concur.
ROBINSON, C. J., and MARSHALL and BURGESS, JJ., concur in the result.

TRIMBLE et al. v. ALLEN-WEST COMMISSION CO.

(Supreme Court of Arkansas. Dec. 19, 1903.)

TAX SALE—VALIDITY—FEE FOR CERTIFICATE.

1. Under Act April 7, 1893 (Acts 1893, p. 230), amending Act March 31, 1883 (Acts 1883, p. 268) § 184, and providing that the collector shall make out and deliver to the purchaser at tax sale a certificate of purchase, stating the amount of taxes, penalty, and costs, for which he shall receive 25 cents, to be taxed as costs therein, it does not invalidate the tax sale to include the fee of 25 cents in the amount for which the land is sold.

Appeal from Lonoke Chancery Court; Thomas B. Martin, Chancellor.

Suit by the Allen-West Commission Company against T. C. Trimble and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Jos. T. Robinson, for appellants. Jno. M. Moore and W. B. Smith, for appellee.

BATTLE, J. On the 12th day of June, 1893, T. C. Trimble purchased certain lands at a sale for taxes in the county of Lonoke, in this state, received a certificate of purchase therefor, and afterwards assigned a half interest in the certificate to Louis Muller. On the 30th of July, 1895, the lands not having been redeemed, the county clerk of Lonoke county conveyed the same to them. On the 20th of May, 1896, Trimble and Muller instituted a proceeding to confirm their title in the Lonoke chancery court, which, on the 20th of May, 1897, resulted in a decree of confirmation.

On the 1st day of November, 1897, the Allen-West Commission Company instituted a suit in the Lonoke chancery court against Trimble and Muller, and alleged in their complaint that it was the owner of the lands purchased at tax sale; that the lands were not sold at said tax sale to T. C. Trimble, but to the state of Arkansas; that afterwards, at the request of Trimble, the clerk erased from the record of sales the name of the state, and substituted that of Trimble as the name of the purchaser; that, if the land was sold to Trimble, the sale was void, because the amount for which the land was sold included

a fee of 25 cents for the certificate of purchase; and that, for various reasons stated, the decree of confirmation was void; and asked that the sale be declared illegal and void, and that the decree be set aside.

The defendants answered, and denied the allegations of the complaint.

The court, after hearing the evidence, canceled the sale and set aside the decree, and the defendants appealed.

In *Goodrum v. Ayers*, 56 Ark. 93, 19 S. W. 97, this court held that: "A sale of delinquent land, under the revenue act of 1874-75 [Acts 1874-75, p. 222] is void where the amount for which the land sold included the fee of twenty-five cents for the certificate of purchase, such fee being payable by the purchaser for the certificate, and not as a part of the amount for which the land was sold."

The statutes in force at the time the sale in question in *Goodrum v. Ayers* was made provided as follows: "The clerk shall make out and deliver to the purchaser of any land or lots, or parts thereof, sold for delinquent taxes as aforesaid, a certificate of purchase, therein describing the lands or lots so sold, as the same was described on the tax-books or in the notice of sale, stating therein the amount for which the same was sold, and the amount of taxes, penalty and cost of advertising." Act April 28, 1873, p. 353, § 106. And provided that the county clerks of this state shall be allowed a fee of 25 cents for each certificate of purchase containing four tracts or less, and a fee of 10 cents for each additional tract. Acts 1874-75, p. 177.

The foregoing statutes were so changed by an act approved March 31, 1883, as to read as follows: "The collector shall make out and deliver to the purchaser of any land or town or city lots, or parts thereof, sold for delinquent taxes as aforesaid, a certificate of purchase, for which the purchaser shall pay the collector twenty-five cents, therein describing the lands or lots, as the same were described in the notice of sale," etc. Acts 1883, p. 268, § 134.

The opinion in *Goodrum v. Ayers*, supra, was delivered on the 16th of April, 1892, and on the 7th day of April, 1893, the statute of March 31, 1883, was amended to read as follows: "The collector shall make out and deliver to the purchaser of any land, or town or city lots, or parts thereof sold for delinquent taxes as aforesaid, a certificate of purchase, for which the collector shall receive twenty-five cents to be taxed as costs of sale therein, describing the lands or lots as the same were described in the notice of sale, stating therein what part of such tract of land, town or city lot was sold, and the amount of taxes, penalty and costs paid therefor." Acts 1893, p. 230.

The only change made by the amendment was in providing that the 25 cents allowed as a fee for a certificate of purchase should be taxed as costs of sale. No such provision was in the statute under which the sale in

question in *Goodrum v. Ayers* was made. The court in that case held that the sale was void, because it was included in the amount for which the land was sold. Within less than a year after this decision, at the first session of the General Assembly thereafter, the statute upon the subject was so amended as to include it as a part of the cost of sale. What defect in the statute was the amendment intended to cure? Evidently that pointed out in *Goodrum v. Ayers*.

The statutes require lands delinquent on account of the nonpayment of taxes to be sold for taxes thereon, penalty, and cost. The cost referred to was the expense necessarily incurred in subjecting the land to sale. This was the only cost for which it could be sold. In making the fee allowed for the certificate of purchase a part of the cost of sale, the statute made it a part of the amount for which lands delinquent on account of the nonpayment of taxes may be sold. The purchaser should not be made liable for the costs of sale. The only thing which can be made liable is the land, and the only way in which it can be made liable is by selling it to pay the same. Hence it should be included in the amount for which such land is sold at tax sale. There can be no injustice or wrong done to any one by this construction of the statute; for it is evident that every person, in bidding for land at tax sale, will be governed by the amount he will have to pay to secure a tax title, and the result as to the amount bid will not be affected by it.

The allegation that the lands in controversy were sold to the state of Arkansas, and that the name of the state was erased from the record of sales, and that of Trimble was substituted for it, was not sustained by the evidence.

Since the sale is valid, there is no necessity for an inquiry into the validity of the decree of confirmation.

Reverse and remand, with instructions to enter a decree in accordance with this opinion.

HARTFORD FIRE INS. CO. v. ENOCH.

(Supreme Court of Arkansas. Dec. 12, 1903.)

FIRE INSURANCE — CONDITION IN POLICY — BREACH — WAIVER — PLEADING — EVIDENCE.

1. In an action on a fire insurance policy, a copy of a written statement of the loss given the insurer as required by the policy was inadmissible in evidence until it was shown that the original was lost or destroyed, or that it was in the possession of the opposite party, who failed to produce it when notified to do so.

2. Where an answer denied "that on the 13th day of February, 1901, the plaintiff gave the defendant due notice and proof of loss," as required by a fire insurance policy, the plaintiff cannot, after accepting it and going to trial, complain of its insufficiency on appeal.

3. Where one had purchased property conditionally, the vendor retaining title, but a policy of fire insurance thereon provided that it

¶ 2. See Insurance, vol. 22, Cent. Dig. § 1653.

should be void if the insured's interest was other than unconditional and sole ownership, the burden is on him to show that the condition was waived by the company after notice of its breach.

4. Evidence that, after an insurer was informed that there was a lien on property insured against fire, it demanded additional proof of loss, which was furnished, is insufficient to show waiver of a condition that the policy should be void if the insured's interest was other than unconditional and sole ownership; a lien not being necessarily inconsistent with such ownership.

Appeal from Circuit Court, Howard County; Will P. Feazel, Judge.

Action by S. Enoch against the Hartford Fire Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

W. C. Rodgers, for appellant. D. B. Sain and W. S. & F. L. McCain, for appellee.

BATTLE, J. S. Enoch sued the Hartford Insurance Company on a policy of insurance. He alleged in his complaint that the defendant on the 12th day of December, 1900, for the consideration of \$53.12, insured the plaintiff, for the term of one year, beginning the 12th of December, 1900, and ending the 12th of December, 1901, against all direct loss or damage by fire, to an amount not exceeding \$1,250, to his 1½ story frame shingle-roof building, occupied as a livery stable, his hay, corn, and other feed stuff, his harness, collars, bridles, carriages, buggies, and other vehicles, while contained in said livery stable; that on the 3d day of January, 1901, while the policy was in force, the property was totally destroyed by fire, and the plaintiff thereby suffered a loss of \$1,500; that "on the 13th day of February, 1901, the plaintiff gave the defendant due notice and proof of loss by reason of said fire, as required by the policy."

The defendant answered, and admitted the insurance, and denied "that on the 13th day of February, 1901, the plaintiff gave the defendant due notice and proof of loss, as required by the terms of the policy sued on," and alleged that the policy of insurance, among other things, provided "that the entire policy should be void and of no force if the interest of the insured in the property be other than an unconditional and sole ownership, and that the interest of the said S. Enoch, to whom the policy was issued, and at the time of the alleged fire, was not an unconditional and sole ownership."

Plaintiff recovered judgment for \$987.50, and the defendant appealed.

In the trial the policy was read as evidence. One of the conditions of the insurance, as shown by the policy, was that, "if fire occur, the insured shall give immediate notice of any loss thereby, in writing," to the defendant, "and within sixty days after the fire, unless such time is extended in writing by" the defendant, "shall render a statement" to the defendant, "signed and sworn to by

said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon," etc. And the policy further provided that it shall be void if the interest in the property assured "be other than an unconditional and sole ownership."

Appellee was allowed by the court, over the objections of the appellant, to show the statement or proof that he rendered to the appellant after the fire, as to his loss, by a copy thereof, without laying any foundation for its admission.

It was shown that appellee purchased a large portion of the property insured, and destroyed by fire, conditionally; that the vendor retained title to the same until the purchase money was fully paid; and that it had not been paid. The evidence tended to prove that these facts as to the ownership of the property were discovered by appellant after the fire.

The copy of the statement or proof as to the loss of the property by fire was not admissible as evidence until it had been shown that the original was lost or destroyed, or that it was in the possession of the appellant, and it had failed to produce it as evidence after being notified to do so. The court therefore erred in allowing it to be read as evidence without proof of the facts necessary to show its admissibility being first made. *Stanley v. Wilkerson*, 63 Ark. 556, 39 S. W. 1043; *Halum v. Dickinson*, 47 Ark. 120, 14 S. W. 477; *Jones v. Robinson*, 11 Ark. 504, 54 Am. Dec. 212; *Dade v. Ins. Co.*, 54 Minn. 336, 56 N. W. 48; 1 Greenleaf on Evidence, §§ 557, 561.

Appellee insists that no proof that the statement or proof was furnished was necessary, because the appellant, in his answer, denies only that it was furnished on the 13th of February, 1901. The denial was not sufficient, but appellee accepted it, and went to trial, and cannot now complain of its insufficiency. *Tyner v. Hays*, 37 Ark. 599; *Hecht & Imboden v. Caughron*, 46 Ark. 132.

Appellee was not the absolute and unconditional owner of a part of the property insured, and the policy, according to its own terms, is void. *Phoenix Insurance Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959. But appellee contends that this condition was waived. The burden was upon him to prove such waiver. *Planters' Mutual Ins. Co. v. Loyd*, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136. There could have been no waiver unless appellant at the time of the alleged waiver knew or had notice that the policy was forfeited on account of the failure of the condition. *Planters' Mutual Ins. Co. v. Loyd*, supra. The evidence adduced for the purpose of showing a waiver was to the effect that appellant was informed that there was a lien on property for unpaid purchase money, and thereafter de-

manded additional proof of loss, which was furnished. That was not sufficient. The lien might have existed, and appellee might nevertheless have been the absolute and unconditional owner of the property. The evidence wholly fails to show a waiver.

Reversed and remanded for a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. PHILPOT.
(Supreme Court of Arkansas. Dec. 5, 1903.)

RAILROADS—DOGS—NEGLIGENT KILLING—DAMAGES—EXPERT TESTIMONY—VERDICT—EVIDENCE—SUFFICIENCY.

1. Charges requested, not supported by the evidence, are properly refused.

2. In an action against a railroad for the negligent killing of a valuable dog, the contributory negligence of the owner of the dog is not an issue when not pleaded.

3. In an action against a railroad for the negligent killing of a bloodhound bitch, testimony of one who had bred and trained bloodhounds "on a small scale," and had sold trained bloodhounds in various states, including the hound in controversy, which he had sold to plaintiff, when the hound was six months old, for \$75, that one of her class, "in perfect physical condition, good breeder, nearly four years old, well trained for the trailing of persons, very cold nose, known to have followed by scent such a trail 20 hours old," was worth, at the time plaintiff's hound was killed, from \$200 to \$300, which description the evidence tended to prove suited to that of the one killed, is competent, in the absence of better evidence, to assist the jury in arriving at a fair valuation.

4. Evidence considered, in action against railroad for the negligent killing of a valuable dog, and held to support verdict for \$250 damages.

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by C. M. Philpot against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Dodge & Johnson, for appellant. W. F. Coleman, for appellee.

BATTLE, J. C. M. Philpot sued the St. Louis, Iron Mountain & Southern Railway Company for the damages he suffered by reason of the killing of his dog. He alleged in his complaint that the defendant on the 20th of April, 1900, in the county of Jefferson, in this state, carelessly and negligently ran one of its trains over and killed his bloodhound bitch, of the value of \$250, and asked for judgment for that amount. The defendant answered, and denied negligence. Plaintiff recovered judgment for the amount sued for.

Evidence was adduced at the trial tending to prove, substantially, the following facts:

Plaintiff was the owner of a valuable bloodhound bitch. He paid for her, when she was about six months old, \$75. In the month of April, 1900, she was killed by a passenger train of the defendant. When she was killed, she was about 3½ or 4 years old, and was well trained. She was very useful, and had performed feats in tracing and finding escaped prisoners. At one time she caught a

man, who had escaped from jail, after tracing him for about seven or eight miles and swimming a quarter of a mile; found him in the hollow of a cypress tree in a lake.

On the day she was killed she was attempting to trail a man who had been sent out for that purpose, with directions to take any course he might choose. In the effort to follow him, she ran upon the railway track of the defendant, about 100 yards in advance of one of its passenger trains, and ran about 60 feet upon the track in the same direction it was moving, when she was struck and killed by it. She was running in a zigzag direction between the rails, as if following a track. She was intent, and seemed unconscious of the approach of the train, which was running at the rate of 25 or 30 miles an hour. No bell was rung, no whistle was sounded, and no effort was made to check the train, although the engineer or fireman could have seen her when she came upon the track.

Dogs are exceedingly alert and active, and trains rarely run over them. Trainmen rely more upon their getting off a track than they do men.

Plaintiff testified that he knew of no market for the sale of bloodhounds in Jefferson county, where the dog was killed, and he resided; that the only persons that he could call to mind who raised bloodhounds for the market resided at Lexington, in the state of Kentucky. They sold their pups when they were ten weeks old, asking for the males \$35, and females \$40. Never knew of their offering more than one dog that was trained, and he was only two years old, and they wanted \$400 for him.

R. P. Miller testified, over the objections of the defendant, as follows: He is a resident of Indianola, in the state of Mississippi. He has been sheriff of the county of Sunflower, in that state, and while he was sheriff he bred and trained bloodhounds "on a small scale, and more for his own use than for sale, and did sell trained bloodhounds in various states during that period." About the 12th of July, 1897, he sold a "black and tan bloodhound bitch pup, name 'Fanny,'" about six months old, to plaintiff, for \$75. Bloodhounds become more valuable as they grow older, until old age "renders them unable to make hard runs." There is no market for bloodhounds in Indianola. He thinks that a bloodhound of the same stock as the dog he sold to plaintiff, "in perfect physical condition, good breeder, nearly four years old, well trained for the trailing of persons, very cold nose, known to have followed by scent such a trail twenty hours old, was worth in April, 1900, from \$200 to \$300."

The evidence tended to prove this dog of plaintiff, killed by the railway train, was of that description.

The court instructed the jury, but refused to instruct them, at the request of the defendant, as follows:

"(6) The court instructs the jury that if plaintiff knew that, when his dog was in pursuit of a person by scent, it would become so intent it would not take heed or notice or warning of danger, then it was his duty to have chosen a training trail for his dog away from the dangers of passing trains. So, if you believe from the evidence that the dog was killed because of this neglect of duty, then the plaintiff cannot recover, and you will find for the defendant.

"(7) The court instructs the jury that a railroad track on which trains are liable to pass at any time is a place of danger, and, when plaintiff chose a training trail for the purpose of training said dog along or over a railroad track over which a train was liable to pass at any time, he took upon himself the ordinary risks incident to such perils.

"The only duty then resting upon the railroad company was to have kept a constant lookout upon its track, and to have used all ordinary care at its command to prevent striking the dog after it went upon the track. So, then, if you believe from the evidence that the engineer in charge of the train was keeping a constant lookout, and that he did not, by the exercise of ordinary care, see the dog on or near the track in time to have avoided striking it, then the company is not liable in this action, and you will find for the defendant."

Dogs are personal property, for the negligent killing of which by its train a railway company is liable. *St. Louis Southwestern Ry. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659.

The instructions refused by the court were inapplicable. There was no evidence that plaintiff selected "a training trail for the purpose of training said dog along or over" the defendant's railway track, or that the man the plaintiff attempted to make his dog trail was on or crossed the railway. The instructions refused imply that he did. Contributory negligence was not pleaded, and that was not an issue in the case. 5 Ency. Plead. & Prac. 10, and cases cited.

The testimony of Miller was admissible for the purpose of enabling the jury to ascertain the value of the dog killed. Such dogs had no market value in Jefferson county, where she was killed, and her owner resided. Miller at one time bred and trained such dogs for market. They had no market value in the town of Indianola, where he resided; that is to say, persons living there did not purchase. But Miller did sell them there to persons residing in other states. He sold a few in Arkansas.

This testimony was competent to show a market value in Indianola, by reason of the demand for such dogs in other states, and that such dogs would have the same market value, by reason of such demand, in any place where they are kept for sale. This is shown by the testimony of plaintiff as to the sale of such dogs in Lexington, Ky. The

testimony of Miller furnished the jury with information which was reasonably calculated to afford them assistance in arriving at a fair valuation of the dog. In the absence of better evidence, it was admissible for that purpose. *Jones v. Railway*, 53 Ark. 27, 13 S. W. 416, 22 Am. St. Rep. 175; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. (Fla.)* 9 South. 661, 17 L. R. A. 33, 60, 61.

The evidence is sufficient to sustain the verdict of the jury in this court.

Judgment affirmed.

TUCKER et al. v. HAWKINS et al.

(Supreme Court of Arkansas. Dec. 5, 1903.)

AMENDING RECORD—NUNC PRO TUNC ORDER.

1. Where, at the time the decree was rendered, the oral testimony was not part of the record, and nothing had been done to have it made a part thereof, it cannot be made a part by a nunc pro tunc order.

Appeal from Monroe Chancery Court; John M. Elliott, Chancellor.

Action by W. T. Tucker, administrator, and another, against W. M. Hawkins and others. Decree for defendants. Plaintiffs appeal. Affirmed.

J. M. Battle, for appellants. M. J. Manning and J. P. Lee, for appellees.

BATTLE, J. About the 11th day of December, 1897, Calvin Tucker (now deceased) and D. L. McCright instituted a suit in the Monroe chancery court against W. M. Hawkins, and T. H. Jackson and W. E. Williams, sheriffs, respectively, of Monroe and St. Francis counties. On the 24th of October, 1899, the defendants recovered a decree against the plaintiffs. The decree recites that plaintiffs, to sustain their complaint, introduced a judgment in a certain action of replevin, and the execution that was issued thereon, and the depositions of S. B. Kelly, M. H. Vaughan, T. L. Vaughan, and W. T. Tucker; and the defendant Hawkins, to sustain his answer, introduced the depositions and statements of W. M. Hawkins, M. J. Manning, J. P. Lee, W. T. Bonner, E. A. M. Webb, and J. E. Lentz, and exhibits, and the oral testimony of J. S. Thomas and T. H. Jackson. The oral testimony was not in any manner made a part of the record. On the 13th day of February, 1902, the plaintiffs, by motion for a nunc pro tunc order, attempted to have the oral testimony made a part of the record, and the motion was denied.

When the record does not contain all the evidence adduced at the hearing of a cause, "we indulge the presumption that there was proof of every fact which is necessary to sustain the court's ruling, wherever evidence adduced at the proper time would justify its action. Every ruling is presumed to be right, unless the record contains matter which shows affirmatively that it is wrong." Mc-

Kinney v. Demby, 44 Ark. 74; **Railway Company v. Amos**, 54 Ark. 159, 15 S. W. 362.

The record of the decree in this case speaks the truth. It is not amendable by making certain testimony a part of it which was not a part thereof, when no effort had been made to that end at the time the decree was rendered, and nothing for that purpose was done. A nunc pro tunc order does not create, but states what has been done. **Cox v. Gress**, 51 Ark. 224, 11 S. W. 416; **Gregory v. Bartlett**, 55 Ark. 30, 17 S. W. 344.

Decree affirmed.

BAGLEY v. WEAVER et al.

(Supreme Court of Arkansas. Dec. 5, 1903.)

MARSHALING OF ASSETS—VENDOR AND PURCHASER—OUTSTANDING MORTGAGE—DEMURRER TO WHOLE COMPLAINT—PLEADING GOOD IN PART.

1. Where one paragraph of the complaint states a cause of action, a demurrer to the whole complaint should be overruled.

2. One who purchases property without notice of an improperly recorded mortgage, embracing other property, is entitled to have such other property first sold to satisfy the indebtedness secured before resort is had to the property purchased by him.

Appeal from Circuit Court, Little River County; Will P. Feazel, Judge.

Action by E. O. Bagley, as administrator of the estate of Paul Bagley, deceased, against Sarah F. Weaver and another. Judgment for defendants, and plaintiff appeals. Reversed.

The complaint states that Paul Bagley, in his lifetime, bought from appellee Sarah F. Weaver the west half northeast quarter and east half northeast quarter (west half of northeast quarter and east half northwest quarter) of section 30, in township 13 south, range 28 west, in Little River county, Ark., and paid therefor \$165 in cash, and received a warranty deed therefor dated 26th February, 1901, which was duly filed for record two days afterwards; that he made diligent search of the records before purchasing, which showed title in Mrs. Weaver to said lands, and no incumbrances thereon; and that Mrs. Weaver, his vendor, assured him that she had never sold or mortgaged said lands; and that afterwards appellant discovered, in the office of A. Goldsmith, what purported to be a valid mortgage, executed by appellees Weaver and Nichols on these lands, and recorded, as it appears, on the 3d day of April, 1899, in Record Book V, 421, in the office of the recorder of Little River county. It was executed to one W. J. Cotter, who has assigned the same to said Goldsmith. It also included other property as follows: Southwest quarter, southeast quarter, section 31, township 13 south, range 28 west, in Little River county; four mules, 2 horses, 2 wagons, gear and chains, steam engine and boiler, 1 cotton press and gin stand and running gear

for the same, 4 stock cattle, 1 sawmill complete, one gristmill, and the crops for 1899, and was given to secure \$250 and supplies to be furnished to Nichols. The complaint further alleged that said mortgage was not executed and recorded in manner and form as prescribed by law, etc. The prayer of the complaint is that said mortgage be canceled as a cloud upon the title of complainant, and, in case this could not be done, that the other property in said mortgage be first subjected to payment of the amount due thereon, or that he have judgment against said Weaver and Nichols, under sections 1578 and 1579, Sand. & H. Dig. To this complaint a general demurrer was sustained, and the complaint dismissed. From this judgment of dismissal the complainant appealed.

Ratcliffe & Fletcher, for appellant.

HUGHES, J. (after stating the facts). If any cause of action was stated in the complaint, the demurrer should have been overruled. A demurrer to the whole complaint, if either paragraph states a cause of action, should be overruled. **Railway v. Parks**, 32 Ark. 131; **Warner v. Capps**, 37 Ark. 34. This was a complaint for the marshaling of assets. The appellant stated that he bought and paid cash for land, and that another party had a mortgage on the same land and various other property, which he alleged was sufficient to pay the amount for which it was mortgaged, and prayed that this property mortgaged, other than that which he had bought and paid for, should be first sold to pay the amount due upon the mortgage. This should have been done. It would have been inequitable to sell the property bought by complainant to satisfy the amount due upon the mortgage upon it and other property included in the mortgage without first exhausting that upon which the appellant had no lien or claim. Where a party has a lien upon two funds, and another party has a lien upon one of them, the party having the lien upon both may be compelled to first exhaust that upon which the other party has no lien. If this satisfies his debt, the other party is afforded an opportunity to be protected in his demand. This could work no injustice, and would afford protection to the one having rights that could not be otherwise protected. **Story, Eq. Jurisprudence**, vol. 1, § 633; **Marr v. Lewis**, 31 Ark. 203, 25 Am. Rep. 553; **Terry v. Rosell**, 32 Ark. 478; **Bourland v. Wittich**, 38 Ark. 167; **Howell v. Duke**, 40 Ark. 102.

Reversed and remanded, with directions to overrule the demurrer.

DENNIS et al. v. BALL-WARREN COMMISSION CO.

(Supreme Court of Arkansas. Dec. 12, 1903.)

FRAUDULENT CONVEYANCES—TITLE IN THIRD PERSON.

1. A debtor conveyed a tract of land to his father, and his homestead to his brother, and

¶ 1. See Pleading, vol. 39, Cent. Dig. § 428.

of D. C. Hill against the Porter Lumber Company for damages for unlawfully entering upon the land of the plaintiff, and cutting and converting to its own use timber and logs belonging to plaintiff.

In one of the paragraphs of its answer the company undertook to set up the defense of estoppel, but we think that the action of the court in sustaining a demurrer to this paragraph was clearly correct, for it does not allege facts sufficient to constitute an estoppel. It does not allege that the agent of plaintiff who "stood by and failed to object to the cutting and conversion of the timber" had authority to act in that matter. Much less does it show that his authority was such that a mere failure on his part to make this objection estopped the plaintiff from asserting his rights. It is alleged in the answer that one Atwood was an agent of plaintiff, but the answer does not show what kind of an agent he was, nor what his powers were. The mere failure of an agent employed to pay taxes and prevent trespassing upon land to perform his duty could not affect the rights of plaintiff in this action, for an agent with such limited powers has no authority to give the timber of his principal away; and, if he could not do so directly by permission or agreement, he certainly could not do so indirectly by acts constituting an estoppel.

The only other point presented arises on an exception to an instruction given by the presiding judge to the jury in reference to the ownership of the land described in the complaint. In order to understand the circumstances under which the instruction was given, it will be necessary to state that during the progress of the trial the plaintiff introduced evidence showing that he had purchased the land from certain parties, and that after the purchase he had paid the taxes on the land continuously for 18 or 20 years. He also read in evidence a tax receipt for the taxes for the year 1894, showing that he had paid the taxes for that year. When the evidence was all in, the court said to the jury, "the plaintiff is the owner of the land described in the complaint, and, the taxes having been paid for the year 1894, the forfeiture and sale for that year were illegal and void, and gave no right to any one claiming under said sale, and, notwithstanding the sale and the deed made thereunder, the title to the land and the timber thereon remained in the plaintiff." The instruction then proceeds to submit to the jury the question as to whether the defendant got timber from the land, and converted the same to its use, but it is unnecessary to set out that portion of the instruction. The defendant saved his exceptions to the instruction, and now contends that the court erred in telling the jury that plaintiff was the owner of the land from which he claims the timber had been cut. If this fact had been one of the issues raised on the trial, we would be compelled to sustain this contention, for the chain of title in-

troduced by the plaintiff does not go back to the state or United States, and there is no evidence to show that plaintiff or either of his grantors was ever in possession of the land. On the contrary, the evidence shows that the land was wild and unimproved, and that no one has been in the actual possession of it; and so the evidence is not sufficient to prove title, if that fact had been in dispute. *John Henry Shoe Co. v. Williamson*, 64 Ark. 100, 40 S. W. 703; 10 Am. & Eng. Ency. Law (2d Ed.) 484.

But plaintiff contends that the answer of the defendant is not sufficient to put that question in issue. Plaintiff alleged in his complaint that "he is, and has been for ten years last past, the owner and in the constructive possession" of the lands. The answer of the company to this allegation was in the following language: "It denies that the plaintiff is, and has been for the last ten years, the owner and in the possession of the land." Now, this form of denial is what is sometimes called a "negative pregnant." In other words, it is a form of denial which implies an affirmative. The denial is not that plaintiff was the owner of the land at the time the timber was cut, nor is it a denial that he was the owner at any time during the 10 years that he alleges that he owned it; but it is, in effect, a denial that plaintiff was both the owner of the land during that time, and in the constructive possession of the same. By that denial the pleader may have intended to admit the ownership, and to deny the constructive possession, or he may have intended to admit both of these facts, and to deny that plaintiff had been the owner "for the last ten years." This form of denial is ambiguous, and has been frequently condemned, both at common law and under the Code. *Bliss on Code Plead.* (3d Ed.) § 332; *Pomeroy, Code Plead.* (3d Ed.) § 618; 1 *Ency. Plead. & Prac.* 796, and cases cited.

Notwithstanding the defects in the answer, if the defendant had really intended to put the question of title in issue by that answer, and if the parties had, without objection, tried the case on that theory, it would be too late to object now. But an examination of the record in this case has convinced us that the parties below did not treat the question of whether or not the plaintiff had at one time owned the land as an issue on the trial. The defendant set up in its answer that the land had been forfeited and sold for nonpayment of taxes in the year 1895, and that the timber had been cut under a contract with the party who owned the title derived from such sale, and it contended that this tax title was valid. It did not object to the introduction of the deeds offered in evidence by plaintiff, showing color of title to the land, under which he had paid the taxes for many years. Nor did it object to the introduction of the evidence showing payment of taxes, except so far as it tended to overthrow the tax title set up in the answer. It did not call

the attention of the court to the fact that the chain of title introduced by plaintiff did not go back to the government, nor move to exclude it, nor call for any ruling by the court on that point. It is true that the defendant objected to the instruction given by the court in which the court told the jury that plaintiff was the owner of the land, yet, when that objection is considered in the light of the whole record, it plainly appears that it was based on the fact that this instruction told the jury to disregard the tax title set up by the defendant, and which defendant contended was valid. Now, we have already called attention to the fact that the answer of the defendant does not, in fact, deny that plaintiff was at one time the owner of the land, as alleged by him. The answer may be strictly true, and yet plaintiff may have at one time owned the land. Notwithstanding such defect, we, as before stated, should have treated it as a denial of ownership here, had it been, without objection, so treated below. But, as we have also previously stated, the facts in the record show that neither the trial judge nor the defendant company treated that fact as controverted, further than was done by setting up a tax title upon which the defense was based. This conduct of the defendant, taken in connection with the form of the answer, led the presiding judge to take it as admitted that the title was at one time in plaintiff, and to pass on the question of title only as it was affected by the tax title set up by defendant. And when the undisputed evidence showed that the taxes for the supposed nonpayment of which the land was sold had in fact been paid in due time before the sale, there was nothing to support the tax sale, or the title based thereon; and the court, looking at the case from that standpoint, so instructed the jury. If this was error, it was one invited by the ambiguous answer and the subsequent conduct of the defendant, of which it should not be allowed to take advantage. *Klein v. German Bank*, 69 Ark. 140-145, 61 S. W. 572, 86 Am. St. Rep. 183.

Being convinced that the judgment is right, it is therefore affirmed.

GORMAN v. PETTUS & BUFORD.

(Supreme Court of Arkansas. Dec. 19, 1903.)

STATUTE OF LIMITATIONS—PART PAYMENT— AUTHORIZATION BY DEBTOR—RECOGNITION OF DEBT—PRESUMPTION.

1. A debtor borrowed money of a third person, payment to be made through the creditor. The creditor applied part of the loan to discharge an existing incumbrance on property tendered by the debtor as security, and another part as a partial credit on his own claim, and paid the remainder to the debtor, with a statement of the disposition of the loan. The debtor was present when the credit was entered. Afterwards, and a few months before his death, the debtor admitted to others the existence of

the indebtedness. *Held*, in proceedings by the creditor for the allowance of his claim against the debtor's estate, sufficient to show that the credit was made with the debtor's authority, so as to take the claim out of the bar of the statute of limitations.

2. In the absence of rebutting evidence, a part payment raises a presumption that the debtor recognized the debt and promised to pay the balance.

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

Proceedings by Pettus & Buford, a partnership, for the allowance of a claim against the estate of one Cook, deceased. From a judgment for claimants, Walter Gorman, as administrator, appeals. Affirmed.

Pettus & Buford, a mercantile firm, on January 1, 1900, presented to the probate court a claim against the estate of D. S. Cook for \$512.57 for balance due on account. The administrator of the estate resisted the claim on the ground that the debt was barred by statute of limitations. The probate court found in favor of the plaintiffs, and allowed the claim. The case was afterwards tried in the circuit court on appeal, the only point at issue being whether the account of the plaintiffs was barred by statute of limitations. On this point H. T. Gorman testified on part of plaintiffs as follows: "In March, 1899, I was bookkeeper for Pettus & Buford, and at this time their books showed that Mr. Cook was indebted to them in the sum of \$578.78. The last charge or credit upon the books was in 1892. On March 16, 1899, I, as bookkeeper, placed a credit on the account of \$100, and under the following circumstances: Mr. Cook borrowed some money from Mr. E. A. Rolfe, who was not at this time a member of the firm, but he is at present time, and the money loaned by Rolfe to Mr. Cook was, at the time the loan was made, on deposit at the store of Pettus & Buford, and Mr. Cook obtained the money through the firm in the following manner: We first paid off an incumbrance that was on the land mortgaged to Mr. Rolfe, and then gave Mr. Cook's account credit for \$100, and gave him a check for the balance coming from the loan, and at the same time gave him a statement, showing what disposition was made of the money that he had borrowed. Up to the time that this hundred dollars was placed on the account, there had not been either a charge or a credit against Mr. Cook's account since 1892. The balance due Pettus & Buford from Mr. Cook at the time of his death, with interest, as shown by the books of Pettus & Buford, was \$512.57. Mr. Cook did not tell me to give him credit for the hundred dollars, but he was in the office at the time. This was the only indebtedness owed this firm at this time. I cannot remember any conversation Mr. Cook had, any more than I could any other customer. These things are too numerous and frequent."

¶ 2. See Limitation of Actions, vol. 33, Cent. Dig. § 713.

In addition to the testimony of H. P. Gorman, the plaintiffs introduced an insurance agent, who testified that Cook, within four or five months of his death, came to his office, and talked about making application for some insurance. At that time he stated to the agent that he was indebted to plaintiffs, and said that, if they would pay the premiums, he would take out a policy on his life, and allow them to hold it as security. This was all the evidence. The case being submitted to the court without a jury, the court found that the debt was not barred, and gave judgment in favor of the plaintiffs, for the amount of their debt and interest.

S. H. Mann, for appellant. Norton & Prewett, for appellees.

RIDDICK, J. (after stating the facts). This is an action by plaintiffs against the administrator of the estate of D. S. Cook to recover a judgment on an account held by them against D. S. Cook. There is no dispute about the amount of the account, and the only defense set up is that the claim is barred by statute of limitations. This action on the account was commenced on the 1st day of January, 1900. The account shows that on March 16, 1899, a credit of \$100 was placed on the account. Prior to that time the last charge or credit upon this account was in 1892. It thus appears that at the time this credit of \$100 was entered the account was already barred, and the question we have here is whether the evidence was sufficient to support the finding of the court to the effect that the sum of \$100 was paid by Cook on the account at that time, and whether this payment removed the statute bar from the remainder of the debt. "The presumption of a deliberate promise to pay the residue, which the fact of part payment raises, can arise only from what would be deemed an actual part payment. But the fact of actual payment need not in every instance be proved directly. Circumstances from which the payment may be presumed are enough, in the absence of a rebuttal of that presumption." *Wilson v. Pryor*, 44 Ark. 534. Now, in this case it is conclusively shown that \$100 belonging to Cook was appropriated by plaintiffs and credited on his account on the day named. The only room for doubt is whether this payment was authorized by Cook, and whether he intended it to go as a part payment on the account for which he owed plaintiffs. The evidence shows that Cook had borrowed certain money from one Rolfe, which money was paid to him through the firm of Pettus & Buford. A portion of the money borrowed from Rolfe was applied to pay off a prior incumbrance on land that Cook mortgaged to Rolfe to secure his loan. One hundred dollars of the same was applied as a credit on the account which Cook owed Pettus & Buford, and the remainder was paid over to Cook. The book-keeper could not recall any conversation he

had with Cook about the credit, but remembered that Cook was present in the office at the time the credit was entered, and witness also stated that at the time the credit was entered he gave Cook a statement showing what disposition was made of the money that he had borrowed from Rolfe; that is to say, as we understand witness, to mean, he gave Cook a statement showing that a certain part of the money had been applied to remove an incumbrance on the land mortgaged to Rolfe, and that \$100 had been applied as a credit on, and in part payment of, the account sued on. There was also other evidence showing that Cook within four or five months of his death admitted that he was indebted to plaintiffs.

We think this evidence sufficient to support the finding of the court that this \$100 was appropriated and paid on the account by and with the knowledge and consent of Cook. There are no circumstances in evidence to rebut the presumption that arises from this payment on his account, so the law presumes from the part payment that he recognized that it was a just debt, and promised to pay the balance due.

We are therefore of the opinion that the judgment should be affirmed, which is so ordered.

HARTGROVE & CLEGG v. SOUTHERN COTTON OIL CO.

(Supreme Court of Arkansas. Dec. 5, 1903.)
CONTRACT TO FURNISH FEED TO CATTLE—
BREACH—MEASURE OF DAMAGE—IN-
STRUCTION—ERROR.

1. In an action for breach of contract to furnish a certain quality of feed to cattle, the measure of damages is the difference between the value of the cattle immediately before they became sick, by reason of the inferior quality of feed, and their value after they became sick.

2. In an action for breach of contract to furnish a certain quality of feed to cattle, the measure of damage is the difference between the value of the cattle before they became sick, by reason of the inferior quality of feed, and their value after they recovered, if of less value after the sickness than before, and, in addition thereto, a sum sufficient to compensate for loss of time, care, attention, and other necessary expenses or losses caused by the sickness.

3. To give two correct rules in charging on the measure of damages, in an action for breach of contract to furnish a certain quality of feed to plaintiffs' cattle, resulting in injury thereto, without the two rules being carefully distinguished, is reversible error.

Appeal from Circuit Court, Pulaski County; Joseph W. Martin, Judge.

Action by Hartgrove & Clegg against the Southern Cotton Oil Company. From a judgment for plaintiffs for \$400, plaintiffs appeal. Reversed.

The Southern Cotton Oil Company, of Little Rock, Ark., agreed with the partnership firm of Hartgrove & Clegg that the cotton oil company would furnish to the firm cotton seed hulls, and also a quantity of prime cot-

ton seed meal sufficient to feed a large number of cattle which Hartgrove & Clegg agreed to bring from Texas and to feed at the cattle pens of the company near Little Rock. The firm on their part agreed to pay to the company a stipulated price for the hulls and meal furnished by the company. The firm claimed that the cattle became sick by reason of the fact that the company furnished inferior meal made from damaged and rotten cotton seed, which were fed to the cattle, and that by this breach of the contract on the part of the company the firm suffered a large amount of damages, to recover which they brought this action at law. The company filed its answer, denying each material allegation of the complaint, except that the contract had been made and the meal furnished. On the trial the court refused to give certain instructions asked by the plaintiff as to the measure of damages, and gave the following instruction on his own motion: "If you should find for the plaintiffs that the defendant was guilty of the breach alleged, and that the sickness of their cattle was the result, and you further find that as to such breach, under the rules of law as given, the plaintiffs are barred from no part of their recovery by reason of their own failure to perform their duty in the matter, then the measure of their damages would be, as to the cattle that died, their fair market value when made sick. And as to the cattle that were sick and recovered, it would be the difference between their market value when they were taken sick and their market value immediately after said sickness. And here the defendant would be entitled to the application of the rule given as to their duty to use all reasonable effort to prevent additional loss from defendant's breach of contract. That if you should find that by the subsequent care and attention to the cattle by plaintiffs there was a reduction in the amount of damages as declared by above rule, then the defendant would be entitled to benefit of such reduction; and, as to the cattle which recovered and were finally sold by plaintiffs, you should take as a measure of the damages in this case the final loss in the aggregate weight of the cattle by reason of such sickness and injury as the defendant was responsible for, and also the loss in value per hundred pounds of cattle by reason of the depreciation in the quality of the cattle for beef, so far as you may find such elements of damage established by a preponderance of the evidence in the case. Fluctuations in the cattle market are not to be regarded by you. This estimate of damages would include the reasonable and necessary expenses, as you may find from the evidence, incurred by the plaintiffs in so caring for the cattle after their sickness, and up to the time when they were ready for the market. Remembering, in the application of these rules and measures of damages as indicated herein above, that the plaintiffs are

barred from recovery of all damage, if any shown, which was the result of their own failure to exercise ordinary care and prudence in the matter of feeding their cattle on said meal. Negligence is the failure to exercise ordinary care; that is, it is the doing of something which a person of ordinary care and prudence would not do under all the circumstances, or the failure to do something which a person of ordinary care and prudence would do under all the surrounding circumstances, and it is a question for the jury to settle, in view of all the evidence before them in each particular case." There was a verdict and judgment in favor of plaintiff for the sum of \$400, from which plaintiff appealed.

C. K. Bell and W. S. & F. L. McCain, for appellants. Geo. W. Williams, Sterling Pearson, and Ratcliffe & Fletcher, for appellee.

RIDDICK, J. (after stating the facts). This is an action by plaintiffs against a cotton seed oil company to recover damages which plaintiffs allege was caused by the fact that the defendant, in violation of its contract, furnished meal made in part from rotten cotton seed, which, being fed to the cattle of plaintiffs, caused them to become sick, to the damage of plaintiffs in a large amount. The facts are not set out in the bill of exceptions, but only those facts are stated necessary to show the bearing and pertinency of the instructions given by the court or asked by the parties. The facts as thus set out show that evidence was introduced by the plaintiffs tending to show that the defendant company did for a stipulated price agree to furnish plaintiffs a sufficient quantity of cotton seed hulls and prime cotton seed meal to feed the cattle of plaintiffs, and that in violation of this contract the company furnished to the plaintiffs cotton seed meal mixed to the extent of 8 or 10 per cent. with meal which had been made from old cotton seed that had been overheated and damaged by rain and were partly rotten. The bill of exceptions further states that the evidence tended to show that some of this meal thus mixed had been delivered and fed to plaintiffs' cattle before plaintiffs noticed that anything was wrong with the meal; and plaintiffs having observed that their cattle were not doing well, and being expert cattle feeders and capable of telling good meal, examined the meal which was being fed to their cattle, and saw that the meal was dark in color, tasted and smelled badly, and they pronounced it bad meal. They then reported this fact to the superintendent of the defendant, and objected to the use of such meal. He thereupon showed to plaintiffs the cotton seed cake from which he claimed that the meal that was being furnished to plaintiffs was made, and plaintiffs, seeing this was good cake, and being thus assured by the superintendent, continued to feed the meal a

while longer; but, still finding that their cattle to which the meal was fed were not doing well, they went into the room where the meal was manufactured, and saw that the meal was being mixed with dark meal made from overheated seed brought over from the crop of 1898. Plaintiffs then reported this fact to the superintendent, and declined to use the mixed meal further, and thereafter they were furnished good meal.

In view of this evidence, we think the instruction given by the court on this point which is set out in the bill of exceptions is somewhat too narrow, as it fails to call the attention of the jury to the phase of the case presented by the evidence which tended to show that the superintendent, after the plaintiffs had suspected that the meal furnished was inferior and not suitable, reassured them by asserting that it was made from cake that was sound and wholesome. We agree with the contention of plaintiffs on this point that, even if the plaintiffs discovered facts sufficient to raise in their minds the belief that the meal was inferior and not suitable to be fed to cattle, yet if they at once informed the superintendent of the defendant company of the facts and objected to the further use of the meal, and if thereupon the superintendent represented to and assured them that the meal was not bad, but prime meal of the kind called for by the contract, and the plaintiffs, acting with due care and in good faith, relied upon such representations, and were misled thereby under circumstances that were calculated to mislead a person of ordinary prudence placed in like situation, they would have the right to recover for any damages arising from injury to the cattle by the use of such meal up to the time when they ascertained that the representations were in fact false and the meal was unfit to be used to feed cattle. The plaintiff asked an instruction somewhat on these lines, but he did not make the refusal of it a basis for his motion for new trial, so we have not considered whether it was correct or not; but we refer to what seems a defect in the instructions on this point, for the reason that we have concluded that a new trial must be allowed on account of error committed in another instruction given by the court on the measure of damages, which we will now notice.

So far as the cattle which died from the failure of the defendant to perform its contract, the court instructed the jury that the measure of damages was their market value just before they were taken sick, and there is no doubt that this was correct, with the exception that possibly interest should be added from the date of the injury; but no complaint is made to that part of the instruction. 1 Sutherland on Damages, § 105.

As to the cattle which recovered, there are two rules for the admeasurement of damages, which, though different in form, amount in results to about the same thing. The first

of these is to allow the difference between the value of the animals immediately before they became sick and their value immediately after they became sick. *New York R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292; *St. L., etc., Ry. Co. v. Biggs*, 50 Ark. 169, 6 S. W. 724. If the wrongful act of the defendant caused the cattle of plaintiff to become sick, then this rule gives him full compensation for the depreciation in value caused by the sickness, which is all that he is entitled to claim. But in order to correctly determine the value of the cattle after they became sick, it is proper for the jury to take into consideration the subsequent history of the sickness. They should consider the amount of care and expense reasonably required on account of the sickness, and whether the cattle were permanently injured by the sickness or entirely recovered from the effects thereof. *Lemon v. State*, 19 Ark. 172. It would not be possible for the jury to correctly determine the value of the cattle after they became sick, without knowing and considering these matters. For if, under this rule, the damages are not assessed in the light of this subsequent history, and if the value of the sick cattle is estimated only as it appeared to be at the time they became sick, the result will be that the plaintiff will be allowed only his apparent damages as they appeared to be at the time the cattle were taken sick. These apparent damages may have been greater or less than the actual damages. It may be that to those who observed the sick cattle when they were first affected they appeared to be but slightly unwell, whereas they may have been so seriously affected that much care and attention were required to restore them to health. On the other hand, they may at that time have appeared to be in a much worse condition than they really were. It may have seemed to those who saw them that they were of no value, when in fact only a small amount of care may have been required to bring them to health again. The law seeks to give one, not his apparent, but his actual, damages; and, in order that the jury may determine what those damages are, they are permitted to have before them all facts in relation to the sickness and recovery of the cattle, in order that they may allow the plaintiff full compensation for the injury sustained, and nothing beyond.

But it may not be always easy to get a jury to understand that in assessing the value of the sick cattle they are to take, not the value as it may have appeared at the time of the sickness, but the actual value as shown by the light of subsequent events. For this reason another rule is sometimes followed, and the damages assessed by allowing the difference between the value of the cattle before they became sick and their value after they recovered, if they were of less value after the sickness than before, and, in addition thereto, a sum sufficient to compen-

sate the plaintiff for the loss of time, care, attention, and other necessary expenses or losses caused by the sickness, including, where the animals are work animals, the value of their use lost by the sickness. 2 Sedgwick on Damages (8th Ed.) § 435. The object of each of these rules is to compensate the plaintiff for the loss sustained on account of the sickness and injury of the cattle, and the result of a correct application of one would be about the same as the other. In the first rule, where the difference in the value of the animal before and after it became sick is taken as the measure of damages, nothing is expressly allowed the plaintiff for care and attention to the sick animal; but it is allowed in effect, for under this rule the value of the animal when sick is fixed by considering, among other things, the value of the care and attention required to cure him. For instance, suppose that the ox of plaintiff worth \$100 is made sick by the wrongful act of the defendant; suppose that after he recovers he is of the same value, but that the care, attention, and other costs of his sickness amount to \$50. Under the first rule the jury should say that this ox was worth \$100 before he became sick, and he is worth the same now as if he had never been sick, but it took \$50 to cure him, therefore his value immediately after he became sick was only \$50, and the difference between that and his value before sickness is \$50, which is the extent of the damages to be allowed. Under the second rule they would take the difference in value of the animal before and after sickness, which, in the case supposed, would be nothing, and to that they would add a sum sufficient to cover the cost of the sickness, including loss of time and expenses, which would be \$50 as the amount to be allowed for damages, being the same as that under the other rule. It would probably be necessary in some cases to allow interest, but no question of that kind is raised here.

Of course, it is not pretended that these rules would in all cases work out exactly the same result, but only that in this case the results would be substantially the same, and that, under the facts here, substantial justice would result from the correct application of either of them. Other cases with a different state of facts might present other elements of damages and call for a corresponding modification of the rule for their admeasurement. Now the presiding judge seems to have had both these rules in mind. He begins by saying that the measure of damages as to the cattle that recovered is "the difference between their market value when they were taken sick and their market value immediately after said sickness." He meant by this, we suppose, the difference between their market value just before they became sick and their value just after they became sick, which would be correct, but the language that he used might be given an-

other meaning. A careless juror might understand the phrase "when they became sick" to mean after they became sick, and the phrase "after said sickness" to mean after the sickness was over, or, in other words, after they recovered. This would lead to very erroneous results. But though the language would bear that construction, we do not think that meaning was intended, and, as no special objection was made to it, we take it that the uncertainty was simply a mistake of form committed in the hurry of trial, which misled no one. But, passing that matter, the instruction proceeds to tell the jury that, if by subsequent care and attention to the cattle on the part of the plaintiff there was a reduction in the amount of damages as declared by this rule, the defendant would be entitled to the reduction. Now, the idea of the court may have been correct, but the law is not correctly stated. In estimating the value of the cattle after they became sick, it is proper, as we have said, to take into consideration the subsequent history of the sickness of the cattle. If the health of the cattle has by care and attention been restored, that should be considered, also, in order to correctly ascertain the value of the cattle after they became sick. When that value is ascertained, the plaintiff is entitled to the difference between that and their value immediately before they became sick, without reduction of any kind, for less than that would not give him full compensation for the injury sustained.

Again, after the court had laid down one measure of damages for the guidance of the jury, he proceeds in the same instruction, without calling the attention of the jury to the difference between the two, to lay down for their guidance another and different measure of damages. He tells the jury in that part of the instruction that as to the cattle that recovered they should take as a measure of damages the "final loss in the aggregate weight of the cattle by reason of such sickness and injury as the defendant was responsible for, and also the loss in value per hundred pounds of cattle by reason of the depreciation in the quality of the cattle for beef, so far as they may find such element of damages established by a preponderance of the evidence in the case." The court then proceeds to say that "this estimate of damages would include the reasonable and necessary expenses, as you may find from the evidence, incurred by the plaintiff in so caring for the cattle after their sickness and up to the time when they were ready for the market." But this statement of the rule seems to us somewhat confusing. If the court meant by this that the measure of damages would be the final loss in value of the cattle on account of the sickness, we see no reason why the jury should be required to separate the loss in weight and the loss in beef quality, or why the court should say that the rule as stated includes the rea-

sonable expenses of the sickness, instead of telling the jury that to the difference between the value of the cattle before the sickness and their value after the sickness should be added the reasonable and necessary expenses caused by the sickness.

Another objection to this instruction is that it confuses the two rules for the admeasurement of damages above referred to. The application of either of these rules would have given substantial justice, but when the court directs the jury in effect to apply both rules, without carefully distinguishing one from the other, the result is necessarily confusing. The presiding judge may have had a correct view of the law in his mind, but in the hurry of the trial it was not clearly stated in the instruction given, some parts of which in our opinion are incorrect and misleading.

Judgment reversed, and cause remanded for a new trial

KANSAS & T. COAL CO. v. CHANDLER. (Supreme Court of Arkansas. June 20, 1903.)

INJURY TO EMPLOYE—FURNISHING SAFE PLACE TO WORK—WARNING EMPLOYE OF DANGERS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. Plaintiff was injured by the falling of a stone from the roof of a room in a coal mine, in which room he and another alone worked. It was part of their duty, as they extended the room by their digging, to see that the roof was properly supported by timbers, which it was the duty of defendant employer to furnish. *Held* that, the evidence being conflicting as to whether the accident happened from failure of defendant to furnish timbers or from plaintiff's failure to use those furnished, it was misleading to instruct, without qualification, that defendant assumed the duty of furnishing a reasonably safe place for plaintiff to work.

2. An instruction, in an action for injury to an employe in a coal mine through the falling of a stone from the roof of the room in which he and another worked, that, if the plaintiff was without experience in mining coal, it was defendant employer's duty to warn him of the dangers, is abstract and misleading, plaintiff's testimony showing that, though he had dug coal but six weeks, he had, previous to the accident, learned the necessity of keeping the roof properly supported, and knew that an unsupported roof was dangerous, and that it was the master's duty to furnish supporting timbers, and his duty to put them in place.

3. An instruction, in an action for injury to an employe in a coal mine through the falling of a stone from the roof of the room in which he worked, that, if he requested the foreman to furnish him props, and the foreman promised to furnish them, then, if plaintiff relied on the promise, and for that reason continued at his work, he did not assume the risk incident on the failure to furnish the props, is misleading, as plaintiff would not have been justified in exposing himself to danger so obvious and imminent that no person of ordinary prudence would, under like circumstances, have exposed himself to it; and the question of his negligence in continuing at work in the absence of props depends on a consideration of all the circumstances.

Appeal from Circuit Court, Sebastian County; Styles T. Rowe, Judge.

Action by W. F. Chandler against the Kansas & Texas Coal Company. Judgment for plaintiff. Defendant appeals. Reversed.

W. F. Chandler was employed to work as a miner in a coal mine owned by the Kansas & Texas Coal Company. He commenced work about the 18th of January, 1900, and continued to work in the mine until the 19th day of February, when he was injured by the fall of a rock from the roof of the room in which he was at work mining coal. Chandler sued the company for damages. On the trial he testified that he was without experience in mining coal before being employed by the company, though his testimony on this point is not clear, for in reply to a question about whether Godt, the foreman of the company, or Brown, the local superintendent, knew that he had previously worked as a miner or not, he replied, "I told Billie Brown I had dug coal." The examination then proceeded as follows: "Q. What did you tell them, if you told them anything, about mining coal? A. I never told them anything about mining coal a minute. Q. did the company know you had not mined coal much when they employed you? A. I don't know whether they did or not. Q. I thought you told Mr. Brown that you hadn't mined coal at all? A. Yes, I told him that I hadn't mined coal; that I had a job firing." He also testified that none of the employes of the company cautioned him or gave him any instructions about how to protect himself against the dangers of mining. The testimony shows that he and a miner named Meyers had been working together in the same room. The company constructed the passageway to the rooms in which the miners worked. Along this passageway or entry a track was laid on which a car was operated, the car being drawn by a mule. Opposite the entrance to the room in which the miner worked a switch was provided by which cars when needed could be brought into the room. The cars for the miner were delivered by the driver at the switch at the entrance to the rooms, at which place it was received by the miner, who pushed it into the room near to the face of the coal. The evidence shows that it was the duty of the company to properly safeguard the passageways and also provide necessary timbers for the miners to securely prop the roof of his room. The company delivered these timbers at the switch when it delivered the cars—that is, at or near the entrance of the room. These timbers designed to support the roof of the room and prevent it falling are called "props" and "caps." A prop is a stick of wood 6 to 8 inches square and from 4 to 5 feet long, according to the height of the roof from the floor. A cap is a piece of wood 12 to 16 inches long, about 4 to 6 inches wide, and from ½ inch to 1¼ inches thick. These caps, as the name implies, are used on top of the prop, so that it will cover more space on the roof, and give greater bearing against the roof

to support it than the end of the prop would afford. Besides these timbers, ties are used in the mines upon which to lay the track that the cars go on. Ties are about the same thickness as props, and are sometimes used for props; but ties cost more than props, and for that reason their use as props is discouraged by the company. Chandler testified that while working in the mine he needed timbers to support and safeguard his roof, and that on Friday before the injury occurred on Monday he ordered the driver to bring him some props and caps, but that he failed to bring them. He did not work on Saturday. On Monday, about noon, he spoke to Godt, the foreman of the company, whose duty it was to see that timbers of that kind were furnished, and told him that he needed timbers. "He told me," said Chandler, "to go ahead; that he would send me timbers in plenty time to put up; that he wanted that place drove through." He further testified that when he went to work after this conversation with the foreman he had no props or caps, and that there were no timbers in his room or near the entrance that he could get; that he found a tie, and set it up in the room to support a rock which could be seen in the roof overhead, and to prevent the rock from falling on him while at work. While he was at work the rock fell on him, crushed his foot so that it had to be amputated, and otherwise injured him. Plaintiff stated that he knew the roof was dangerous, but did not suppose that the danger was immediate; that at the time of the accident he was expecting props to come in, and continued at work upon the request and promise of the foreman. On the part of the defendant there was testimony tending to show that the company had furnished plaintiff with all the timber he needed, and that the injury was caused by the carelessness of plaintiff in failing to use these timbers to prop the roof of his room. The jury returned a verdict in favor of the plaintiff for \$1,999, and defendant appealed.

Hill & Brizzolaïd, for appellant. Jno. B. Tatum and Robert A. Rowe, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal from a judgment in an action by an employé of a mining company to recover damages from the company for an injury received by him while at work in its mine. The evidence is very conflicting, but it is unnecessary for us to notice it further than to enable us to determine whether the case was properly submitted to the jury. The plaintiff was injured by the fall of a rock from the roof of a room in the mine where he was at work digging coal. If the roof had been properly supported by timbers, the rock would not have fallen. It was the duty of the defendant company to furnish the miners in its employ with sufficient and suitable timbers called "props" and "caps" to support the roof of the room in which they

worked, and it was the duty of the miner to use these timbers, and see that the roof was properly supported. Plaintiff testified that the company failed to furnish him sufficient timbers in this instance, though he had repeatedly requested them to do so. He said that only two or three hours before the injury occurred he had requested the foreman of the company to have timbers sent to him. "He told me," said plaintiff, "to go ahead; that he would send me timbers in plenty time to put up; that he wanted that place drove through." Relying on this promise and request of the foreman, plaintiff says that he went ahead with his work, and was injured. This testimony of plaintiff was contradicted by witnesses for the defendant; but the jury having found in favor of plaintiff, we will, for the present, assume that it is a correct statement of the facts. Counsel for defendant contends that, if this be so, yet that the evidence shows that plaintiff carelessly and willfully exposed himself to a known danger, and for that reason he cannot recover. It is doubtless true that, where the danger is so obvious and imminent that no one but a reckless person would, under like circumstances, expose himself to it, if the servant continues knowingly to expose himself to the danger, and is injured in consequence of his own recklessness, he cannot recover, even though the master was also at fault. If one remains at work under a rock which he knows is liable to fall at any moment, his injury from the fall of the rock is a consequence of his own carelessness, and prevents a recovery on his part. But in this case, if the plaintiff knew that the rock was likely to fall if unsupported, yet it appears that he did attempt to support it by placing a tie under it. This support turned out to be insufficient, but the evidence does not so conclusively show that the danger to which plaintiff exposed himself was so imminent and plain that we can say as a matter of law it forbids a recovery, when we consider that there was evidence to show that he was requested to remain at work by the foreman of the company. While the plaintiff had been at work mining coal for the company about six weeks previous to his injury, and knew that it was necessary to have the roof supported, and was aware that there was danger in an unsupported roof, yet it is probable that he did not consider his judgment concerning the condition of the roof so good as that of the foreman of the mine, who advised him, so plaintiff says, to go ahead, and continue the work. It was the duty of the company to have an experienced and prudent man as foreman in charge of its mine. The foreman should have been, and no doubt was, a man of judgment and of practical experience in the business of mining. He was put there for the purpose of supervising and directing the work, and it was quite proper and natural that a miner, especially one having only six weeks' experience in the business, should to a large ex-

tent defer to and rely upon the judgment of the foreman concerning the safety of the work in which he was engaged. When told by the foreman to go ahead with the work, that he would send him the props needed to support the roof in due time, plaintiff, so he says, obeyed his directions, and in consequence was injured. Under these circumstances and under this evidence it is clear that the court cannot say as a matter of law that the plaintiff was guilty of carelessness in working under an unsupported roof, for that was a question for the jury to determine.

If this was the only question presented, we should have little trouble in disposing of the case. In fact, if we felt certain that the jury found that the attention of the foreman was called to the dangerous and unsafe condition of the room, and that he was requested by plaintiff to furnish timbers with which to make it safe, but that, instead of doing so, he directed plaintiff to go ahead with his work in the room, promising to furnish the timbers in time, and that plaintiff, relying on this advice and promise of the foreman, remained at the work, and in consequence was injured as alleged, we should affirm the judgment, as on that theory of the case there is evidence to sustain it. But the third, fourth, and fifth instructions given by the court are, it seems to us, abstract and misleading, and may have led the jury to find for the plaintiff on an entirely different ground from that above mentioned. These instructions tell the jury, in substance, that the defendant assumed the duty of furnishing a reasonably safe place for plaintiff in which to work, and that, if plaintiff was without experience in mining coal, it was the duty of the company to instruct the plaintiff as to the dangers of his employment, and, if it failed to do so, and the plaintiff was injured in consequence of such failure, then the company was liable. Now, while it is a well-established rule that it is the duty of the master to furnish the servant a reasonably safe place in which to work, and if, through failure of the master to exercise ordinary care in this respect, the servant is injured, the master is liable, yet it would be misleading to give that rule as a guide to the jury in this case without calling their attention to the limitation of the rule made by the peculiar circumstances under which it must be applied in this case; for in this case the evidence shows that it was the duty of the servant to make his room safe by the use of timbers which the master was to furnish. The duty of the master to use due care to furnish a safe place for the servant to work would, under the circumstances here, be discharged by furnishing the servant an ample supply of suitable timbers with which to make the room safe; for the plaintiff was not injured in a passageway or place under the control of the master only, for the condition of which the master alone was responsible. He was injured in a room in the mine, where he and his partner alone work-

ed, and where, as they extended the room by digging into the walls thereof, they were, as a part of their duty both to themselves and their employer, to see that the roof of the room was kept properly supported. The company was to furnish suitable timbers for this purpose. It was to furnish the props and caps, and the plaintiff himself and his partner undertook by the use of them to support the roof and make the room safe. If the injury to the plaintiff arose from his own failure to use the material furnished by the company to make the room safe, he certainly has no right to complain of the company. The evidence on this point was conflicting, and under these circumstances we think it was to some extent misleading to tell the jury without qualification, as the court did in the third instruction, that "the defendant assumed the duty of furnishing a reasonably safe place for plaintiff in which to work, and safe appliances." This might be true of the passageways or other portions of the mine where the work of plaintiff required him to go, but it was not strictly true of the room in which plaintiff was injured as we have shown, and for that reason the instruction should not have been given in that form without a further statement that, under the circumstances of this case, the master's duty as to providing a safe place was discharged by furnishing safe passageways to the servant and also the necessary timbers to safeguard his room.

But we think a still more serious defect in these instructions is that they tell the jury that, if the plaintiff was without experience in mining coal, it was the duty of the defendant to warn him of the dangers he was liable to encounter in the work; and if the defendant knew, or by the use of ordinary care could have ascertained, that the defendant was without experience in mining coal, and failed to give him such warning, then defendant was responsible for any injury sustained by the plaintiff on account of such failure to warn. Now, while his statements on that point are not very clear, as may be seen by a reference to the statement of facts, yet if we take it as true that he was without experience in mining coal at the time he entered the employ of the defendant company, we must remember that he remained at work digging coal for about six weeks before he was injured. He was 32 years of age, and there is nothing to show that he did not possess at least ordinary intelligence. He was at work in a room with an experienced miner, and it is hardly supposable that he worked in the mine that length of time without gaining considerable experience in regard to the dangers and difficulties of the business. His testimony shows that he was fully aware of the necessity of keeping the roof supported, and of the danger to which an unsupported roof would subject those who worked in the room. He understood also the respective duties of

himself and the company in respect to keeping the roof in a safe condition, that the company was to furnish the timbers for supporting the roof, and he and his partner were to place them in position. His only complaint is that the company failed to furnish him a sufficient quantity of these supporting timbers, and that he was induced by the foreman to remain at work, and in consequence of so doing was injured. The right of plaintiff to recover depended, then, on the question whether the company had failed to furnish him a sufficient quantity of timber to support and safeguard the roof of his room, and whether the injury which he received was due to the failure of the company and the request of the foreman that he should continue at work, or whether it was due to his own carelessness. The testimony of plaintiff himself shows plainly that previous to his injury he had learned the necessity of keeping the roof properly supported, and knew that an unsupported roof was dangerous. As he had obtained this knowledge from some source, it was entirely immaterial whether the company did or did not instruct him about that matter at the commencement of his service. This being so, it seems to us that the instructions in regard to the duty of the company to warn an inexperienced servant of the dangers of the work were abstract and misleading. Decisions may no doubt be found in which such instructions have been approved, for under other circumstances they might be appropriate; but it is not safe to take the law as declared in one case and apply it in another without a careful consideration of the circumstances of each case in order to determine whether it be applicable or not. In order to avoid confusion, statements of law to a jury must have reference to the evidence in the case and the issues they are required to decide. So, in order to determine whether instructions are proper, we must consider them in the light of the facts to which they are applied. Now, so far as we know in this case, the jury, under the instructions, may have found that the defendant discharged its duty to the plaintiff in respect to making his room safe by furnishing him an ample supply of suitable timbers for that purpose, and yet found against the company on the ground that the plaintiff was inexperienced, and that the company failed to warn him of the dangers of the business, and for that reason was liable for the injury suffered. The giving of these instructions was, we think, under the facts of this case, misleading, and prejudicial to the defendant.

Again, the court, in instruction No. 10, told the jury that if the plaintiff requested the foreman to furnish him props, and the foreman promised to furnish them, then if the plaintiff relied on the promise of the foreman, and for that reason continued at his work, he did not assume the risk incident "upon the failure to furnish a sufficient

amount of props to securely and safely prop the room where the plaintiff was working." But, conceding that he did not assume the risk incident upon the failure to furnish the props, it does not follow that he was not guilty of negligence in working under an unsupported roof; for the fact that the foreman promised to furnish the props necessary to support the roof did not justify the plaintiff in exposing himself to danger so obvious and imminent that no person of ordinary prudence would under like circumstances have exposed himself to it. As before stated, whether he was guilty of negligence in remaining at his work when there were no timbers on hand to support the roof is a question for the jury to determine from a consideration of all the circumstances of the case. A laborer working under a foreman or superintendent of a mine is, as a general rule, expected to obey the orders of such foreman in reference to the work, and would not be guilty of negligence in doing so unless the danger to be incurred thereby is so manifest and plain that no person of ordinary prudence would do so under like circumstances. If it is shown in this case that the plaintiff remained at work in obedience to the order of his foreman, the jury should take into consideration not only the circumstances indicating danger, but the relative experience and knowledge of the two men in reference to such work and the danger to be apprehended, and determine from a full consideration of all the circumstances whether plaintiff was guilty of carelessness in proceeding with his work, the question, as before stated, being one of fact for the jury to decide. *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542; *Schlacker v. Ashland Iron Co.*, 89 Mich. 253, 50 N. W. 839; 20 Am. & Eng. Ency. Law (2d Ed.) 147; *Wood's Master & Servant* (2d Ed.) § 387.

Having said enough to indicate our opinion upon the legal questions involved, it is needless to discuss the instructions further. For the error in the instructions referred to, the judgment is reversed, and a new trial ordered.

GREENE COUNTY v. LIGHT.

(Supreme Court of Arkansas. Dec. 12, 1903.)
COUNTY CLERK—FEES—SETTLEMENT OF ACCOUNTS.

1. The drawing of warrants by a county clerk, on order of the county court, delivering them to their owners, and taking receipts therefor, as required by Sand. & H. Dig. §§ 1240, 1241, do not constitute settlements of accounts within section 3309, subd. 24, allowing the clerk a fee of 10 cents "for making settlements of each account with the county."

Appeal from Circuit Court, Greene County; Felix G. Taylor, Judge.

Claim by G. O. Light against Greene county. From an order allowing the claim, the county appeals. Reversed.

W. S. Luna and R. E. L. Johnson, for appellant. J. D. Block, D. E. Bradshaw, and T. E. Helm, for appellee.

BUNN, C. J. This is a claim for clerk's fees against Greene county. The claim was presented to the county court, and by it disallowed. An appeal was taken to the circuit court from the order of disallowance, and the claim was allowed by the circuit court, and the county appealed to this court.

The case was heard in the circuit court on the following agreed statement of facts, to wit:

"(1) That plaintiff was circuit and ex officio county clerk of Greene county for two consecutive terms, and until the 30th of October 189-."

"(2) That during the four years plaintiff, as such county clerk, delivered to the legal owner or owners thereof, six thousand eight hundred and eighty (6,880) warrants drawn by order of the county court, and that he took the receipt or receipts of such owner or owners for each warrant or warrants so delivered, as is provided for in sections 1240, 1241, Sand. & H. Dig.

"(3) That plaintiff's claim herein is that the delivery of each one of such warrants, and taking the receipt therefor, as is set forth in paragraph No. 2, above, constituted a 'settlement of each account with the county,' as is provided for in the twenty-fourth item in section 3309, Sand. & H. Dig., for which he is entitled in each case to a fee of ten cents, as such item provides, which would make the total amount of his claim for such services against the county six hundred and eighty-eight (\$688) dollars."

By agreement, also, copies of entries on the warrant register were introduced in evidence.

On the hearing the circuit court allowed the claim, and the county appealed to this court, as stated above, and now the case comes up for reversal of the judgment of the circuit court.

The twenty-fourth item of section 3309, Sand. & H. Dig., regulating and fixing fees of county clerks, is in this language: "For making settlements of each account with the county." The varied meaning of the word "settlement" has doubtless created some confusion in the minds of many in construing the word as employed in the language of the statute. Among other meanings, the word "settlement" means "an adjustment of accounts," and also the payment of a debt. In our opinion, the meaning of the word, in the connection here used, is "an adjustment of accounts," the meaning of which presupposes some work or labor of the clerk, made a duty by law for him to perform, and this required labor is the basis of the fee allowed to him in the statute. When a claim is presented to the county court, it expresses upon it directly, and allows or disallows it. If it is allowed, ipso facto, the

clerk is required to enter the order of allowance; and on request of the claimant he is then required to issue the necessary warrant upon the treasurer, and, in order that controversies may not arise as to the issuance and delivery of the warrant, he is required to take a receipt from the claimant, and at the same time to deliver the warrant to him. This giving of the receipt is, of course, the work of the claimant, and not the clerks, for he only takes it when tendered to him. For all these duties imposed upon the clerk by law—the entering the order of allowance and the issuance of the warrant—the clerk is allowed fees, specifically named, except for the receipt from the claimant, which it is the duty of the claimant, and not the clerk, to give.

In our opinion, there was no settlement in this case by the clerk for which the law allows him a fee; and this case comes under *Duncan v. Scott County*, reported in 70 S. W. 314. The mere taking of the receipt adds nothing to the transaction towards making it a settlement in contemplation of the statute.

The judgment of the circuit court is therefore reversed, and the claim dismissed.

HOT SPRINGS R. CO. v. WILLIAMSON et ux.

(Supreme Court of Arkansas. Dec. 12, 1903.)

RAILROAD—RIGHT OF WAY—COVENANT FOR PEACEABLE POSSESSION—BREACH.

1. Where parties granted to a company a right of way, to maintain a railroad "over, across, through, or upon any land owned by them," with a covenant for peaceable possession, the covenant is not broken by their suit for, and recovery of, damages for the maintenance of a railroad on a street between lots owned by them, abutting on the street, nor by a suit in equity to compel the abatement of the nuisance; it not appearing that they owned any portion of the street.

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Action by the Hot Springs Railroad Company against C. S. Williamson and wife. From an order sustaining a demurrer to the complaint, and a judgment dismissing the action, plaintiff appeals. Affirmed.

This is an action by the Hot Springs Railroad Company against C. S. Williamson and Fannie G. Williamson to recover damages on account of a breach of a covenant for quiet enjoyment. The plaintiff alleged in its complaint as follows:

"Paragraph 1. That it is a corporation duly organized and incorporated under the laws of this state for the construction, maintenance, and operation of a railroad from Malvern, in Hot Spring county, to the city of Hot Springs, in Garland county, and is located in and through each of said counties.

"That the defendants on the 10th day of

April, 1880, in consideration of the sum of \$200 to them paid by the plaintiff, bargained, sold, and conveyed to the plaintiff, by their deed, duly executed and acknowledged, the right of way of the width of six rods through, over, and upon all the lands owned by them in the said counties of Hot Spring and Garland, for the purpose of locating and maintaining a railroad over, across, through, and upon said land, in either of said counties, upon or across which the line of said railroad was then, at the time of said conveyance, or might thereafter be, located.

"And the defendants, in their deed, covenanted with the plaintiff that it should quietly enjoy the peaceable possession of said right of way, without interference or molestation by the defendants, their heirs or personal representatives. Said deed and covenant are in words as follows, to wit:

"This deed of conveyance made and entered into this the 10th day of April, 1880, by and from Fannie G. Williamson and Curnel S. Williamson, her husband, of the first part, and the Hot Springs Railroad Company of the second part; witnesseth,

"That the said party of the first part, for and in consideration of the benefits and advantages to result to them by the location and construction of the line of the Hot Springs Railroad upon, over and across the following described lands, by said party of the second part, or their assigns, and for the further consideration of the sum of \$200 to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do grant, convey and confirm unto the said party of the second part, the right of way of the width of six rods, for the purpose of locating, constructing and maintaining said railroad over, across, through or upon any land owned by them, situate or being in the counties of Garland and Hot Spring, or either, and state of Arkansas, and it is hereby expressly understood, between the parties to these presents, that it is intended by this deed to convey unto the said Railroad Company and their assigns, the right of way aforesaid, over, across, through or upon any lands owned by or belonging to said party of the first part, upon or across which the line of said railroad is or may hereafter be located by said party of the second part, or their assigns, agents, or attorney, without any further or more particular description thereof.

"To have and to hold the above described right of way and premises, together with all and singular the privileges and appurtenances thereunto belonging, in fee simple, unto the said party of the second part, or their assigns, for ever.

"And the said parties of the first part hereby covenant to and with the said party of the second part that they shall, without interference or molestation by said parties of the first part, their heirs, executors or ad-

ministrators, have, hold and enjoy quiet and peaceable possession of said above granted premises, for the uses and purposes aforesaid."

"And plaintiff alleges that the defendant at the time of the aforesaid conveyance owned the following land situated in Garland county, viz.:

"Lot nine (9) in block sixty-nine (69), and lots one (1) and two (2) in block seventy-eight (78), in the city of Hot Springs; that lot nine (9) aforesaid had a lateral frontage on the south side of Benton street, one of the streets of said city, and lots one (1) and two (2) aforesaid, abutted or fronted on the north side of said street; lot one (1) in block seventy-eight (78) being directly opposite lot nine (9) in block sixty-nine (69), and said lots constituting the north and south boundaries of that part of said street upon which they are located.

"During the year 1881, and after the execution of the aforesaid deed and covenant on the part of the defendants to the plaintiff, plaintiff located and constructed its said railroad in a skillful and proper manner in and upon Benton street between the lots owned by the plaintiff, and abutting on said street as aforesaid, and was in the quiet and peaceable possession, occupation, and enjoyment thereof from thence until the 10th of October, 1882, when the defendants, in violation and disregard of their aforesaid covenant with the plaintiff, instituted an action at law against the plaintiff in the circuit court of Garland county for the recovery of damages for injury which they allege had accrued to the aforesaid lots, and to their easement in Benton street abutting their said lots, and for injury and impairment of their right of access from said lots to and from said street by reason of the location, construction, and maintenance of said railroad by plaintiff in and upon said street in alleged violation of their rights and easements in said street as adjacent landowners.

"Plaintiff filed its answer to the complaint in said cause, and at the September term, 1883, of said court, said cause was tried before a jury, selected and impaneled, and the defendants recovered of the plaintiff the sum of \$2,275 for damages by reason of their alleged injuries, and the cost of said proceeding, and the plaintiff thereupon prayed and obtained an appeal from said judgment to the Supreme Court, where the same was reviewed and affirmed at the November term, 1885 [45 Ark. 429]. Whereupon plaintiff sued out a writ of error from the judgment of affirmance rendered by the Supreme Court of this state in said cause to the Supreme Court of the United States; and afterwards, at the October term, 1889, of the Supreme Court of the United States, said cause was heard on the transcript of the aforesaid proceedings and assignment of errors filed by plaintiff therein, and the rulings of the Supreme Court of this state were thereupon

affirmed [10 Sup. Ct. 955, 34 L. Ed. 355]; and afterwards, on the — day of —, a mandate from the Supreme Court of the United States was filed with the clerk of the Supreme Court of this state in said cause, and the plaintiff was compelled to, and did, pay to the defendants the sum of \$3,000 in satisfaction of said judgment and the costs of said proceedings, and in addition thereto was compelled to expend divers other large sums, viz.:

"One thousand dollars for attorney's fees and other expenses incurred in defending the aforesaid action.

"Plaintiff states that, prior to the beginning of the aforesaid action by the defendants herein against it, the aforesaid deed from defendants to plaintiff was mislaid, and the existence thereof was not discovered by plaintiff, or made known to its attorney in said litigation, until after the conclusion of said suit, and the payment of the judgment recovered by defendants against the plaintiff as aforesaid.

"Whereupon plaintiff avers that the defendants have failed to keep and perform their aforesaid covenant, but, on the contrary, the said defendants did not suffer or permit the plaintiff to peaceably and quietly enjoy said right of way and premises without interference or molestation of the said defendants, according to the form and effect of their said covenant in the said deed contained, to plaintiff's damage in the sum of \$4,500, and plaintiff prays judgment for said sum."

In another paragraph of its complaint, plaintiff alleged that the defendants, in violation of their said covenant, instituted a proceeding in equity in the circuit court of Garland county, in which they sought "to have plaintiff's said railroad, and the improvements and appurtenances incident and necessary thereto, removed from said street, and abated as a nuisance"; that, upon the hearing of said cause upon the merits, the court dismissed it; and that it was put to great trouble, loss, and expense in defending said action, and had to expend large sums, to wit, the sum of \$3,000, in employing attorneys, taking testimony, preparing exhibits, and other expenses necessarily incurred in and about the defense of said action; and asked judgment for \$3,000, as damages for the breach of the covenant.

In a third paragraph of its complaint it made substantially the same allegations as are contained in the first paragraph, and set out the same cause of action.

Defendants demurred to the complaint, and the court sustained their demurrer; and the plaintiff electing to stand upon its complaint, and declining to plead further, a judgment was rendered in favor of the defend-

ants, dismissing the action, and for costs, and the plaintiff appealed.

J. M. Moore and W. B. Smith, for appellant.

BATTLE, J. (after stating the facts). Appellees granted to appellant a right of way, of the width of six rods, for the purpose of locating, constructing, and maintaining a railroad over, across, through, or upon any land owned by them, situate or being in the counties of Garland and Hot Spring, or either, and covenanted that it should quietly and peaceably enjoy the possession of the same. No other right of way or property was protected by this covenant.

Appellant did not allege in its complaint that it located or constructed its railroad "over, across, through, or upon" any land owned by the appellees, but that it located and constructed it in and upon Benton street, in the city of Hot Springs, between the lots owned by the appellees, and abutting on said street. There is no allegation that the appellees owned Benton street, or any interest therein, which they could grant as a right of way, or that appellant held, claimed, or appropriated any part of the lots abutting thereon for right of way.

On the 10th of October, 1882, appellees brought an action for the recovery of damages for the injury which they alleged "had accrued to their lots and to their easement in Benton street, * * * and for injury and impairment of their right of access from said lots to and from said street, by reason of the location, construction, and maintenance of said railroad * * * in and upon said street in alleged violation of their rights and easements in said street as adjacent landowners." If this be true, they did not thereby disturb the quiet enjoyment by appellant of any right of way granted to it by appellees over their lands, or protected by their covenants, but recovered damages for the injury to their lots caused in the manner stated in appellant's complaint. These damages, or the rights or property out of the injury to which they arose, were not incident to, or any part of the right of way granted by appellees; the railroad having been constructed in a street of the city of Hot Springs. They had not waived such damages, and, under the Constitution of this state, were entitled to recover them. Hot Springs R. Co. v. Williamson, 45 Ark. 429.

In the second paragraph of its complaint, appellant fails to show a cause of action. Appellees covenanted that it should have quiet and peaceable possession of the right of way granted by them. No paragraph in the complaint shows a breach of this covenant.

Judgment affirmed.

BOHNE et al. v. BLANKENSHIP et al.
(Court of Appeals of Kentucky. Jan. 6, 1904.)
HIGHWAYS — DEDICATION — APPROPRIATION
WHEN NOT KEPT IN PROPER REPAIR—AC-
TION TO ENJOIN—PARTIES PLAINTIFF.

1. Where land has been dedicated as a public highway, and the dedication has been accepted on behalf of the public, failure of the public to put and keep it in proper repair will not authorize the owner of adjacent premises to appropriate it to his private use, even temporarily.

2. Where the owner of land, on dividing it into lots, dedicates a strip of it as a highway, a subsequent purchaser of one of the lots adjacent to it has such an interest in the unobstructed use of the way, in the nature of an appurtenance to his lot, that he may maintain injunction to abate obstruction of the way.

Appeal from Circuit Court, Bullitt County.
"Not to be officially reported."

Suit by E. C. Bohne and others against J. J. Blankenship and others. Judgment for defendants. Plaintiffs appeal. Reversed.

Charles Carroll, for appellants. Fairleigh, Strauss & Fairleigh, for appellees.

O'REAR, J. The parties to this appeal and suit have title to adjoining lots from a common grantor. In the deed to appellees, the grantor reserved a 15-foot strip of land adjoining a railroad right of way as a public highway, expressly dedicating it to the use of the public. The county court, by an order of record, has accepted the proposed dedication, but has not allotted hands to work it. Appellees built a fence across and along the passway, so as to hinder its use by the public. Appellants sue to restrain the continuing of the obstruction. Appellees admit the right of the public to the passway, but say that, until the proper public authorities have actually taken charge of the road and put it in fit condition for travel, they may obstruct it with impunity.

We are of opinion that after land has been dedicated by the owner to the use of the public as a highway, and the dedication has been accepted by or on behalf of the public, as has been done in this case, the right of the public to use it without hindrance from the owner of the burthened estate is complete. It will not do to say that, if the public authorities fail to keep a road in proper repair, the owner of the adjacent premises may appropriate it to his private use, even temporarily. The public lose none of their rights, once acquired, to use a highway, merely because some public servant has omitted to do his duty in keeping the way in repair.

It is also claimed that appellants, owners of an adjacent property, had no such particular interest as warranted their suit for relief against the maintenance of a public nuisance by injunction. But appellants have an interest in the free and unobstructed use of the passway beyond that of the public generally. The way in question was dedicated by the former owner when he divided the original tract of land into lots for sale, in-

tending thereby clearly to afford a way of outlet from appellants' lot. Their use of the passway is in the nature of an appurtenant to their lot, the obstruction of which gives them a right of action for relief by injunction. Damages recoverable from a solvent interferer in such case is not an adequate remedy.

The judgment of the circuit court dismissing appellants' petition is reversed, and the cause is remanded, with directions to enter judgment granting the injunction prayed for.

MAGRUDER v. POTTER et al.

(Court of Appeals of Kentucky. Jan. 7, 1904.)
ROADS — DEDICATION — PRESUMPTION — PER-
MISSIVE USE—BURDEN OF PROOF.

1. A dedication by the owner and acceptance by the proper authorities will be presumed where a passway has been used by the public continuously for more than 15 years.

2. Where a passway has been continuously used, as a matter of right, for 15 years, unexplained, a presumption of grant arises.

3. When a passway has been used for something like a half century, it is unnecessary to show by positive testimony that the use was claimed as a matter of right.

4. After a passway has been used for something like a half century, the burden is on defendant, in an action to open it, and for damages for its obstruction, to show that the use was only permissive.

Appeal from Circuit Court.

"Not to be officially reported."

Action by S. O. Magruder against R. L. Potter and another. From a judgment for defendants, plaintiff appeals. Reversed.

W. F. Bradshaw, for appellant. Wheeler & Hughes, for appellee C. St. & M. O. R. Co. Bloomfield & Crice, for appellee Potter.

HOBSON, J. This appeal is prosecuted from a judgment of the circuit court sustaining a general demurrer to the plaintiff's petition, in which it is alleged that the plaintiff owns 70 acres of land in McCracken county, on which he resides; that the defendant R. L. Potter is the owner of an adjoining tract of land, recently acquired by him by purchase from T. E. Haddox, which lies north of the plaintiff's land, and between it and the public road, the distance being about 400 yards; that Potter also owns another tract, of 160 acres, lying east of this tract, and adjoining it; that between these two tracts, and running from the county road down to plaintiff's land, and alongside of it out to another county road, there has existed for 40 or 50 years a lane which is a road or passway by which the plaintiff can get out from his land to the public road; that the traveling public have used this road for more than 40 years, not as a matter of permission, but as a matter of right; that this way has been recognized and used as a right on substantially the same ground it now occupies for more than 40 years; that the landowners on each side of it have for that length of time conceded and recognized the right of

¶ 1. See Dedication, vol. 15, Cent. Dig. §§ 80, 81.

the public to travel upon the road by leaving a lane from 12 to 18 feet in width; that the passway was an easement belonging to the plaintiff's farm, and was so recognized and regarded by his vendor, Theodore Bradshaw, for more than 20 years, during which period he owned the land, and resided on it; that the said vendor and others and the traveling public have continuously used and traveled over this passageway, as a matter of right, for a period of more than 50 years past, and this right was conceded by the land-owners on each side, by setting their fences back so as to leave the lane; that 25 or 30 years ago the land owned by the plaintiff and the defendant Potter all lay in one body, and was one farm, owned by Shelby Bradshaw, and the said passway extended north and south along the east boundary of said farm; that recently the defendant Potter has built a fence across the passway, and his codefendant has made a cut across it, so as to obstruct it and prevent its use, destroying plaintiff's way of reaching the county road. The plaintiff prayed judgment opening the road, and damages for its obstruction. The court sustained the demurrer, it seems, upon the idea that there is no allegation of a grant dedication to the public, or acceptance by it, and that the allegations of the petition are not sufficient to show a continuous holding by adverse possession of the land as a private passway.

In *Riley v. Buchanan* (Ky.) 76 S. W. 527, and *Bohne v. Blankenship* (decided Jan. 6, 1904) 77 S. W. 919, this court considered at length the question whether a dedication by the owner and acceptance by the proper authorities will be presumed where a passway has been used by the public continuously for more than 15 years without let or hindrance from the owner; and, under the rule laid down in those cases, the allegations of the petition are sufficient to show prima facie that the road is a public way. In *Butt v. Napier*, 14 Bush, 46; *Talbott v. Thorn*, 91 Ky. 417, 16 S. W. 88; *Newcome v. Crews*, 98 Ky. 39, 32 S. W. 947; *Potts v. Clark* (Ky.) 62 S. W. 884; *Bowen v. Cooper* (Ky.) 66 S. W. 601; *Olay v. Kennedy* (Ky.) 72 S. W. 815—it was held that the continued use of a passway as a matter of right for 15 years, unexplained, will create a presumption of grant, and that, when the passway has been used for something like a half century, it is unnecessary to show by positive testimony that the use was claimed as a matter of right, but that after such a great length of time the burden is on the defendant to show that the use was only permissive. Under these principles, the facts stated in the petition are sufficient to raise a presumption of a grant of a private passway if no public right is established.

The court therefore erred in sustaining the demurrer. Wherefore the judgment is reversed, and cause remanded for further proceedings consistent herewith.

LOUISVILLE & C. PACKET CO. v. BOTTORFF et al.

(Court of Appeals of Kentucky. Jan. 6, 1904.)
CARRIER—DELIVERY OF MACHINE—NEGLIGENT DELAY—MEASURE OF DAMAGE—VERDICT—EVIDENCE—SUFFICIENCY.

1. A peremptory instruction is properly refused where the evidence is conflicting.

2. Objectionable questions and answers in a deposition must be excepted to specifically, and unless such exceptions appear in the bill of evidence they will not be considered on appeal.

3. Where no incompetency of a witness appears, an objection to the reading of his deposition as a whole is without merit.

4. Evidence considered in action against a carrier for negligent delay in delivery of a machine, and held sufficient to sustain verdict for plaintiff for \$250.

5. A carrier is responsible for damages for negligent delay in delivery of a machine only on the ground of unreasonable delay in delivering it, after prepayment of the freight, when prepayment may be required by the carrier.

6. It is the duty of a consignee to use ordinary care to ascertain the cause of the delay in the transportation of a shipment.

7. It is the duty of a consignee to use ordinary care to remove the cause of the delay in the transportation of a shipment.

8. It is the duty of a consignee of a machine to use ordinary care in obtaining another machine, where the one shipped is delayed in transportation.

9. In an action against a carrier for damages for negligent delay in delivery of a machine, the measure of damage is such a sum as was the natural and proximate result of the carrier's delay after receiving payment for the shipment, and for such time only as intervened between the date the machine should have been delivered and such time as by the use of ordinary care the consignee could have removed the cause of delay or obtained another machine, including the increased cost of labor to the consignee in the absence of the machine and the loss of time or profits on contracts made by the consignee.

Appeal from Circuit Court, Oldham County.

"Not to be officially reported."

Action by Lee Bottorff and others against the Louisville & Cincinnati Packet Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

D. H. French, for appellant. Morris & Morris, for appellees.

SETTLE, J. This is an appeal from a judgment of \$250 against the appellant, recovered by appellees in the Oldham circuit court, for damages sustained by reason of the alleged negligent failure of the former as a common carrier to transport and deliver to the latter within a reasonable time a machine made by the Huber Manufacturing Company, of Marion, Ohio, known as a "self-feeder," and intended for use in operating a wheat thresher owned by the appellees. The facts presented by the record are as follows: The appellees in the latter part of June, 1901, through one Stoll, ordered of the Huber Manufacturing Company a feeder, which was shipped by the company June 26, 1901, over the Erie Railroad, from Marion to Cincinnati, Ohio, to be transported by the appellant on one of its steamboats from that

city down the Ohio river to Tarleton's Landing, in Oldham county, Ky., where it was to be received by the appellees. Upon its reaching Cincinnati the feeder was delivered to Robert Little, transfer agent, who, on July 8, 1901, delivered it to the agent of the appellant to be shipped upon one of its steamboats to its final destination. But appellant's agent refused to ship the feeder without the prepayment of the freight charges therefor, which fact was made known to Little, and by him communicated to the Erie Railroad Company, which in turn communicated it to the Huber Manufacturing Company, at Marion, and that company, upon being authorized by appellees, through its Lexington agent, then paid the demanded charges to the agent of the Erie Railroad Company, who directed Little to pay them to the appellant, which he did not later than July 15, 1901, but the feeder was not transported by appellant to Tarleton's Landing or delivered to the appellees until July 31, 1901. It is admitted by the appellant that the feeder was not delivered at Tarleton's Landing until July 31, 1901, and also admitted that it refused to ship it without prepayment of the freight, and there seems to be little doubt from the evidence that the feeder was received by it July 3d. It is, however, claimed by appellant, and such was the testimony of its several witnesses, that the freight was not paid by Little until July 30th—only the day before the delivery of the feeder to appellees. The issue made by the pleading on this point was whether or not the appellant failed to deliver the feeder at Tarleton's Landing within a reasonable time after the prepayment of the freight, and, as Little testified that the freight was, in any event, paid appellant by July 15th, and the feeder was not delivered to appellees until July 31st, if his testimony was accepted by the jury they evidently came to the conclusion that the interval of 16 days constituted unreasonable and inexcusable delay on the part of appellant, for which it ought to account to the appellees. The evidence furnished by the witnesses introduced by the appellees strongly conduces to prove that the feeder was received by appellant's Cincinnati agent July 3d, at which time prepayment of the freight was demanded. On the same day the amount of the freight was paid by Dumbaugh, of the Huber Company, to the Erie Railroad Company. Correction of the waybill was then commenced, and by direction of the Erie Railroad Company Little paid the freight to the appellant as soon as the correction was completed, which he says was not later than July 15th. It doubtless appeared to the jury unreasonable that the Huber Company, railroad company, Little, and appellees, after receiving on July 3d notice of the appellant's demand for prepayment of the freight, should have allowed practically a whole month to pass without seeing it paid, and equally unreasonable that

the appellant would have permitted itself to be put to the trouble of storing and caring for the machine for a month without knowing whether or not the charges would be paid. At any rate, the trial court was unable to say that there was no evidence whatever to support the appellees' cause of action, therefore the peremptory instruction asked for by appellant was properly refused. It cannot be denied that the evidence was conflicting, but in that state of case it was the province of the jury, and not of the court, to determine its weight and effect.

It is insisted for the appellant that the depositions of Dumbaugh, Sand, Agnew, and Little were incompetent, and should have been excluded by the court. It will be found that the only exceptions shown by the record are to each of these depositions as a whole, consequently they only go to the competency of the witnesses. If particular questions or answers in a deposition are objected to, they, and each of them, must be excepted to specifically, and such exceptions must appear in the bill of evidence; otherwise they cannot be considered by this court. The witnesses whose depositions are complained of all appear to have been competent to testify, and the lower court did not err in permitting their depositions to be read to the jury.

On the question of damages there was no conflict of evidence. It is clearly shown that the "self-feeder" was not received by the appellees until about the close of the wheat-threshing season. They had contracted in the beginning of the season to thresh sundry crops of wheat for their neighbors and customers upon the faith of being able to procure the self-feeder in time to do so, and the proof shows that with the help of the feeder, if it had been received in reasonable time after being ordered, they could have threshed every crop engaged to them, but that by reason of the delay in its delivery they lost and were compelled to abandon many of these crops. It also appears that in attempting to operate their wheat thresher without the assistance of the self-feeder appellees were put to additional expense in employing extra hands and in boarding them; that with the self-feeder from 200 to 400 bushels more of wheat per day could be threshed than without it, and that appellees during the season of 1901, by reason of not having the use of the self-feeder ordered by them, lost the threshing of not less than 8,000 bushels of wheat from the crops contracted to them, for which they would have received five cents per bushel. In view of this evidence we are unable to say that \$250, the amount allowed appellees by the verdict of the jury, is unreasonable or excessive, although, according to their own evidence, they lost the use of the self-feeder only 16 days. Consequently we are unable to sustain the contention of counsel for appellant that the verdict is flagrantly against the evidence.

We have been unable to find any error in the instructions. They recognize the right of appellant to require of appellees, under the facts of this case, the prepayment of the freight for transporting the self-feeder, and make it responsible for damages only upon the ground of unreasonable delay in delivering it after the prepayment of the freight, if it was prepaid, and there was such delay. They also told the jury that it was the duty of the appellees to use ordinary care to ascertain the cause of the delay in the transportation of the feeder, and to use such care in removing such cause or in obtaining another feeder; and, further, if they found for appellees, that the measure of damages was such a sum as was the natural and proximate result of appellant's failure to transport the feeder to its destination in a reasonable time after receiving payment therefor, if it did so fail, and for such time only as intervened between the date the feeder should have been delivered at Tarleton's landing and such time as by the use of ordinary care the appellees could have removed the cause of delay or have obtained another feeder, and in this connection that they might consider the increased cost of labor, if any, in operating the thrasher, the loss of time or profits on the contracts made by appellees, caused by the failure, if any, of appellant to transport the feeder to its destination in a reasonable time after prepayment of freight; if there was any such delay.

Finding no error in the record whereby the substantial rights of the appellant have been prejudiced, the judgment is affirmed.

WOODRUFF et al. v. COMMONWEALTH. (Court of Appeals of Kentucky. Jan. 6, 1904.)

CRIMINAL LAW—APPEAL—REVIEW—NEW TRIAL.

1. The verdict in a criminal case will not be disturbed on appeal, there being any evidence to support it.

2. The question of misconduct of a juror, from incompetency arising during the trial, being raised for the first time on motion for new trial, cannot be considered on appeal; decisions of the court on motion for a new trial being, by provision of Cr. Code, § 281, not subject to exception.

Appeal from Circuit Court, Christian County.

"Not to be officially reported."

John Woodruff and Francis Drake were convicted of murder, and appeal. Affirmed.

W. H. Yost, for appellants. Hunter Wood & Son, for the Commonwealth.

O'REAR, J. Appellants were convicted and sentenced to life imprisonment under an indictment charging them with the murder of Robert H. Coffey. Although some seven grounds for a new trial are set out in the motion before the circuit court, only two are presented by the brief of counsel for appellants in this case, namely: (1) That the verdict was influenced and brought about by

passion and prejudice, and was contrary to the evidence; and (2) that the court erred in refusing a new trial on account of the misconduct of one of the jury. An examination of the other grounds, not discussed in the brief, fails to disclose wherein the court erred to any extent.

There was a great conflict of evidence concerning appellants' guilt. If the witnesses for appellants were believed, it would be impossible for the jury to have returned their verdict. On the other hand, if the evidence of the commonwealth witnesses was believed, there was enough to sustain the verdict in this case. In the criminal practice in this state there is probably no question as thoroughly fixed as that this court cannot and will not interfere with the verdict of a jury where there is any evidence to support it. An examination of the following cases, not mentioning a great number of others, would seem to be sufficient to conclude this inquiry: *Travis v. Commonwealth*, 96 Ky. 77, 27 S. W. 863; *White v. Commonwealth*, 96 Ky. 180, 28 S. W. 340; *Nantz v. Commonwealth*, 29 S. W. 333; *Vowells v. Commonwealth*, 83 Ky. 193; *Patterson v. Commonwealth*, 86 Ky. 313, 5 S. W. 387; *Jackson v. Commonwealth*, 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. Rep. 336; *Pace v. Commonwealth*, 37 S. W. 948; *Barnes v. Commonwealth*, 101 Ky. 556, 41 S. W. 772; *Nelson v. Commonwealth*, 62 S. W. 1018.

The alleged misconduct of the juror George W. Embry is that Embry became incompetent to proceed with the trial on account of mental aberration, characterized in the argument as temporary lunacy. It was attempted to be shown upon the motion for a new trial, where the matter was first presented to the trial court, that Embry was laboring under a hallucination that he was being tried for some offense; that certain officers of the court and other persons were his prosecutors. On the contrary, a number of the jurors, the physician who had attended Embry, and the sheriff who had custody of the jury, all testified that Embry's indisposition was physical only, did not affect his mind, and did not disqualify him from his duties as juror; that his intellect was clear, and his will and judgment apparently uninfluenced by his physical condition. It furthermore appeared that the condition of the juror (the trial having lasted for several days) was brought to the attention of the learned trial judge, who personally examined the juror and questioned him at the time concerning his ability to proceed with the trial, and, being satisfied from his answer and from the inspection of the court that he was able, the trial was proceeded with without objection. We are satisfied, from an examination of the record, that the juror was not incompetent because of any mental infirmity; at least, it is not shown that he was. But a more serious objection to the consideration of this ground is presented by the fact that

the question arose for the first time upon the motion for a new trial. Under the provision of section 281 of the Criminal Code, the decisions of the court upon the motion for a new trial are not subject to exceptions, and consequently are not reviewable on appeal. *Smith v. Commonwealth*, 100 Ky. 133, 37 S. W. 586; *Sawyers v. Commonwealth* (Ky.) 38 S. W. 136; *Terrell v. Commonwealth*, 13 Bush, 246; *Kennedy v. Commonwealth*, 14 Bush, 343; *Redmon v. Commonwealth*, 82 Ky. 334; *Brown v. Commonwealth*, 14 Bush, 400; *Fuqua v. Commonwealth* (Ky.) 73 S. W. 782; *Vinegar v. Commonwealth* (Ky.) 46 S. W. 510.

The record fails to show any error of the trial court to which appellants objected or excepted. Under the repeated adjudications of this court, we are without power to examine further the matters complained of in argument as constituting the grounds for this appeal.

Therefore the judgment must be affirmed.

CAMPBELL et al. v. COMBS.

(Court of Appeals of Kentucky. Jan. 6, 1904.)

BOUNDARIES—ORAL AGREEMENT FOR DIVIDING LINE—BINDING EFFECT—LAPSE OF TIME.

1. In 1860, a father, who, with his sons, held patents on certain lands, agreed orally with the owner of an overlapping grant on a dividing line, and this line was observed by him and his children till 1894, when vendees of the children began to disregard it. *Held*, that the agreement was binding on the children and their vendees.

Appeal from Circuit Court, Perry County.
"Not to be officially reported."

Action by Sallie Combs against W. B. Campbell and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. J. C. Bach and N. H. Miller, for appellants. Bailey P. Wootton and Jesse Morgan, for appellee.

NUNN, J. Appellee secured a judgment for \$210 against appellants for a trespass upon her land by cutting and hauling away timber trees therefrom. Of this judgment appellants complain. The facts, in substance, are as follows: Prior to the year 1860 Nicholas Combs was the owner by patent from the commonwealth of Kentucky of several tracts of land on First creek, and McCager Napier was the owner of lands on Sixteen Mile creek. One of Napier's patents for 400 acres was issued to and in the name of his sons Patrick B. and McCager S. Napier. This patent extended over the ridge between Sixteen Mile creek and First creek, and a portion of it was situated on the waters of First creek, and it was on this portion of the 400-acre patent where the trespass was committed. A portion of the lands patented to Nicholas Combs extended over this

dividing ridge, and was situated on Sixteen Mile creek. The proof shows without much, if any, contradiction, that in the year 1860 Combs and Napier, for himself and boys, entered into an oral agreement by which it was agreed that the top of the dividing ridge between First and Sixteen Mile creeks should be the line between their lands; that Napier and his children were to have all of the land of Combs on Sixteen Mile creek and Combs all the Napier lands on First creek. At the time of this agreement Combs lived on First creek and Napier and his boys on the other creek, and each from that time recognized this agreed line, and claimed to it as long as they lived, and their children and heirs recognized it as the true line until the year 1894, when appellants, as vendees of Patrick B. Napier and McCager Napier, Jr., took possession of that part of the 400-acre patent in controversy. Appellee claims under a division of the lands of Nicholas Combs, and her part in the division fell on this 400-acre patent. Appellee and those under whom she claims have been in the actual adverse possession of the lands in controversy since 1860. The only question to be determined is whether this agreement made by McCager Napier for himself and boys was binding upon the boys. The agreement, being oral, was not binding, of itself, on any of the parties; but when the parties to the agreement and those interested execute it, and acquiesce in it, they ought not to be allowed to revoke, as in this case, 25 or 30 years after the agreement was made. In the case of *Alexander v. Parks*, 72 S. W. 1107, this court said: "We do not mean that such an agreement is irrevocable. Any party to the agreement may renounce it, within the proper time, or avoid it by the institution of proper proceedings," etc. The case of *Grigsby v. Combs*, etc. (Ky.) 21 S. W. 37, was one which involved the same question as in the case before us. The court in that case said: "We are of the opinion, however, that both in principle and by authority an agreement of this nature can be upheld. It is no more a swap of lands than results by reason of agreed corners between neighbors, or agreed division fences, and these amicable arrangements have been sanctioned by repeated adjudication." These cases and the authorities therein cited are conclusive of this case.

Perceiving no error, the judgment of the lower court is affirmed.

GRAYCRAFT et al. v. NATIONAL BUILDING & LOAN ASS'N.

(Court of Appeals of Kentucky. Jan. 8, 1904.)

CORPORATIONS—VOLUNTARY LIQUIDATION.

1. Among the rights inter sese of stockholders of a corporation, on its dissolution, is to share pro rata in proportion to the number of shares held by each in its assets, on a money basis; and though a majority of the stockholders vote that, so long as it lasts, the real es-

¶ 1. See *Boundaries*, vol. 3, Cent. Dig. §§ 217, 225.

tate of the corporation may be purchased at certain prices by the stockholders in exchange for their shares, and that, if the remaining assets are sufficient to pay the other stockholders more than is received by the stockholders who exchange stock for land, the surplus shall be distributed to all stockholders alike, the corporation cannot give an indefeasible title to stockholders so desiring to purchase, as, if they thus get a greater proportion of the assets than the other stockholders, they may be compelled by dissenting stockholders to refund to the extent of the surplus.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"To be officially reported."

Action by the National Building & Loan Association against George Craycraft and another for specific performance of a contract to purchase real estate. Judgment for plaintiff. Defendants appeal. Reversed.

Strother, Hardin & Strother and H. M. Johnson, for appellants. Woolfolk & Klein, for appellee.

O'REAR, J. Appellee is a building and loan association organized and operating under the laws of Kentucky, and subject to the provisions of the present Constitution and statutes. Appellee found it was unable to prosecute its business with success, and, in the course of its business, by investment in real estate and the purchase of real estate for debts, it acquired real property of the value of about \$140,000 at its book value; that is, at the price which the property cost appellee. It had a large number of stockholders, holding a large amount of its capital stock, which, at its book value (that is, the aggregate of dues paid on stock, and of the dividends which had been declared and credited to the stock), amounted to a sum much in excess of the value of the real estate. Its assets, consisting of notes secured by mortgages and by pledges of stock, together with the book value of the real estate, practically balanced the liabilities of the company to its stockholders. The pleadings claim, and proof in this case indicates, that this real estate could not be sold in the ordinary and usual way of selling for as much as \$140,000, by practically one-third of that amount; that is, the real estate could not have been sold in the usual way for more than \$93,000 or \$94,000. To sell this property, therefore, in this way, would have made the company unable to pay its stockholders in full, by the sum of \$46,000, if the result should be as anticipated. Taking into account depreciations in value and losses which must necessarily result in collecting its personal assets, the company, in the usual way of winding up, is probably insolvent. With this condition confronting them, the directors, through a committee, while in process of liquidation, conceived a plan of disposing of this real estate to its stockholders by adding to the cost value of the real estate arbitrary amounts, not exceeding 8 per cent. of any one piece of property,

and accepting in payment therefor stock of the stockholders at its book value, with the stipulation that in the event the assets, upon final distribution, were sufficient to pay to the stockholders who did not purchase real estate more than was received by the stockholders who exchanged stock for real estate, such surplus should be distributed to all of the stockholders alike. It will be observed that there was no final surrender of the stock, or of the rights of stockholders, upon the exchange of stock for real estate. In order to ratify this plan, a meeting of the stockholders was called, and was attended by the holders of a bare majority of stock—a bare quorum—and the plan was ratified by a bare majority; and, of this bare majority of the stock, 26 shares attending the meeting voted against approving the plan. Under the plan adopted, offers for the property by stockholders, to be paid in stock, were authorized to be made up to the 1st of February, 1903, at which time the right of stockholders to make such exchange expired, under the terms of the plan. After such approval as was made by the stockholders of the proposed plan for disposing of the real estate, printed propositions containing the substance of the above plan, and a list of real estate of the appellee, with its price, were mailed to each of the stockholders. Prior to the 1st of February, 1903, the company received propositions under the plan for about \$30,000 worth of its real estate, and no more. About the time this plan was adopted by the directors, a resolution was adopted by the corporation, in substance, that it would proceed to dispose of its assets, pay its liabilities, and wind up the business. This did not legally put the company in liquidation. See *Economy, etc., Association v. Paris Ice Company* (Ky.) 68 S. W. 21. In the meantime, however, a consent such as is required by section 561, Ky. St. 1899, was signed by the necessary number of stockholders, and lodged with the directors in the latter part of January, 1903; and between that time and the 1st of February, at which time the plan above mentioned expired, the appellant Craycraft made a proposition to exchange stock of appellee of the book value of \$648 for the lot described in the petition, upon condition that the corporation would convey the property to him by a good, merchantable, indefeasible, fee-simple title. This proposition was accepted by the appellee, and a deed was drawn and tendered to appellant, which he declined to accept. This suit was brought for the specific performance of that contract.

The question involved here is whether the plan for disposing of its real estate is legal, whether appellant, at this stage of the winding up of appellee, would obtain by the deed tendered a good, merchantable, indefeasible, fee-simple title to the property described in the petition. These propositions involve the question whether the transaction above set forth is a sale of the lot described in the pe-

tion, such as they can lawfully make, or whether it is a mere distribution of assets to the stockholders receiving the property, and whether the property itself remaining in the hands of the stockholders, at the suit of dissenting or nonconsenting stockholders, would be brought in for the purpose of procuring an equal distribution of the assets of the corporation among all of its stockholders alike. It will be observed that only about \$30,000 worth of this \$140,000 worth of real estate was bargained for on the plan above described before the expiration of the plan, which leaves \$110,000 worth, as to which there is no assurance that it can be sold in the same way or upon the terms under renewal or extension of the plan; and, if not sold, its sale in the ordinary way of winding up a corporation may make the corporation so insolvent as to result in other stockholders receiving a much less pro rata from the assets of the corporation than those who get real estate for their stock.

That appellant was entitled to receive not only a deed, with covenant of general warranty, conveying the fee-simple title, but was to receive an indefeasible title, is admitted. If the scheme evolved by the majority stockholders, and above set forth, did not enable the corporation to pass such title to the stockholders whose bids might be accepted, then the specific execution of the contract between appellant and the association should not be adjudged. It should be borne in mind that the corporation is not indebted. Its sole liability is to its stockholders.

The argument is made that, in the course of a voluntary liquidation upon a statutory dissolution of a corporation, the will of the majority in interest as to the time and method of procedure, so long as it does not produce a substantial inequality in the result, must be allowed to control. The argument is utilitarian, and is opposed by the characterizing principles of the common law, which regard the rights of the individual in private property, in preference to the will or welfare of any greater contending number. The question of the rights of the stockholders as among themselves is one of implied contract. It is that, upon a dissolution of the joint enterprise for which they formed the corporation, its assets, after paying its indebtedness, will be distributed pro rata among the stockholders according to interest. It may be that, if these assets were of a quality capable of an exact partition in the proportion represented by each shareholder's interest, they might be distributed in specie. But that can rarely happen. The only dividend which can ordinarily receive the devisor of share interests is money. The basis of contribution, of reckoning liability, and of apportioning the final results is money. To liquidate, in law, is to make certain or exact, in units of money, and, in the sense in which the word is used in winding up a corporation, to discharge, in lawful money, the liabilities so ascertained. Each

stockholder is entitled, as a matter of right, and as an incident of his contract, to participate in the distribution on that basis. Although the majority in interest and numbers may conceive their interest to be, and although it may be a fact that their interest is, to hold the assets of the corporation for future enhancement of value or for other uses, the dissident members are not bound to yield their right to a legal liquidation to the welfare of the others. To make them do so would be compelling them, against their wills, to enter into a different contract from the one originally made. The doctrine being discussed is thus stated by Cook on Stock and Stockholders (1st Ed.) 638: "When the regular business of a corporation has been brought to a close, the shareholders have a right to an immediate distribution of the corporate assets. They cannot, therefore, be compelled to accept other property or rights in lieu of cash." The authorities cited by the author support the text. Using the instant case as an illustration, it may be, and probably is, that among the nonconsenting or dissenting stockholders there are some who hold but a few shares—possibly some who hold only a single share—of stock. It is not likely that any of them would be able to find a piece of real estate on the list of the same value as his share or shares. He may not be able or willing to invest money in addition in the real estate offered, and especially at the price offered. He would then be compelled to yield absolutely to other stockholders his claim as stockholder upon \$140,000 of real estate of the corporation, and to take the chances of realizing an equal proportion from the remaining assets of the company. It might be advisable for him to adopt that plan. But the question is, does the law compel him to relinquish a present valuable interest for a chance? It is not true, strictly, that every stockholder has an equal chance in the proposed plan, even if an even chance in anything except money would satisfy his right. For there are about \$200,000 worth of shares, at book value, with only about \$140,000 of real estate at book value. Some of these shares must necessarily fail to participate in this partition of the real estate, and therefore be compelled to take whatever chance there may be in realizing an equivalent sum, proportionately, from the other assets of the company. If they should fail, to that extent there would be an unequal distribution of the assets of the corporation among shareholders of the same rank, if the scheme here involved should be adjudged by the court. Such a distribution would never be decreed or sanctioned by a court of chancery. Nor are we aware of either principle or precedent that would allow a minority stockholder to be bound against his will by a resolution of the majority that would or could produce such result.

It is suggested that this scheme is particularly desirable and beneficial to all stockholders, because thereby extraordinary costs of

winding up by proceedings in the courts are averted. Under section 561, Ky. St. 1899, the board of directors of a corporation in voluntary liquidation are given ample power to do all that is necessary to pass title to its real estate by sales and conveyances, by public or private sales. Indeed, it is made their duty to expeditiously take these steps to reduce the assets into condition for distribution. The suggestion of costs and court expenses is probably more a bugaboo than a danger.

We do not mean to say that the plan submitted to the stockholders was not a judicious one. If all the stockholders had agreed to it, it is altogether probable it would have worked out satisfactorily. But even if that were clearer than is made to appear, we know of no legal way to compel them to enter into the agreement, for, at last, any deviation from the legal enforcement of the stockholders' rights is a matter of agreement among the parties. All the assets of the corporation in liquidation are a trust fund, which must be ratably distributed among all the stockholders of the same rank. If any of them are permitted to withdraw a greater proportion than others (i. e., any part of it that they were not entitled to), the former would be compelled to restore at least the surplus, that the others might be made equal. *William Goodrich v. City L. & B. Ass'n*, 54 Ga. 98; *Allen v. Russell*, 78 Ky. 105; *Endlich on Building Associations*, 526.

From this it follows that appellant would not get an indefeasible title to the lot contracted by him, for, upon a failure of any of the nonconcurring stockholders to receive an equal sum or value on final distribution, he could be compelled, at the suit of such stockholders, to surrender to them at least the surplus in value in the lot over his pro rata of all the corporation assets.

The judgment of the circuit court decreeing the specific performance of the contract of exchange of the lot for the seven shares of stock is reversed, and cause remanded, with directions to dismiss the petition.

25 Ky. R. 1644,
ANDERSON et al. v. MUNDO & MCGRAW.
 (Court of Appeals of Kentucky. Jan. 6, 1904.)
ADOPTED CHILD—MAINTENANCE BY PARENT—
PROPERTY OF CHILD—RIGHTS OF
PARENT'S CREDITORS.

1. Under Ky. St. § 2072, placing one who adopts a child "under the same responsibilities as if the person so adopted were his own child," the property of an adopted child cannot be reached by creditors of a parent on the ground that the child's maintenance has been borne by the parents; the provision made for the child not being unreasonable.

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Suit by Mundo & McGraw against Addie R. Anderson and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Wm. P. McClain, for appellants. Montgomery Merrell, for appellees.

O'REAR, J. Appellant Addie R. Anderson, as surety for her husband, was indebted to appellees in the sum of \$359.32, which was reduced to judgment in 1901. An execution having been returned "No property," this suit was filed by the creditors, seeking to subject a fund arising from a sale of land, the title to which appeared to be in Edna Earle Anderson, an adopted daughter of appellant Addie R. Anderson. It was claimed by the creditors, and accordingly adjudged by the trial court, that the land was bought with money belonging to the debtor; the title being taken to the daughter to defraud creditors. The proof shows that Mrs. Anderson and her husband, when in apparently easy circumstances, took their niece Edna Earle, when about 18 months old, to rear as their own child. They had no children born to them. Later they adopted Edna Earle by proceedings in court, under the statute (section 2071, Ky. St. 1899), as their heir at law. In the meantime the child's parents and certain of her uncles had given to her various sums, amounting to about \$1,100, which had been turned over to G. W. Anderson, husband of appellant Addie R. Anderson, to keep till the child should arrive at 21 years of age, or till it was required in her education. The foster parents continued to hold her money separate from their own, paying her ordinary expenses of schooling, clothing, etc., with their own means, as parents ordinarily do. A short while before the girl arrived at 21, her money was invested in the land. In the meantime the foster parents had lost most of their means, and were not able to complete the education of the daughter, who was being trained as a musician. So she sold the land, and deposited a part of the money in bank to her own credit, intending to finish the course in music with it. It was this purchase money that was attached for the debts of the parents. The proof is overwhelming that the money belonged to the girl. There was not a syllable of evidence to the contrary. The foster parents had a right to adopt this child. They had a right to assume toward her a relation of duty and care. Having done so, they might use a not unreasonable proportion of their means in educating her and clothing her during her minority, exactly as if she were their own child, without ground of complaint from their creditors. Indeed, she was adopted before the liability to appellees was created. The debtors' duty to the child was prior in time and certainly equal in dignity to, if not greater than, their obligation to their creditors, appellees. Therefore it is not a case of "being generous before being just."

To the claim of the creditors that the foster parents became creditors of the child, Edna Earle, by spending their own means in educating and clothing her, when she herself had means, it is a sufficient answer that the statute (section 2072) places the person adopting a child "under the same responsi-

bilities as if the person so adopted were his own child." Appellant seems to have done no more for this child than was reasonable for a mother to have done for her own daughter, under the circumstances.

The judgment of the circuit court subjecting any part of the fund must be reversed, and the cause remanded, with directions to dismiss the petition so far as appellant Edna Earle Anderson is concerned.

LOGSDEN v. STERN.

(Court of Appeals of Kentucky. Jan. 8, 1904.)
HUSBAND AND WIFE—COMPETENCY AS WITNESSES—AGENCY.

1. Civ. Code Prac. § 606, subd. 1, declaring husband and wife incompetent to testify for each other, except in an action for lost baggage, where "either or both" may testify, and in an action which might have been brought by or against the wife, if she had been unmarried, where "either, but not both," may testify, was amended by adding the further exception that, when a husband or a wife is acting as agent for his or her consort, "either" of them may testify as to any matter connected with such agency. *Held* that, when part of the facts connected with the agency are within the knowledge of one and part within the knowledge of the other exclusively, each may testify to the facts within his or her own knowledge, but both may not testify with reference to the same facts or matter.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

Action by Jesse G. Logsdan against Mrs. E. Stern. Judgment for defendant. Plaintiff appeals. Affirmed.

Harry A. Shaw and J. D. Reed, for appellant. W. P. Lincoln and Lieber Lincoln, for appellee.

NUNN, J. It appears from the record that appellee, Mrs. E. Stern, is the owner of a store in the city of Louisville, and that her husband, Jacob Stern, is the manager thereof, and that some two or three years since either the appellant, Jesse G. Logsdan, or his son, Tony Logsdan, purchased of E. Stern, her husband, Jacob, making the sale, a suit of clothes at the price of \$12.50. Some time after the sale, the appellee, by her husband and manager, instituted a suit for the balance of this account, to wit, \$6.50, against appellant, Jesse G. Logsdan, and obtained an attachment, and caused the Continental Tobacco Company, for whom appellant was laboring, to be summoned as garnishee. The case was tried in the justice's court, and appellee was defeated. Then appellant instituted this action in the circuit court to recover \$1,500 damages for the malicious prosecution of this suit in the justice's court without any probable cause. The theory of appellant was that the suit of clothes was sold to Tony Logsdan, and that he was in no way responsible to appellee for same, while appellee contended that the suit was sold to ap-

pellant for his son, Tony, and that he assumed the payment of the purchase price. On the trial of this action many exceptions were taken by the parties, but all were immaterial, and did not seriously prejudice the rights of the parties, except possibly one, and that was appellee introduced as a witness in her behalf her husband, the manager of her store, after she had testified for herself. The facts with reference to this matter were these: Appellant introduced himself and son, Tony, both sustaining appellant's contention that the clothes were not sold to or on his behalf, but to the son, Tony. Then appellant introduced as a witness one Smith, who stated that, after the clothes were sold, he was in the storeroom of appellee, Mrs. E. Stern, and she asked him if he knew the Logsdans. He answered her that he knew the old gentleman very well when they lived in Elizabethtown, Ky.; that he was a good honest man; but that he did not know the young man very well, as he was a mere boy at that time. Then Mrs. Stern said to him that she did not have anything against the old man, but that she had a claim against the boy, and it was as to him that she desired information. Appellee was then introduced as a witness, and denied having had any such conversation with Smith, or that she had ever seen Smith. Then her husband, Jacob Stern, her agent and manager, testified with reference to the sale of the clothes, and the institution and prosecution of the action in the magistrate's court as the agent of appellee. To this testimony of Jacob Stern appellant objected and excepted.

The competency of this witness must be governed by the first subdivision of 606 of the Civil Code Prac., which is as follows: "Neither a husband nor his wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage or its value against a common carrier, an innkeeper or a wrongdoer, and in such action either or both of them may testify; and, except in action which might have been brought by or against the wife, if she had been unmarried, and in such actions either, but not both, of them may testify. [And except that when a husband or a wife is acting as agent for his or her consort, either of them may testify as to any matter connected with such an agency.]" The words in brackets added by act of February 23, 1898 (Acts 1898, p. 1, c. 1). The result of the question under consideration depends on the meaning and construction of this amendment of 1898. Under the common law, as well as under the provision of the Code, husband and wife were and are prohibited from testifying for or against each other. But the Code makes exceptions to this rule. The first exception is as to lost bag-

gage, and permits either or both to testify; second, in actions which might have been brought by or against the wife, if she had been unmarried. In such an action either, but not both, may testify.

The third and last exception is this amendment, which permits either to testify as to any matter connected with such an agency, when either has acted as the agent of the other, in any transaction. This amendment has never been construed by this court. It is a well-recognized rule in construing a statute that the court should endeavor to ascertain the meaning and intent of the General Assembly in enacting the statute, and give it the construction and effect intended. When the General Assembly enacted this amendment, it had before it the section of the Code referred to, and the prior body in the case of lost baggage had used the words "either or both," and in an action by or against the wife with reference to her individual rights used this language: "Either, but not both, may testify." In this amendment the words "either of them may testify" are used without adding the words "or both," as in the first exception, or adding the words "but not both," as used in the second exception, but did add words significant of the meaning and intent of the legislative will by adding these words, "as to any matter connected with such an agency." It is to be assumed, therefore, that by the use of the words "either may testify" the law intended to restrict the testimony in relation to matters coming within such facts as might be known by one of the parties only. Is it not more reasonable to presume that the Legislature intended that, when part of the facts are within the knowledge of one and part within the knowledge of the other exclusively, each may testify to the facts within his or her own knowledge, but that both cannot testify with reference to the same facts or matter? To make the matter plain, suppose appellee had sold to appellant many articles of merchandise at different dates. Half of the articles had been sold and delivered by her, and the other half by her husband as her agent. She had no personal knowledge of the sales made by her husband, and he was likewise ignorant of the sales made by her, and she had sued appellant on the account, and he had controverted the claim. To construe this amendment to the Code as contended by appellant, she would lose one-half of her claim. Our construction is that she might testify as to the sales made by her and her agent as to the sales made by him, but, if both were present at the sale, only one could testify. The act of 1894 (Act 1894, p. 176, c. 76), commonly known as the "Weissinger Act," greatly enlarged the power of married women in respect to making contracts, the bringing of actions, and in the control of their property. The right to make contracts and to bring, prosecute, and defend actions in most cases would be a barren one unless accompanied by the right to give testimony in its support.

In the case at bar unless the appellee had been permitted to testify in rebuttal of the testimony of Smith, she would have been helpless to protect herself and property.

The judgment of the lower court is affirmed.

GIBSON v. GIBSON.

(Court of Appeals of Kentucky. Jan. 7, 1904.)

EXECUTOR DE SON TORT—CONSTRUCTION OF TESTAMENTARY WRITING—CREATION OF TRUST—LIABILITY TO BENEFICIARIES—INDIVIDUAL RIGHTS IN PROPERTY—STATUTE OF LIMITATIONS—INFANCY.

1. The owner of property in Texas left, at his death, two minor children, and a paper reciting, "I * * * give and turn my property over to C. [a brother residing in Kentucky] to sell and dispose of as he sees fit, to pay my indebtedness and take my two children to Kentucky and look after them and raise them." C. sold the property, and brought the proceeds and the children to Kentucky. *Held*, that he was not an executor de son tort, but a trustee for the children, and therefore could be sued by them directly, without the appointment of a personal representative.

2. The writing did not give C. any right to the property individually.

3. The statute of limitations does not run against an infant.

Appeal from Circuit Court, Marshall County.

"Not to be officially reported."

Suit by C. M. Draffin, as guardian of W. W. Gibson, an infant, against G. S. Gibson. Judgment for plaintiff, and defendant appeals. Affirmed.

Reu & Oliver, Oliver & Oliver, and Oliver & Reed, for appellant. Fisher & Edwards and Lovett & Holland, for appellee.

HOBSON, J. B. H. Gibson moved from this state to Texas, where he owned a tract of 320 acres of land, on which he resided, and he also held some cattle, hogs, and other personal property. About the year 1884 his wife died, leaving two little children, one four and the other less than two years old. Soon after this, B. H. Gibson himself was taken sick, and appellant, G. S. Gibson, who was his brother, in response to some letters from Texas, went there to see after him and the children. When G. S. Gibson reached Texas his brother was dead, and had left this paper: "I, B. H. Gibson, give and turn my property over to G. S. Gibson to sell and dispose of as he sees fit, to pay my indebtedness and take my two children to Kentucky and look after them and raise them." G. S. Gibson did not have the paper probated as a will, but took charge of the personal property and sold it, and brought the children and proceeds with him back to Kentucky. The grandmother took charge of the children, G. S. Gibson paying her \$40 a year for both of them, or \$20 each. When the boy, who was the younger of the children, was about eight years old his grandmother

† 3. See Limitation of Actions, vol. 23, Cent. Dig. § 390.

was taken sick, and he then lived with his uncle something over a year, but at his grandmother's request returned to her house and lived with her until her death, G. S. Gibson paying her nothing for taking care of the boy after his return. After the boy was about 15, and after his grandmother's death, he returned to his uncle's house and stayed there some time, but then went off to work for himself. When he was about 19 he filed this suit, by his guardian, against his uncle, to recover his part of his father's estate in the hands of his uncle. The uncle pleaded limitation. He also denied receiving as much as alleged, and claimed to have paid out for the boy large amounts. He also claimed that he should be allowed \$200 for his services in going to Texas and bringing the children home with him. The court gave judgment against him for \$325, with interest from the date of the judgment, and from this judgment he appeals.

The first question made in this court is that the boy has no cause of action, on the ground that G. S. Gibson was executor de son tort of his brother's estate, and that he is liable to the true executor, but not to the distributee. It is also insisted that the paper above quoted gave G. S. Gibson the property referred to therein. The rule of law relied on as to an executor de son tort seems to us to have no application. The paper does not give the property to G. S. Gibson individually, but as trustee for the children, to bring them to Kentucky and look after them and to raise them, after paying the decedent's indebtedness. The payment of the indebtedness and the taking care of the children are equally provided for by the paper, and G. S. Gibson can no more claim the fund individually against the children than he could against the creditors of the decedent. He did not receive the property as executor de son tort, and does not hold the proceeds as such, but held as trustee for the children after the debts were paid. He is the trustee of an express trust, and as such may be sued by the cestuis que trustent. The statute of limitation does not run against the infant. Besides, it was an express continuing trust.

The trustee has furnished no itemized statement of his sales in Texas. When he returned to Kentucky with the children he was very vague in his statements as to what was in his hands. He did not qualify as their guardian, or file in the county court any statement showing the amount in his hands. He did not communicate to the relatives of the children who inquired of him any exact data as to what he had done or what he had, and his statements then made on these subjects are more or less conflicting with his testimony in the action. On all the proof we conclude that the judgment of the court below is as favorable to him as the law warrants.

Judgment affirmed.

77 S.W.—59

CRAVENS v. SHIPPEN.

(Court of Appeals of Kentucky. Jan. 6, 1904.)

DOWER—RIGHT OF BANKRUPT'S WIDOW.

1. The widow of a bankrupt, who, by deed in which she did not join, conveyed to his assignee in bankruptcy land of which he became seised after their marriage, is entitled to dower therein, she having received nothing in satisfaction of her potential right of dower, though her husband was paid \$1,000 by the assignee from the proceeds of the sale in lieu of his homestead, even though her husband applied such money to her use.

Appeal from Circuit Court, Larue County.

"Not to be officially reported."

Action by Elizabeth T. Cravens against W. H. Shippen. Judgment for defendant. Plaintiff appeals. Reversed.

Mather & Creel, for appellant. Williams & Haudlen, for appellee.

SETTLE, J. By this action the appellant sought to recover dower in 724½ acres of land lying in the counties of Larue and Marion, of which her late husband, John Cravens, became seised in fee simple after their marriage, but which he, by deed in which appellant did not join, conveyed in the year 1878 to one Thos. J. Miller, his assignee in bankruptcy. Appellant's husband died May 14, 1889, and her petition in this case was filed in the Larue circuit court November 1, 1902. The land was sold by Miller, assignee in bankruptcy, shortly after it was conveyed to him, for \$1,780; and the money thus received, together with the proceeds of the residue of the bankrupt's estate, was duly distributed by the assignee among his creditors, after first paying to the bankrupt out of the proceeds of the land \$1,000 in lieu of his homestead. After passing through the hands of several persons, the land finally became the property of the appellee, W. H. Shippen, who is yet the owner and in the possession thereof. The appellee filed a general demurrer to the petition, and at the same time an answer. By the answer the appellant's right to dower in the land is denied, and the further defense interposed that her action therefor is barred by the 15-years statute of limitation, and further that appellant was compensated for her dower by the assignee, who likewise paid her husband \$1,000 for his homestead, and, besides, that there was existing on the land at the time of its sale by the assignee a lien for unpaid purchase money, and that the amount for which the land sold was not more than sufficient to satisfy this lien. The affirmative matter in the answer was controverted by reply, to which rejoinder was filed; and, the cause having been submitted upon the pleadings and proof, judgment was rendered by the chancellor dismissing appellant's petition and allowing appellee his costs, and from that judgment this appeal was taken.

It is conceded by counsel for appellee that the action is not barred by the statute of limitations. It will not, therefore, be neces-

sary to notice that ground of defense. A careful examination of the record convinces us that the other grounds of defense are equally untenable. There is no competent evidence tending to support any of them. That the husband did receive \$1,000 of the proceeds of the land in lieu of a homestead is satisfactorily shown by the receipts given by him for the money, found among the papers of the assignee after his death. But the husband was entitled to the homestead, and he alone received the money therefor. There is nothing in the record to show that she received any part of the \$1,000 for which the husband gave the receipts, or that any other sum was ever paid her in satisfaction of her potential right of dower in the land. There is likewise no competent evidence in the record tending in the least degree to prove that there was a lien for purchase money existing on the land at the time of its sale by the assignee. It is true that the deed from Miller to appellant's husband, filed as an exhibit with the petition, recites the fact that something over \$2,900 of the consideration for the land was unpaid, and that for this sum two notes were given by purchaser, payable in one and two years, respectively, for which a lien was retained in the deed. But the deed conveying the land to the assignee in bankruptcy was not made until eight years later, and it is unreasonable to suppose that the holder of the notes for the unpaid purchase money would have allowed them to run all that time without taking some step to enforce their payment. Besides, no such notes were ever filed with the assignee for payment in the bankruptcy proceedings. It may also be remarked that the notes for unpaid purchase money, if presented to the assignee for payment, would doubtless have consumed the entire proceeds realized by the sale of the land, as it only brought \$1,780, and there would have been nothing left to satisfy the bankrupt's claim of homestead, so the fact that he was paid the value of his homestead refutes the contention that any part of the purchase money on the land was unpaid at the time of its sale by the assignee. This contention is further disposed of by the copy made from the records of the bankruptcy proceeding filed with the petition, which shows that the assignee, in his schedule of assets, reported the land of the assignee as free of liens; and, independently of all that has been mentioned, the appellant, in giving her deposition, unequivocally stated that the purchase money for the land had all been paid by her husband before the execution of the deed to his assignee. The only evidence that tends to contradict this idea is found in the deposition of one Clark, who testified that on one occasion he heard some of the creditors of appellant's husband, during the pendency of the bankruptcy proceedings, express the opinion that there was a lien for unpaid purchase money on the land, and that he made some sort of a calculation

to arrive at the amount of it; but none of the creditors then present claimed to own the notes for purchase money, or to know who held them. The statement of the witness was incompetent because based upon the statements of others who spoke from hearsay, and whose information upon the subject under discussion was no better than that of the witness himself. Besides, if his testimony were competent, it would not be sufficient to overthrow the great weight of the opposing evidence. There was some effort to prove by appellant that the \$1,000 received by her husband as the value of his homestead, or other moneys of his, were received by her, or were invested by the husband in lands to which she took the title. Nothing on this point was, however, testified to by her that would militate against her right to the dower claimed by her; but, if it had been conclusively shown that the value of the husband's homestead was thus applied to her use, he had the right to do as he pleased with it, and it cannot be charged to her in determining her right to dower in the land in controversy. The right of dower cannot be barred, forfeited, or relinquished except by the voluntary act of the dowress. In *Lee v. Campbell*, 1 S. W. 873, this court said, in discussing facts similar to those in the case at bar: "Her husband received the homestead money and reinvested it. The fact that she [the wife] ultimately got the benefit of it upon his death does not bar her right to dower. When the land was aliened she had a potential right in it, which upon her husband's death became an absolute one. She has never parted with it, nor is she estopped by anything disclosed in the record from claiming it."

We are of opinion, therefore, that the chancellor erred in dismissing the petition, as the appellant is clearly entitled to the dower claimed by her. She is also entitled to the rents claimed by her, and the proof shows \$300 per annum to be the fair rental value of the entire tract. She should therefore receive one-third of this sum per year from the time of the institution of her action until dower is assigned her.

Wherefore the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

BLOOM v. WANNER.

(Court of Appeals of Kentucky. Jan. 6, 1904.)

LANDLORD AND TENANT—AGREEMENT FOR SURRENDER ON NOTICE—MANNER OF SERVICE — MAILING NOTICE — EVIDENCE OF RECEIPT.

1. A lease provided that the tenant would surrender possession, in the event the premises were sold by the lessor, 30 days after receipt by him of notice in writing that the purchaser desired possession. *Held*, that the notice contemplated was not a statutory one, personal service of which would be necessary, but that service by mail was sufficient.

2. While the mailing of a notice creates no legal presumption that it has been received by

the addressee, it is proper evidence on the issue of notice, and, in the absence of contrary evidence, is sufficient to sustain a finding of the receipt thereof.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by Julius Wanner against Sol Bloom. Judgment for plaintiff, and defendant appeals. Affirmed.

Marrett & Marrett, for appellant. Crawford & Kreiger, for appellee.

BURNAM, C. J. On the 7th of October, 1901, B. S. Nicholson leased to the appellant, Sol Bloom, two houses on East Jefferson street, in Louisville, for a term of five years at a rental of \$25 per month. By the terms of the lease, Bloom agreed to surrender the possession of one or both houses, in the event they were sold by his lessor during the continuance of the lease, to the purchaser, 30 days after the receipt by him of notice in writing that the purchaser desired the possession thereof. On the 13th of August, 1902, Nicholson sold and conveyed these houses to the appellee, Julius Wanner, and on that day wrote, addressed, and mailed to the appellant, properly stamped, the following communication: "Louisville, Ky., Aug. 13, 1902. Mr. Sol Bloom: I have sold the houses number 531 and 533 East Jefferson Street to Mr. Julius Wanner, and he asked me to notify you that he wanted possession of said property thirty days from this date, and I hereby notify you as required by your lease to give Mr. Wanner full possession of said property within thirty days from this date, in as good order as you received it, ordinary wear and tear excepted according to the condition of the lease." On the 18th of August, 1902, the appellee, Julius Wanner, directed to the appellant, at his proper address, the following properly stamped letter: "Louisville, Ky., Aug. 18, 1902. Mr. Sol Bloom, City—Dear Sir: Having purchased the property of B. S. Nicholson, 541 and 543 East Jefferson, I hereby notify you that I wish possession of this property thirty days from the date of sale, August 13th, according to your contract with him. Mr. Nicholson has no doubt notified you of the transfer as he promised to do. You would oblige me by turning over to me the leases and any money collected in advance at that time on this property." On the 19th of September, 1902, the appellee, Wanner, sued out a writ of forcible detainer against the appellant, Bloom, for the possession of these houses, and a trial before a justice of the peace resulted in a judgment for the appellant. The appellee within three days filed a traverse of the finding of the jury with the justice of the peace, and carried the case to the circuit court. Upon the trial in the circuit court, appellee was permitted, over the objections of appellant, to read as evidence of notice to appellant to vacate the property

the letters quoted supra. The appellant was then introduced as a witness, and testified that he had seen an account of the sale of the leased property to appellee in a newspaper, and that on the 15th of September he went to his office, and paid him \$25 as rent for the houses for the month beginning with the 15th of September and ending with the 15th of October, 1902, and took a written receipt therefor which he produced. He did not deny, however, the receipt by him of either of the written notices. Appellee admitted the execution of the receipt, but stated that he supposed the money was paid to him for the rent of the property for the 30 days for which appellant was permitted to occupy it after his purchase, and testified that appellant agreed at that time to surrender the property at the end of 30 days from the 13th of August, 1902. The trial in the circuit court resulted in a judgment for appellee, and Bloom was appellant.

The main ground relied on by him for a reversal is that the trial court erred in admitting as evidence the written notice mailed to him by Nicholson and appellee on the 13th and 18th of August, respectively, and insists that the notice required by the written contract was the statutory notice, which, to be effectual, required personal service upon the appellant. In our opinion, the contention of appellant is not well taken. The contract between the parties provided for 30 days' notice in writing. There is no stipulation for a personal service, or that the course provided by the statute should be followed. Whilst the mere mailing of the letters to appellant which contained the written demand for the possession created no legal presumption that such letters and notices were actually received by him, it was proper testimony upon the question, and, in the absence of any denial of their receipt by him, was sufficient to warrant the conclusion by the trial court that they had actually been received by him. See Sullivan, etc., v. Kuykendall, 82 Ky. 483, 56 Am. Rep. 901.

Several technical objections are relied on by appellant, but, in our opinion, the judgment appealed from is in conformity with the weight of the evidence; and the judgment is therefore affirmed.

TOWN OF LONDON et al. v. BOYD.

(Court of Appeals of Kentucky. Jan. 7, 1904.)

TAXATION—PERSONAL PROPERTY—SITUS—RESIDENCE—EVIDENCE—SUFFICIENCY.

1. Ky. St. 1903, § 3673, relative to towns of the sixth class, and providing that all personal estate within them, except such tangible personal property as has an actual and bona fide situs without the city, of persons domiciled or actually residing in the city, shall be assessed, etc., did not, in view of the numerous decisions of the Court of Appeals to the effect that the situs of personal property for taxation purposes was the domicile of the owner, and not the actual situs of the property itself, change that rule, and confer on towns of the sixth class the power to tax for local purposes personal

property of nonresidents which happened to be located within the city limits on the day fixed for assessment.

2. In an action to enjoin the collection of city taxes on personal property situated in a town, testimony introduced for the town that plaintiff was frequently seen about his office and on the streets of the town, took his meals at one of the local hotels, and often spent the night there, was not sufficient to rebut the positive, unequivocal statements of plaintiff to the effect that his legal residence and home was at his farm, five miles from the town; that he had resided there for some years, voting in the country precinct which included his farm; that during the greater part of the year for many years he had been absent from the state; and that the notes and bonds which the town sought to tax had been left in a safe in the office, which belonged to him, and which was occupied by one of his nephews, for convenience and safety alone.

Appeal from Circuit Court, Laurel County. "Not to be officially reported."

Suit by R. Boyd against the town of London and others. From a judgment for plaintiff, defendants appeal. Affirmed.

H. C. Hazelwood and Cork & Jones, for appellants. D. K. Rawlings and J. W. Alcorn, for appellee.

BURNAM, C. J. This suit was instituted by the appellee against the appellants to enjoin the collection of city taxes for the year 1902 upon certain personal property owned by him, aggregating about \$35,000, which consisted of promissory notes, bonds, and cash on deposit in one of the banks of the town, upon the ground that he was not a resident thereof. The defendant, in its answer, claimed that the property was liable for taxes for two reasons: (1) Because the notes, bonds, and cash were actually within the town of London on the 15th of September, 1901; and (2) because the appellee, Boyd, was an actual resident of the town, domiciled therein.

Section 3673 of the Kentucky Statutes of 1903, which is one of the provisions in the charters of towns of the sixth class, to which the defendant belonged, reads as follows: "All real and personal estate within the city, and all personal estate, except such tangible personal property as has an actual and bona fide situs without the city, of persons domiciled or actually residing in the city on the 15th of September, in the year in which the assessment shall be made, * * * shall be assessed," etc.

It is the contention of appellant that, under this section of the statute, as the notes and bonds belonging to appellee were usually kept by him in an iron safe in his law office in London, Ky., and were there on the 15th of September, 1901, and the cash was deposited in a bank in London on that date, the property had an actual situs in London for taxation, under the statute, regardless of the residence of the owner. This court, in construing similar statutory provisions, in numerous decisions, held that the situs of personal property for purposes of taxation was

the domicile of the owner, and not the actual situs of the property itself. *City of Louisville v. Sherley*, 80 Ky. 71; *Baldwin v. Shine*, 84 Ky. 502, 2 S. W. 164; *City of Newport v. Ringo's Ex'r*, 87 Ky. 635, 10 S. W. 2; *Harting's Ex'r v. City of Lexington*, 43 S. W. 415; *City of Lexington v. Fishback's Trustee*, 60 S. W. 727; *Boske, Sheriff, v. Security Trust & Safety Vault Co.*, 56 S. W. 524. There is nothing in the statute relied on by appellant which indicates an intention on the part of the General Assembly to confer upon the authorities of a sixth-class town the power to tax for local purposes the personal property of nonresidents which happened to be located within the city limits on the day fixed for assessment; and it is fair to presume that, if the General Assembly had intended to make so radical a departure in its policy with respect to the taxation of this class of property as contended for, they would have made their intention clear by unequivocal language.

The further contention that appellee was an actual resident of London on the 15th of September, 1901, is not supported by the testimony. He testifies that his legal residence and home was at his farm, five miles from the town of London, and that he resided there on the 15th of September, 1901, and had done so for several years previous to that date, when in Kentucky, and that he voted in the country precinct which included his farm; that during the greater part of the year for many years he had been absent from Kentucky on account of his health; that the notes and bonds had been left in a safe in an office which belonged to him in the town of London, and which was occupied by one of his nephews, for convenience and safety alone. And whilst a number of witnesses introduced by appellant testified that appellee was frequently seen about his office and on the streets of London, and took his meals at one of the local hotels, and often spent the night there, this testimony was not sufficient to rebut the positive, unequivocal statements of appellant as to his actual residence.

We therefore conclude that the trial court properly found against appellant on both contentions. Judgment affirmed.

PEAL et al. v. CITIZENS' BUILDING & LOAN ASS'N'S ASSIGNEE

(Court of Appeals of Kentucky. Dec. 1, 1903.)

BUILDING AND LOAN ASSOCIATIONS—SURRENDERING STOCK FOR CREDIT ON LOAN—VALUE OF STOCK.

1. Where one surrenders his stock in a building and loan association to get credit on its loan to him, its value is determined, not by what he has paid for it, but by the association's then assets and liabilities.

"Not to be officially reported."

On rehearing. Denied.

For former report, see 76 S. W. 332.

¶ 1. See *Building and Loan Associations*, vol. 1, Cent. Dig. § 19.

HOBSON, J. The only question in this case is the amount due upon the mortgage. What appellants' rights may be as stockholders on final settlement of the association cannot be determined here, and nothing in the judgment affects their right to come in as stockholders in the distribution of the surplus assets of the concern among the stockholders. Peal was simply a stockholder holding his stock for investment from the time he took it until he made the loan in August afterwards. He then hypothecated his stock to secure the loan. When he subsequently surrendered his stock, and was credited by \$569.90, this was simply a sale of the stock to the corporation; and it must be presumed that the credit was then the book value of the stock, or else he would not have taken it. The value of the stock in the corporation is not determined by the amount he paid for it, but by the amount of its assets and liabilities at the time, for, while he had paid in a good deal of money, the association may have sustained heavy losses in other transactions. There is not enough in the record to warrant the court in disturbing the settlement then made by the parties, and the case does not, therefore, fall within the principle laid down in the *Frisbie Case*, 76 S. W. 7.

Petition overruled.

LOUISVILLE & N. R. CO. v. CUMNOCK et al.

(Court of Appeals of Kentucky. Jan. 7, 1904.)

RAILROADS—CHANGE OF GRADE—DAMAGE TO PROPERTY — COMPENSATION — MEASURE — AMOUNT—FORMER RECOVERY—EFFECT — APPEAL—DISTURBANCE OF VERDICT.

1. The Supreme Court cannot disturb the finding of the jury on the question of damages, where several witnesses estimated the damages largely in excess of the verdict rendered, and an equal number testified that the property was not damaged at all.

2. Where, when railroad tracks were operated upon the natural grade of a street, the public could use the whole road as a highway except when trains were actually passing, and after the change, which was by the construction of a stone wall in the middle of the street, the view from plaintiff's property and the free circulation of air were seriously interfered with, and his property fronted upon a mere alley between the property line and the rock wall, in which one track was still left, a verdict for \$800 was not excessive.

3. A recovery in an action by a property owner against a railroad for damages resulting from the operation of the road along the street in front of his property by reason of the noise, smoke, and occupation of the street did not bar a subsequent action for a subsequent change in grade by the railroad by the construction of a stone wall in the street over which the trains were operated.

4. Under Const. § 242, providing that municipal and other corporations and individuals vested with the privilege of taking private property for public use shall make just compensation for property "taken, injured, or destroyed" by them, a railroad cannot make a change in the grade, width, or use of a street, injuriously affecting abutting property owners, without making compensation for the damages inflicted.

5. In an action by a property owner against a railroad for damages resulting to his property from a change of the railroad's grade, the measure of damages is the difference between the market value of the property just before it was generally known that the work was to be done, and the market value since the completion of the work.

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Action by Lizzie P. Cumnock and others against the Louisville & Nashville Railroad Company. From a judgment for plaintiffs, defendant appeals. **Affirmed.**

Yeaman & Yeaman, for appellant. Clay & Clay, for appellees.

BARKER, J. In the year 1885 the appellees and their father were the owners and in possession of a lot of ground 102 feet front by 208 feet deep, situated on the northeast corner of Fourth and Main streets in Henderson, Ky. The dwelling house upon the lot fronted then, as now, upon Fourth street. At that time the Henderson Bridge Company had constructed and was operating a railroad bridge across the Ohio river from the Indiana to the Kentucky shore, and, in order to permit appellant to connect its track with that of the bridge company on Main street, it was authorized to lay and operate certain railroad tracks along Fourth street in front of appellees' property. Claiming that the maintenance of the railroad tracks and the operation of a railroad along Fourth street, by reason of the noise, smoke, and the occupation of the street by the railroad injured the value of their property, the appellees and their father, in 1885, instituted an action for damages against appellant, in which a judgment was rendered in their favor for the sum of \$500, which was thereafter paid. So far as this record shows, the situation between appellant and appellees remained unchanged until the year 1901.

Fourth street, in front of appellees' property, and for several squares beyond, is exceedingly steep, making a heavy grade, which can be surmounted only with great difficulty, and by the expenditure of great force. In order to obviate this difficulty, appellant obtained from the common council of the city of Henderson an ordinance authorizing it to erect along the center line of Fourth street, in front of appellees' property, and for several squares beyond, a rock wall about 8 feet wide and 15 feet high, over which it operates one of its lines at a much more convenient, if not level, grade. This wall divides Fourth street, so far as appellees' property is concerned, into two narrow thoroughfares, and in the one next to appellees' property appellant constructed and is operating an additional railroad track upon the natural grade of the street. Contending that this change in the situation materially damages their property, appellees instituted this action against appellant. In bar of ap-

¶ 4. See *Eminent Domain*, vol. 18, Cent. Dig. § 270.

pelles' claim, appellant denied that their property was damaged, pleaded the permission of the council to make the improvement, and also pleaded the former judgment obtained by appellees and their father in 1885. A trial resulted in a judgment in favor of appellees for \$800, from which judgment this appeal is prosecuted.

The testimony as to whether or not appellees' property was damaged by the change in the situation herein described was variant. Some 12 or 15 witnesses for the appellees estimated the damages largely in excess of the verdict rendered. An equal number testified in favor of appellant—that the property was not damaged at all. In this state of case, we would not feel at liberty to disturb the finding of the jury, whose peculiar province it is to settle questions of fact.

But it is obvious that the erection of the wall in question must have injured appellees' property greatly. The record does not show the width of Fourth street, but, assuming it to be of the ordinary width of 60 feet, with a carriageway of 36 feet, it can be readily seen that the wall reduces what was an ordinarily convenient thoroughfare into a mere alley. When the tracks were laid and operated upon the natural grade of the street, the public could use the whole thoroughfare as a highway, except when the trains were actually passing along, readily driving from one side of the street to the other, across and over the rails. This cannot now be done, and, as said before, appellees' property fronts upon a mere alley, which has upon it a railroad track between the property line and the rock wall. It is apparent that it would be nearly as dangerous to drive a vehicle into this narrow alley, and incur the risk of meeting or being overtaken by a train, as it would be to drive into a railroad tunnel. The wall in question must also materially obstruct and shut off the view from appellees' property on the Fourth street side, as well as to seriously interfere with the free circulation of the air. For these reasons we feel convinced that the verdict is not beyond the actual damage suffered.

This action has no reference to that instituted in 1885; it only purports to recover damages for a new cause of action, which is entirely distinct and in addition to that involved in the first suit, and the instructions of the court fully restricted the jury to this view of the case.

Appellant relies upon the principle announced by this court in the case of Louisville & Frankfort Railroad Company v. Brown, 17 B. Mon. 763. Conceding that, prior to the adoption of the present Constitution, appellees could not have recovered for the consequential damages sustained by the acts of appellant complained of, this court, in the cases of City of Henderson v. McClain, 43 S. W. 700, and City of Ludlow v. Detweiler, 47 S. W. 881, construed section 242 of the present Constitution as radically changing

the rule existing prior thereto on the subject at hand; and the case relied upon by appellant is especially mentioned as being among those whose authority has been affected by the change in the organic law. Under the provisions of section 242, neither the city of Henderson, appellant, nor any other corporation possessing the right of eminent domain could lawfully make a change in the grade, width, or use of the street, injuriously affecting the abutting property owners, without making compensation for the damages inflicted.

Appellant complains of the criterion of damages fixed by the instructions given by the court, which is as follows: "If you find for the plaintiffs under this instruction, the criterion of their relief must be the difference between the market value of said property just before it was generally known that said work would be done, and its market value since the completion of said work." This instruction was approved by this court in the case of City of Louisville v. Hegan, 49 S. W. 532. The instructions of the court, as a whole, contain a correct exposition of the law of this case.

Perceiving no error in the record, the judgment is affirmed.

SALT LICK, E. & MT. C. TURNPIKE ROAD CO. v. GILFILLIN et al.

(Court of Appeals of Kentucky. Jan. 6, 1904.)
TURNPIKE ROADS—TAXES TO AID IN CONSTRUCTION—STATUTES.

1. Act March 9, 1867 (2 Acts 1867, p. 539, c. 2035), incorporating a turnpike company, empowers it to construct a toll road in L. county; requires the county, when \$5,000 is subscribed by the corporators, to subscribe \$1,000 for each mile of road built; creates a taxing district within which a 1 per cent. tax is required to be levied; and provides that the tax shall be levied and collected to assist in building the road, and shall be collected till the road is completed for 15 miles. *Held*, that the tax is only to "assist" in "building" the road; that its maximum amount cannot exceed the cost of building, less the solvent private subscriptions of \$5,000 and the county aid; and cannot be increased by losses after the road is built, or damage to any part after its completion, or by cost of management, or in the case of any taxpayer by mere failure to collect taxes from delinquents.

Appeal from Circuit Court, Lewis County.
"To be officially reported."

Suit by William Gilfillin, Sr., and others against the Salt Lick, Esculapia & Mt. Carmel Turnpike Road Company to enjoin collection of a tax. Judgment for plaintiffs. Defendant appeals. Affirmed.

Allan D. Cole, for appellant. E. L. Worthington and W. C. Halbert, for appellees.

O'REAR, J. Appellant turnpike company was incorporated by an act of Legislature approved March 9, 1867. 2 Acts 1867, p. 539, c. 2035. It was empowered to construct a macadam toll road in Lewis county, this state.

So soon as \$5,000 should be subscribed by the corporators, the company was authorized to organize, to condemn right of way where necessary, and the county of Lewis was required to subscribe and deliver its bonds to the amount of \$1,000 per mile for each mile of road built by the company, in addition to \$1,000 for a bridge over Salt Lick creek. A taxing district was created, within which there was required to be levied an ad valorem tax of \$1 on the \$100 of taxable property in the territory constituting the district. The provision of the act on this point reads: "The said tax shall be levied and collected for the purpose of assisting in building said road; and the taxpayers shall be stockholders in said company to the extent that they pay taxes under this act; said tax to be collected until said road is completed 15 miles of its distance from Vanceburg." 2 Acts 1867, p. 280, c. 1708.

The first mile of the road was built by the company in 1871, for which it received the bond of Lewis county for \$1,000. The bridge was built about 1873. The county issued to the company a \$1,000 bond for that. Work on the road seems to have been abandoned then till about 1892, when the corporation, electing new officers, resumed the project of building the road. It let the contract for the remaining five miles of road. The work was completed.

It is admitted that Lewis county issued to the company and that it received the bonds of the county to the amount of \$1,000 for each mile of the road. Beginning in 1892, and continuing each year till 1898, inclusive, there was levied on the taxable property in the taxing district the special tax of \$1 on the \$100, which was listed with the sheriff for collection. The assessed valuation of the district was about \$54,000 per year on an average. The same rate of tax was also assessed for the years 1870, 1871, 1872, 1873, and 1874. In 1899 this suit was brought by appellees, 62 of the taxpayers of the district, to enjoin the collection of the tax for that year and further years on the ground that the purpose for which the tax had been authorized had been fulfilled, and, furthermore, they alleged that the acts under which it was levied were unconstitutional for various reasons.

The last-named feature of the case we will not discuss, having found a controlling reason in the facts shown by the record for affirming the circuit court's judgment granting a perpetual injunction against the further collection of the tax.

The record discloses that the first mile and a half (including the bridge) originally constructed cost not exceeding \$2,800, of which Lewis county paid \$2,000. What sum was collected from the taxpayers of the district under the assessments from 1870 to 1874 is not shown. The remaining five miles, built subsequent to 1892, cost, contract price, according to appellees' version, \$7,615; and ac-

cording to appellant about \$8,200. Of this sum it is admitted the county paid \$5,000 in her bonds, as has been stated. The tax assessed against the district would not be less than \$470 net per annum, realizing, in the seven years not in dispute, \$3,290. So that it appears that the taxpayers and the county have paid in fully enough, or more than enough, to discharge the total cost of construction. It is claimed that some of the taxpayers did not pay for certain years—were delinquent—and that in consequence the company did not get all that was due to it on that score. It is also claimed that owing to the lack of repair the first mile and a half of road became almost worthless, and had to be rebuilt. Counsel for appellant observe here: "If the company had at the start pushed the work to completion, the amount originally expended would not have been thrown away. This is the whole trouble in this case." The company's present indebtedness is alleged to be about \$2,700.

The taxpayers of the taxing district, who became stockholders upon the payment of their taxes, became in a sense involuntary subscribers to the stock of the company. Like other stockholders, their liability was only to the extent of their subscription. Each one was liable only for his own, not for default of others. By the terms of the act they were to pay only so much as was required in "assisting to build the road"—not to operate it, nor to keep it in repair. When they had paid a sum sufficient to build it, their liability was at an end, notwithstanding the company might have become insolvent through bad management. The tax levied was a lien, as other taxes against the land in the district, collectible by distraint. If the company failed to collect any one's taxes, it must be presumed, in the absence of showing to the contrary, in view of the lien and means of collection, that it voluntarily failed to do so, or by neglect failed. In either event it will not be permitted to collect the amount from other taxpayers not in default.

As to the first mile and a half, it will be conclusively presumed against the corporation, claiming a right to exercise the extraordinary function of taxation in its behalf, that it had subscribed in good faith the minimum amount of capital stock which authorized it to become a corporation, with the right to enjoy the extremely liberal provisions of the act in its behalf. At least it will not be heard, in the suit of the taxpayers, to say that it failed to perform a condition precedent to its right to collect taxes at all in its aid, yet insist on the payment of such taxes. Therefore, the court must assume that the \$5,000 of stock required before the company could be organized was subscribed. This sum, the \$2,000 paid by Lewis county, and the taxes collected during the early seventies would more than pay for the building of that first mile and a half of

road. The taxpayers were required only to assist in building the road. Therefore, the private subscription that was solvent, and the county aid above alluded to, must be taken into account in measuring the maximum liability of the taxpaying stockholders. This done, we find that they have fully discharged that liability, so far as complainants and others similarly situated are concerned, and their liability cannot be enhanced either by losses incurred after the road was built, or damage to any part after its completion; nor to cost of management; nor to a mere failure to collect taxes from delinquents.

Wherefore the judgment is affirmed.

LOUISVILLE & N. R. CO. v. SHORT.

(Supreme Court of Tennessee. May 17, 1903.)

RAILROADS—NEGLIGENCE—FIRES—EVIDENCE—PRIOR FIRES—CONTRIBUTORY NEGLIGENCE.

1. In an action against a railroad for fire caused by sparks from one of defendant's locomotives, evidence of the setting of other fires by other locomotives is competent, it appearing that the other locomotives were of similar construction to the one in question.

2. In an action against a railroad for the destruction of a bale of cotton caused by sparks from one of defendant's locomotives, plaintiff cannot be regarded as guilty of contributory negligence because of having placed his cotton on an open platform 50 feet from the main track of the railroad.

Effor to Circuit Court, Haywood County; Juo. R. Bond, Judge.

Action by L. M. Short against the Louisville & Nashville Railroad Company. Judgment in favor of plaintiff, and defendant brings error. Reversed.

J. W. E. Moore, for plaintiff in error. C. S. Walker, H. J. Livingston, and Byars & Dixon, for defendant in error.

NEIL, J. This action was brought in the court below to recover the value of a bale of cotton belonging to the defendant in error, alleged to have been ignited and destroyed by sparks from one of the plaintiff in error's engines while the cotton was stored on an open platform near the track.

Numerous errors have been assigned by the plaintiff in error, all of which have been considered and disposed of, but only two of them will be noticed in this opinion.

The first of these arises upon the action of his honor, the circuit judge, in his rulings upon certain testimony offered by the defendant in error concerning other fires than the one which was the occasion of the present suit.

The fire occurred March 13, 1901. There was testimony tending to show that all the engines of plaintiff in error, in 1901 and thereafter, were constructed in the same manner in respect of spark arresters. There was no testimony tending to show a like construction prior to 1901.

The defendant in error, over the objection of plaintiff in error, was allowed to prove the following points, which, for sake of noting the objections, are thus numbered, viz.: (1) By J. L. Livingston, that about one year before the fire in question another fire was set out by one of the plaintiff in error's engines; (2) by the witness Arthur Dulin, that a year or two before the fire in question the plaintiff in error had by one of its engines set out another fire; (3) by Andrew Wells, that it set out a fire by one of its engines nine or ten months after the fire in question; (4) by A. H. Cromwell, that it set out a fire about three months after the date referred to; (5) by the same witness, another fire about five months after; (6) by Arthur Dulin, a fire about nine months afterwards; (7) by the same witness, another fire about ten months afterwards; (8) and by James Tipton, another fire about six months after the said fire in question.

It is insisted that the testimony was irrelevant.

We are of opinion that the objections which we have marked 1 and 2, respectively, should have been sustained, and that those which we have marked 3 and 8, inclusive, were properly overruled.

We sustain numbers 1 and 2 because these fires happened so long a time before the fire in question that they do not tend to throw any light upon the inquiry whether the fire was set out by plaintiff in error, or (assuming that the fire in question was set out by the plaintiff in error) they do not throw any light upon the inquiry as to whether plaintiff in error was guilty of negligence in setting out that fire; it not appearing in the testimony that prior to 1901 the engines of plaintiff in error were, in respect of spark arresters, constructed in the same manner in which they were constructed during that year, or a similar manner, and it appearing in the testimony that prior to 1901 (although how far prior is not shown) a different pattern of spark arrester, the Diamond, was in use by plaintiff in error.

We overrule the objections which we have marked 3 and 8, inclusive, because, inasmuch as it appears in the testimony that during the year 1901 and afterwards all of the engines of plaintiff in error were of the same pattern in respect of spark arresters, proof of other fires set out by plaintiff in error, by its engines, does tend to show, if not that the fire in question was set out by plaintiff in error, yet that the said plaintiff in error was guilty of negligence in so doing, when the fact is otherwise proven that the fire in question was set out by it.

A great many authorities refer to such testimony as proper—that is, testimony as to other fires—when such fires occurred “at or about” the time of the fire under examination. Some of these authorities say “within a few weeks” before or after; others speak of the time as “during the same summer.”

We shall not undertake to examine in de-

¶ 1. See Railroads, vol. 41, Cent. Dig. §§ 1719, 1722.

tail the authorities upon this subject, nor attempt to reconcile them where they conflict. Had we time for such an inquiry, no really useful purpose could be served by it.

No rule has been established in this state. It does not seem unreasonable, however, to hold that proof of other fires set out by the company's engines of similar construction along its line throws light upon the inquiry as to whether the said company was guilty of negligence in setting out the fire in question, as showing either an improper construction of its engines or a negligent operation of them.

Assuming this to be true, we are unable to see why the time should be confined to "a few weeks" or "the same summer." We do not undertake to fix any definite time, or to announce a hard and fast rule, but we are of the opinion that ten months' time is not too long.

This conclusion is supported, in a general way, by *L. & N. R. R. Co. v. Malone*, 109 Ala. 509, 20 South. 83, wherein it was held that upon the defendant introducing testimony tending to show that its engines were of a special construction, and that sparks could not escape from them, and reach neighboring property, and had been so constructed and used for more than a year, the plaintiff might introduce testimony covering the same period, and showing that during that time other fires had been set out by the defendant's engines. 109 Ala. 511, 519, 20 South. 84, 87.

It is also supported, in a general way, by *Hoyt v. Jeffers*, 30 Mich. 181, wherein it was held that proof of other fires might cover a considerable time, upon its being shown that the (in that case) chimney had during the time covered been in substantially the same condition as to the emission of sparks. *Id.* 186, 189, 190.

It is insisted by plaintiff in error that the engine that caused the injury in this case was identified. But the record does not sustain this contention. At most, it was shown that it was one or the other of two engines that scattered the fire, but which of the two did so the testimony does not show. Hence the rule insisted upon—as to the correctness of which we express no opinion—to the effect that proof of other fires by other engines cannot be allowed where the particular engine is identified, does not apply. *Railroad Company v. Richardson*, 91 U. S. 454, 23 L. Ed. 356.

Another assignment of error was filed raising the point that the defendant in error was guilty of contributory negligence in placing his cotton upon an open platform so near to the railroad—50 feet from the main track—and that for this reason there should have been no recovery. The point arose upon certain testimony offered by the plaintiff in error and excluded by his honor.

The assignment is overruled. There can

be no contributory negligence in the proper use by a man of his own land. He is not bound to presume future negligence on the part of the adjoining owners, or to guard against that negligence. *L. & N. R. R. Co. v. Marbury Lumber Co.* (Ala.) 28 South. 438, 50 L. R. A. 620, 627, and authorities cited. See, also, *Burke v. Railroad*, 7 Helsk. 461, 464, 19 Am. Rep. 618; *Richmond & D. R. Co. v. Medley*, 75 Va. 490, 505-507, 40 Am. Rep. 734; *Cook v. Champlain Trans. Co.*, 1 Denio. 91, 99-101; *Shearman & Redf. Neg.* (4th Ed.) §§ 680, 681; 13 Am. & Eng. Encycp. Law (2d Ed.) 480-491.

But for error committed in respect of matters contained in the previous assignment of error, and for other errors specified in a memorandum filed with the record, the judgment of the court below must be reversed, and the cause remanded for a new trial.

ÆTNA LIFE INS. CO. v. FALLOW.

(Supreme Court of Tennessee. May 29, 1903.)

INSURANCE—PREMIUMS—MATURITY—PAYMENT—COURSE OF BUSINESS—FORFEITURE—ESTOPPEL—GENERAL AGENTS—SUBAGENTS—AUTHORITY.

1. Where an accident policy provided that there should be no insurance thereunder unless the premium was actually paid prior to any accident by reason of which claim was made, but for a long time prior to the accident a course of business had been adopted between insurer's general agent and insured as to the payment of premiums, by which insured was directed to retain premiums as they became due until they were called for by some person connected with the general agent's office, and in pursuance of such custom a premium due prior to insured's injury was not paid when due, but was subsequently collected by one of the employés of such general agent and remitted to the insurer after insured had suffered an injury insured against, the insurer was estopped to deny liability under such policy provision.

2. Where a general agent of an accident insurance company had apparent authority to waive a forfeiture for insured's failure to pay premiums at maturity, such agent might waive conditions in the policy providing for such forfeiture, though the policy declared that no agent had such authority, and that no waiver would be recognized unless in writing, signed by either of certain officers of the company.

3. Where a general agent of an insurance company having authority to issue policies, collect premiums, etc., in two states, appointed several subagents and clerks in his office whom he authorized to contract for risks, deliver policies, collect premiums, etc., the act of one of such subagents in collecting a premium on a policy after maturity, and after a loss had been sustained thereunder, was the act of the general agent, and was sufficient to estop the insurer from insisting on forfeiture for failure to pay the premium at maturity.

Appeal from Circuit Court, Shelby County: J. S. Galloway, Judge.

Action by C. J. Fallow against the Ætna Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

¶ 2. See *Insurance*, vol. 23. Cent. Dig. §§ 948, 954.

Malone & Malone and W. B. Glisson, for appellant. Thos. M. Scruggs and M. G. Evans, for appellee.

NEIL, J. This suit was brought below to recover upon an accident policy. It resulted there in favor of the plaintiff, and the defendant has appealed and assigned errors.

The facts necessary to be stated to raise the legal questions to be considered herein are as follows:

During the year 1895 the defendant in error obtained from the plaintiff in error an accident policy, which was continued in force by the payment of quarterly premiums, without question, down to December 18, 1901. At first, and during several quarters, the defendant in error went to the office of the plaintiff in error's general agent in the city of Memphis, Tenn., Harris, and paid the premiums promptly when due; but on several occasions, not finding the agent or any of his clerks in the office, he complained of this matter to Mr. Harris, calling attention to the inconvenience occasioned thereby. In response the agent instructed Mr. Fallow to retain the premiums until he himself or some of his clerks should call for them. Thereafter the custom of business prevailing between the parties was that the assured waited for the agent to collect the premium from him, and the agent, by himself or his clerks, did so for a series of years, continuing up to the time the present litigation began. Very often the agent or his clerk failed to collect the premium until it had been overdue eight or ten days. The assured relied implicitly upon this habit of business, and always reserved the premiums until called upon by the agent or some of his clerks. The last premium before the injury occurred fell due upon the 18th of December, 1901, but was not then paid, the agent of the company not having called for it or sent for it. The injury occurred on December 23, 1901. On the 26th of the same month the company's agent sent Dr. Hall to inspect the injury and to examine the assured upon the subject. The assured stated the facts fully to the doctor. On the next day the agent directed the assured to send in his formal notice of loss, and to send in his "claim blank" when he should be fully recovered.

On the 2d day of January, 1902, some one of the agent's employes or clerks in the office whose business it was to collect premiums collected the premium from the assured and credited it to the company upon the agent's books, and deposited it in bank to the agent's credit, as agent, and it was forwarded by the agent to the company, along with other moneys belonging to it in his hands, and is still retained by it, and no offer has ever been made to return it to the assured.

This premium was not credited upon the books of the agent until January 6, 1902, and the agent had no personal knowledge

of the fact that it had been collected until about the last of January or the first of February, 1902. He could, however, by examining his books, have ascertained at any time, subsequent to December 18th, that the premium had not been paid on that day, and by a like examination he could have learned that it had been credited on the 6th of January. It was not his custom, however, to attend to the details of the business. This was committed by him to the clerks in his office, whom he appointed, and from whom he took bonds for the company.

He was at the head of the office, and was the general agent of the company for its accident department, covering two states—Tennessee and another. Among other things, it was his duty to receive applications for insurance, personally or through his clerks, to countersign policies in blank, and place them in the hands of his policy clerks for filling up and issuance, and to continue policies in force from quarter to quarter by accepting premiums therefor, personally or through his clerks.

Under the custom of business prevailing in the office of Mr. Harris, when premiums were paid after they were due policies were treated as renewed for three months from the date of the maturity of the premium. However, if the patrons of the company desired, after a premium day had passed, to take out a new policy rather than to renew the old one, they were allowed to do so, and in this case the new policy took effect from the date of its issuance.

The following conditions appear upon the back of the policy sued on, and are referred to in its face and made parts of it, viz.:

"(1) There shall be no insurance under this policy unless the premium is actually paid prior to any accident by reason of which claim is made."

"(9) No agent has authority to waive any condition of this policy, and no waiver will be recognized, unless in writing, signed by either the president, vice president, secretary, or assistant secretary of the company."

In respect of the foregoing facts his honor charged the jury as follows:

"If you find from the evidence in this case that the plaintiff was insured in the Aetna Life Insurance Company, and had an accident policy in the company that had been in operation for several years, and you further find that in his dealings with the defendant company it was the custom and usage, as between them, that the agent of the defendant's company would call at his place of business and collect the premiums, and that manner of payment and carrying on business had renewed the policy quarterly for several years; and you further find that the premium was not paid on the 18th day of December, a few days before the accident; and you further find that the plaintiff was injured on the 23d day of December, 1901, and suffered injuries whereby he would be

entitled to the accident benefit according to his policy; and you further find that a day or so after the party was injured Dr. Hall, as the agent and representative of the Ætina Life Insurance Company, was sent to examine the condition of the plaintiff, and did so examine the condition of the plaintiff, and the plaintiff disclosed all the facts and circumstances to Dr. Hall; and you further find that Dr. Hall reported these facts to the home office here (Memphis); and you further find that the plaintiff paid—say on the 2d day of January or the 6th day of January after the accident—the home office here or the agent of the company the premiums that would have been due on the 18th day of December, 1901, and that the agent accepted that money and passed it to the treasurer of the company, and issued a regular receipt for the money so paid,—then the court charges you that that would be a waiver of the demand of the premium in advance, and would be an acceptance of the money, and would continue the policy of insurance from the 18th day of December, 1901.”

The defendant below asked the court to give in charge to the jury the following instruction, which was refused, viz.:

“The plaintiff cannot recover in this case unless he shows that he actually paid the premium due on the 18th day of December, 1901, prior to the accident in which he was injured, and no agent of the company by the terms of the policy has any authority to waive this condition of the policy requiring actual payment prior to the injury.” In other requests his honor was asked, in substance, to charge that the company would not be bound by any collection made by the clerks in the office of the general agent, which request he likewise refused.

Error is assigned upon the action of his honor in charging the jury as he did charge them, and in refusing to give the instructions asked by the plaintiff in error.

The contention of the plaintiff in error, stated in the briefest way, is that it was not liable, for the reason that the premium had not been paid when the accident occurred, and that this fact was in no way qualified by any of the special facts which we have recited as bearing upon the question.

It is, of course, true that a provision for the release of an insurance company from liability for nonpayment of premiums is a material element of the contract, and that on violation of such a provision, unless there has been a waiver thereof, neither a court of law nor of equity will enforce the contract. *Dale v. Continental Ins. Co.*, 95 Tenn. 38, 31 S. W. 286; *Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789; *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662.

But the law is equally well settled that insurers are estopped to insist upon forfeiture for nonpayment of premiums when due, when, by any course of action, representa-

tion, or dealings, the assured has been led to believe that the forfeiture will not be insisted upon; or, as said in *New York Life Ins. Co. v. Eggleston*: “Any agreement, declaration, or course of action on the part of an insurance company, which leads a party honestly to believe that by conformity thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture.” *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841. See, also, *Phoenix Insurance Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18, 27 L. Ed. 65; *Hartford L. & A. Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496; *Ins. Co. v. Hyde*, 101 Tenn. 396, 403, 48 S. W. 968.

It is held, however, in the following cases that, where the policy on its face denies the right of the company's agent to waive forfeitures, there can be no waiver by any act of the agent, unless sanctioned by the company itself directly, or “by its course of action” ratifying its agent's representations, declarations, or acts, of the same or similar character, or by receiving or retaining the premiums paid without knowledge of the agent's mode of dealing. *Insurance Co. v. Eggleston*, supra; *Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Ins. Co. v. Wolff*, 95 U. S. 330, 331, 24 L. Ed. 387. The rule is stated substantially in the same way in many other cases.

But in this state the rule has been given a larger scope, and it has been held that a general agent may waive conditions in the policy, and that the company will be thereby estopped to insist upon them in the enforcement of a forfeiture, when such agent acts within the apparent scope of his employment as agent of the company. *Murphy v. Continental Life Ins. Co.*, 3 Baxt. 440, 27 Am. St. 761; *Southern Life Ins. Co. v. Booker*, 9 Helsk. 606, 24 Am. Rep. 344. In the first cited of these cases it was held that a local agent of the company was such general agent within the territory over which his operations extended, where he had power to receive applications for insurance, to take preparatory steps for forwarding the applications to the principal office, to countersign policies, to receive advance premiums, to receive premiums from persons having policies for the purpose of continuing or keeping alive those policies from year to year, and all the powers necessary and convenient for the execution of his authority, which latter powers would be conclusively presumed to exist. To receive premiums even after the expiration of the year, and when the policies had, by their terms, determined and ceased, was held to be within the apparent scope of the employment of such agent, when it appeared that he was intrusted with the collection of current premiums and the delivery of receipts therefor, placed in his hands by the

company, and therefore that the company was bound by his acceptance of a partial payment, and giving credit for the residue, after the time when the premium was payable. In *Southern Life Ins. Co. v. Booker* the clause of the contract in question appeared in the application, and was as follows: "The policy hereby applied for shall not be binding upon the company until the amount of the premium as stated therein shall have been received by said company, or some authorized agent thereof, during the lifetime of the person therein assured." The agent who issued the policy had entire or general charge of the business of the company for the state of Louisiana, acting under general instructions to such agents, and without special instructions limiting his authority. He was held to be a general agent, having power to waive the provision above copied, and that he did waive it by taking a promissory note from the assured, and that the company was bound on the policy, although the assured died before the note was paid.

The authorities are very numerous to the effect that a general agent of an insurance company may waive the condition that no insurance shall be considered as binding until the actual payment of the premium. See the following cases: *Sheldon v. Life Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565; *Sheldon v. Atlantic F. & M. Ins. Co.*, 26 N. Y. 460, 84 Am. Dec. 213. See, also, *Post v. Aetna Ins. Co.*, 43 Barb. 361, 367; *Dean v. Aetna Life Ins. Co.*, 2 Hun, 359; *Shear v. Phoenix M. L. Ins. Co.*, 4 Hun, 801; *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun, 98; *Wood v. Poughkeepsie M. Ins. Co.*, 32 N. Y. 622, 624; *Boehen v. Williamsburgh City Ins. Co.*, 35 N. Y. 133, 90 Am. Dec. 787; *Bodine v. Exch. F. Ins. Co.*, 51 N. Y. 122, 10 Am. Rep. 566; *Church v. La Fayette F. Ins. Co.*, 66 N. Y. 225; *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 439; *White v. Conn. F. Ins. Co.*, 120 Mass. 330, 333; *Peck v. New London Mut. Ins. Co.*, 22 Conn. 575; *Miller v. Life Ins. Co.*, 12 Wall. 285, 308, 20 L. Ed. 398; *Alexander v. Continental Ins. Co.*, 67 Wis. 422, 30 N. W. 727, 58 Am. Rep. 869; *New York Cent. Ins. Co. v. Nat. Pro. Ins. Co.*, 20 Barb. 469.

The authorities are numerous in support of the general proposition that an agent of an insurance company, having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority. *Farnum v. Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *Miss. Val. Ins. Co. v. Neyland*, 9 Bush, 436; and the following cases cited supra: *Sheldon v. L. Ins. Co.*; *Sheldon v. Atlantic F. & M. Ins. Co.*; *Hotchkiss v. Germania F. Ins. Co.*; *Wood v. Poughkeepsie M. Ins. Co.*; *Church v. La Fayette F. Ins. Co.*; *Van Schoick v. Niagara F. Ins. Co.*; *White v. Conn. F. Ins. Co.*; *New York Central Ins. Co. v. Nat. Pro. Ins.*

Co.; *Peck v. New London Mut. Ins. Co.*; and *Miller v. Life Ins. Co.*

He is presumed to have the power of the company to waive immediate payment, and make contracts for credit, and such contracts are binding on the company. *Ball & Sage Wagon Co. v. Aurora F. & M. Ins. Co. (C. C.)* 20 Fed. 232; *Post v. Aetna Life Ins. Co.*, 43 Barb. 351; *Stewart v. Union Mutual L. Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147.

The rule must be the same where such agent has the power, as in the present case, to accept annual premiums and to issue renewal receipts, thereby extending or renewing policies of insurance, because the underlying reason is the same. *Murphy v. Continental Life Ins. Co.*, supra. And see *Alexander v. Continental Life Ins. Co.*, supra; *Appleton v. Phenix Life Ins. Co.*, 59 N. H. 541, 47 Am. Rep. 220; *Am. L. Ins. Co. v. Green*, 57 Ga. 469; *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625, 626; *Insurance Co. v. Wolff*, 95 U. S. 330, 331, 24 L. Ed. 387. And see the following cases cited supra: *Dean v. Aetna Life Ins. Co.*; *Shear v. Phoenix Mut. L. Ins. Co.*; *Boehen v. Williamsburgh City Ins. Co.*; *Bodine v. Exch. F. Ins. Co.*; *Ins. Co. v. Hogue*, 41 Kan. 524, 527, 21 Pac. 641, wherein a question arose upon a claim put forward that the policy had been renewed by credit given for the premium by the agent of the company. See, also, the following cases: *Goodwin v. Mass. Mut. L. Ins. Co.*, 73 N. Y. 480, 495; *Dean v. Aetna Life Ins. Co.*, supra; *Post v. Aetna Ins. Co.*, supra; *Rivara v. Queen's Ins. Co.*, 62 Miss. 728, 729; *Am. Cent. Ins. Co. v. McLanathan*, 11 Kan. 533, 549; *Continental Ins. Co. v. Kasey*, 25 Grat. 274, 18 Am. Dec. 681; *Van Schoick v. Niagara F. Ins. Co.*, supra; *Nat. Mut. F. Ins. Co. v. Barnes*, 41 Kan. 161, 163, et seq., 21 Pac. 165; *Ins. Co. v. Wilkinson*, 13 Wall. 234, 235, 20 L. Ed. 617—which fully sustain the rule laid down in our cases concerning the powers of the general agent of an insurance company. See, also, the case of *Farnum v. Ins. Co.*, supra, where the subject is extensively discussed.

It has also been held that, even though an agent of the company had no authority to bind them by receiving payment of a premium after it was due, yet the company might receive payment at any time, and, if they received the amount of the premium from the agent after it was due, they were bound to inform themselves of the time when it had been paid to him, and by receiving it from him without inquiry they waived the right to insist on the delay in the payment as a ground of forfeiture of the policy. *Hodson v. Guardian L. Insurance Co.*, 97 Mass. 144, 93 Am. Dec. 73.

And in *Insurance Co. v. Wolff* it was said: "Where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances coming to his knowledge

affecting its liability; and, if subsequently the premiums are received by the company without objection, any forfeiture incurred will be presumed to be waived."

As to the point raised under the ninth condition of the policy, that no agent had authority to waive any condition, and that no waiver could be recognized, unless in writing signed by either the president, vice president, secretary, or assistant secretary of the company, this has been heretofore so fully considered in the decisions of this court affirming the right of the agent to waive that we hardly deem it necessary to more than refer to them. *Am. Cent. Ins. Co. v. McCrea*, Maury & Co., 8 Lea, 513, 520, 521, 524-526; *Dale v. Continental Ins. Co.*, 95 Tenn. 38, 48-50, 31 S. W. 266.

As said in these cases: "A written contract may be changed by parol, and this although it stipulates that it shall be changed only in writing, for the obvious reason that men cannot tie their hands or bind their wills so as to disable them from making any contracts allowed by law, and in any mode in which it may be entered into"—citing *Pechner v. Phoenix Co.*, 65 N. Y. 195. Again: "A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it"—citing *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 153; *Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689. Again: "A parol permission may equally be given (although the terms of the policy require the permission to be indorsed on the policy), or a forfeiture may be waived by parol"—citing *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521. See, also, *Eclectic L. Ins. Co. v. Fahrenkrug*, 68 Ill. 468, and *German Ins. Co. v. Gray* (Kan.) 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150.

In the latter case it is said: "In the present case, as in some of the cases cited, it was qualified in the policy that no agent of the company, or any other person than the president and secretary, should have authority to alter or waive any of the terms or conditions of the policy, or make any indorsements thereon, and all agreements of the president or secretary must be signed by either of them. This provision, however, may be modified by the company to the same extent as any other, and whatever the company can do may be done by its general agents." 8 L. R. A. 77. "Especially is this true in respect of a foreign insurance company, whose officers are especially inaccessible to the assured." *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89, 42 N. W. 208; and see *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108, 28 Am. Rep. 535; *Am. L. Ins. Co. v. Gallatin*, 48 Wis. 36, 3 N. W. 772; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361, 10

N. W. 381; *Lamberton v. Con. F. Ins. Co.* (Minn.) 39 N. W. 76, 1 L. R. A. 222; *Willcuts v. Northwestern Mut. Ins. Co.*, 81 Ind. 307, 310; *Richmond v. Niagara F. Ins. Co.*, 79 N. Y. 230, 239; *Am. L. Ins. Co. v. Green*, 57 Ga. 469; *Phoenix Ins. Co. v. Hart*, 149 Ill. 514, 520, et seq., 36 N. E. 990; *Germania L. Ins. Co. v. Koehler*, 168 Ill. 298, 48 N. E. 297, 61 Am. St. Rep. 106.

As to the point that a subagent or clerk in the office had no authority to bind the company by collection of the premium after due, there is nothing in this. "It has been held that an ordinary agent of an insurance company has the power to employ clerks to discharge the ordinary business of his agency, and that a waiver of a character which the agent himself could make is to be attributed to him when made by his clerk. In *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117, it was said by Earl, C., at page 123: 'We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person; and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums in cash or securities, and to give credit for premiums or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of "Delegatus non potest delegare" does not apply in such a case. Story, Ag. § 14.' Enough has been said to show that an agent of an insurance company has the right to, and indeed it is the expectation of the company that he will, employ such clerks and other assistants as may be necessary and proper in order that he may do the business for which he has been appointed agent. Upon the question of the character of the service, we think it is sufficient that the person is engaged by the agent to do for him some portion of the ordinary, usual, and well-known duties pertaining to the position of the agent, and what he does in the course of that employment as within its general scope is done by the agent." *Arff v. Star Fire Ins. Co.* (N. Y.) 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721; *Steele v. German Ins. Co.* (Mich.) 53 N. W. 514, 18 L. R. A. 85; *Goode v. Georgia Home Ins. Co.* (Va.) 23 S. E. 744, 30 L. R. A. 842, 53 Am. St. Rep. 817; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Ins. Co. v. Bradford* (Pa.) 50 Atl. 286, 55 L. R. A. 408, 88 Am. St. Rep. 770. We think the foregoing excerpt from *Arff v. Ins. Co.* states the law correctly, and we adopt it as a sound statement of the rule. There is no conflict between this holding and the case of *Ins. Co. v. Ewing*, 2 Baxt. 306. The facts stated in that case take it out of the operation of the

rule, because it was there expressly proven that, under the practice and dealings current in the office, the subagent in question had no authority to collect premiums.

It is next insisted that in no event could the company be bound by the agent's collection of the premium after loss, because it was not shown that any such collection had ever before been made. But, under the facts stated, we do not think this is a material consideration. The agreement and the course of business under which the assured and the company, through its general agent, were acting, were made and entered upon before the assured fell in arrears. He was authorized to rely upon them, and did rely upon them. But for this agreement, and settled course of business thereunder, he would no doubt have paid his premium when due, and would not have fallen in arrears at all. To allow the company to repudiate the action of its agent in collecting the premium under these circumstances, and to escape the payment of the loss, would be to sanction a fraud. We think the facts stated make out an estoppel upon the company. *Dean v. Aetna L. Ins. Co.*, 62 N. Y. 642; *Tennant v. Travellers' Ins. Co.* (C. C.) 31 Fed. 322, 324, 325; *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 222, 65 Am. St. Rep. 563; *Alexander v. Continental Ins. Co. of N. Y.*, 67 Wis. 422, 30 N. W. 727, 58 Am. St. Rep. 869; *Phenix Ins. Co. v. Tomlinson* (Ind.) 25 N. E. 126, 9 L. R. A. 317, 21 Am. St. Rep. 203; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *Ins. Co. v. Norton*, 96 U. S. 241, 24 L. Ed. 689; *Ins. Co. v. Wolff*, 95 U. S. 331, 24 L. Ed. 387; *Bliss on Ins.* § 194.

There were other errors assigned, all of which have been considered and overruled.

No question was made upon the amount of the indemnity allowed, and, there being no error in the action of the court below, the judgment must be affirmed.

WESTBROOK et al. v. BELTON NAT. BANK et al.

(Supreme Court of Texas. Jan. 7, 1904.)

INDEMNITY TO SURETY—DEED OF TRUST—
PRIMARY LIABILITY OF LAND—EXTENSION
OF TIME—RELEASE OF DEED.

1. Where a deed of trust delivered to the sureties on a note declared that it was to "indemnify" the sureties, but provided that, if the note were not paid at maturity, the trustee, on request of the holder of the note, should sell the land and pay the note, the extension of the time of payment before maturity, and acceptance of a new note, from which one of the sureties was omitted, without the consent of the grantor, released the deed of trust; the land having stood in the attitude of surety in the original transaction.

Certified questions from Court of Civil Appeals of Third Supreme Judicial District.

Suit by the Belton National Bank and others against M. S. Westbrook and others. Judgment in favor of plaintiffs, and defend-

ants appealed to the Court of Civil Appeals, which certifies questions. Questions answered.

Chas. A. Jennings and Baker & Thomas, for appellants. A. L. Curtis, for appellees.

WILLIAMS, J. Certified question from the Court of Civil Appeals for the Third Supreme Judicial District. The certificate shows that the bank brought this action upon a note payable to it, of date October 27, 1900, due November 4, 1901, for \$1,300, signed by Richard H. Harrison, M. S. Westbrook, and Waller S. Baker. Harrison was dead, and the suit was against Westbrook and Baker. Defendants answered that on the 4th day of November, 1899, a note for \$1,575, payable to the bank, and due on the 4th day of November, 1900, had been executed by Richard H. Harrison, M. S. Westbrook, Waller S. Baker, and James A. Harrison for the debt of Richard H. Harrison, on which all of the signers except the last named were sureties for him, and that, for a balance due on this note, and before its maturity, the note sued on was given, by which the time of payment was extended for a year, and James A. Harrison was omitted as one of the signers. They also alleged that, when the first note was given, Mrs. Mary S. Harrison, the wife of Richard H. Harrison, joined by her husband, executed and delivered to the defendants and James A. Harrison a deed of trust, set forth in the answer. This deed recited that Harrison and wife were justly indebted to the bank in the amount of the note of November 4, 1899 (describing it), and were desirous of assuring and securing to Westbrook, Baker, and James A. Harrison, sureties on the note, its payment at maturity, and conveyed to W. H. Jenkins certain land, the separate property of Mrs. Harrison, with the condition that if "I shall well and truly pay said note and interest due thereon to the legal holder thereof when same shall become due this conveyance and all herein contained to be null and void; but in case of default in the payment of said note and interest or any part thereof when the same shall become due and payable it shall be the duty of the said W. H. Jenkins, trustee, at any time after such default, at the request of any legal holder of the note or notes unpaid to sell the property," in the manner specified, and with the proceeds arising from such sale, after deducting expenses and commissions, "the trustee shall pay the amount of principal and interest due on said note," and pay any balance to Mrs. Harrison. The deed also empowered the "holders and owners of said note," in case of failure, etc., of the trustee to act, to appoint a substitute trustee, with the same powers, and closed with this declaration: "This instrument is executed to indemnify and secure said M. S. Westbrook against loss by reason of having signed as my surety the note hereinbefore described." Upon the

facts thus alleged, Westbrook and Baker made Mrs. Harrison a party to the action, and prayed for a foreclosure of the mortgage for their protection. Mrs. Harrison urged a general demurrer to this pleading, which was sustained, and, upon judgment being rendered discharging her, and in favor of the bank against Westbrook and Baker, they appealed. The Court of Civil Appeals affirmed the judgment (75 S. W. 842) and, pending motion for rehearing, certified this question: "Did the execution and delivery of the new note herein sued on in lieu of the former note, under the circumstances stated, have the effect to release said deed of trust?" The certificate properly sets forth at length the answer and deed of trust in question, but the statement given is sufficient for a proper understanding of our decision.

The arguments of the parties and the opinion of the Court of Civil Appeals develop but one point of contention, and we shall confine our attention to it. The position of counsel for Mrs. Harrison is that her land occupied the attitude of a surety in the original transaction, and that the change in the contract by extension of time and release of James A. Harrison without her consent effected a discharge of the land. Counsel for appellants dispute the proposition that the land stood in the relation of a surety for the debt, and contend that it was mortgaged only as an indemnity to them against loss by reason of their suretyship, and that the rule which holds a surety released by a change made, without his consent, in the contract by which he was bound, has no application. If this were the legal effect of the mortgage, the authorities cited by them would probably sustain the conclusion which they seek to establish. *Way v. Hearn*, 11 J. Scott (N. S.) 774; *s. c.*, 13 J. Scott (N. S.) 292; *Mayer v. Grottendick*, 68 Ind. 1; *Lytle's Appeal*, 36 Pa. 131; *Buffington v. Bronson*, 61 Ohio St. 231, 56 N. E. 762. A case which seems to conflict with the above is *Foy v. Sinclair* (Tenn.) 30 S. W. 28, but the correctness of the doctrine of those first cited may be conceded for the purposes of our decision. In the cases cited, strangers to the debt bound themselves or their property to persons who were sureties for that debt, to reimburse them for payments they might have to make upon it, and herein those cases differ from this. The reason for the holdings is that the indemnitors or their property were never bound for the debt, the creditors could not enforce the contract of indemnity, and hence no suretyship for the debt ever existed. It is held that, while a creditor may avail himself of any security given by the debtor, the principal obligor, to his surety to indemnify the surety against loss, the creditor cannot take advantage of such an indemnity given to the surety by a stranger to the debt. *Hampton v. Phipps*, 108 U. S. 264, 2 Sup. Ct. 622, 27 L. Ed. 719; *Macklin v. Bank*, 83 Ky. 314; *Taylor v.*

Farmers' Bank, 87 Ky. 398, 9 S. W. 240. All of the decisions relied on by appellants are founded upon the fact that the undertakings of the indemnitors were with the sureties alone, were for the sole purpose of indemnifying them in case they should have to pay the debts, and were in no sense agreements to pay or to secure such debts. From this the conclusion was reached that the creditor could not hold them or their property liable, that the indemnitors were therefore not sureties, and that hence an extension of time by the creditors to those who were liable for the debt was not a change in the contract between the indemnitors and the sureties. But a distinction is made between such contracts and one where provision is made by the third person for the payment of the debt, although the purpose of such provision is the protection of the surety. In *Hampton v. Phipps*, Mr. Justice Matthews thus states the principle: "Of course, if an express trust is created, no matter by whom, nor for what, for the payment of the debt, equity will enforce it according to its terms, for the benefit of the creditor, as a *cestui que trust*." And in *Macklin v. Bank* it is said: "The rule is that when the security is given with the intention that it shall be applied to the payment of the debt in order to relieve the surety, or to enable the creditor to make his debt, he will be substituted to the rights of the surety; but, when the pledge of the property is to indemnify the surety only against the payment, it becomes personal, and presents a different question." The rule applicable must therefore be determined by the nature of the contract. The deed in this case expressly binds the property for the payment of the note, and empowers the creditor to enforce the trust for that purpose. In other words, for the protection of the sureties, Mrs. Harrison interposes her property between them and the creditor; making it responsible for the debt, so that the sureties might not have to pay it. It is apparent, therefore, not only that her property is, in the fullest sense, made subject to the debt, but that, as between her and the sureties, it is primarily chargeable. While the allegation is that the deed was delivered to the sureties, its provisions must determine its legal effect. Although the purpose is declared to be to indemnify the sureties, that protection is to be given in a specified manner—not by reimbursement of sums which the sureties might have to pay, but by sale of the property to pay the debt in the first instance. It inevitably follows that the property became directly responsible for Harrison's debt, and therefore surety for it. Had the bank, without the consent of appellants, extended time to Harrison, not only they, but Mrs. Harrison's property, would have been discharged. That they were not discharged is due to the fact that they assented to the new contract, which fact cannot prejudice her. Her property cannot be

held as security for a contract essentially different from that to secure the performance of which by her husband she pledged it, any more than a personal surety upon one contract can be held bound upon a different one made without his consent.

The question is therefore answered in the affirmative.

PEARSON v. WEST.

(Supreme Court of Texas. Jan. 7, 1904.)

TRIAL—VENUE—DEFENDANT'S RESIDENCE—ESTOPPEL.

1. Rev. St. 1895, art. 1194, provides that no person who is an inhabitant of the state shall be sued out of the county in which he has his domicile, except in certain cases. *Held*, that the word "domicile" in such section was used in the sense of "residence," and hence where a defendant had a house in one county, where he resided a part of the year, and a ranch in another county, at which he spent the balance of his time, an action against him for an assault alleged to have been committed at the ranch might be properly brought in either county.

2. Where a defendant resided in one county a part of the year and spent the balance of his time in another, plaintiff's right to sue in one of such counties did not depend on whether defendant, by his acts, had misled plaintiff as to his domicile, and thereby estopped himself to deny that he resided in such county, as plaintiff's right to sue in one county was just as certain as in the other.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Annie M. Pearson against George West. From a judgment sustaining a plea in abatement, affirmed by the Court of Civil Appeals (75 S. W. 334), plaintiff brings error. Reversed.

M. W. Davis, for plaintiff in error. Proctors, Denman, Franklin & McGown and O. C. Clamp, for defendant in error.

BROWN, J. On the 9th day of October, 1902, Annie M. Pearson filed this suit in the district court of the Fifty-Seventh Judicial District, Bexar county, against George West, to recover \$10,000 damages for an assault charged to have been committed upon her by West in Live Oak county, Tex., on the 14th day of August, 1902. The defendant, West, pleaded in abatement of the suit that at and before the commencement of the suit and service of process he resided in Live Oak county, state of Texas, and had his domicile therein, and not in the county of Bexar and state of Texas, as alleged in plaintiff's petition; that ever since the commencement of this suit and now he has resided and had his domicile in said Live Oak county; that, if plaintiff has any cause of action against him, it did not accrue in the county of Bexar, but arose in the county of Live Oak; and the defendant claimed the privilege of being sued in the said county of Live Oak, the place of his domicile. The case was submitted upon this plea to the judge without a jury, and judgment was entered sustaining the plea and dis-

missing the case, which judgment was affirmed by the Court of Civil Appeals.

The honorable Court of Civil Appeals did not file conclusions of fact, but there is no conflict in the evidence upon the issue presented, and we will state the facts which are established by the undisputed evidence, as follows: In 1882 West was a citizen and resident of Lavaca county, Tex. In that year he purchased a ranch in Live Oak county, and in 1885 removed with his family to the ranch, and made it his domicile, with the intention of remaining there for the future, which intention has never been changed. For five years preceding this trial West had owned 70,000 acres of land in Live Oak county and a large herd of cattle, with other things necessary for ranch purposes. Upon his ranch he had a residence house, also a house for his foreman, houses for servants, carriage houses and barn, and all such as are necessary for such a place. This ranch, its stock and equipments, constituted all the property that West owned, and the management of it was the only business in which he engaged. The business of the ranch occupied West's time during the months of April, May, June, July, August, and September, during which time each year he and his wife resided in their residence on the ranch. About the 1st of October of each year West would lock up his residence on the ranch, leaving all of his furniture and household goods in the house, go to San Antonio, and there remain until the next April or May. During the time that West and his wife were in San Antonio in the winter, he made occasional trips to the ranch, looking after his business affairs, where he would spend a few days at a time, and return to his wife at San Antonio. He had a telephone constructed to the ranch house, by means of which he held communication with his foreman whenever he desired, and transacted his business at the ranch by telephone from San Antonio. Some time before the institution of this suit West purchased a residence in San Antonio for about \$21,000. He thought it cheap, and bought it as an investment. It was a large, well-equipped and well-furnished residence at the time he purchased it, and he and his wife have occupied it from October to April or May in each year since he bought it. He had the deed to the property made to his wife, and when they went to the ranch in the spring they left the carriage driver in charge of the city residence until their return in the fall. West has never claimed to be a citizen of Bexar county, has refused to vote or sit on juries in that county. He has voted in Live Oak county since he moved there in 1885, has served on juries in that county at times. In all of the contracts which West made during the time he has claimed to be a citizen of Live Oak county, and the business men with whom he has had transactions so understood him to be. The plaintiff in error was employed by West and his wife as a cook, and has resided with

them for a number of years, both in San Antonio and upon the ranch. When West and wife would leave the ranch and go to San Antonio, Annie M. Pearson accompanied them, and lived with them in San Antonio, and when they would return from San Antonio to the ranch she likewise would accompany them, and serve them at that place. She was fully aware of the fact that West owned and occupied the ranch place as well as the place in San Antonio, and all of the facts and circumstances connected with his occupancy of the different places. The transaction out of which this suit was brought occurred in Live Oak county at the time when West and his wife were occupying the ranch residence, and the suit was instituted in Bexar county before West and his wife returned to San Antonio during the fall.

The general rule for determining the venue of suits in this state is prescribed by the following article of the Revised Statutes of 1895: "Art. 1194. No person who is an inhabitant of this state shall be sued out of the county in which he has his domicile, except in the following cases, to-wit:" It is not claimed that this case comes within either of the 27 exceptions to the general rule. The question at issue must be determined by ascertaining the meaning of the word "domicile," as used in the article quoted. In the case of *Brown v. Boulden*, 18 Tex. 434, this court, in discussing the question, said: "It not infrequently is a question of considerable nicety and difficulty to determine in which of two places a man's domicile really is. The statute also uses 'inhabitant.' An inhabitant and resident mean the same thing. And the word 'domicile' is evidently used in the statute in the sense of 'residence.' But there may be a difference between a man's residence and his domicile. He may have his domicile in one place, and still may have a residence in another; for although a man, for most purposes, can be said to have but one domicile, he may have several residences." This decision was approved in *Wilson v. Bridgeman*, 24 Tex. 615, and a number of cases not necessary to mention. The case of *Brown v. Boulden* was decided in the year 1857, and the law construed was enacted in the year 1846. In 1863 the Legislature amended the law of 1846, but re-enacted that part quoted above in the exact language of the original law. See Laws 10th Legis. p. 10, c. 17. The Legislature has frequently amended the law, adding new exceptions to those already enacted, but has made no change in the language as it was construed in *Brown v. Boulden*. In 1876 there was a revision of the laws of this state, and the same language was embraced in the Revised Statutes without any alterations; and in 1895 there was a revision of the laws of this state in which the same language was embraced as article 1194. In the 27 exceptions to the general rule there are 10 which depend upon the residence or domicile of a party, and of these there are

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4 in which the word "domicile" is used and 6 in which the word "residence" is used to designate the place of venue, showing that the words "domicile" and "residence" have been used by the Legislature interchangeably. We think that these facts show conclusively that the Legislature used the word "domicile" in view of the construction which the court had placed upon it, and that its use was in the sense of "residence."

Considering article 1194 as if it read, "No person who is an inhabitant of this state shall be sued out of the county in which he has his residence," the question presented for our decision is, did the plaintiff have the right to institute this suit in either county in which one of the residences of the defendant was, notwithstanding she knew all of the facts and circumstances connected with the occupancy of the two places? In *Crawford v. Carothers*, 66 Tex. 200, 18 S. W. 500, suit was filed in Travis county, the petition alleging that the defendant was a citizen of that county, to which petition defendant pleaded in abatement that he was at the institution of the suit an inhabitant of Waller county. To this plea exceptions were filed and sustained, and upon appeal Justice Robertson said: "The plea states that the defendant was an inhabitant of Waller county at the date of the institution of the suit. He might have been a resident of both counties." The court affirmed the judgment, which could not have been done except upon the ground that suit might be brought in either county in which the defendant had a residence, which is the question before us in this case. The statute required that West should be sued in the county of his residence, and of this right he could not be deprived; but as he had a residence in each of two counties at the same time, the law was satisfied by a suit at either place. The object was to bring litigation to the home of the defendant, which is done by suing in either county in which he resides.

Counsel for defendant in error insists that the right to sue in Bexar county depended upon whether the defendant had, by his acts, misled the plaintiff as to his domicile or residence, and was thereby estopped to deny that he resided in that county. In many of the cases cited by counsel the facts rendered it uncertain where the defendant's residence was. They were cases in which a change was being made from one county to another, and the courts, in discussing the question, assigned as a reason for their holding that the party who claims the benefit of the law should show that his domicile or residence was so plainly designated by the facts as not to leave the plaintiff in doubt; but in no case was the decision rested upon the ground of estoppel. Counsel for defendant in error insists that plaintiff had a clear right to sue in Live Oak county, because the assault was committed there, and that she should have filed her petition there. If there were a question of estoppel in the case, the suggestion would have force, but

the right to sue in Bexar county was just as certain as in Live Oak county, and the court will not control a plaintiff in his choice between two places when he may sue in either. *Carro v. Carro*, 60 Tex. 395.

The district court erred in sustaining the plea to the jurisdiction of the court of Bexar county, and the Court of Civil Appeals erred in affirming that judgment, for which errors the judgments of both courts are reversed, and the cause remanded.

RIGGINS v. RICHARDS et al.

(Supreme Court of Texas. Jan. 8, 1904.)

MUNICIPAL CORPORATIONS — CHARTER — REMOVAL OF OFFICERS — MAYOR — RIGHT TO HEARING — TRIAL — COMPETENCY OF MEMBERS OF COUNCIL.

1. A city charter provided that the city council should have power to remove any officer after due notice, etc., and the next article provided that, in addition to the "foregoing power of removal," the council should have power to remove by resolution any officer elected by them. *Held*, that the phrase, "any officer" in the former provision, referred to all officers, whether elected by the people or by the council.

2. A city charter gave the city council power to remove any officer for incompetency, etc., after notice and a hearing. By the charter the council was composed of a mayor and aldermen, the latter being required to elect their president, whose duty it was to act in case of the inability of the mayor; and it was provided that a majority of the council should constitute a quorum for the transaction of business. Rev. St. 1895, art. 3268, subd. 5, provides that in the construction of statutory enactments a joint authority given to any number of persons may be executed by a majority of them unless otherwise declared. *Held*, that the power of removal was not conferred on the council as a body, which could not act without the mayor, so that he could not be tried on charges against him, but he could be tried by a majority of the council, presided over by its president.

3. Where a city charter provided that the council should have power to remove any officer for incompetency, etc., after due notice and an opportunity to be heard in his defense, such provision sufficiently provided a mode of procedure on charges against an officer, there being an implication of authority to do whatever might be proper, consistent with the right of the accused to a fair hearing.

4. Certain aldermen who signed and presented charges against the mayor of the city were not thereby disqualified to participate in his trial, the council not constituting a court, but being an administrative body, and they not being "interested" even under the rule prescribed by Const. art. 5, § 11, for judges of the courts, and disqualifying one interested in a case.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Mandamus on the relation of J. W. Riggins against Ben C. Richards and others, city council of the city of Waco, to compel the restoration of relator to the office of mayor. From a judgment denying relief, relator appealed to the Court of Civil Ap-

peals, which certifies questions to the Supreme Court. Questions answered.

Waller S. Baker, Scarborough & Kimball, and W. L. Rodney, for appellant. Wm. W. Evans, Allan D. Sanford, and Clark & Bolinger, for appellees.

BROWN, J. This is a certified question from the Court of Civil Appeals for the Third Supreme Judicial District. The statement and questions are as follows:

"This is a mandamus suit brought by J. W. Riggins against the members of the city council of the city of Waco and Allan D. Sanford, the acting mayor of said city, by which Riggins seeks to be restored to the office of mayor, from which he has been removed by the city council. The district court rendered judgment refusing to grant the relief sought, and Riggins has appealed. Among other questions presented for decision are two material questions, which the Court of Civil Appeals desires to certify to the Supreme Court for decision, and by way of explanation the following statement is made:

"The city of Waco is a municipal corporation, chartered by a special law enacted by the Legislature, which charter contains the following among other articles:

"Art. 4.—The municipal government of the city shall consist of a city council, composed of the mayor and two aldermen from each ward, a majority of whom shall constitute a quorum for the transaction of business, except at all meetings for the imposition of taxes, when two-thirds of a full board shall be required, unless herein otherwise specified."

"Art. 7.—The above named officers (except city treasurer, who shall not be considered within the meaning of this act an officer) shall be elected by the qualified electors of said city, as hereinafter provided, and shall hold their offices for two years, and until the election and qualification of their successors. * * *

"Art. 35.—The city council shall be composed of the mayor and aldermen provided for by this act. The mayor shall be president of the council, and in case of a tie on any question, he shall give the casting vote.

"Art. 36.—At the first meeting of each new council, or as soon thereafter as practicable, one of the aldermen shall be elected president pro tem. who shall hold this office for one year.

"Art. 37.—In case of the failure, inability or refusal of the mayor to act, the president pro tem. shall perform the duties and receive the compensation of the mayor."

"Art. 87.—The city council shall have power, from time to time, to require other and further duties of all officers whose duties are herein prescribed, and to define and prescribe the powers and duties of all officers appointed or elected to any office, under this

¶ 4. See *Municipal Corporations*, vol. 36, Cent. Dig. § 351.

act, whose duties are not herein specially mentioned, and fix their compensation.'

"Art. 273.—The city council shall have power to remove any officer for incompetency, corruption, misconduct or malfeasance in office, after due notice and an opportunity to be heard in his defense.

"Art. 274.—In addition to the foregoing power of removal, the city council shall have power, at any time, to remove any officer of the corporation elected by them, by resolution or declaratory of its want of confidence in said officer, provided that two-thirds of the aldermen elected vote in favor of said resolution.'

"In September, 1902, while J. W. Riggins was occupying the office of mayor of the city of Waco, to which he had been duly elected, seven of the ten members of the city council signed, and presented to the council written charges against said Riggins, embracing nine specifications, some of which, in the judgment of this court, charge him with corruption, misconduct, and malfeasance in office. The charges referred to were in the form of a resolution declaring Mayor Riggins guilty of incompetency, corruption, misconduct, and malfeasance in office in the several particulars specified in the nine separate charges and specifications contained in the resolution. The resolution was so framed as that its adoption would operate as a removal of Riggins from the office of mayor.

"After due notice and the appearance of Mayor Riggins in person and by attorneys, the council proceeded to try him upon the charges so preferred, Ben C. Richards, the mayor pro tem., presiding; and, by a vote of seven to two, found him guilty of all the charges, and removed him from the office of mayor. However, all this was done over the objection and protest of Riggins, who then presented the same objections that are presented here and involved in the questions hereinafter certified.

"We also deem it proper to state that the same members of the city council who preferred the charges against Riggins voted to sustain them, and the other members who were present voted against his removal. It was not shown that the city council, by ordinance or otherwise, prescribed any mode of procedure for the removal of officers.

"The questions hereby certified are properly raised and presented for decision, are material, and their decision is necessary for the final disposition of the appeal.

"With the foregoing explanation and statement, the following questions are certified to the Supreme Court for decision:

"(1) As against officers elected by the people, and not by the city council, is article 273 of the city charter self-executing, and did the city council, by force of that article or the common law, have authority and jurisdiction to try and remove appellant from

the office of mayor? If it be held that the council had jurisdiction, then—

"(2) Were the seven aldermen who preferred the charges against the mayor qualified to sit as members of the council and try him upon the charges? Or, by reason of having prepared and filed the charges, were such members of the council disqualified from trying him, and, if so, was their action in finding him guilty and removing him from office absolutely void?

"In addition to the authorities cited in the briefs, the following are referred to as having some bearing: On the first question: *Odell v. Wharton*, 87 Tex. 173, 27 S. W. 123, and *Warner Elevator Co. v. Maverick*, 88 Tex. 489 [30 S. W. 437, 31 S. W. 353, 499]. On the second question: *Stockwell v. Township Board of White Lake*, 22 Mich. 341; *People v. Common Council*, 85 Hun, 601 [33 N. Y. Supp. 165]; *Ryers et al. v. Commissioners*, 72 N. Y. 1, [28 Am. Rep. 88]; *Newcome v. Light*, 58 Tex. 141 [44 Am. Rep. 604]; *Armstrong v. Traylor & Elmore*, 87 Tex. 598 [30 S. W. 440]."

We answer the first question in the affirmative. The appellant claims that under article 273 of the charter of Waco the city council had no jurisdiction to try the mayor, for the following reasons:

First. Because the phrase "any officer," as used in said article, means the same as "any officer" in article 274; that each of them refer to officers elected by the city council, and do not embrace officers elected by the voters of the city. The following clause of article 274 clearly distinguishes the officers mentioned therein from those named in the preceding article: "In addition to the foregoing power of removal, the city council shall have power, at any time, to remove any officer of the corporation elected by them." The terms of article 273 embrace all officers of the city, whether elected by the people or by the council, but by its provisions no officer can be removed by the council except for one of the causes named, and after trial; but article 274 of the charter confers authority upon the council to remove officers elected by it by a resolution declaring want of confidence in such officer, which differences show that article 273 embraces officers elected by the voters of the city.

Second. Because article 273 of the city charter confers the power of removal upon the city council as a body, which was composed of a mayor and aldermen, all of whom must act in the execution of the power; that the mayor could not act in the trial of himself, and the council could not act without him; therefore the council could not try the mayor. There is authority to sustain the contention, but it is unnecessary for us to discuss the question, because it is determined by the charter and by subdivision 5, art. 3268, Rev. St. 1895: "The following rules shall govern the construction of all civil statutory enactments:

* * * (5) A joint authority given to any number of persons or officers may be executed by a majority of them unless it is otherwise declared." By the terms of the charter the council of the city of Waco was composed of a mayor and 10 aldermen, and, at the first meeting of each new council, the aldermen were required to elect from their number a president pro tem., whose duty is prescribed by article 37 of the charter in the following language: "In case of the failure, inability or refusal of the mayor to act, the president pro tem. shall perform the duties and receive the compensation of the mayor." By article 4 of the charter it is provided that a majority of the council shall constitute a quorum for the transaction of business. By these provisions of the charter it will be seen that it was not contemplated by the Legislature that the city council should act as a whole in the transaction of business, or that the mayor should at all times be present and perform the duties of his office, and that he might be disqualified to preside in some cases. The term "inability," as here used, embraces disqualification or disability on account of interest in the subject of the action. Webster's Dic., word "Inability." The mayor being interested, the president pro tem. would preside in his absence, and a majority of the city council thus organized constituted a quorum which could transact all business that might come before the body.

Appellant contends with much earnestness that article 273 does not, of itself, furnish authority upon which the city council could proceed to try the mayor of the city, because it provides no mode of procedure; in other words, it is claimed that the article is not self-acting. This language in article 273, "after due notice and an opportunity to be heard in his defense," is very comprehensive, and is pregnant with the idea of charges preferred, specifying the grounds upon which a removal is to be made, due notice to the accused, with the right to cross-examine the witness produced against him, and to furnish testimony to exculpate himself from the charges, which would secure the constitutional right of a fair and impartial trial. These are strongly implied by the language of the act, and that which the law implies is as binding as if written in the body of the act. Suth. Stat. Const. § 334; *U. S. v. Babbitt*, 1 Black, 61, 17 L. Ed. 94. When power to perform an act is conferred by the Legislature upon a body of officers, and no procedure is specified, the law will imply authority to do whatever is proper in the execution of the power consistent with the right of the accused to a fair and impartial hearing. *State v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; *Armatage v. Fisher*, 74 Hun, 173, 26 N. Y. Supp. 364; *People v. Higgins*, 15 Ill. 110; *State v. Walker*, 68 Mo. App. 117; *In re Eaves*, 30 Fed. 21.

It is insisted that the city council should have adopted by ordinance or resolution a

method of procedure before entering upon the trial, and that without some rules expressed in the charter or provided by the council there was no authority for the council to make the removal. In the case of *Armatage v. Fisher*, before cited, the court states the law upon this point in the following terms: "Assuming that the common council has, in any event, power to remove the president, we are unable to see that any rule as to the course of procedure was necessary to be adopted prior to such removal. In other words, if the defendants have the power to remove the plaintiff, they can do so as well without the adoption of a new rule as with it." And in the case of *State v. Walker*, before cited, the court say: "It is contended by relator that, since the council had not passed an ordinance regulating the manner of impeachment and removals, as authorized by said section 11 [Sess. Acts 1893, p. 68], it could not resolve itself into a court of impeachment. It is a sufficient answer to this to say that by the provisions of said section 11 is conferred the power to remove all elective officers for cause, and yet, while there are no means or measures whereby the removals may be accomplished as therein provided, or by any ordinance passed in pursuance thereof, yet the grant of power by the section carried with it all necessary incidental powers, without which the grant would be ineffectual. The general rule is that, where a grant of power is given, all the means necessary to effectuate the power pass as incidents to the grant." *State v. Walbridge*, 119 Mo. 396, 24 S. W. 457, 41 Am. St. Rep. 663. Differently stated, the contention is that the council might have prescribed rules to govern its own action, but could not have done the same things when not formulated into rules. We do not see the force of this contention. If the council proceeded properly, without a rule, the result was the same as if the method had been embodied in an ordinance. *State v. Smith*, 72 Conn. 575, 45 Atl. 355. We are of opinion that there was ample authority in the terms of article 273 to enable the city council to make the removal of the mayor if they found him guilty.

To the second question we reply that the aldermen who signed and presented the charges against appellant were not thereby disqualified to participate in the trial of the accused. The council, when sitting for the purpose of trying the accused, did not constitute a court, but was an administrative body, and the power to remove officers was administrative power, to be used for the purpose of maintaining discipline and good order in the management of the business of the city. It is true that by the terms of the law the proceeding was required to be conducted in a manner judicial in character; but this does not necessarily constitute the body a judicial body, nor subject it to the rules which would be prescribed for a court, either in its procedure or as regards the qualification of

its members. *State v. Common Council*, 90 Wis. 619, 64 N. W. 304; *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228; *Donahue v. Will Co.*, 100 Ill. 94. The grant of power to the council to remove the officers of the city imposed upon the members of that body the duty to see that such officers, when charged with the offenses named, should be arraigned, tried, and, if guilty, removed. By preferring the charges against Mayor Riggins, the aldermen did not become parties to the proceeding, and had no personal or pecuniary interest in the matter. The act was simply a discharge of a duty in which the public was more interested than they. *People v. Wheeler*, 21 N. Y. 82; *State v. Council of the City of Superior*, 90 Wis. 612, 64 N. W. 304; *State v. Smith*, 72 Conn. 572, 45 Atl. 355; *Andrews v. King*, 77 Me. 234; *People v. Common Council*, 85 Hun, 607, 33 N. Y. Supp. 165. In the case last cited, the charges were preferred by members of the council, who took part in the trial, and the court, speaking of their qualifications, said: "These members of the common council had no pecuniary interest in the result of the proceeding, and were not in any sense parties to it further than to discharge the duty imposed upon them by law. We must hold that the common council had jurisdiction, and that the authority conferred upon it by the statute in relation to the subject-matter has been pursued in the mode required by law in order to authorize them to make the determination." That case was criticised in *People v. Board of Trustees* (Sup.) 39 N. Y. Supp. 607, which announces the contrary doctrine, but we are of opinion that the reasoning in the former case is much more satisfactory and consistent with sound principles than the latter. In *Andrews v. King*, the mayor of the council, having made the charges against the party to be tried, did not sit in the trial. The court held that he was not disqualified by reason of having made the charges; therefore the council could not act without him, because the authority to remove was given to it as a whole, and could not be exercised by a part of the body. The court said: "It was not improper for the mayor, as a chief executive magistrate of the city, required to be vigilant and active in causing the laws of the state to be enforced, to formulate the charges, even *suo motu*. In his supervision over the conduct of officers it may be his duty to do so." In *State v. Council of Superior*, 90 Wis. 612, 64 N. W. 304, the charges were preferred against the mayor by an alderman, but the question of disqualification was not discussed. The same is true of *State v. Smith*, 72 Conn. 572, 45 Atl. 355. However, if we apply the rule prescribed by article 5, § 11, of the Constitution of this state, for judges of the courts, the aldermen who made the charges would not be disqualified, because they were not interested in the proceeding in a personal or pecuniary sense. In fact, the aldermen, after making the charges,

had no more interest in the proceeding, personally, than those who did not sign the charges. *Taylor v. Williams*, 26 Tex. 587. If the rule claimed should apply, then the principle upon which it is based would prevent the prosecution before the council of any public officer, because, if the charges should be presented by a person not a member of the council, it would be necessary for that body to examine them, and to determine whether there was sufficient cause to justify the prosecution, and granting permission to file the charges would involve as much consideration of the merits as to formulate and present the accusation.

Counsel claims that appellant was entitled to a fair and impartial trial, and enters into a discussion of the facts to show that he did not have such a trial at the hands of the council; but no such question is certified to this court, and we can only say upon the certificate that the aldermen were not disqualified merely by the act of formulating and presenting the charges against the mayor.

SCOTT v. SLAUGHTER.

(Supreme Court of Texas. Jan. 7, 1904.)

APPEAL—AGREED STATEMENT OF FACTS—ABSENCE OF PLEADINGS.

1. An agreed statement of facts made and signed by the counsel of the parties and certified to be correct by the trial judge, the findings of the court and the judgment rendered, constituting the record of the cause under the express provision of Rev. St. 1895, art. 1293, together with the assignments of error and the appeal bond, contained in the transcript on appeal, are sufficient, without the pleadings and an agreement as to what the issues were, to require a consideration of the appeal and revision of the judgment.

Appeal from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Winfield Scott against C. C. Slaughter. From the judgment rendered, plaintiff appeals to the Court of Civil Appeals. On motion to dismiss, the question is certified to the Supreme Court whether the record is sufficient to require consideration of the appeal. Answered in the affirmative.

Matlock, Miller & Dycus, for appellant. K. R. Craig and G. G. Wright, for appellee.

WILLIAMS, J. Certified question from the Court of Civil Appeals for the Fifth Supreme Judicial District, as follows:

"In view of the opinion, as we understand it, delivered by the Court of Civil Appeals, Fourth Supreme Judicial District, sitting at San Antonio, in the case of Thaison v. Sanchez, 35 S. W. 478, in which opinion this court does not concur, we deem it advisable to present to the Supreme Court of the state of Texas, for adjudication, the following issue of law arising in the above-entitled cause of Winfield Scott, appellant, v. C. C. Slaughter, appellee.

"Statement.

"The record before us contains nothing more than an agreed statement of facts, made and filed by the parties in the court below, upon which the case was tried, the judgment of the court, the findings of fact and conclusions of law of the trial court, assignments of error, and the appeal bond. The pleadings are omitted, and there is no agreement and statement as to what the issues were on the trial of the cause. The agreed statement of facts is dated May 1, 1903, signed by the attorneys of the respective parties, and properly certified to be correct by the judge before whom the case was tried, and was made, signed, and filed before the trial in the lower court. The agreed statement contains the following:

"Winfield Scott vs. C. C. Slaughter. No. 22079. In the District Court of Dallas County, Texas, 44th Judicial District. We hereby agree that the following is a statement of the facts in the above styled and numbered cause, and that the controversy herein may be submitted to the court on same as an agreed statement of facts."

"Then follows a statement of the facts agreed on, and is signed by the attorneys for the respective parties. The statement of facts is certified to be correct by the judge before whom the case was tried, and that said cause was tried upon said agreed statement of facts and exhibits and no other testimony. The judgment was rendered for plaintiff on the 1st day of May, 1903, for the sum of \$1,325.69. Said judgment contained the following recitation:

"From said agreed statement of facts and the exhibits thereto attached and made a part thereof, it is the opinion of the court that the plaintiff is entitled to recover the sum of \$1,325.69, with interest, being the amount of money belonging to the plaintiff, which was withdrawn from the treasury of the state of Texas by the agent of the defendant on the first day of September, 1902, and that he is not entitled to recover anything else."

"The attorneys representing appellee have filed in this court the following motion to dismiss this appeal, for the reasons as therein stated, to wit:

"First. The transcript does not contain nor purport to contain the record of the court below, there being nothing more than the statement of facts, conclusions of fact and law, and judgment of the court. This court is therefore not in a position to determine what were the issues in the court below, nor what action the court took on the pleadings, nor what issues were before the court when the judgment was rendered.

"Second. The statement of facts filed in the court below appears to be nothing more than a substitute for the introduction of evidence on the trial in the usual manner, and is wholly insufficient under article 1293, Rev. St. 1895, for the reason that the issues made

by the pleadings and submitted to the court below are not incorporated therein, and nowhere appear either in the statement of facts or in the judgment."

"Question. Is an agreed statement of facts made and signed by the counsel of the parties to a cause, as above set forth, the findings of fact of the court before whom the cause was tried, the judgment rendered, assignments of error and the appeal bond, contained in a transcript on appeal, in the absence of the pleadings and an agreement and statement as to what issues were and are, sufficient to authorize or require a consideration of said appeal and revision of the judgment rendered in the trial court?"

The case is controlled by article 1293, Rev. St. 1895, and is answered in the affirmative.

SEERY v. GULF, C. & S. F. RY. CO.

(Court of Civil Appeals of Texas. Dec. 19, 1903.)

MASTER AND SERVANT—INJURY—OPERATING CAR—NEGLECT—ASSUMPTION OF RISK—EVIDENCE.

1. Where railway employes were transporting ballast on a push car for repair of the track, and had to remove the car from the track between trips, when replacing it on the track they were operating a car, within Sayles' Ann. Civ. St. 1897, art. 4560f, providing that a railway company shall be liable for injuries to a servant in operating a car through the negligence of any other servant.

2. Where a servant of a railway company was injured in helping to place a push car on the track, evidence that his fellow servants' feet slipped, causing the injury, is insufficient to show them guilty of negligence for which the company is liable.

3. Where one had been a railway section foreman 17 years, and handled push cars constantly, though not of the same kind as the one by which he was injured, the company was not negligent in failing to notify him of the unusual weight of that car, where its size and construction were open to observation.

4. Where the size and construction of a push car were open to observation, and an experienced section foreman had seen others operate it, he assumed the risk of injury from operating it with the assistance of too few men to handle it safely.

Appeal from District Court, Hunt County: T. D. Montrose, Special Judge.

Action by J. H. Seery against the Gulf, Colorado & Santa Fé Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Evans & Elder, for appellant. J. W. Terry and Perkins, Craddock & Wall, for appellee.

TALBOT, J. Appellant, Seery, brought his action against the Gulf, Colorado & Santa Fé Railway Company to recover damages for personal injuries alleged to have been received by him through appellee's negligence. A jury was called and impaneled to try the case, and when the evidence closed the court

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 312.

instructed the jury to return a verdict in favor of the defendant, which was accordingly done, and judgment entered thereon.

Appellant alleged substantially, among other things, that at the time he was injured he was employed by appellee as section foreman, and had been directed by the road master to repair a defective place in the railroad track discovered on that portion of the same which appellant's duties required him to work; that he was furnished a push car with which to convey over appellee's railroad track ballast to be used in performing the service required of him. The acts of negligence alleged are: "The failure of the defendant to furnish a sufficient number of persons to handle the push car; that they were engaged in the work of operating a car, and plaintiff was injured by the negligence of one of the sectionmen, in this: by failing to use ordinary care and caution in lifting said car, or by failing to sustain and hold said car while assisting in lifting the same, or by negligently permitting the same to fall, or by turning the same loose when he knew or could have known that plaintiff was assisting in holding up and lifting the car, and would likely be injured if the same was turned loose or permitted to fall."

There is but one assignment of error presented, which is as follows: "The court erred in sustaining the motion for a peremptory instruction, and in giving the charge instructing the jury to return a verdict for the defendant, and in overruling the plaintiff's first amended motion for a new trial, for the reasons: Because the undisputed testimony established the liability of the defendant on two causes of action alleged by the plaintiff, in this: Plaintiff alleged that at the time he was injured he and three other persons were engaged in the work of operating a car, and that by reason of the negligence of one of the men, who negligently turned the car loose, plaintiff was injured by the car running against him; or that the defendant negligently and carelessly failed to furnish a sufficient number of employes to handle said car; that while trying to place said car on the track, and without the knowledge of its weight, and not ever having an opportunity to acquire such knowledge, one of the employes turned loose his hold because of the excessive weight of the same, thereby letting the car run against plaintiff, and injuring him; and if plaintiff knew of the weight of said car, or was chargeable with the knowledge of such weight, then that they undertook to handle such car under stress of great emergency to prevent the destruction of life and property, and under circumstances not admitting of deliberation."

Plaintiff was section foreman over that portion of the railroad track which he was endeavoring to repair, with authority to command and direct the men under his control. When injured he and three men subject to his orders were attempting to put the push

car which had been furnished him by appellee on the railroad track, to convey some ballast or other material to the point where the track was defective. This, among other things, was the design of this car, and when in use was operated by being pushed along and over appellee's railroad track from place to place by the men in charge thereof, as their work required, and when not in use, or when passenger or freight trains approached, was removed from the track to permit them to pass. At the time appellant was hurt there was no superior officer present, and he was in charge of and directing the work in which he and the men under his control were engaged.

That the push car was a car, within the meaning of article 4560f, Sayles' Ann. Civ. St. 1897, and that the appellant and those employed with him were engaged in the work of operating the car, we believe has been definitely settled. *Texas & Pacific Ry. Co. v. Webb*, 72 S. W. 1044, 7 Tex. Ct. Rep. 34. A distinction has been drawn between the *Webb Case*, supra, and the case of *Lakey v. Texas & Pac. Ry. Co.* (Tex. Civ. App.) 75 S. W. 568, by Chief Justice Garrett, of the Galveston court, who delivered the opinion in the latter case. The distinction is based upon the difference in the work in which the men were engaged. The facts of the respective cases are substantially stated in the opinion in *Lakey's Case*, which are as follows: In *Webb's Case*: "Webb and a fellow servant, Greathouse, were engaged in loading stone at a quarry on a push car, which, when loaded, they ran down an inclined switch track to a rock crusher. Their duty was to load the car, mount and start it, and control its movements by brakes, and after unloading it at the rock crusher to push it back to the quarry for another load. While they were loading the car Greathouse negligently threw a stone on Webb's foot and injured it." In *Lakey's Case*: "The men were laying steel in the construction of a railway track. They were not loading, transporting, and unloading the rails, and for that purpose operating the car, but their work consisted of taking the rails from the car or unloading them only, so far as the car was concerned; not ending there, however, but ending only with the laying of the rails on the ties and heeling them ready for the spikers." In commenting upon the facts Judge Garrett says: "In the present case [*Lakey's Case*] the men were engaged in track-laying, and for convenience in handling the steel rails were laid on a hand car, from which, over a dolly fixed in the front end, they were dragged into place. In *Webb's Case* they were transporting stone, and for that purpose were operating the car." The facts in the case at bar, we think, more nearly approach the facts in *Lakey's Case*. Here appellant and those engaged with him in the work had set about repairing the weak and defective place in appellee's railroad track. In the accomplishment of this work it

became necessary to transport ballast to that point. This was to be done by loading the same on the push car, and by the men then pushing the car over the railroad track to the place where the ballast was to be used. The number of trips required to transport the necessary material to repair the track is not shown, but we conclude that appellant and his men were engaged in the operation of a car, within the meaning of the statute referred to, at the time he was injured. That the car at the time appellant was hurt was off the track is, in our opinion, of no consequence. In endeavoring to place the car on the track to be used for the purpose stated, the operation of it was begun. The putting of the car off and on the track was contemplated and necessary in the use to which it was being put, and an essential step in the operation of it.

It is insisted by appellant that the evidence fairly raises the issues of negligence on the part of appellee in the particulars set out in his assignment of error, and that the court erred in refusing to submit them to the jury. In this contention we do not concur. We have carefully considered the evidence as disclosed by the record, and conclude that the court correctly instructed a verdict for the appellee. The contention of appellant is, in effect, that the push car was heavier than others with which he had worked, and at the time injured was unknown to him; that appellee knew the weight of the car, and was negligent in failing to inform appellant of its weight, and in failing to furnish him a sufficient number of men to safely handle it; that the men assisting in operating and attempting to place the push car on the railroad track negligently permitted the same to fall or run back on him, proximately causing his injury; that this negligence consisted in the slipping of their feet, which caused them to turn the car loose, or in the failure to exercise ordinary care to prevent injury to appellant in lifting and holding said car. We have scrutinized the evidence closely, and unless it can be said that the mere proof of the slipping of the feet of one or both of the men handling the front end of the car, while endeavoring to place it on the track, was negligence, then, in our opinion, there was no evidence of negligence in this respect, or, if any, that it was so slight and wanting in probative force as clearly justified and required the action of the trial court in refusing to submit the issue to the jury. There is no evidence in the record that Talley and Massey, whose feet it is claimed slipped and caused the car to strike appellant, or either of them, failed to exercise ordinary care in stepping or placing their feet. In *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059, the Supreme Court says: "From a careful examination of the cases it appears (1) that it is the duty of the court to instruct a verdict, though there be slight testimony, if its probative force be so weak that it only raises a mere surmise or suspicion of

the existence of the fact sought to be established, such testimony, in legal contemplation, falling short of being 'any evidence'; and (2) that it is the duty of the court to determine whether the testimony has more than that degree of probative force. If it so determines, the law presumes that the jury could not reasonably infer the existence of the alleged fact," and "that there is no room for ordinary minds to differ as to the conclusion to be drawn from it." We believe the rule here announced is applicable to the facts of the case under consideration, and establishes the correctness of the trial court's conclusion upon this issue of appellant's case.

The remaining question is, was the appellee negligent in failing to notify appellant of the weight of the push car, and in failing to furnish him a sufficient number of men to handle it? Under the facts in this case, we do not believe it can reasonably be said that appellee was negligent in either of these respects, or that the appellant is in a position to insist upon a recovery by reason of such failure on appellee's part, if any. The evidence shows that he was an experienced section foreman, having been engaged in that character of work for many years. He testified: "Have been in the United States over twenty years, during which time I have been a railroad man all the time, all of which time has been devoted to track service. I have been foreman of a section for the last seventeen or eighteen years. I think I understand the business of section foreman. I have always had a hand car while section foreman, and in addition have always had a push car on the section. The particular car with which I was injured was sitting down at the bottom of the dump, in plain view. It was not covered up or hidden that morning when we put it on the track. It was set there where a man could see it, one end of it up tolerably close to the rail, and the other down at the bottom of the dump. I could see it just like I see that table setting there; could see the sides of it; could see what kind of wheels it had; could see what kind of handholds it had; and there was nothing hidden about it. I had not had but three men with me since the 1st of January, 1900." The rule announced that the duty devolves upon the master to give caution as to danger where an inexperienced servant enters upon a dangerous service, or where defective machinery is furnished, and the defect is apparent, but the danger hidden or remote in its connection with the defect, is not applicable here. The appellant was a vice principal in the service of appellee. He was thoroughly acquainted with the nature and character of the work in which he was engaged when injured. The size and construction of the push car with which he was at work was open to his observation. The material of which it was constructed was apparent, and no part thereof concealed. He had seen his men handle the car on another occasion, although he had not

handled it himself, and after appellant was injured it appears the three men under his control by a simple method placed the car on the railroad track. If the car was too heavy to be safely handled by appellant and the men assisting him—which is not admitted—still that fact was known to him before he was hurt, or by the exercise of ordinary care in the discharge of his duties he must necessarily have known it. *Eddy v. Rogers* (Tex. Civ. App.) 27 S. W. 295; *G., C. & S. F. Ry. Co. v. Williams*, 72 Tex. 163, 12 S. W. 172; *Texas & Pac. Ry. Co. v. Bradford*, 66 Tex. 732, 2 S. W. 505, 59 Am. Rep. 639; *I. & G. N. R. R. Co. v. McCarthy*, 64 Tex. 632.

The facts of this case do not bring it within the principle of those cases wherein the party suing has been excused from the charge of contributory negligence because of his efforts to save human life, where the danger was imminent.

Appellant having assumed the risks naturally and ordinarily incident to his employment, and his injuries being the result of such risk, he was not entitled to recover, and the judgment of the court below is affirmed.

SAN ANTONIO & A. P. RY. CO. v. BROCK et al.

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

APPEAL—FILING BRIEFS IN COURT BELOW— DELAY—DISMISSAL.

1. Under Rev. St. 1895, art. 1417, providing that, when a brief is filed by appellant in the trial court, the clerk shall give notice to the appellee of such filing, and that in 20 days after such notice the appellee shall file a copy of his brief with the clerk, the appellee has 20 full days after the day of notice in which to file the brief; and where appellant's briefs were filed on November 4th, and the case was set for submission in the appellate court on November 25th, as the 20 days would not have expired until the last moment of the 25th, the full 20 days to which the appellee was entitled had not expired, and the appeal will be dismissed.

Appeal from District Court, Milam County; J. C. Scott, Judge.

Action between the San Antonio & Arkansas Pass Railway Company and Mrs. Bunny Brock and others. From a judgment for the latter, the former appeals. On rehearing on motion to dismiss appeal. Motion overruled, and appeal dismissed.

Duncan, Walters & Lane, for appellant. Henderson, Morrison & Freeman, for appellees.

On Rehearing.

FISHER, C. J. At a former day of this term, we dismissed the appeal on motion of appellees, for the reason that the appel-

lant had not complied with article 1417 of the Revised Statutes of 1895. The record was delivered to the attorneys for the appellant on the 29th day of August, 1903, and was filed in this court on the 9th day of September, 1903. Appellant's briefs were filed in the trial court on the 4th of November, 1903. After the briefs were filed in this court, an order was entered by this court setting this case for submission on November 25, 1903. Appellees' motion, in effect, states that no notice was served upon them or their attorneys of the filing of the briefs in the trial court, and that they did not obtain knowledge that the briefs had been filed within time to have filed their briefs in this court before the day on which the case was set for submission. The statute requires that, when the brief is filed by the appellant in the trial court, the clerk of that court shall forthwith give notice to the appellee or defendant in error, or his attorney of record, of the filing of such brief, and that in 20 days after such notice the appellee or defendant in error shall file a copy of his brief with the clerk of the said court below; and with the clerk of the Court of Civil Appeals, four copies. This statute gives the appellee 20 full days after the day of notice in which to file brief in the Court of Civil Appeals. If we concede that it was the duty of the clerk of the trial court, immediately upon the filing of appellant's brief, upon the 4th day of November, to have notified the appellees of that fact, the appellees would not have had the full 20 days allowed by law prior to the day that the case was to be submitted under the order of this court. The statute uses the expression, "Twenty days after such notice, appellee shall file copies of his brief." Under a familiar rule of construction, the day of notice should be excluded; and, if this is the case, the appellees would have been entitled to the last moment of the 25th of November upon which to file their brief. The 20 days would not have expired until that time. It is seen from this that, when the case was called for submission during the working hours of the court on the 25th day of November, the time had not expired in which the appellees could have filed their brief. This case, upon principle, is not distinguishable from *Harris v. Pryson* (Tex. Civ. App.) 73 S. W. 548, and *G. C. & S. F. Ry. Co. v. Hall* (Tex. Civ. App.) 74 S. W. 778, and *Hunt v. Glasscock* (Tex. Civ. App.) 65 S. W. 209. The failure of appellant to comply with the statute has, in our opinion, according to the doctrine of the above cases, deprived the appellees of a substantial right.

The motion for rehearing is overruled, as, in our opinion, it states no good reason why the provisions of the statute were not complied with. Motion overruled.

¹ No written opinion.

ADAM et al. v. SANGER.*

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

DECEDENTS—ACTION AGAINST ADMINISTRATOR—EVIDENCE—TRANSACTION WITH DECEDENT—HARMLESS ERROR.

1. In an action against an administrator on a note executed by his intestate, testimony of plaintiff that he had never made any contract with the intestate releasing him from liability on the note was not incompetent, as concerning a transaction with the deceased.

2. Where, in an action against an administrator on a note executed by his intestate, defendant did not claim that there was any express release of the intestate, but claimed that his discharge from liability on the note was shown by facts and circumstances, the exclusion of the testimony of plaintiff that he had never made any contract with the intestate releasing him from liability was not prejudicial, though it was competent.

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Suit by Minnie Adam and others against Sam Sanger, as administrator of the estate of I. Lowinger, deceased. From a judgment in favor of defendant, plaintiffs appeal. Affirmed. Motion for rehearing overruled.

Scarborough & Kimball, for appellants. D. A. Kelley, for appellees.

FISHER, C. J. This is a suit brought by Minnie Adam and her husband, B. Adam, against Sam Sanger, as administrator of the estate of I. Lowinger, deceased, to establish a claim for \$1,050, besides interest, which had been rejected by said administrator upon the ground that the original note given in 1898 to plaintiff by Joel Robinson and I. Lowinger had been substituted by a new note in 1899, given by Robinson alone, and secured by a deed of trust upon real estate, signed by said Robinson alone, which deed of trust had been foreclosed by the plaintiff Minnie Adam, joined by her husband, she having derived the proceeds from the sale of the property described in the deed of trust; that by virtue of such proceedings Lowinger had been released from liability upon the original note, which is the note here now sued upon, and which note was not produced nor properly accounted for by plaintiff. The district court sustained Administrator Sanger in his contention, and decided that the estate of I. Lowinger was not liable to the plaintiff, and decided the case in favor of the administrator, from which decision the plaintiff Minnie Adam, joined by her husband, has taken an appeal, which appeal is here now presented.

We find that the note sued upon was executed by Robinson and Lowinger, and there is evidence in the record which justifies the conclusion that Lowinger was a surety of Robinson upon this note, and that subsequent to its execution Robinson gave a new note, payable to the appellant, and executed a deed of trust on property owned by him to secure this new note; that this new note was executed in lieu of the note sued upon; and the

facts justify the inference that the intention was to release Lowinger from the note in controversy.

The writer of the opinion entertains some doubt as to the correctness of the ruling of the trial court in excluding the evidence set out in appellant's first and second assignments of error, but we have reached the conclusion that there was no error in this ruling, as the evidence sought to be introduced tended to show a transaction between appellee and the deceased, Lowinger.

The evidence objected to in appellant's third assignment of error was admissible. The record in the case of Mortgage Company v. Joel Robinson, in which proceeding the appellants were parties, had a tendency to show that the appellants relied upon the last note executed by Robinson alone, which was secured by certain real property in Waco, and this evidence had some bearing in tending to establish the fact that Lowinger was released from the note sued upon.

Our conclusions of fact dispose of appellant's fourth and fifth assignments of error.

We find no error in the record, and the judgment is affirmed.

On Rehearing.

(Jan. 6, 1904.)

The appellants in their motion for rehearing state that there is no evidence in the record justifying the conclusion of this court that Lowinger was a surety of Robinson on the note sued on, and that Robinson gave a new note in lieu of this note, and that the facts justify the inference that the intention was to release Lowinger from the note in controversy. The deductions and inferences to be drawn from the facts stated in the record justified the conclusion that Lowinger was released from the note in controversy. The statement that there was no evidence showing that Lowinger was a surety of Robinson is in direct conflict with the following evidence, found on pages 25 and 26 of the record: Joel Robinson testified as follows: "In 1898 I borrowed \$1,000 from Minnie Adam, giving my note for same, with Lowinger as surety, on one year's time." Plaintiff B. Adam, while a witness on the stand in his own behalf, was asked the following question: "If he at any time made any contract or agreement to discharge Lowinger from his obligation on said note." This was objected to, on the ground that it involved a transaction with the deceased, Lowinger, which objection was sustained by the court. The answer of the witness would have been, if he had been allowed to testify, that he had made no contract releasing or discharging Lowinger, and that he made no agreement to accept the individual obligation of Robinson and to release Lowinger. In the original opinion this court held that there was no error in the trial court's declining to admit this evidence, but there was some doubt expressed by one

*Writ of error denied by Supreme Court.

of the members of the court as to the correctness of this ruling. Upon reconsideration we have reached the conclusion that the testimony was admissible; that it did not come within the prohibition of the statute. It did not relate to a transaction with the deceased, but was merely negative in character, to the effect that the plaintiff had not had any such transaction with the deceased of a nature that would release the deceased, Lowinger, from the note sued on. If the purpose had been to prove a transaction with Lowinger, it would come within the purview and meaning of the statute; but the object of this testimony was to establish the fact, not of a transaction, but that no such transaction ever occurred.

While we are inclined to the opinion that the evidence was admissible, we are clearly of the opinion that if it had been admitted it would not have influenced the trial court to a different conclusion. There is no pretense upon the part of the appellees that there was any express release of Lowinger or contract to that effect between him and Adam; but his release and discharge from liability upon the note in controversy arises by reason of the facts and circumstances which are shown by the evidence, these circumstances being of a nature that would authorize the conclusion by the trial court and this court that Lowinger was released, although there might have been positive testimony to the effect that he was never formally discharged by Adam, nor that there was any contract to that effect between those parties. If Adam had been permitted to testify that there was no contract releasing Lowinger, the trial court would doubtless have arrived at the same conclusion that was reached by it in disposing of the case. And if we concede that the testimony was admissible, we do not think that its exclusion was harmful or reversible error. *Beauchamp v. I. & G. N. R. Co.*, 56 Tex. 243, and cases there cited.

We are of the opinion that the answer to the question involved in the latter part of appellant's bill of exception No. 1 was not admissible. It related to a transaction with the deceased, Lowinger.

We find no reversible error, and the motion for rehearing is overruled.

TEXAS & N. O. R. CO. et al. v. JONES' EX'RS.

(Court of Civil Appeals of Texas. Dec. 19, 1903.)

CONVERSION—TRESPASS—DAMAGES.

1. Where a trespass is committed under a mistaken belief of right, and timber is cut down, and manufactured, and sold to an innocent person, the measure of damages against the latter for conversion is the value of the trees, and not of the manufactured lumber.

Appeal from District Court, Henderson County; John Young Gooch, Judge.

Action by the executors of Joella Jones, deceased, against the Texas & New Orleans Railroad Company. Judgment for plaintiffs. Defendant appeals. Modified.

Jno. A. Mobley, N. R. Bishop, and M. H. Gossett, for appellant. Faulk & Faulk, for appellees.

RAINEY, C. J. This suit was brought to recover damages for the conversion of certain timber taken from plaintiffs' land and converted into cross-ties, the damages claimed being the value of the ties. The cause was tried without a jury, and judgment rendered for plaintiffs for the value of the ties "in their manufactured condition at the time defendant railroad company bought them and converted them."

The case was tried upon an agreed statement, as follows: "Agreed statement of facts: That G. A. Jones sold 150 ties in the tree to R. A. Grogan, tie contractor, which in fact was on land owned by plaintiffs, but which land was by the said G. A. Jones believed to be covered by deed from J. Z. Isler to said Jones, and which land G. A. Jones in good faith, on reasonable grounds, believed to be his at the time said timber was sold and cut. That J. T. Meredith, an experienced land, record, and instrument man and surveyor, with G. A. Jones' deed in his hand, and read and examined by him, located the land on which said timber was cut as being the land covered by deed to G. A. Jones by J. Z. Isler, and thought from said deed that same was G. A. Jones' land. That the said J. T. Meredith has since said survey, after full investigation, concluded that the field notes in deed from Isler to G. A. Jones do not in fact embrace land on which said 150 ties were cut. That R. A. Grogan bought said 150 ties in timber from G. A. Jones, had it converted into ties, and sold them to the T. & N. O. R. R. Co. for 35 cents per tie. That the market value of manufactured ties is 35 cents per stick. That the market value of tie timber in the tree as sold by Jones is 6 cents per stick. The question of law, under the above statement of facts, is, liability of defendant to plaintiffs for 6 cents or 35 cents per tie."

It will be seen that the only issue is as to the measure of damages—whether defendant was liable for the value of the tie timber in the tree or the value after it was manufactured into ties.

The learned trial judge in his findings of law followed what he conceived to be the holding in *Ry. Co. v. Starr* (Tex. Civ. App.) 55 S. W. 393, and *Brown v. Pope*, 65 S. W. 42, 3 Tex. Ct. Rep. 279, and held that the measure was the value of the ties in "their manufactured condition." In this we think there was error. The facts in those cases show that the trespass was willful, and no necessity existed for making a distinction between the facts in those cases and a case like the present, where it is shown that the

trespass was committed under a mistaken belief of right. In the Starr Case, *supra*, the holding was based in a great measure on the case of *Bolles' Woodenware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, which supports the holding. In the latter case the facts show the trespass to have been willful, and the plaintiff was authorized to recover for the increased value, though the timber had passed into the hands of an innocent party. But it was further held therein that where the trespass was made under an honest mistake a different rule prevails. The court says: "The weight of authority, in this country as well as in England, favors the doctrine that, where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition." This is a fair and just rule, and should control in this case. This holding does not conflict with the holding in the Starr Case nor the Brown v. Pope Case. The authorities of the various states are in hopeless conflict, and we will not attempt to reconcile them.

Under the agreed issue presented, we are to determine only as to the liability of defendants for either 6 cents or 35 cents per tie, and we conclude that its liability is only for 6 cents per tie. It is therefore ordered that the judgment be reformed and affirmed for \$9, appellees to pay costs of this appeal.

FIRST NAT. BANK OF WHITESBORO v. C. A. ANDREWS & CO.*

(Court of Civil Appeals of Texas. Nov. 28, 1908.)

PLEDGES — SALE OF PLEDGED GOODS — PROCEEDS — RIGHTS OF PLEDGEE — ESTOPPEL.

1. Defendant bank made advances to W., to be used to purchase cotton, under an agreement with W. to pledge to defendant the cotton so purchased, to secure the advances; and yard tickets representing the cotton purchased were delivered to defendant. Thereafter W. (who was indebted to plaintiffs for \$200), with defendant's consent, sold plaintiffs 800 bales of the cotton; and they, with notice of defendant's lien, claimed the right to take out of the proceeds the amount of W.'s indebtedness. *Held* that, since the entire purchase price of the cotton was less than the total amount advanced by defendant to W., defendant was entitled, as against plaintiffs of whose claim it had no notice, to receive the whole amount paid for the cotton.

2. Where cotton was pledged to a bank to secure advances, and was subsequently sold by the pledgor to plaintiffs with the bank's consent, but the latter had no knowledge of an agreement between plaintiffs and the pledgor that plaintiffs should be entitled to deduct a previous indebtedness of the pledgor from the price, and the bank, immediately on ascertaining that such indebtedness had been deducted, refused to consent, and charged back to plaintiffs the amount of a credit for such debt which

had been made to plaintiffs' account under a mistake as to the amount of the price, the bank was not estopped by such credit to deny plaintiffs' right to deduct such indebtedness.

3. Where a buyer of cotton negligently or wrongfully failed to impart to a bank, to which the cotton had been pledged to secure advancements for the price, the terms and correct amount of the sale, the fact that the bank could not put the parties in statu quo after learning that the real price paid for the cotton was \$200 in excess of that reported, and its refusal to permit the buyer to retain such sum in payment of the pledgor's previous indebtedness, did not estop the bank from claiming the entire purchase price, necessary to satisfy its advances.

Error from Grayson County Court; G. P. Webb, Judge.

Action by C. A. Andrews & Co. against the First National Bank of Whitesboro. From a judgment in favor of plaintiffs, defendant brings error. Reversed.

Hamp. P. Abney, for plaintiff in error. B. L. Jones and Smith & Beaty, for defendants in error.

TALBOT, J. On the 25th day of January, 1902, and prior thereto, C. Wilson was a cotton buyer in the town of Whitesboro, and the defendants in error were cotton merchants in the city of Sherman. Wilson had bought 1,100 bales of cotton, with money furnished to him by plaintiff in error for that purpose. By contract between Wilson and plaintiff in error, this cotton was pledged to plaintiff in error to secure the payment of the money advanced for its purchase. As an evidence of this pledge, and a delivery of said cotton to plaintiff in error, "yard tickets" were issued by the cotton yard at Whitesboro as the cotton was paid for, and turned over to plaintiff in error. Wilson, by consent of plaintiff in error, on the 25th day of January, 1902, sold to defendants in error 800 bales of said cotton, at the price of 7.58 cents per pound, basis middling, amounting to the sum of \$30,316.56. At this time Wilson was indebted to defendants in error in the sum of \$200 on an old account, and they agreed to pay more for the 800 bales of cotton than its market price, with an agreement with Wilson that \$200 would be deducted from the price to be paid by them, and applied to the satisfaction of said old account. This agreement was unknown to plaintiff in error. When the cotton was sold to defendants in error, it was agreed that drafts made by them upon parties to whom they might sell said cotton should be sent through the First National Bank of Whitesboro, the plaintiff in error. Defendants in error knew at the time they purchased the cotton from Wilson that it was pledged to plaintiff in error by him to secure the payment of the money advanced by it on same. After defendants in error purchased of Wilson, they sold the cotton for the sum of \$31,087.09, and wrote a letter to plaintiff in error, dated February 1, 1902, in which they inclosed drafts on the purchasers for the full sum of \$31,087.09,

*Rehearing denied January 2, 1904.

with instructions to place \$30,316.56 of said amount to the credit of Wilson, when collected, and the balance, \$770.53, to their own credit. There was nothing in this letter that notified plaintiff in error that the cotton had been sold by Wilson to defendants in error for more than \$30,316.56; and at this time it did not know that the cotton was really sold by Wilson for \$30,316.56, and, in accordance with defendants in error's instructions, placed to their credit the \$770.53. On February 4, 1902, plaintiff in error wrote a letter to defendants in error, requesting them to send to it a bill of the cotton, to enable them to "check up the grades and price." In answer to this letter, defendants in error rendered a statement of the cotton, showing the price paid Wilson to be \$30,316.56. Upon the receipt of this statement, plaintiff in error promptly notified defendants in error, by letter, that it would not allow the \$200 item to be credited on account due them by Wilson, and that they had only placed to their credit \$570.53. There was a conflict in the evidence as to how much the price paid by defendants in error exceeded the market price, but that the price paid was more than the market price is undisputed. The total amount for which said cotton was sold to defendants in error was insufficient to pay off and satisfy the debt due by Wilson to plaintiff in error, for the payment of which said cotton was pledged. This suit was instituted to recover the \$200 agreed by Wilson to be allowed in payment of the old debt due by him to defendants in error in the justice's court of Grayson county, which resulted in a judgment in favor of defendants in error. Plaintiff in error perfected an appeal to the county court, and, on a trial in the latter court, judgment was rendered for defendants in error for the sum of \$90, from which judgment a writ of error is prosecuted to this court.

The contention of plaintiff in error is that, the cotton having been pledged to it to secure the payment of the sums advanced to Wilson, it was entitled to receive the whole amount paid therefor by defendants in error, if necessary to discharge its debt, although they may have paid more than its market price; that it was in no way bound by the agreement between Wilson and defendants in error, to which it was not a party, and of which it had no knowledge at the time; that it is not bound by its action in crediting defendants in error with the \$200 claimed, because such credit was entered under the belief, induced by defendants in error's letter, that Wilson had sold them the cotton for the sum of \$30,316.56; and that it recalled the credit and corrected the mistake as soon as it ascertained that the cotton sold for \$200 more than represented. We are of the opinion that this contention must be sustained. The undisputed evidence shows that, by an express contract between plaintiff in error and Wilson, it held the cotton pledged

as security for the payment of the sums of money advanced for its purchase, and defendants in error were aware of that fact. The amount due by Wilson, and for the payment of which said cotton was pledged, exceeded the amount derived from the sale of the same, at the price agreed to be paid by defendants in error therefor; and, by the terms of its contract with Wilson, plaintiff in error was entitled to the entire proceeds of the sale. With a knowledge of the contract between plaintiff in error and Wilson, no agreement between defendants in error and Wilson, without the consent of plaintiff in error, by which any part of the purchase price of the cotton was to be diverted from the payment of Wilson's debt to plaintiff in error, was binding upon it. It will be noted that the trade between defendants in error and Wilson was that they were to pay him 7.58 cents per pound for the cotton; the full amount to be collected by plaintiff in error through drafts drawn on purchasers from defendants in error, and \$200 of the amount placed to their credit. Plaintiff in error had a right to insist on a strict compliance with its contract with Wilson, and to have whatever the cotton sold for applied to the liquidation of the debt due it by Wilson, regardless of the market price of the cotton. An agreement between defendants in error and Wilson, to which plaintiff in error was not a party, to the effect that they were to deduct from the amount agreed to be paid for the cotton a sum equal to the old debt due by Wilson to them, cannot be enforced, to the injury of plaintiff in error.

The theory of estoppel advanced by defendants in error finds no warrant in the evidence before us. It is admitted that defendants in error bought with knowledge that the cotton was pledged to plaintiff in error, and, so knowing, they sent drafts to plaintiff in error for collection, with instructions to credit Wilson, when collected, with what it supposed to be the full amount they had paid Wilson for the cotton. They did not inform plaintiff in error that Wilson had agreed to deduction of \$200, to be applied to a debt due by him to them; and they knew nothing of such an agreement, and did not have knowledge of any fact to put them upon inquiry of any such agreement until after the credit was entered. From the letter written, inclosing the drafts, the conclusion reached by plaintiff in error, that the cotton sold for \$30,316.56, was the most natural and reasonable conclusion that could have been arrived at. Under this mistaken belief created by the conduct of defendants in error, it allowed them a credit of \$200, which they had no right to demand, and which, it is fair to presume, plaintiff in error would not have allowed, had it been informed of the truth of the matter. Indeed, as soon as it was informed of the real purchase price of the cotton, the \$200 credit was charged back, and defendants in error notified of the fact,

That it was then too late to restore the status quo can make no difference. This condition of affairs was brought about by the neglect or wrongful act of the defendants in error, in failing to impart to plaintiff in error, at the proper time, the terms upon which they bought the cotton from Wilson, and they cannot now reasonably claim that plaintiff in error is estopped to retain the money in dispute.

The judgment of the lower court will therefore be reversed, and here rendered for appellant.

TEXAS MIDLAND R. R. v. LITTLE.*

(Court of Civil Appeals of Texas. Dec. 12, 1903.)

CARRIER OF PASSENGERS—UNWARMED DEPOT—ELEMENTS OF DAMAGE—INSTRUCTION.

1. In a husband's action for the suffering of his wife, occasioned by the unwarmed condition of defendant railroad company's depot, the fact that the wife was cold when she entered the depot would not affect the right to recover for suffering from continued or increased cold thereafter, occasioned by its unwarmed condition.

2. In a husband's action for suffering occasioned his wife by the unwarmed condition of defendant railroad company's depot, the court instructed that if plaintiff and his wife were not guilty of negligence in connection with her riding to the depot as she did, clad as she was, and if they did as persons of ordinary prudence would have done, and she became cold in going to the depot, and was cold when she entered it, and if the depot was not warm, and plaintiff's wife suffered from cold while there, which suffering was the result of the concurrent action of her going there, without negligence, and defendant's failure to have the depot warm, defendant would be liable for damages for the suffering of plaintiff's wife from cold while in the depot. *Held*, that the instruction was objectionable as leading the jury to understand that they could award damages for cold suffered by plaintiff's wife while in the depot, due to the combined effect of her ride thither and of defendant's negligence in failing to have its waiting room warm.

Appeal from District Court, Delta County; H. C. Conner, Judge.

Action by G. A. Little against the Texas Midland Railroad. Judgment for plaintiff, and defendant appeals. Reversed.

Chas. W. Ogden, A. H. Dashiell, and W. H. Lipscomb, for appellant. King & Guthrie and L. L. Wood, for appellee.

TALBOT J. This action was brought by G. A. Little against the Texas Midland Railroad to recover damages alleged to have been sustained by him in consequence of cold and sickness suffered by his wife by reason of the failure of defendant to have its passenger depot at Enloe, a station on its line of railway, comfortably warm for the accommodation of his said wife, as a passenger, while waiting for the arrival of the

train on the 1st day of February, 1902. The trial resulted in a verdict and judgment for the plaintiff for \$150, and defendant has appealed.

On the afternoon of February 1, 1902, the plaintiff and his wife left their home, about six miles distant in the country, and drove, in an open wagon, to the said station, with a view of Mrs. Little taking the train over defendant's railroad for Commerce, Tex., to visit a sick relative. They were accompanied by Mr. and Mrs. Priest and their children, also relatives of the sick person at Commerce. Plaintiff alleges, in substance, that his wife was warmly clad and wrapped, and when she reached defendant's depot was not extremely cold, but slightly so. That there was no fire in the depot of defendant when she entered it, and the same was very cold. That the floor of said depot was wet and muddy, and the doors standing open. That she arrived at said depot about 45 minutes before the arrival of the train, and was compelled to remain therein that length of time waiting for the train, and continued to grow colder, and suffered very much therefrom. Plaintiff further alleged, as an additional cause of action, that his wife was made sick with a disease called la grippe, by reason of her exposure to cold while remaining in defendant's depot, and claimed and sought to recover damages therefor. Plaintiff further alleged that if his wife's suffering from cold while in said depot, and her said sickness, were not caused solely by reason of defendant's failure to have said depot warm, then such suffering and sickness was the proximate result of the concurrent action of her going from her home to the depot in the cold, though without negligence on her part or that of himself, and the negligent failure of defendant to have said depot warm.

When the introduction of the evidence closed, the court was requested, in writing, to instruct the jury to return a verdict for the defendant. This was refused, and is made the basis of the defendant's first assignment of error, which is insisted upon with much earnestness. A careful examination of the evidence as contained in the record, however, satisfies us that the action of the court in refusing the instruction was correct. There were two grounds of recovery alleged: First. That the failure of defendant to have its depot warm for the accommodation of plaintiff's wife while waiting therein for the arrival of the train upon which she intended to take passage caused her to suffer physically and mentally from cold during the time she remained in said depot. Second. That by reason of defendant's failure to have its said depot comfortably warm, and his wife's exposure to and suffering from cold while remaining therein, she was made sick with la grippe, and suffered physically and mentally therefrom, and otherwise resulted in damages to him for lost services

*Rehearing denied January 2, 1904.

of his wife and for medical attention and doctor's bill incurred.

The duty is imposed upon railroad companies by statute in this state to have their depots warmed for the comfort of all passengers who are entitled to go therein, for a time not less than one hour before the arrival and one hour after the departure of passenger trains, and are made liable to the party injured for all damages sustained by reason of such failure. Whatever doubt may exist as to the sufficiency of the evidence to warrant the submission of the issue whether Mrs. Little's sickness was caused by cold suffered while she remained in defendant's depot at Enloe, or was caused by her exposure to and cold suffered before she reached said station and after she left it, there seems to be none as to the sufficiency thereof upon the issue that she suffered with cold while in the depot by reason of defendant's failure to have said depot warm. If defendant failed to have its depot warm for the comfort of plaintiff's wife, and she suffered with cold while there by reason of such failure, then defendant could not claim immunity from liability for damages sustained by plaintiff, because his wife may have been cold when she entered said depot. It is no less the duty of railway companies to provide warm depots for persons who go there cold, to become passengers on their trains, than for those who may arrive there in a warm and comfortable condition; and if plaintiff's wife went into said depot cold, and continued to suffer with such cold or with increased cold while she remained in said depot, on account of defendant's failure to provide fire and properly warm the same, then defendant would be liable to plaintiff for such damages as he sustained by reason of such suffering of his wife. But defendant would in no event be liable for any suffering experienced by plaintiff's wife from cold before she reached said depot.

The fourth paragraph of the court's charge reads as follows: "If, however, you believe from the evidence that the plaintiff was not guilty of negligence, as hereinbefore defined, in conveying his wife to the depot at the time he did and in the manner he did, clad as she was, and the plaintiff's wife was not guilty of negligence in going at the time she did and in the manner she did, clad as she was; that is, taking all the circumstances into consideration, if the plaintiff and his wife, in going to said depot at the time they did, in the manner they did, did in all respects as a person of ordinary prudence would have done under the same circumstances, and the wife became cold in going to said depot, and was cold when she went into said depot; and if you further believe from the evidence that the depot was not warm when she arrived in the same, and that plaintiff's wife suffered from cold while in said depot; and further believe that such suffering was the result of the concurrent

action of plaintiff's wife going there, without negligence on her part, or of plaintiff (if you find they were not negligent), and the failure of the defendant to have said depot warm—the defendant would be liable to the plaintiff for such damages to the plaintiff for the suffering of his wife from cold while in said depot, if she did so suffer, unless she was guilty of negligence in remaining in the depot, in which event the defendant would not be liable." This charge is objected to on the ground that it authorized the "jury to find for the plaintiff such damages as they might see fit to award because of the discomforts and sufferings to which his wife was subjected by reason of being cold while in defendant's depot, if the jury should find that her suffering from cold while she was there was due to the combined effect of the ride in an open wagon from her home to Enloe and of the negligence of the defendant in failing to have its waiting room warm." We believe the objection urged is well taken. No matter what may be understood to be the proper interpretation and legal effect of this charge by the trained and analytical mind of the lawyer, yet we believe to the understanding of the average juror it would convey the idea that they were authorized to take into consideration the cold suffered by plaintiff's wife, before she reached defendant's depot, in estimating the amount of damages plaintiff was entitled to recover. If this was not the strict legal effect of this charge, it is so framed that the jury doubtless so understood it.

By defendant's sixth assignment of error the same objection as the above is urged to the sixth paragraph of the court's charge. This paragraph related to that branch of plaintiff's cause of action where he alleges that his wife was made sick with la grippe by reason of the cold she suffered while in defendant's depot at Enloe, because of the failure to have the same warmed; and that if such failure on defendant's part was not the sole cause of such sickness, then such sickness was the proximate result of the concurrent action of his wife in going there and the failure to have said depot warm. Practically the same vice exists in this paragraph of the court's charge as is found in the fourth paragraph above set forth, and, for the same reason given for holding that the fourth paragraph is erroneous, this assignment must be sustained.

In view of another trial we deem it proper to suggest that, in framing the charge to the jury, care should be taken to so word the same as to exclude from the consideration of the jury the cold and suffering of plaintiff's wife experienced before she reached defendant's depot.

We believe the special charge requested, as shown by the second assignment of error, does not state a correct proposition of law, and that the court properly refused to give

it. For the error in the charge, the judgment of the court below is reversed and remanded.

N. A. MATTHEWS' LUMBER CO. v. VAN ZANDT COUNTY.*

(Court of Civil Appeals of Texas. Dec. 5, 1903.)

COUNTIES — ROAD OVERSEERS — AUTHORITY — PURCHASE OF MATERIAL — COUNTY'S LIABILITY.

1. Batts' Ann. Civ. St. art. 4744, provides that a road overseer may take timber, gravel, etc., to build causeways and bridges, most convenient therefor, in which case the owner of the timber, etc., shall be paid out of the county treasury a fair compensation, to be determined by the commissioners' court on the owner's application. *Held*, that such section was based on the county's right of eminent domain, and did not authorize a road overseer to contract for the purchase of lumber for a specified price, to be used in making the causeways on a public road.

2. A road overseer is not an agent of the county so as to render it liable in its corporate capacity for purchases of lumber made by him for the repair of highways.

Appeal from Van Zandt County Court; John W. Davidson, Judge.

Action by the N. A. Matthews Lumber Company against Van Zandt county. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Yantis & Hubbard, for appellant.

TALBOT, J. In 1902-1903 R. E. Lee was road overseer on that section of the public road which leads from Edgewood to Stewarty Chapel, in commissioner's precinct No. 3 of Van Zandt county. While such overseer he bought from appellant a bill of lumber amounting to \$206.62, without authority from the commissioners' court of said county, which was used in making causeways in a creek bottom on said public road. The commissioners' court of said county made no order for said lumber, and had no contract whatever with appellant for the same. The appellant's bill was approved by Lee as road overseer, and by them presented to the commissioners' court for allowance. The commissioners' court at its February term, 1903, rejected and refused to allow said claim, and appellant brought suit thereon in the county court, and, having failed to recover, prosecutes this appeal.

The sole question for determination is: Can a county be held liable on a contract made by a road overseer, without an order or authority of the commissioners' court, for material to repair or improve one of its public roads? We find no statutory authority for such liability, and, after a review of the decisions of this state bearing upon the subject, are of the opinion that no such liability exists. The duties of a road overseer are prescribed by statute, and the only authority

conferred upon him by law to bind the county for material used in repairing public roads is found in article 4744, Batts' Ann. Civ. St., which reads thus: "When to the overseer it may appear expedient to make causeways and build bridges or to gravel any public road, the timber, gravel, earth, stone or other necessary material, most convenient therefor, may be used, but in such case the owner of such timber, or gravel, earth, stone or other necessary material, shall be paid out of the county treasury a fair compensation for the same, to be determined by the commissioners' court upon application of such owner."

It will be observed that no authority is given the road overseer by virtue of the above statute to agree upon and fix with the owner of such material the compensation to be paid by the county for the same, but the right to determine the amount of such compensation is vested in the commissioners' court of the county, upon application made therefor by the owner. The principle upon which this statute seems to rest is the rightful exercise of the right of eminent domain; and we believe the authority therein given is restricted to the taking under such right of that character of material named, found within and adjacent to such highway, and is no warrant for the making of contracts by road overseers for the purchase of material to be used in the improvement of public roads. The contention of appellant that road overseers are agents of the county, and that their acts in purchasing necessary material for the improvement of public roads are binding upon the county, cannot be sustained. The remarks of the learned judge who delivered the opinion in the case of *Watkins v. Walker County*, 18 Tex. 592, 70 Am. Dec. 298, wherein he says, "The overseers of roads are the legally constituted agents of the counties from which they receive their appointments, and what they do in the proper and necessary exercise of the authority conferred upon them the county in its corporate capacity is responsible for," does not warrant such contention. That suit was based upon a statute very similar, if not identical, with the present statute, and the remarks of the judge therein, above quoted, must be construed to have been made with reference to the particular facts of that case and the authority conferred upon the road overseer by virtue of the particular statute under which it appeared he acted, and not as an authoritative expression that road overseers, by reason of their relation to the county, have general authority to make contracts pertaining to the work imposed upon them, binding upon the county. We have been referred to the cases of *Rutherford v. Harris County* and *Monghon & Sisson v. Van Zandt County*, decided by the Court of Appeals, and reported in 3 Willson's Civ. Cas. Ct. App. §§ 114, 198, as authority for the position assumed by appellants, but we find these cases have been impliedly overruled by the case of *Fears v.*

*Rehearing denied January 2, 1904.

Nacogdoches Co., 71 Tex. 337, 9 S. W. 265. The control and management of county affairs have been confided to and vested by law in the commissioners' courts of the respective counties, and parties dealing with road overseers appointed by them must take notice that such overseers have no authority to bind the county, except as such authority is conferred upon them by law or by order of such court.

We believe the proper judgment was rendered by the court below, and it is therefore affirmed.

SHERMAN OIL & COTTON CO. v. DALLAS OIL & REFINING CO.

(Court of Civil Appeals of Texas. Dec. 12, 1903.)

SALES—BROKER'S NOTES—DELIVERY—CARS—SIZE—EVIDENCE—LETTERS—DEPOSITIONS—INTERROGATORIES—OBJECTIONS—INSTRUCTIONS.

1. Where, in an action for breach of a contract for the sale of oil negotiated through a broker, the broker's memorandum called for five tanks of oil, to be placed in the buyer's tanks, to contain about 135 barrels, a requested instruction that, if the seller either authorized or ratified the contract, he was bound to deliver 135 barrels to the tank, not exceeding the capacity of the cars furnished, and that the use of the word "about" would not excuse the seller from filling the tanks to their capacity, provided he was bound by the contract, was erroneously refused.

2. Where an oil manufacturer authorized certain brokers to make a contract for the sale of oil, the brokers had implied authority to stipulate the quantity which the seller was bound to put into the buyer's tank cars in which the oil was to be delivered.

3. The sustaining of an objection to an answer to an interrogatory in a witness' deposition was harmless where the witness was subsequently placed on the stand and testified.

4. In an action for breach of a broker's contract for the sale of oil, an answer of the broker, as a witness, to a question seeking to ascertain what the agreement was as to the capacity of tank cars to be furnished to take the oil, that he had an understanding with the seller that the cars were to be of 135 barrels capacity, was not objectionable as a conclusion of the witness.

5. Where a broker's contract for the sale of oil was silent as to the capacity of the tank cars in which it was to be delivered, parol testimony was admissible to show that it was orally agreed between the parties that such tanks should be of 135 barrels capacity.

6. A broker's contract for the sale of oil did not specify the size of the tanks in which the oil was to be delivered, and in an action for breach of the contract the broker was asked how many barrels of oil it would take to fill the order. He answered that it was understood between himself and the seller that the sale was for 10 Sherman tanks, 135 barrels capacity each, and that his failure to insert the capacity of the tanks was because sellers were usually acquainted with the capacity of buyer's tanks, and that the railroads required the tanks to be well filled; that when a sale is consummated the broker gives the seller the buyer's name, whereupon the seller understands that the tanks furnished are to be loaded to full capacity, etc. *Held*, that the answer was objectionable, as not responsive to the question.

7. Where an answer to an interrogatory in a witness' deposition contains matter pertinent

and impertinent, the court may exclude such part of the answer as is impertinent and admit the balance.

8. In an action for breach of a broker's contract for the sale of oil in tank cars, the capacity of which was not specified in the contract, a letter purporting to have been written by the broker to the seller on the receipt of the contract, objecting to such omission, and written to the seller in reply to a communication in relation to the contract, was admissible for the purpose of determining the agreement of the parties with reference to the capacity of the tanks.

Appeal from Grayson County Court; G. P. Webb, Judge.

Action by the Dallas Oil & Refining Company against the Sherman Oil & Cotton Company. From the judgment defendant appeals. Reversed.

Smith & Beatty, for appellant. Wolfe, Hare & Semple, for appellee.

RAINEY, C. J. This suit was instituted by appellee against appellant to recover damages for the breach of a contract to deliver cotton seed meal. Appellant recovered for damages for the alleged breach of several contracts to deliver cotton seed oil. The court instructed in favor of appellee for the full amount of its claim. As to this there is no controversy here. On the counterclaim of appellant the court submitted various issues to the jury, and the only question presented here arose on the counterclaim.

On September 25, 1899, a conversation was had over the phone between Hamilton & Co., brokers, and P. A. Fitzhugh, manager of appellee, by which it was agreed that appellee would sell to appellant ten tanks of oil, five to be delivered in October and five in November. In confirmation of this sale, Hamilton mailed to each, the appellee and appellant, two memoranda of sale, being identical, except one specified October shipment and the other November, as follows: "Dallas, Texas, 9, 25, '99. Dallas Oil & Refining Co., Dallas, Texas. Gentlemen:—Referring to the telephone messages exchanged between us this date I beg to confirm the following sale for your account to Sherman Oil & Cotton Company, Sherman, Texas, five tanks prime crude oil made from new seed at 20 cents per gallon of 7½ pounds f. o. b. the mill at Dallas, buyer's tanks, October shipment. Tanks to contain about 135 barrels. F. o. b. cars your station, sellers guaranteeing weights and quality. Shipping directions to be furnished by the buyer. Terms: Sight draft on the buyer with bill lading attached for full amount of the invoice. This memorandum of sale is made in triplicate—one copy being duly stamped and retained in this office, one copy being sent to the seller, and one to the buyer. Yours very truly, J. Hamilton & Co., as Brokers Only."

Fitzhugh denied that he ever received these memoranda. In the conversation over the phone between Hamilton and Fitzhugh the number of barrels a tank should contain was

not mentioned, and the contention of appellee is, in effect, that appellee was not bound by the memoranda as to the number of barrels the tanks should contain, but was only bound by the uses and custom of the trade, which was that 125 barrels constituted a tank when not otherwise specified; and, further, that if bound by said memoranda the same was ambiguous, and it was a question for the jury to determine therefrom what constituted a tank of oil. On the other hand, the appellant contends that the memorandum constitutes the contract between the parties, that it is plain and unambiguous in its terms, and it was the duty of the court to construe it, and the court erred in leaving its construction to the jury.

On this phase of the case the appellant asked the following charge, which was refused, to wit: "In this case, gentlemen of the jury, you are instructed that if the plaintiff either authorized the contracts of September 25, 1899, before they were made, or ratified them after they were made, the plaintiff was bound to deliver thereunder 135 barrels to the tank car, not exceeding, however, the capacity of the cars furnished, and the use of the word 'about' would not excuse the plaintiff from filling the tanks to their capacity, provided the plaintiff became bound by the contract." This instruction should have been given. There is no room for legitimate controversy as to the proper construction of the memoranda. Each calls for five tanks of oil. The oil was to be placed in the "buyer's tanks," and it specifically states "tanks to contain about 135 barrels." This last clause evidently refers to the quantity contracted to be sold. Otherwise it would be devoid of meaning and useless. The expression excludes the idea that "tank bottoms" was intended only.

The court also erred in refusing the following charge requested by appellant: "If the plaintiff authorized the brokers to make the sale of September 25, 1899, it was not essential that they should have expressly authorized them to stipulate the amount that the tanks should contain, for implied authority to do this would result for a general authority to sell the number of tanks of oil." This charge announced a correct principle of law applicable to the facts, and should have been given.

Defendant also alleged the breach of two other contracts made by appellee through O. Roane & Co., brokers, to deliver oil, one on March 20 and the other April 2, 1901. The March contract was for the delivery of ten tanks, to be forwarded in April and May, at 25 cents per gallon, loaded free on board buyer's tank cars at Dallas, Tex. The April contract was for five tanks, at 27½ cents per gallon, to be delivered in April, and specifies the capacity of the five tank cars sold to be 135 barrels each. The appellant complains of the court for leaving it for the jury to decide whether the shortage was under the March contract or the April contract, the con-

tention being that the undisputed evidence showed the shortage was under the March contract. While the evidence as shown by the record tends strongly to support appellant's contention, there is some evidence to the contrary, and we do not feel authorized to say that the evidence is undisputed, and that there was no shortage under the April contract.

On the trial the defendant offered in evidence the deposition of C. O. Roane, of Dallas county, Tex., and among others the following interrogatories and answers: "Interrogatory. Please state whether or not you had any conversation prior to the making of said contract (the contract of March 20, 1901) with the plaintiff or any of its officers with regard to the capacity of the tank cars that would be furnished to take the oil; and state what understanding or agreement there was, if any, to this effect. Answer. Yes; I had a distinct understanding with Mr. Fitzhugh, manager of the Dallas Oil & Refining Company, of the capacity of tank cars to be used to move this oil, agreement being 5 and 10 tanks, respectively, of 135 barrels capacity each." To the introduction of this evidence the plaintiff objected, on the ground that it contained a conclusion of the witness and his opinion, and he did not state what conversation occurred, but simply his conclusion of the effect of some conversation that it claimed to have occurred; and, further, that the contracts were in writing, and the written instrument the best evidence, and not subject to be varied by parol; which objection was by the court sustained, and said evidence excluded, to which action and ruling of the court the defendant then and there excepted.

This ruling was harmless, as Roane was subsequently placed upon the stand and testified. As the case will be reversed on other grounds, we deem it proper in view of another trial, to consider it. We think the action of the court was error. The interrogatory sought to ascertain what the agreement was as to the capacity of the tank cars that would be furnished to take the oil. The answer was a clear statement of the agreement, and cannot be termed a mere conclusion of the witness. The testimony cannot be considered as changing or varying the written contract of March 20, 1901. Said writing was silent as to the capacity of the tanks, and parol testimony was competent to show the agreement, if any, in that respect. When a contract is part written and part parol, it is always competent to show by oral testimony the part not written, provided the parol does not alter or vary the written part.

The appellant complains of the action of the court as shown in the following: On the trial the defendant offered in evidence the deposition of C. O. Roane, of Dallas county, Tex., and among others the following cross-interrogatory and answer: "Cross-Interrogatory. Examine the contract of March 20, 1901, and state under the expression of ten

tanks how many barrels of oil it would take to fill this order of ten tanks. It is a fact, is it not, that 1,250 barrels would fill this contract, and would be so understood by any and all dealers? Answer. While contract of March 20, 1901, reads ten tank cars of prime, well settled, crude, cotton seed oil, it was at the same time clearly understood between the seller, Mr. Fitzhugh, and myself that the sale was ten Sherman tanks, of one hundred and thirty-five barrels capacity each. Our failure in first instance to insert capacity of tanks in contract referred to was for the reason that sellers are usually acquainted with capacity of buyer's tanks, and that the railroads require tanks to be well filled, as a partially filled tank is dangerous to handle. When trade is consummated, and we give name of buyer, sellers understand tanks furnished are to be loaded to full capacity. Referring to this particular sale, however, I had a distinct understanding with Mr. Fitzhugh, as my letter attached hereto, and marked Exhibit B of date March 22, 1901, shows, that this sale was to be ten tank cars, of one hundred and thirty-five barrels each. For contract purposes, yes." To the introduction of that part of the answer to this interrogatory before the last sentence ("For contract purposes, yes") the plaintiff then and there objected on the ground that it stated a conclusion and opinion, and that as to the plaintiff it was hearsay, irrelevant, and immaterial; that it does not purport to give any conversation that took place between the witness and Mr. Fitzhugh, but simply the witness' construction of the legal effect of some purported conversation; that it also seeks to vary the terms of a written contract; and that there is no pleading here to support evidence tending to alter or reform the contract sued on. The court sustained the objection and excluded the evidence, and the defendant then and there excepted to the ruling of the court. And afterwards the plaintiff offered in evidence the question and the sentence in the answer to said interrogatory reading, "For contract purposes, yes." To the introduction of this the defendant then and there objected, because the introduction of that sentence, cutting it off from the balance of the answer, was not fair, and that one cannot get at what the witness means by taking a part of the question and a part of the answer when the witness undertakes to answer the whole of it. The court overruled the objection, and admitted the evidence, and the defendant then and there excepted to the ruling of the court. And after the evidence was closed, and while counsel for plaintiff was making the closing argument, he commented to the jury on the testimony of the witness Roane, reading the above-mentioned interrogatory and the portion of the answer that was admitted in evidence, and contended to the jury that the testimony of said witness proved that the delivery of 125 barrels of oil to the

car was sufficient to comply with the contracts in question; to which argument of counsel the defendant then and there excepted, on the ground that the same was unfair; whereupon the court said nothing with reference to the matter, and counsel for the plaintiff did not withdraw his remarks.

The plaintiff's objection to the answer, that it stated the conclusion of the witness, was properly sustained. The point at issue was the construction of the contract, which was a question for the jury in this instance, and the conclusion of the witness was not proper. No part of the answer was responsive to the interrogatory, except the concluding sentence, to wit: "For contract purposes, yes," and this was not legitimate.

The objection that it varied the terms of the written contract is not tenable. As we have heretofore stated, the contract was ambiguous as to the capacity of the tanks, and parol evidence was admissible to show by parol the understanding, if any, between the parties in relation thereto. There was no error in overruling the objection of defendant to the introduction of the latter part of the answer, as the ground of objection was not good. The court can exclude a part of an answer not pertinent and admit a part that is. In discussing this assignment we have not confined our remarks altogether to the objections made to the evidence, but we have said this much in view of another trial.

On the trial the defendant offered in evidence a letter written by the broker C. O. Roane to P. A. Fitzhugh, manager of the Dallas Oil & Refining Company, dated the 22d of March, 1901, shown to have been duly sent and received, reading as follows: "Mr. P. A. Fitzhugh, Mgr., Dal. Oil & Refg. Co., Dallas, Texas. Dear Sir:—Your favor of today received. Copy same sent Sherman. You failed, however, to insert in the contract as you advised you would do that tanks were to be 135 barrels each. Kindly bear this in mind, as the Sherman tanks, as we advised you, have capacity of 135 barrels. We thank you for this business and contrary to your expectations hope there may be no unpleasantness between you and Sherman and we do not think that you will. With kindest regards, we are, dear sir, yours very truly, C. O. Roane & Co." To the introduction of this letter in evidence the plaintiff then and there objected on the ground that it was irrelevant and immaterial; that it was written after the execution of the contract; and then on the further ground that it was hearsay and a self-serving declaration. The court sustained the objection, and excluded the letter from evidence, and the defendant then and there excepted.

This letter purports on its face to have been written on receipt of the contracts, and calls attention to what the writer considered an omission in the contract. Fitzhugh admits receiving the letter, but says that upon its receipt he called up Roane and objected,

and had an agreement that 125 barrels should constitute a tank. Roane denies Fitzhugh's statement, and says no objection was ever made to the terms of the letter. The letter having been written in reply to a communication from Fitzhugh in relation to the contract, it was a circumstance that could be looked to in determining what the contract really was as to the capacity of the tanks, and the court erred in excluding it.

The court's charge relating to the extra freight plaintiff had to pay on account of defendant's failure to receive certain oil tendered by plaintiff is not entirely free from the criticism urged by appellant that it was calculated to impress the jury that such tender relieved appellee from liability therefor. This can be corrected on another trial.

The judgment is reversed, and cause remanded.

ATCHISON, T. & S. F. RY. CO. v. WOOD.*
(Court of Civil Appeals of Texas. Dec. 16, 1903.)

CARRIERS—EJECTION OF PASSENGER.

1. A carrier may eject a disorderly and vicious passenger.

Appeal from District Court, El Paso County; A. M. Walthal, Judge.

Action by Minnie Wood against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

J. W. Terry and Ballinger Mills, for appellant. M. W. Stanton, for appellee.

NEILL, J. This suit was brought by appellee against appellant to recover damages alleged to have been caused by being wrongfully ejected from its train, on which appellee was a passenger, at Balen, N. M. Appellant answered by a general denial and that appellee's misconduct rendered her ejection necessary, and that no force or violence was used. There was a verdict and judgment of \$500 for the appellee. It is complained that the verdict is not supported by the evidence, but is contrary to the same, in that it shows without dispute that appellee went on appellant's cars at Albuquerque in a drunken condition, and while thereon, in the presence of appellant's passengers, behaved in a rude, riotous, and disorderly manner, was insulting to the passengers and employes on the train, and her ejection was solely because of such conduct and misbehavior. Out of regard for common decency, we must refrain from reciting the evidence pertinent to this assignment. It is enough that under our judicial system courts and jurors are compelled to listen to, clerks to record, and judges read evidence of conduct and utterances showing a depth of degradation that seems a libel on human nature itself, without perpetuating

such evidence in the reported decisions of our state. Suffice it to say that, unless the evidence of the appellee, a self-confessed prostitute, who has sunk in degradation even below her class, is to be taken against that of a number of respectable witnesses, her conduct and language while on appellant's train was such as to make it the imperative duty of appellant's employes to rid the passengers of her presence. Hutch. on Carriers, § 548; Fetter on Carriers of Passengers, § 330. While in discharge of our duty we have always upheld verdicts where the evidence was deemed reasonably sufficient to support them, there is a limit beyond which we cannot and will not go. We will not allow a verdict to stand that rests alone upon the testimony of a maudlin, drunken, depraved wreck of humanity when overwhelmingly opposed by the testimony of impartial, fair-minded, decent people, corroborated by every attendant fact and circumstance. As long as passengers have redress against railway companies for wrongs and injuries done them on trains by disorderly and vicious persons, such companies cannot be denied the right to eject such disorderly and vicious persons from their trains. *Railway v. Saulsberry* (Ky.) 66 S. W. 1051, 56 L. R. A. 581.

Because the verdict is against the preponderance of the evidence, and the testimony is not reasonably sufficient to support it, the judgment is reversed, and the cause remanded.

TAYLOR et ux. v. FLYNT.

(Court of Civil Appeals of Texas. Dec. 5, 1903.)

ACTION TO RECOVER LAND—JURY FINDINGS—INCONSISTENCY—HOMESTEAD PROPERTY—FRAUD IN SECURING LOAN—KNOWLEDGE OF LOAN COMPANY.

1. In an action by one claiming under a foreclosure sale to recover the land from the mortgagors, the jury were asked if the mortgagors caused a fictitious deed to be made by themselves to a third person to deceive the loan company, and procure a loan on the property which the company would not otherwise have made, and answered "Yes." They were asked if the loan company's agent aided and advised the mortgagors in procuring the loan, and answered "Yes." They were asked whether the deed was made for the only purpose of destroying the homestead character in the land, so as to get the loan, and answered "Yes." There was evidence that all of the parties acted in good faith, believing that by the transmutation of paper title the constitutional inhibition against mortgaging the homestead could be avoided. The vital issue in the case was whether the loan company had notice of the homestead character of the land through its agent. *Held*, that the jury's findings were inconsistent, uncertain, and ambiguous, so as to necessitate the reversal of the judgment for plaintiff.

Appeal from District Court, Wilbarger County; A. H. Carrigan, Judge.

Action by W. Q. Flynt against A. Jones Taylor and wife. Judgment for plaintiff, and defendants appeal. Reversed.

*Rehearing denied January 13, 1904.

¶ 1. See Carriers, vol. 9, Cent. Dig. § 1443.

D. R. Britt and H. Snodgrass, for appellants. Frost & Neblett and J. R. Tolbert; for appellee.

CONNER, C. J. For the third time this case is before us. On the first appeal the judgment of the trial court was reversed because the jury were peremptorily instructed to find for appellee, Flynt. See 59 S. W. 1128. On the second appeal the judgment was reversed because of error in the submission of the issues to the jury. See 67 S. W. 347. The statements of the facts in the reports cited enable us to now refer to them very briefly.

Appellee, Flynt, claims the 130 acres of land in controversy by virtue of a deed from the Texas Loan Agency; said agency having acquired its title, if any, by a trustee's sale and deed to it made by virtue of a deed of trust executed by one R. S. Taylor on the 7th day of March, 1889. It appears that appellants, A. Jones Taylor and wife, owned 310 acres of land, of which 200 acres, it is alleged, constituted their homestead. A. Jones Taylor, desiring to secure a loan, applied therefor to F. S. Kerr, the local agent of the Texas Loan Agency, and was informed that the desired loan could not be made on less than the entire 310 acres. Kerr suggested, however, that, if they (A. Jones Taylor and wife) would convey the 310 acres to R. S. Taylor, R. S. Taylor could apply for and secure the loan, and thereafter reconvey the homestead to appellants. Adopting this plan of securing the loan, appellants on the 4th day of March, 1889, without consideration, executed their deed to the 310 acres of land to R. S. Taylor, who was the father of A. Jones Taylor, and who on the same day made written application to said Texas Loan Agency for a loan of \$2,000, and thereafter executed the deed of trust above named to secure it.

One of the vital issues upon the trial below was whether the Texas Loan Agency had notice of the homestead character of the land in controversy, if it was in fact homestead, as claimed by appellants. It is insisted that the loan agency was not affected with Kerr's knowledge of the homestead character, if any, of the land in controversy, for the reason that Kerr and appellants, A. Jones Taylor and wife, conspired together to deceive and defraud the loan agency in the matter of the loan involved.

On the last trial the case was submitted upon special issues requested by the several parties to the action. The eighth and ninth special issues submitted at the request of appellee, and the answers of the jury thereto, are as follows: "Eighth. Did A. Jones Taylor and wife cause a fictitious or simulated deed to be made by themselves to R. S. Taylor and wife for the purpose of deceiving the Texas Loan Agency, and procuring in that way a loan of \$2,000 on the property, which the loan agency would other-

wise not have made to them?" To which the jury answered "Yes." "Ninth. If the above question is answered in the affirmative, then did F. S. Kerr help, aid, and have notice of such facts, and advise said parties, and assist them in procuring the loan from the Texas Loan Agency under such conditions?" To which the jury answered "Yes." The fourth special issue submitted at the request of the appellants, and the answer of the jury thereto, are as follows: "Fourth. Is it not a fact that said deed of March 4, 1889, was made for the purpose only of destroying the homestead character in the land, so as to get it in shape to secure the loan of \$2,000?" To which the jury answered "Yes." Appellants insist that these several findings, when considered as a whole, render the verdict of the jury contradictory, indefinite, uncertain, and ambiguous, and error is therefore assigned to the rendition of the judgment upon the verdict. We think the assignment must be sustained. As stated in the opinion by Justice Hunter on the first appeal, the facts in the particular under consideration are similar to those in the case of *People's Building & Loan Ass'n v. Dailey* (Tex. Civ. App.) 42 S. W. 364; and the answers of the jury quoted, in our judgment, render it uncertain whether they intended to find such fraudulent purpose—such collusive acting—on the part of Kerr and the Taylors as will relieve the loan agency of the effect of Kerr's knowledge, under well-settled rules. See *Association v. Parham*, 80 Tex. 528, 16 S. W. 316; *Association v. Dailey*, supra; et opinions on former appeals herein. Mere knowledge on Kerr's part that appellants conveyed their homestead to R. S. Taylor, without consideration, to the end that they might thereby procure a loan that they could not otherwise procure, will not relieve the loan company of the legal effect of Kerr's knowledge that the land accepted as security was appellants' homestead, if so it was. The purpose to deceive and to defraud must exist. This involves the idea that Kerr knew and appellants knew at the time that the security, to the extent of the homestead, was a nullity, and that to that extent the loan company would be kept in ignorance of the true facts, and thereby deprived of security, and that, so knowing, the parties named pursued the method adopted for the purpose of thereby illegally obtaining money from the loan company which could not otherwise be obtained. The facts must be such as in legal effect to constitute Kerr the agent of appellants for the purpose intended and secured; otherwise the principal, the loan agency, is liable for the acts of its agent, and the agent's knowledge must be imputed to his principal. If it be said that the answer of the jury to the eighth special issue submitted at appellee's instance is to be construed as a finding that appellants acted with intent to deceive and defraud the loan company, then such finding seems in conflict with the finding on the

fourth issue, submitted at appellants' request, to the effect that the sole purpose of A. Jones Taylor and wife in making the deed to R. S. Taylor on March 4, 1899, was to destroy the homestead character of the land in controversy, and render such land subject to secure the loan in contemplation. Emphasis is given the finding last mentioned by evidence to the effect that some, if not all, of the parties acted in good faith, believing that by the transmutations of paper title made, the constitutional inhibition against mortgaging the homestead could be avoided. The very form in which the issues were requested and submitted seems complicated. The vital issue we have discussed, if therein presented, seems so involved and incumbered with other facts, some of which were undisputed, but upon which findings were required, as to leave us in doubt whether the jury fully understood the issues or the precise import of their verdict thereon. We think all of the material issuable facts should be clearly submitted, to the end that no cause shall exist for a misapprehension of the findings of the jury.

The questions urged before us relating to a purchase on appellee's part without notice of appellants' claim are not presented in the pleadings, or so submitted or supported by the findings as to enable us to dispose of them, or give other direction than a reversal of the judgment, which is now ordered. Reversed and remanded.

KUSMIERZ et al. v. MAHULA.*

(Court of Civil Appeals of Texas. Dec. 16, 1903.)

APPEAL BOND—DESCRIPTION OF COURT—DESCRIPTION OF JUDGMENT—SUFFICIENCY.

1. An appeal bond which describes the court in which the judgment was taken as "James Trainer's Court, J. P.," approved by "J. M. Trainer, J. P. Prec., 4 B. C.," sufficiently identifies the court in which the judgment was rendered, where, looking to the whole record, it appears that the judgment was rendered by "J. M. Trainer, Justice of the Peace, Precinct Number 4, Bexar County."

2. Where the style, number, and date of the judgment are given in an appeal bond, as well as the name of the justice before whom the case was tried, those data, as well as the approval and signature of the justice of the peace, sufficiently identify the judgment from which the appeal was taken, though it describes the judgment as one against all of the appellants for \$100, no other particulars being given, when, in fact, it was a judgment against all the defendants for \$75, the value of a mule sought to be replevied, and against one of the defendants alone for \$25, and provided that the portion of it against all the defendants for the value of the mule would be satisfied by a return of the mule to appellee.

Appeal from Bexar County Court; R. B. Green, Judge.

Action by Charles Mahula against Willie Kusmierz and others. From a judgment of

the county court dismissing defendants' appeal from a judgment rendered in a justice court, defendants appeal. Reversed.

Geo. R. Gillette and James Raley, for appellants. C. S. Robinson, for appellee.

FLY, J. This is a suit to recover a mule, which originated in the justice's court, where appellee recovered of Willie Kusmierz and his sureties on a replevy bond the sum of \$75, the value of the mule, and from Willie Kusmierz alone the sum of \$25 damages. It was also provided in the judgment that the portion of it against the principal and sureties for the value of the mule would be satisfied by a return of the mule to appellee.

Appellants, desiring to remove the case to the county court, gave an appeal bond which described the justice court in which the cause was tried as "James Trainer's Court, J. P.," and described the judgment as one against all the appellants for \$100, no other particulars as to the judgment being given. There was a motion filed to dismiss the appeal from the county court because the judgment was misdescribed in the appeal bond. The bond was approved by "J. M. Trainer, J. P., Prec. 4, B. C.," which can be held to mean "J. M. Trainer, Justice of the Peace, Precinct Number 4, Bexar County," and to sufficiently identify the court in which the judgment was rendered. Looking to the whole record from the justice's court—which can be done in aid of the appeal bond—it fully appears that the judgment was rendered in Precinct No. 4, Bexar County. *Landa v. Heermann*, 85 Tex. 1, 19 S. W. 885.

The style, number, and date of the judgment are given in the appeal bond, as well as the name of the justice of the peace before whom the case was tried, and those data, as well as the approval and signature of the justice of the peace, we think sufficiently identify the judgment from which the appeal was taken. It is true that no mention is made of the mule, and that it is recited that the judgment was for \$100 against all the parties, while it was for that sum against only one of them and for \$75 against the others, yet we do not believe such discrepancies should invalidate the bond. *Austin v. McMahan*, 2 Willson, Civ. Cas. Ct. App. § 429; *Nelson v. Baird*, 1 White & W. Civ. Cas. Ct. App. § 1236; *Lewis v. Richardson*, 3 Willson, Civ. Cas. Ct. App. § 343; *Witten v. Caspary*, 4 Willson, Civ. Cas. Ct. App. § 190, 15 S. W. 47. It is true that in the case of *James v. Roberts*, 78 Tex. 670, 15 S. W. 111, the facts of which are quite similar to the ones in this case, the Supreme Court decided the appeal bond invalid because the bond did not mention that part of the judgment referring to the mule, but it appears that other errors had their influence with the court. Long after that decision had been rendered, which is in conflict with the case of *Austin v. McMahan*, above cited, the latter was cited and approved in *Warren v. Marberry*, 85 Tex.

*Motion for rehearing denied January 13, 1904.

193, 19 S. W. 994, and, although there were errors in the appeal bond in regard to the amount of the judgment and the date of it, the Supreme Court, after a review of numerous cases touching on the subject, concludes: "These cases lay down the rule that the appeal bond is sufficient if the description of the judgment as stated in the bond is accurate enough to identify it as the judgment appealed from, although the bond may in some respects misdescribe it, or fail to accurately describe it." The sole object in inserting a description of the judgment in the appeal bond is to identify it as the one appealed from and to secure which the bond is given, and, if that is done, however imperfect the description may be, the end of the law has been attained.

The judgment is reversed and the cause remanded.

ODEN & CO. v. VAUGHN GROCERY CO., Limited.

(Court of Civil Appeals of Texas. Dec. 21, 1903.)

JUDGMENT BY DEFAULT—ENTRY BEFORE RETURN DAY—ACCOUNT TAKEN AS TRUE—NATURE OF ACCOUNT.

1. A judgment by default, entered before the time at which defendant is commanded by the citation to appear and answer, is void.

2. An account which is not for the value of personal property sold and delivered in a general course of dealing is not such an account as can be prima facie proved by affidavit, as authorized by Rev. St. 1879, art. 2266.

Error from Panola County Court; J. G. Woolworth, Judge.

Action by the Vaughn Grocery Company, Limited, against Oden & Co. Judgment for plaintiff, and defendants bring error. Reversed.

H. N. Nelson, for plaintiffs in error.

PLEASANTS, J. Defendant in error brought this suit against Oden & Co. to recover an alleged indebtedness of \$710.05 due upon an open account. Judgment by default was rendered in favor of plaintiff below on February 5, 1903, for the amount sued for. The citation upon which the judgment by default was rendered commanded the defendants to appear and answer on the second Monday in February, 1903, which was the 9th day of said month. It thus appears from the record that the judgment complained of was rendered four days before the time at which the citation served on the defendants commanded them to answer plaintiff's suit. To hold that a judgment by default rendered before the time the defendant was cited to appear and answer is binding upon such defendant would be, in effect, to deny him his day in court, and is abhorrent to every principle of enlightened jurisprudence, and it requires no citation of authority to sustain the

proposition that a judgment so rendered cannot be affirmed.

It is unnecessary to consider the questions raised by the other objections to the citation on which the judgment was rendered, presented in the brief of plaintiffs in error. The account sued on, which was attached to plaintiff's petition, does not appear to be an account for the value of personal property sold and delivered by plaintiff to defendants in a general course of dealing, and is therefore not such an account as can be proved by affidavit, under article 2266 of the Revised Statutes of 1879. *McCamant v. Batsell*, 59 Tex. 363.

For the errors above mentioned, the judgment of the court below is reversed, and this cause is remanded for a new trial. Reversed and remanded.

BROWN et al. v. IKARD et al.*

(Court of Civil Appeals of Texas. Dec. 5, 1903.)

INJUNCTION—RESTRAINING EXECUTION SALE—PERSONS ENTITLED—EQUITABLE OWNERS.

1. Owners of the equitable title to land, whose trustees threaten no breach of trust, but stand ready to convey, are not entitled to an injunction restraining the sale of the trust property under an execution directed against a stranger to the paper title, nor does the fact that their title rests in parol give them that right.

2. An allegation of title by limitations founded on the possession by an agent, which, if adverse to them would have invested the agent with title, when contradicted by other allegations of the petition showing that plaintiffs had been under the disability of minority until less than four years before institution of suit, shows no grounds for injunction to restrain the sale of lands under execution directed against the agent, as their remedy by trespass to try title against purchaser would have been adequate.

Appeal from District Court, Clay County; A. H. Carrigan, Judge.

Suit to restrain the sale of lands on execution by Jennie B. Ikard and others against R. J. Brown and others. From a judgment granting a perpetual injunction, defendants appeal. Reversed and suit dismissed.

W. T. Allen and Denny & Taylor, for appellants. Matlock, Miller & Dycus, for appellees.

STEPHENS, J. The City National Bank of Dallas, Tex., recovered a judgment against W. R. Curtis, T. J. Atkinson, W. S. Ikard, and E. F. Ikard in March, 1888, for a large sum of money, which was revived in October, 1896. Execution issued upon this judgment was levied January 29, 1903, on the lands in controversy as the property of W. S. Ikard, Willie S. Carrew (joined by her husband), and Jennie B. Ikard, children of W. S. Ikard, obtained an injunction restraining the sale of said lands, which was made perpetual on final hearing, and from that judgment this appeal was taken.

At the date of the levy, as well as at the

*1. See Judgment, vol. 30, Cent. Dig. § 212.

*Rehearing denied January 9, 1904, and writ of error denied by Supreme Court.

institution of this suit, the legal title to these lands stood in the name of M. F. Ikard, to whom they had been conveyed by quitclaim deed in November, 1898, by D. G. Patten, who had nominally purchased them at execution sale made in March, 1897, under a small judgment against M. Ikard, to whom the Texas & Pacific Railway Company had conveyed them in the year 1888. Ever since the date of this conveyance from the railway company to M. Ikard, W. S. Ikard, who had become insolvent the preceding year, has been in the actual possession of the lands, claiming the same for his said children, who, until recently, were minors, and using the same as a ranch for a valuable herd of cattle also claimed for them in lieu of cattle which he had given them and sold with his own herd at a time when he was not only solvent but rich. This suit was brought by the appellees, as the equitable owners of the lands, against the sheriff making the levy and the plaintiffs in execution, assignees of the Dallas bank, alleging that the lands had been originally purchased for them, and paid for with money derived from the sale of cattle belonging to them; that M. Ikard, D. G. Patten and M. F. Ikard had each in succession held the lands in trust for them; that their father, W. S. Ikard, ever since the purchase in 1888, had been in possession as their agent and manager; that their title rested in parol; and consequently that a sale of the lands as the property of W. S. Ikard would cast a cloud on it.

The first question raised in the trial court and in this court is, were appellees entitled, on the facts stated, to injunction? We are of opinion that they were not. It seems clear from the decisions of our Supreme Court that, if the legal title had been in them, no cloud would have been cast on it by the threatened sale, and consequently that they would not have been entitled to injunction. For a collation of the authorities, see the opinion of Chief Justice Fisher in *Chamberlain v. Baker*, 67 S. W. 532, 4 Tex. Ct. Rep. 339. We have only to determine, then, whether the fact of their title being equitable warranted the relief sought. Undoubtedly, the jurisdiction of a court of equity to protect purely equitable estates or interests is firmly established, and such jurisdiction does not depend upon the inadequacy of legal remedies. 3 Pomeroy's *Equity Jurisprudence*, § 1339. But in such cases, as well as where the title is legal, some necessity for the extraordinary remedy by injunction must be shown before a court of equity will grant it. Mr. Pomeroy, in the section above cited from his excellent work on Equity, in discussing this ground of equity jurisdiction, uses the following language: "It may therefore be stated as a general proposition that whenever the equitable relief against mistake or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties concerning specific property, or of enforcing

any other equitable estates, interests, or claims in or to specific property, requires the aid of an injunction, a court of equity has jurisdiction, and will exercise that jurisdiction, to grant an injunction, either pending the suit or as a part of the final decree, to restrain a breach of trust or of fiduciary duty, or to restrain an alienation, transfer, assignment, incumbrance, or other kind of dealing with the property, which would be in violation of the trust or fiduciary duty, or in fraud of complainant's rights, and which would, therefore, interfere with and prejudice the ultimate remedies to which he may be entitled with respect to such property." The author places in italics the clause, "requires the aid of an injunction," thus emphasizing as the test of jurisdiction to grant injunction as a means of enforcing trusts or other purely equitable estates, interests, or claims the necessity for such relief. Was there any such necessity in the case before us? We think not. M. F. Ikard, who held the legal title in trust for appellees, so far from disputing their claim, had at all times admitted it, and doubtless would have conveyed the lands to them at any time on request. The attitude of M. Ikard, D. G. Patton, and W. S. Ikard towards them was, and had ever been, the same as that of M. F. Ikard. Nothing in violation of the trust was threatened by any of them. In no proper sense, then, could this suit be regarded as one to enforce a trust or other equitable estate, interest, or claim in or to specific property. There was no more necessity to restrain the threatened sale with the legal title standing in M. F. Ikard than there would have been if he had already conveyed the lands to appellees. In other words, the fact that their title was purely equitable placed them in no worse position, so far as the threatened sale was concerned, than if it had been legal, the execution being against W. S. Ikard, who was an entire stranger to the paper title. Nor did the fact that appellees had to resort to parol testimony to show their title to the lands affect the question. As before seen, they could have had the legal title in themselves for the asking, and are not entitled to equitable relief on any such ground. It is only where a threatened sale would cast a cloud on a title but for parol proof that an injunction will be granted to prevent it.

As a further ground for equitable relief, after pleading title in themselves by limitation founded upon the possession of W. S. Ikard as their agent, appellees alleged that, if this possession had been adverse to them, it would have been sufficient to invest W. S. Ikard with title by limitation; but this, if important, was contradicted by the petition itself in stating the ages of the appellees, who were shown to have been under the disability of minority until less than four years before the institution of this suit. The threatened execution sale therefore could hardly have cast much of a cloud even on their title by

prescription, and the remedy of trespass to try title against the purchaser at such sale would seem to be adequate.

On the whole, we conclude that the case made did not call for the extraordinary relief by injunction to prevent a sale which could neither cloud appellees' title nor disturb their possession. Judgment is therefore reversed, and the suit dismissed.

MANEY v. EYRES.*

(Court of Civil Appeals of Texas. Dec. 23, 1908.)

PUBLIC SCHOOL LANDS—COLLUSIVE PURCHASE—RIGHT TO ATTACK—COURT OF CIVIL APPEALS—FINDINGS OF FACT—EVIDENCE.

1. Only the state can attack as collusive a purchase of public school lands made on proper affidavit and compliance with all legal requirements.

2. The findings of fact which it is the duty of the Court of Civil Appeals to make cover only conclusions from the evidence, and not the evidence itself.

On motion for rehearing. Motion overruled.

For former opinion, see 77 S. W. 428.

GILL, J. At a former day of this term we affirmed the judgment of the trial court, on the theory that the evidence presented no issue on the validity of the Hooks purchases. We had no doubt (and now have none) but that the facts strongly presented the issue of fraud and collusion as between the other parties who purchased the lands isolated by the Hooks purchase. If the charges made by plaintiffs are true, it is to be earnestly hoped that the state, through the proper channels, may establish the facts and undo the wrong. But our view of the situation, in so far as it bore upon plaintiff's rights, was this: That whatever the private motive of those who suggested the purchase of Hooks, and aided him in making it, they had done no more than to induce him to do a lawful thing. That he actually occupied the premises and improved them is not disputed. The question, therefore, was not what he did, or the effectiveness of what he did, if done in good faith, but whether or not it was so done.

Appellants in their motion for rehearing have made a very strong presentation of the facts, and, while it is mainly an arraignment of others than Hooks, it cannot be denied that it at least raises a strong suspicion of his motive, even in the face of his denial. We gravely doubt the correctness of our conclusion upon this point. Because of this doubt we have been induced to look further into the law question upon which the trial court directed a verdict. This suit is in effect an assault on the Callaway purchase as having been made in collusion with others, and in furtherance of a conspiracy with them. The Hooks purchase is assailed for the same reason. The Supreme Court has held that the Legislature deemed the affidavit

of the prospective purchaser, made under the pains and penalties of perjury, a sufficient safeguard against bad faith, and that the making of such affidavit, and a compliance with legal requirements in other respects, prima facie imposed upon the land commissioner the duty to allow the application for purchase, and that, if such purchase was in fact collusive, only the state could take advantage of it. *Logan v. Curry*, 95 Tex. 664, 69 S. W. 129. See, also, *Hamilton v. Votaw* (Tex. Civ. App.) 73 S. W. 1091; *Thomson v. Hubbard* (Tex. Civ. App.) 69 S. W. 649. We are of opinion the facts of this case invoke the doctrine thus announced. It follows that the judgment was rightly affirmed for this reason, even if it be conceded that we were in error on the other point.

We are requested by appellant to find as additional facts the evidence on the issue of bad faith and collusion. It is never the duty of this court to find what the evidence is. That is disclosed by the record. Where necessary, it is our duty to find what facts the evidence in the record establishes. What we have already found will entitle appellant to every right upon application for writ of error that he would have should we embody in this opinion the entire statement of facts.

We are of opinion the motion should be overruled, and it is so ordered. Overruled.

JAMISON et al. v. NEW YORK & T. LAND CO., Limited, et al.

(Court of Civil Appeals of Texas. May 15, 1908.)

PAROL EVIDENCE—FIELD NOTES—ABSENCE OF AMBIGUITY—JUDGMENT FOR COSTS—FAILURE OF APPLICANT TO COMPLAIN—NECESSITY OF CROSS-APPEAL BY APPELLEE.

1. Parol evidence is not admissible to change the lines and corners of grounds as shown by unambiguous field notes.

On Rehearing.

2. Where one defendant appeals, without complaining of a judgment for costs, and the judgment cannot be revised without affecting all the appellees, one appellee, plaintiff below, cannot have it reviewed without a cross-appeal.

Appeal from District Court, Brazoria County; Wells Thompson, Judge.

Action by the New York & Texas Land Company, Limited, and others, against D. B. Jamison and others. From the judgment, defendant Jamison and others appeal. Reversed.

Masterson & Masterson, R. O. Gaines, and Brockman & Kahn, for appellants. West & Cochran, for appellees.

GARRETT, C. J. This action was brought by the New York & Texas Land Company, Limited, against D. B. Jamison and others, for the establishment of the boundaries of the Noel F. Roberts survey of 302 acres, situated in Brazoria county, which belonged to

*Writ of error denied by Supreme Court.

¶ 1. See Evidence, vol. 20, Cent. Dig. § 1761.

the plaintiff, except 75 acres thereof which it had previously conveyed to the said D. B. Jamison. The field notes of the Noel F. Roberts survey call to begin at a stake and mound at the northeast corner of the Cornelius Smith league, southeast corner of the Wm. Roberts league, and southwest corner of the Andrew Roberts labor; thence south with the back line of the Smith league 1,710.56 varas to a stake and mound in the prairie; thence east 1,000 varas to a post on the west line of the Cornwall tract; thence north with said line 1,710.56 varas to the corner of the Roberts labor 16 varas north of Cornwall's corner. The difficulty arises over the location on the ground of the east line of the Cornelius Smith league and the west line of the H. H. Cornwall. D. B. Jamison and other heirs of James Jamison own the land to the east end of the Smith league, and claim that its east line extends to a corner marked for many years by a live oak post in the north line of the Asa Mitchell one-half league 155 varas west of the E. Waller west line. Cannon and Erskine and others, vendees and subvendees of Hennell Stevens, whose heirs are vouched in as warrantors, claim the Cornwall, which is a survey of 611 acres, under a patent whose field notes call to begin at a stake 16 varas south of the southeast corner of the Roberts labor; thence south 1,858 varas to the north line of the E. Waller league; thence east 1,858 varas to a stake on the north line of the E. Waller league; thence north 1,858 varas to a stake; thence west 1,858 varas to the place of beginning. According to the calls of the field notes of the Noel F. Roberts, that survey occupies all the space between the Smith and the Cornwall to its extent south, but Branch T. Masterson intervened in the suit as the vendee of the defendant Barrow of two surveys located upon an alleged vacancy between the Noel F. Roberts and H. H. Cornwall, and south of the Roberts and north of the Cornwall, by virtue of certificates issued to Martha C. Tobin and J. M. Swisher for 640 acres each. The position on the ground of the Noel F. Roberts, and the amount of land appropriated by the Tobin and Swisher, locations, depend upon the position of the east line of the Smith league. A trial by jury resulted in a verdict and judgment for the extreme east boundary as claimed by the Jamisons, which shut the intervener out from the recovery of any land between the Noel F. Roberts and the Cornwall. He recovered a small tract covered by the Swisher survey south of the Noel F. Roberts, but the judgment made no disposition of the land included in the Tobin survey lying north of the Cornwall. The Cornelius Smith league was a grant made to him as a colonist in 1824 with the following field notes: " * * * From the southeast corner of the William Roberts league the surveyor commenced the survey of said league, and thence measured three thousand and seventy-three varas to

the south to the north line of the Asa Mitchell league; thence west seven thousand eight hundred and sixty-two varas, crossing Oyster creek; thence south fifty varas to the northeast corner of Samuel Carter's league; thence west two hundred and ninety-two varas to the southeast corner of James B. Bailey's league; thence north, following the eastern boundary of said Bailey's league, to the northeast corner of said Bailey's league; thence east, following the south line of William Roberts' league, eight thousand one hundred and fifty-four varas to the beginning place of the first line." The field notes of the William Roberts league are as follows: "Beginning on the east bank of the Brazos at an elm marked 1 E. R. Thence east 14,224 vrs. to corner a post and mound. Thence south 1,961 vrs. to a stake. Thence west 1,095 vrs. a stake, the N. E. corner of Stephen F. Austin tract; thence west 11,625 vrs. to a stake at Smith Bailey's upper corner; thence up the river with the meanders thereof to the place of beginning." The Smith Bailey and the Stephen F. Austin called for in these field notes were abandoned, and the land adjoining the Roberts on the south was appropriated by the Cornelius Smith and James B. Bailey surveys. The north lines of these two surveys added give 12,720 varas, the exact length of the William Roberts south line. The Andrew Roberts labor was surveyed April 10, 1838. It was for 1,000 varas square, and called to begin at the northeast corner of the C. Smith league, and to run east, north, west, and south. It lies east of and adjoins the William Roberts league. The H. H. Cornwall survey was made September 13, 1860, and the Noel F. Roberts, September 26, 1872. The Swisher and Tobin are junior surveys, and the right of Masterson to recover depends upon the location of the east boundary of the C. Smith league.

It is conceded that the parties have title to the surveys respectively claimed by them, and that the question for determination is the location of the east boundary line of the Smith league. We are of the opinion that this must be determined by running out that survey according to course and distance, commencing at the southeast corner of the Wm. Roberts league, which is established by running out that survey according to course and distance, commencing at the beginning corner of its field notes on the Brazos and running east and south. These field notes develop no ambiguity, and can be applied to the ground, and parol evidence is not admissible to change the lines and corners of the grants. *Thompson v. Langdon* (Tex. Sup.) 28 S. W. 931; *Johnson v. Archibald*, 78 Tex. 96, 14 S. W. 266; *Ratliff v. Burleson* (Tex. Civ. App.) 25 S. W. 984; *Id.*, 26 S. W. 1003; *Converse v. Langshaw*, 81 Tex. 275, 16 S. W. 1031; *Chew v. Zweib* (Tex. Civ. App.) 69 S. W. 210; *Anderson v. Stamps*, 19 Tex. 460; *Giddings v. Winfree*, 73 S. W. 1066, 7 Tex. Ct. Rep. 86. Run out according to course

and distance, the northeast corner of the Smith league is at the southeast corner of the William Roberts league, which is ascertained by running out that league according to clear, unambiguous, and undisputed calls; and the southeast corner of the Smith thus run out is in the Asa Mitchell north line, 2,075 varas west of the live oak post found by the jury to be the southeast corner. Reluctant as we are to disturb the boundaries that have the sanction of many years of time, yet the legal principles which control the production of evidence must be respected. Even if parol testimony should be heard in this case, much uncertainty would be developed as to the location of the line in controversy, growing out of different surveys commencing at assumed corners. The Mills survey fixes the line at only about half as far east from the line according to course and distance from the Wm. Roberts southeast corner as that found by the jury; while if parol evidence be rejected, and the line run according to the field notes, there are no conflicts in the calls, and no difficulty in their application to the ground.

There are other errors in the record arising out of rulings of the court in the admission of testimony and in the charge to the jury, but it is not necessary to notice them, since parol evidence was not admissible at all to change the Smith east boundary from the place where course and distance put it. The judgment of the court below will be reversed, and judgment will be here rendered establishing the east line of the Smith league according to course and distance from the Wm. Roberts southeast corner, ascertained by running the calls of the field notes of that survey; and constructing the Noel F. Roberts upon the Cornelius Smith according to course and distance of the said Noel F. Roberts survey, and disregarding its call for the Cornwall; and constructing the Cornwall upon the E. Waller league according to the calls of the Cornwall survey for course and distance, disregarding its call for the Andrew Roberts southeast corner; and in favor of the said Masterson for the land described in his petition. The judgment of the court below is also reversed as to the recovery against the heirs of Hennell Stevens who have appealed from the judgment against them upon the warranty of title to land by Hennell Stevens. No appeal having been perfected by the Jamisons and others from the judgment as to costs, and Masterson not complaining in that respect, the judgment as to costs will remain undisturbed.

Reversed and rendered.

Motion for Rehearing by the Appellee Land Company.

(Jan. 8, 1904.)

This motion is for a rehearing upon so much of the original judgment of this court entered at the last term, on the 14th day of May, 1903, as adjudged costs against the ap-

pellee New York & Texas Land Company, Limited.

For the reason we stated in the opinion when the case was decided that no appeal had been taken from such judgment, this court is without power to disturb the judgment as to costs. The co-appellees of the land company are affected by the judgment, and it could not be reviewed as to them without a cross-appeal. The motion for a rehearing will be overruled.

Overruled.

Motion for Rehearing by D. B. Jamison.

(Jan. 8, 1904.)

This is a separate motion by D. B. Jamison for a rehearing of this cause and setting aside the judgment of this court entered on 14th day of May, 1903, and the affirmation of the judgment of the court below. The motion will be overruled, except in so far as the said D. B. Jamison is affected by the order of the court this day made on motion No. 2,675 reforming said judgment.

Motion for Rehearing by D. B. Jamison and Others.

(Jan. 8, 1904.)

Upon consideration of this motion for rehearing, the court is of the opinion that it erred in so much of its judgment rendered on the 14th day of May, 1903, in this cause, as adjudged to the New York & Texas Land Company, Limited, the land described therein. The Jamisons claimed the land under a plea of limitation of 10 years, and there was evidence in support of such claim; but the court below, having found the boundary to be as claimed by them, did not pass upon the question of limitation. This court having fixed the boundary so as to leave a part of the land claimed by the Jamisons to the east of it, the plea of limitation became applicable to so much of the land.

That portion of the former judgment of this court which vested title in the New York & Texas Land Company, Limited, to the land described therein as adjudged to it will therefore be set aside, and the judgment so reformed as to remand the cause as to said parties for trial upon the issue of limitation alone.

ZIMMERMANN v. OWEN.

(Court of Civil Appeals of Texas. Dec. 10, 1903.)

VENDOR AND PURCHASER—ACTION ON PURCHASE-MONEY NOTES—STIPULATION IN DEED FOR CLEAR TITLE—COMPLIANCE—BURDEN OF PROOF.

1. A deed provided that the last two of three purchase-money notes should not be paid until it was ascertained whether the grantor conveyed, by the deed, title to the whole property described, or only to an undivided half. The notes provided that their payment was conditioned on the stipulations in the deed. The grantor had acquired the property while living with a woman in a state of concubinage, which

condition continued for 15 years. Neither of them, at the commencement of the association, had any property. When the deed was made, the grantor had not heard of the woman for about 9 years. *Held*, in a suit on the notes to which the woman was not a party, that the burden was on the grantor to remove the cloud and show a clear title, failing which he could not recover.

Appeal from District Court, Lavaca County; M. Kennon, Judge.

Action by J. P. Zimmermann against S. E. Owen. Judgment for defendant, and plaintiff appeals. Affirmed.

H. B. Leonard and C. J. Gray, for appellant. George N. Denton, for appellee.

GARRETT, C. J. This was an action brought by J. P. Zimmermann against S. E. Owen to recover upon two promissory notes which were alleged to be a vendor's lien upon land, and a foreclosure was sought. A trial to the court without a jury resulted in a judgment in favor of the defendant. The facts were that on January 7, 1901, the plaintiff conveyed to the defendant a tract of 161½ acres of land situated in Jones county for a consideration of \$518.75 cash and three promissory notes for \$500 each, due one, two, and three years after that date, with 10 per cent. interest payable annually, the whole series to mature in case of default on one, and 10 per cent. on the amount of principal and interest as an attorney fee in case of suit. The land is described in the petition. The note first due was paid at maturity, but the defendant refused payment of the second. Each of the second and third notes contained the stipulation that its payment was conditional on the stipulations set forth in the deed, and the deed contained the following provision: "It is specially understood and agreed by the parties hereto that neither of the last two notes above described or any part thereof is to be paid until it shall be definitely ascertained whether or not the said J. P. Zimmermann hereby conveys a good and sufficient title to the whole of said tract of land, it being uncertain at this time whether or not the said J. P. Zimmermann has a legal right to convey the whole or only an undivided one-half of said tract of land. The general warranty clause shall apply to only one-half or to the whole of said land as the facts may show that he has the legal right to convey, that is if he has the legal right to convey the whole, then the warranty extends to the whole, if only one-half, then the warranty extends to one-half."

About 25 years before the date of the trial below, the plaintiff and a woman afterwards known as Mollie Zimmermann met, and began to live together in a state of concubinage under an agreement that the relationship should continue as long as she remained true to him. It continued for 15 years, or until September, 1892, when they separated, the woman then leaving the plaintiff for another man. They held themselves out to the pub-

lic, while they lived together, as husband and wife. During the time that they so lived together the land in question was bought by the plaintiff for \$900 in cash, paid, as he testified, out of his own money. The deed was taken to him, and the legal title is in him. When the plaintiff and the woman commenced living together, they had practically no property. The defendant is in undisturbed possession of the land. The last the plaintiff ever heard of Mollie Zimmermann was in November, 1892, when he received a letter from her mailed at Brule, Wis., asking him for \$25, which he said he owed her, and which he testified he then sent her. The stipulation was made in the deed with reference to any claim that Mollie Zimmermann might assert, it having been called to the attention of the defendant that plaintiff had a wife, who, it was said, should join in the deed.

Mollie Zimmermann is not a party to this suit, and would not be bound by a judgment decreeing the full title to the land to be in the plaintiff. Any equitable interest that she might have could be shown in a subsequent suit by herself, or her heirs if she were dead, for the defendant stands charged by the deed with notice that it was uncertain whether or not Zimmermann had the legal right to convey more than a half interest. He contracted that the notes sued on were not to be paid until it should be definitely ascertained whether he had conveyed a good and sufficient title. It was incumbent on him to show that the title was clear. He clouded it by his own act, and made his recovery upon the notes conditioned on his removing the cloud. But the title remains in the same condition that it was when he sold the land, and he has not shown himself entitled to recover. There was no error in the conclusion of the trial court that the burden was on him to clear off the cloud. The woman may have equitable rights arising out of the investment of her own money in the purchase of the land, and they would not be concluded by a judgment to which she was not a party. None of the assignments of error points out any reason for the reversal of the judgment. The plaintiff having failed to clear the title, the defendant was entitled to a rescission and a cancellation of the notes which required a restoration of the one-half interest to the plaintiff, and judgment was properly rendered therefor in his favor. The judgment will be affirmed.

Affirmed.

REGAN et al. v. JESSUP.

(Court of Civil Appeals of Texas. Dec. 17, 1903.)

FALSE IMPRISONMENT—ARREST—JUSTIFICATION—EXECUTIVE WARRANT.

1. A sheriff, in making an arrest under an executive warrant by the Governor commanding the arrest of the person designated therein,

and his delivery to another as extradition agent of a foreign state, acts in a ministerial character, and, though he may bear malice toward the person arrested, he is not liable unless he was concerned in the illegal issuing of the writ. Therefore, in an action against the sheriff for false imprisonment, it was error to exclude from evidence the writ and testimony explanatory of the sheriff's connection with the detention.

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Action by Charles Jessup against James S. Regan and another. Judgment for plaintiff, and defendants appeal. Reversed.

Hume & Hume, for appellants. Brockman & Kahn, for appellees.

GARRETT, C. J. This was an action for false imprisonment, commenced October 18, 1901, by Charles Jessup against James S. Regan and G. B. Johnson. The petition alleged that the defendant Regan conspired with the defendant Johnson and others to effect the illegal arrest of the plaintiff, and in furtherance of their conspiracy did, through their agents and attorneys and in person, effect the arrest and imprisonment of plaintiff without authority, or color of authority, for which the plaintiff prayed damages. The defendant Regan answered by general demurrer and general denial and special plea of justification under an executive warrant by the Governor of Texas commanding the arrest of the plaintiff, and directing his delivery to the defendant as extradition agent of the state of Arkansas. Trial was had by jury, and resulted in a verdict and judgment in favor of the plaintiff against both defendants jointly for \$2,000 actual and \$3,000 punitive damages. At the trial the defendant offered in evidence a copy of the executive warrant described in the answer, duly certified, but on objection by the plaintiff it was excluded. A warrant regular and fair on its face will protect the officer executing it. 12 Am. & Eng. Encyc. Law (2d Ed.) 763-766, and notes; *Id.* 604. The warrant offered in evidence was fair on its face, and would have protected the defendant, as the agent for the extradition of the plaintiff, against an action for false imprisonment, and the court erred in excluding it. The agent appointed by the Governor to receive and return the fugitive, if he proceed according to law, acts in a ministerial capacity, and is not liable for damages although his feelings towards the fugitive were malicious. 12 Am. & Eng. Encyc. Law, 608. His motives are not material. The Governor had jurisdiction to issue the warrant, and his determination of the facts which authorized its issuance was *prima facie* conclusive, and the warrant a justification for the arrest of the plaintiff. *Bruce v. Rayner* (C. C. A.) 124 Fed. 481. But a person cannot legally be extradited to a state for a crime committed within its jurisdiction unless he was actually within the state and is a fugitive therefrom, and

the facts on which an executive warrant for extradition has issued may be inquired into on habeas corpus, and the accused discharged. *Bruce v. Rayner*, *supra*. It was admitted that the plaintiff had never been in the state of Arkansas, and the warrant was therefore not legally issued, but, as above stated, was sufficient to protect the agent.

The exclusion of the deposition of the defendant was clearly erroneous. It explained his connection with the detention of the plaintiff; and if, as above stated, the defendant acted in a ministerial character only, as the agent of the Governor, under a warrant fair on its face, he could not be held liable for false imprisonment. Neither the pleadings nor the evidence makes a case of malicious prosecution. It is one for false imprisonment alone, although there are allegations of malice and conspiracy in the arrest and detention of plaintiff. The executive warrant, with evidence that the defendant acted under it, would have been a complete defense, unless it should be shown that the defendant instigated and procured an illegal warrant for the arrest of the plaintiff. 12 Am. & Eng. Encyc. Law, 752 et seq.

For the error of the court both in excluding the warrant and the deposition of the defendant the judgment of the court below will be reversed and the cause remanded. Reversed and remanded.

GOOCH et al. v. ISBELL et al.

(Court of Civil Appeals of Texas. Dec. 10, 1908.)

TROVER FOR HORSE—COUNTERCLAIM FOR KEEP—PROPERTY—PART OWNERSHIP IN DEFENDANTS—ADMISSIBILITY OF EVIDENCE UNDER PLEADING—DISMISSAL OF PLAINTIFFS.

1. Where plaintiffs, suing for the conversion of a horse, claim his entire value, they cannot show, on defendants' counterclaiming for the animal's keep, that defendants were part owners.

2. Where, in an action by several plaintiffs for the conversion of a horse, defendants counterclaim for the animal's keep, it is error to permit part of the plaintiffs to be dismissed from the suit.

3. An open account for the keep of a horse and the lien therefor may be asserted by way of counterclaim against a suit for the animal's conversion, though the action sounds in tort.

Appeal from District Court, Brazoria County; J. C. Scott, Judge.

Action by S. A. Isbell and others against Ira Gooch and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Astin & Bethea and A. G. Board, for appellants. Doremus & Butler, for appellees.

GILL, J. This suit was brought by S. A. Isbell and nine others to recover of Gooch & McCorquodale \$1,200, the value of a Percheron stallion called "Malaga," and \$300, the value of his services during the season of

1900. The plaintiffs alleged that they were the joint owners of the horse, setting out their respective interests, and that defendants had wrongfully converted him to their own use. The defendants, after exceptions, answered by general denial, averred in bar of plaintiffs' demand that they were the proprietors of a livery stable in Bryan, Tex.; that the plaintiffs turned over the horse to them to be sold; that they kept the horse for 21 months at a reasonable cost of \$15 per month; and that, plaintiffs refusing to pay said feed bill on demand, the horse was sold at public outcry to satisfy their lien as livery men. Judgment is prayed for against plaintiffs for the balance due on the livery bill, amounting to about \$300. On motion of attorneys for plaintiffs, three of them, namely, Joseph Shanks and Eugene and D. H. Fain, were dismissed from the cause. The case proceeded to trial, and judgment was rendered on verdict that plaintiffs should recover \$45. Defendants have appealed.

The facts, stated in a general way, are as follows: Plaintiffs, ten in number, bought of defendants the Percheron stallion in question at an agreed price of \$——, and executed their note, binding each for his respective share. The following clause in the notes was adduced in evidence: "Now it is understood that when the above notes are paid in full the holder of this bill of sale is entitled to $\frac{1}{12}$ interest in said horse. But in default of payment of the above described notes this bill of sale is null and void." Some of the shares were not paid in full, but, according to defendants, they never asserted their right to forfeit the sale as to them. According to testimony adduced by plaintiffs, the defendants agreed at the time of the sale that they would resume possession of any defaulted shares, and bear their part of the burden of keeping the horse, the agreement being that each owner should keep him a proportionate part of the time; that the horse was turned over to defendants to be kept by them under this agreement, and was so accepted and received by them. The \$300 claim for the season of 1900 was stricken out on exception, as was also defendants' plea in reconvention for the unpaid feed bill.

The cause was not rightly adjudicated, and for that reason the judgment must be reversed. We will therefore not notice in their order the assignments of error, but will point out generally such errors as we deem material to be noticed in view of another trial. Defendants objected to the testimony adduced to the effect that they had agreed to resume the unpaid shares, and keep the horse a proportionate time, the ground of the objection being that no such issue was made by the pleadings. The same objection is urged against the charge of the court for submitting that issue to the jury. We regard both objections as sound. Not only was such an issue entirely absent from the pleadings, but they actually negatived such a state

of facts. Ownership was averred in plaintiffs, a claim urged for the entire value of the horse and the whole of the value of his services during the season of 1900. Defendants, having prayed for judgment against plaintiffs, objected to the dismissal of any of them from the suit. We think the court erred in sustaining exceptions to their counterclaim and dismissing any of the plaintiffs from the suit. Of course, any one or more of the plaintiffs might be permitted to take a nonsuit, but would remain in the case for the purposes of the counterclaim. If defendants' testimony is true they had the right to a judgment against all the plaintiffs for the feed bill, even though it should appear that such irregularities attended the sale of the horse to satisfy it as laid them liable for his real value. If they had a valid claim of that sort, it was a lien upon the animal, and the various phases of the transaction are so correlated that the open account for feed and the lien therefor may be asserted as against plaintiffs' claim for damages notwithstanding it is an action sounding in tort. No other errors are presented which are likely to arise on another trial. For those indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

TEXAS GULF COAST LAND & OIL CO. v. GALVESTON-CHICAGO WELL BOR- ING & DRILLING CO.*

(Court of Civil Appeals of Texas. Dec. 10, 1903.)

DIGGING OIL WELL—RIGHT TO COMPLETION— WAIVER.

1. An oil company had a manager in charge of the sinking of a well, who insisted on its being bailed after it had reached full depth without striking oil, and who knew that the casing had not been completed. He reported the well's condition to the company, which thereafter, and after protest to the diggers, paid a sum to them on account, and also sold them the pipe intended for casing, receiving credit therefor on the account. *Held*, that the company had waived the bailing and casing of the well.

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Action by the Galveston-Chicago Well Boring & Drilling Company against the Texas Gulf Coast Land & Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. B. & Chas. J. Stubbs, for appellant.
S. S. Hanscom, for appellee.

GILL, J. This suit was brought by the appellee against the appellant to recover the balance alleged to be due upon a contract to bore an oil well for the appellant on lands in Jefferson county. The defenses pleaded were that appellee had not cased the last 500 feet of the well, and, the contract being an entire

*Rehearing denied.

ty, no recovery could be had until the well was completed according to the requirements of the contract; further, that the work performed had not been done in a skillful and workmanlike manner. Among other things it was charged that plaintiff had failed to bail the well as the work progressed, in order to test the various strata through which the well was sunk; further, that one of the considerations which induced defendant to enter into the contract was the obligation on the part of one Gray to give his personal attention to the drilling, he being an old and experienced driller, and that he had failed to do so. Various items were claimed by defendant for procuring water piping, etc., and these sums defendant sought to have refunded on the ground that they were properly chargeable to plaintiff. There was a trial by jury, with verdict and judgment in favor of plaintiff for \$1,851.96, with interest. The oil company has appealed.

The defendant, a corporation organized for the purpose of acquiring lands and exploring for oil, employed Gray & Bro. to drill a well for it on certain of its land. The contract was in writing, and obligated Gray & Bro. to drill, within a certain time, a well to a depth of 1,500 feet, unless oil in paying quantities was discovered at a less depth. The oil company was to pay Gray & Bro. \$5 per foot, stipulated payments to be made on account at stipulated depths as the work progressed; the oil company reserving the right to stop the work at any depth beyond 700 feet, and pay at that rate for the depth actually achieved. Appellant was to furnish the pipe valves and fittings, and Gray & Bro. was to furnish the machinery and labor, and was to be paid \$3 per day for fuel for the first 40 days, and the actual cost of fuel thereafter. The written contract contained no specific agreement for personal services of Gray. The defendant also bound itself to dig the necessary holes to obtain a water supply for the sinking of the well, and to supply water for the boiler; Gray & Bro. agreeing to furnish the pumps for pumping the water to the engine and well. The well was actually sunk to a depth of 1,512 feet, and payments were made by defendant from time to time according to the contract stipulations. The amount sued for was \$2,500 due on the obligation to sink the well at the agreed amount per foot, and \$2,000 for cost of fuel and water alleged to be chargeable to defendant under the terms of the contract.

On the issue of whether the well had been sunk in a skillful and workmanlike manner, the evidence may be said to be conflicting, but there is neither direct allegation nor any proof that oil would have been found in paying quantities if it had been dug differently. The evidence is also conflicting on the issue of defendant's assenting to the failure to put down the last 500 feet of casing before the drillers abandoned the work; the plaintiff's testimony tending to show that defend-

ant's manager conceded that there was manifestly no oil, and that bailing and casing would be a useless expense. The last 500 feet was not cased, and the completed well was not effectively bailed. Defendant knew during the entire progress of the work that Gray was not giving the matter his personal supervision, and knew also that the contract had been assigned to the appellee at the outset. On the 31st of January, 1902, defendant advised plaintiff by letter that a report had been received from Mr. Nichols, its manager, and that the well could not be received in that condition. Thereafter, with knowledge of the facts, defendant paid plaintiff \$2,000, and turned over to defendant as a credit on their account the very pipe which they furnished to case the last 500 feet of the well, and which they complain was not put down. Had it been put down, it would have been lost to defendant. Such other facts as may become material to the disposition of the questions presented on this appeal will be stated in their proper connection.

The trial court assumed as an established fact that the well had been completed according to contract to a depth of 1,500 feet, and that the plaintiff was entitled to the balance due therefor, less certain credits. The defendant contends that the issue of the completion of the well should have been submitted to the jury, and assails as error the action of the trial court in refusing to do so. As was stated generally in setting out the facts, defendant had one Nichols in charge as manager, who kept himself informed of the manner of the work as it progressed. According to his statements he insisted on the bailing of the well after it reached its full depth. He knew that the well was partially bailed, and that the casing for the last 500 feet was not put in. He concedes that to put it in unless oil in paying quantities was found would have been a waste of time and material. The piping for that purpose belonged to defendant, and was valuable. He reported the facts to the oil company, and that company, with full knowledge of the facts, made a further payment of \$2,000 to plaintiff. It also sold the casing which had been designed for the last 500 feet to plaintiff at an agreed price per foot, and had the amount credited on the account. The evidence altogether makes it very probable, if not certain, that oil in paying quantities was not to be found in that field, and it is not alleged it was to be found in that well. We think, under the facts, the trial court was authorized to assume that defendant had waived the right to insist on the complete bailing of the well, and certainly this is true as to the casing.

We are impressed with the force of defendant's contention that, where one hires another to sink an oil well in an unproven field, the discovery of oil in that particular well is not the only purpose. It is thereby intended to obtain a history of the strata to the depth of the well, and to so conduct the enterprise

as, if oil is not found, to demonstrate the uselessness of making further search in that particular neighborhood. We can understand how bailing from time to time may be necessary to this end. In view of these considerations we are not prepared to hold that, in order to defeat liability on the ground of failure to bail or otherwise properly conduct the boring, the burden is on the owner to show that, but for the well borer's failure of duty in these respects, oil in paying quantities would have been found. Such an issue is incapable of proof save by the sinking of another well. We simply hold that in this case, if such a right in the defendant is disclosed by the contract and the facts, it was waived.

The other assignments assail the method of the trial court in the adjustment of collateral issues involving the fuel and water accounts. It is unnecessary to notice them in detail. They have received at our hands a careful consideration, and we have found them without merit.

The judgment of the trial court is affirmed. Affirmed.

On Motion for Rehearing.

(Jan. 14, 1904.)

We do not desire to add anything to what has been said in respect to the decision of the case. We have found no reason why we should not adhere to our first opinion. This is written merely for the purpose of correcting an inaccurate fact statement as to date. We said in the main opinion that the defendant paid \$2,000 on account subsequent to the date of its letter refusing to accept the well. This is an error. The item was in fact paid about 10 days before, but after the well had been reported completed. The motion is overruled. Overruled.

PRUITT v. SCRIVNER.*

(Court of Civil Appeals of Texas. June 20, 1903.)

PUBLIC SCHOOL LANDS—APPLICATION TO PURCHASE—OUTSTANDING LIENS—INELIGIBILITY OF LESSEE TO PURCHASE.

1. An outstanding lease of public school lands precludes an application to purchase them, though the lessee is ineligible as a purchaser.

Appeal from District Court, Scurry County; P. D. Sanders, Judge.

Action between Warren Scrivner and L. H. Pruitt. Judgment for Scrivner, and Pruitt appeals. Reversed.

E. W. Bounds, for appellant. Beall & Beall, for appellee.

STEPHENS, J. School section 545, block 97, Scurry county, was recovered by appellee from appellant, on the ground that the latter had already purchased four sections of school land from the state when he applied to pur-

chase and was awarded the section in controversy.

In January, 1897, appellant, being an actual settler on section 544, block 97, Scurry county, applied to purchase it and three additional sections in the same block, not including the one in controversy, all of which were awarded to him. In February, 1900, he made proof of three years' occupancy of section 544, and obtained certificate to that effect from the Commissioner of the General Land Office, being then still the owner of the three other sections purchased as additional land. In May, 1900, while still residing on section 544 as his home, but after he had, in some manner not disclosed, ceased to own said other sections, he applied to purchase section 545, the land in controversy, and two other sections, as additional land, all of which were awarded to him. In March, 1901, appellee, who was an actual settler on section 546, block 97, a dry grazing section, and to whom it had been awarded as such actual settler, applied to purchase as additional land the section in controversy, which was within a radius of five miles from his home section, complying in all respects with the law, but this application was rejected. When appellant made his application to purchase the section in controversy, it was covered by a lease to him from the state, which on its face was still alive when appellee made his application.

The foregoing is a condensed statement of the main facts covered by the findings of fact, upon which the judgment was rendered, there being no statement of facts. If the decision of the case depended upon it, we might readily concur with the district court in holding that appellant had exhausted his right to purchase additional land before he applied to purchase the section in controversy, for to hold that he had the right to acquire from the state on the basis of one and the same home section six additional sections would seem to be against both the letter and spirit of the law limiting the purchases of an actual settler to four sections in all; but we need not decide that question in this case. Whether the land was subject to the rejected application of appellee, who was plaintiff, and had to recover on the strength of his own title, is the controlling question. It was held in the recent important mandamus case of Tolleson v. Rogan (Sup.) 73 S. W. 520, 7 Tex. Ct. Rep. 128, that the transfer of a lease of public school land to an intending purchaser removed the obstacle to a sale to such assignee which but for such transfer would have been insuperable. In the still more recent case of Smith v. McClain (Sup.) 74 S. W. 754, 7 Tex. Ct. Rep. 562, certified from this court, it was held that the waiver of a lease from the state in favor of an ineligible purchaser did not authorize a sale to any other person during the life of the lease. By these decisions we are bound, and from them we deduce the conclusion that the land in controversy, on

*Rehearing denied October 24, 1903, and writ of error denied by Supreme Court.

account of the lease to appellant, was not subject to appellee's application when he applied to purchase it, although appellant may have been ineligible as a purchaser.

The judgment is therefore reversed, and here rendered for appellant.

STROHMEYER v. WING et al.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

TRIAL—LOST PAPERS—PROOF—METHOD OF PROOF—STATUTES—EVIDENCE—EXCLUSION—SUBSEQUENT RECEPTION—APPEAL.

1. Rev. St. 1895, art. 1498, provides that, where the records and papers of a cause are lost, they may be supplied on motion, on notice; and, by articles 1499 and 1500, the motion must be verified, and be accompanied by certified copies or substantial copies. *Held*, that where, in garnishment, the affidavit, bond, and writ could not be found in the office of the county clerk, they could not be proved by testimony of the county clerk.

2. It was proper for the court, of its own motion, to raise the question as to the loss of the papers.

3. Where evidence is excluded, but subsequently its introduction is permitted, the party offering it should introduce it, instead of refusing to do so, and relying on appeal on his exception to the exclusion.

Appeal from Bexar County Court; Robt. B. Green, Judge.

Suit by Rudolph Strohmeyer against E. D. Wing and others, as garnishees of O. A. Balcom. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

C. K. Breneman, for appellant. J. C. Sulivan and Ball & Ingram, for appellees.

FLY, J. This seems to be a garnishment suit instituted by appellant against appellees to recover from them money alleged to be due by them to O. A. Balcom, against whom appellant alleged that he obtained a judgment after the institution of the garnishment proceedings. In traversing the answer of appellees, appellant set up a cause of action against appellees on an accepted draft on them given by Balcom. The court held them liable on the draft, but held against their liability as garnishees. No complaint is made as to the judgment on the draft.

It appeared during the course of the trial that there was not on file either bond, affidavit, or writ in the garnishment proceedings; and appellant, without making any effort to substitute the papers, which, it seems, he claimed were lost, attempted to prove by George Moore, a deputy county clerk of Bexar county, that he had filed the affidavit and bond in garnishment, and had issued a writ of garnishment on the same day, and that the writ had been returned as executed, on same day issued, by the sheriff of Bexar county; that the affidavit had been taken by the witness, and the bond approved by him; and that the papers could not be found in the

office of the county clerk. The testimony was objected to on the ground that it was an attempt to supply lost papers through the testimony of a witness, which was not the proper method. The court sustained the objections, but afterwards the objections were withdrawn, and consent given that the evidence might be introduced, whereupon appellant inquired of the court if such testimony would alter the opinion of the court; and the court replied that he was of the opinion that he was without authority to render a judgment against the garnishees in the absence of the affidavit, bond, and writ, and appellant then said he declined to introduce the testimony, and would rely upon the bill of exceptions taken to the rejection of the testimony.

It is provided in article 1498, Rev. St. Tex. 1895, that "whenever the records and papers of a cause or any part thereof may be lost or destroyed, either before or after the trial, the same may be supplied by either party, on motion before the court, upon three days' notice to the adverse party or his attorneys." The method to be used in supplying lost papers is prescribed in articles 1499 and 1500; and while there is an intimation in *Houston v. Blythe*, 60 Tex. 506, to the effect that lost papers may be supplied in other ways than that provided by the statute, we are inclined to the opinion that the statutory method should be followed. Appellant made no motion to supply the lost papers, and no affidavit was made that the papers had been lost or destroyed, or as to what the lost papers contained. The original papers may have been in the possession of appellant at the very time that he was endeavoring to prove their contents by secondary evidence. There are good and substantial reasons why the requirements of articles 1498 and 1499 should be strictly complied with, and no party to a suit should be allowed to file substitutes for papers—much less, to prove their former existence by a county clerk because the papers could not be found in the office of that official.

It does not appear from the record who it was that raised the question of the lost papers, but appellant, in his brief, insists that the court had no right, "of its own motion, to insist upon the production of affidavit, bond, and writs of garnishment," and we presume that the court called for those papers. It is not clear to our minds how he could have proceeded intelligently in the trial of a garnishment suit without demanding that the papers on which the suit was based should be produced, and, when he had exercised that undoubted power, if they could not be produced, appellant should have made an affidavit of loss or destruction of the papers, and sought to reproduce them.

The necessity of a discussion of the substitution of the papers might, perhaps, have been averted by holding that appellant is in no position to raise it, because he could have had the testimony before the court if he had

*Rehearing denied January 13, 1904.

desired. A party to a suit cannot fail or refuse to introduce testimony because he has ascertained that its introduction will not change the attitude of the trial court, and then expect an appellate court to give much consideration to his complaint on account of the testimony having once been excluded. He should have introduced the evidence, and had the matter reviewed in another forum.

The judgment is affirmed.

HOUSTON ELECTRIC CO. v. NELSON.
(Court of Civil Appeals of Texas. Dec. 18, 1903.)

STREET RAILROADS—COLLISION—INJURY TO PASSENGER—INSTRUCTIONS—CHARGE ON WEIGHT OF EVIDENCE—REFERENCE TO PLEADINGS FOR ISSUES.

1. In an action for injuries to plaintiff's wife, a passenger on a street car, alleged to be due to negligence in colliding with a water cart, wherein the evidence was conflicting both on the issue of negligence and the effect of the accident on her, the court, after defining generally the degree of care required, submitted the facts on the single charge that, if the jury "believe from the evidence that the plaintiff's wife was injured by a car colliding with a water cart, as charged in his petition, and in the manner as charged in the petition, then you will find for plaintiff such damages, if any, as the plaintiff has received," etc., and that, "if the jury do not believe that the plaintiff's wife was injured as charged in plaintiff's petition, and in the manner therein charged, they will find for defendant." *Held* that, though a slight collision was undisputed, and the charge, when read in the light of the petition, might be correct in the abstract, it was clearly misleading on its face, as warranting a construction that, if the collision and the consequent injury were shown, liability was established, irrespective of other proof.

2. Though, ordinarily, the action of the court in referring the jury to the pleadings for the issues might not be reversible error, it is a practice which should not be encouraged, as the issues made by the pleadings are a question of law for the court, and should be so determined and distinctly presented in the charge.

3. In an action for injury to a passenger in a street car, alleged to be due to negligence in colliding with a water cart, the court refused a requested instruction that, if the motorman in charge of the car was in exercise of a very high degree of care and prudence to prevent the accident, defendant would not be liable. *Held*, that the latter was entitled to have the issue of proper care submitted to the jury in terms, and the court erred in refusing to do so.

4. In an action for injury to a passenger in a street car, alleged to be due to negligence in colliding with a water cart, a special charge to the effect that the company was not an insurer of the safety of its passengers, and the mere fact that the car collided with the wagon did not in itself establish liability against defendant, was properly refused, as on the weight of the evidence.

5. A carrier of passengers is not an insurer of the safety of its passengers, but is only held to the exercise of that high degree of care which very prudent and cautious persons would use under like circumstances, and if such care is shown, or if the lack of it does not appear, liability is not established.

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Action by Albert J. Nelson against the Houston Electric Company. From a judgment for plaintiff, defendant appeals. Reversed.

Baker, Botta, Baker & Lovett, for appellant.

GILL, J. This is a suit by the appellee against the appellant for damages for personal injuries alleged to have been sustained by his wife as a result of a collision between one of the street cars of appellant (on which his wife was a passenger) and a water cart. The collision is alleged to have been due to the negligence of the servants of appellant in charge of the street car. Appellant answered by general denial. Verdict and judgment were for plaintiff, and defendant has appealed.

The evidence adduced was conflicting both on the issue of the negligence of the company and the effect of the accident on the plaintiff's wife. In view of the result of this appeal, we do not find it necessary to state more fully the facts or the nature of the case.

The court, after defining generally the degree of care which bound defendant with reference to the protection of its passengers, submitted the facts upon the following charge, and no other: "If you believe from the evidence that the plaintiff's wife was injured by a car colliding with a water cart, as charged in his petition, and in the manner as charged in the petition, then you will find for the plaintiff such damages (if any) as the plaintiff has received by reason of the injury, taking into consideration the expense of cure and such amount as the services of plaintiff's wife have been to him diminished in value by reason of the injury, and the jury may take into consideration the permanency of such injury as they may find from the evidence in estimating the damages, if any. If the jury do not believe the plaintiff's wife was injured as charged in plaintiff's petition and in the manner therein charged, they will find for defendant." To this charge several objections are urged, the first being that the charge is a virtual assumption that plaintiff may recover if his wife was injured, and this regardless of whether the company's negligence caused the collision or not. That there was a slight collision between the car and a water cart is undisputed; and while the charge, read in the light of the petition, may be correct in the abstract, it is clearly misleading on the face of it. The most easy and natural construction to place on it is that, if the plaintiff has shown a collision, and consequent injury to his wife, liability is established irrespective of other proof. Whatever may generally be the probative weight of the accident itself on the issue of negligence in passenger accident cases, this is certainly not a case in which the court might assume that proof of the collision established the allega-

¶ 5. See Carriers, vol. 9, Cent. Dig. § 1087.

tion of negligence. The nature of the accident and its causes were fully disclosed, and, if the jury believed the witnesses adduced by the defendant, the servants of the defendant were without fault.

The action of the court in referring the jury to the pleadings for the issues is also criticised. Ordinarily, this might not be error requiring a reversal, but we nevertheless regard it as a practice which should not be encouraged. What issues are made by the pleadings is a question of law for the court, and they should be so determined and distinctly presented in the charge. *Bradshaw v. Mayfield*, 24 Tex. 483; *Barkley v. Tarrant Co.*, 53 Tex. 257.

The defendant requested the trial court to instruct the jury that if the motorman in charge of the car was in the exercise of a very high degree of care and prudence to prevent the accident, then defendant would not be liable. The defendant was entitled to have the issue of proper care submitted to the jury in terms, and the court erred in refusing to do so.

Defendant complains also of the refusal to give a requested special charge to the effect that the company is not an insurer of the safety of its passengers, and the mere fact that the car collided with the wagon does not in itself establish liability against defendant. The charge should not have been given in the form requested. The rule is that carriers of passengers are not insurers of the safety of their passengers, but are only held to the exercise of that high degree of care in respect to their safety which very prudent and cautious persons would use under like circumstances, and, if such care is shown, or if the lack of it does not appear, liability is not established. The defendant was entitled to such a charge. But to charge either way upon the happening of the accident as an evidential fact would have been, under the facts of this case, upon the weight of evidence.

Some of the criticisms of the court's charge on the measure of damages are well founded, but the rules upon the subject are so simple and well settled we cannot believe the errors will be repeated upon another trial. We therefore do not notice them further.

For the errors indicated, the judgment of the trial court is reversed, and the cause remanded. Reversed and remanded.

INTERNATIONAL & G. N. R. CO. v. PINA.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

MASTER AND SERVANT—PERSONAL INJURIES—RAILWAYS—TRIAL—CONTINUANCE—SURPRISE—PLEADING—PETITION—EXCESSIVE VERDICT.

1. Where, on trial of an action for personal injuries, plaintiff, while testifying, was seized

with violent convulsions, followed by unconsciousness, and the jury were disturbed and the court adjourned, it was not error to refuse defendant's request for a continuance on the ground of surprise, in that there were no allegations that plaintiff was subject to such attacks, or that it would be claimed that such conditions were caused by injuries alleged; the application not stating that there was any probability of obtaining evidence that the convulsions were simulated, or were not the result of the injuries received.

2. Where plaintiff, a robust young man about 20 years of age, earning \$35 a month, received injuries probably permanent, whereby his mind was impaired and his eyesight greatly injured, and was suffering great pain up to the trial, a verdict for \$7,500 did not indicate that the jury were influenced by passion or prejudice.

3. In a petition for damages for personal injuries, allegations that plaintiff "was greatly bruised, wounded, and mangled on his head, arms, abdomen, back, and legs, and that he received a blow on his head," were sufficient to permit proof of fits or spasmodic attacks as a result of congestive condition of the brain, and of impairment of eyesight.

4. Where plaintiff, who was an inexperienced young man about 20 years of age, and had been employed as section hand on a railroad for only 9 days, was injured by the derailment of one of three hand cars which the men used in going to and from their work, and which, at the time of the injury, were run in close proximity to each other, and at a high rate of speed, under the order of the foreman, in order to reach a switch ahead of an approaching train, the facts did not make out a prima facie case of contributory negligence, and the burden of proof was not on plaintiff.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by Lorenzo Pina against the International & Great Northern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hicks & Hicks, for appellant. Thos. O. Murphy, for appellee.

FLY, J. This is a personal injury action instituted by appellee to recover damages alleged to have accrued through the negligence of appellant. Appellee obtained judgment for \$7,500.

It is the conclusion of this court, in deference to the finding of the jury, that appellee was damaged, in the sum found by them, through the negligence of appellant, as will more clearly appear from the facts herein after stated.

It appears from bills of exceptions that while appellee was testifying he was seized with a violent convulsion, succeeded by unconsciousness, and the jury was disturbed and excited thereby, and court adjourned until appellee recovered consciousness. Afterwards, during the course of the trial, while a physician was testifying as to appellee's injuries, he again was seized with a convulsion, and, after violent and distressing convulsions, unconsciousness ensued. After each of the convulsions appellant applied for a continuance on the ground that it had not been apprised by pleadings or otherwise that appellee was so afflicted, or that it would be claimed that such condition was superin-

*Rehearing denied January 13, 1904.

duced by the injuries alleged, to have been received through the negligence of appellant, and no opportunity was offered for appellant to meet such a state of affairs. It was alleged that appellant was surprised that appellee was subject to convulsions, and that it would be claimed that they were caused by the injuries.

It was not stated in either application for a continuance that there was any probability of obtaining any evidence that the convulsions were simulated, or that they were not the result of the injuries received at the hands of appellant, and there is nothing to indicate that the jury was influenced by the unfortunate condition of appellee. He was a robust young man, 19 or 20 years of age, was earning \$35 a month, and his injuries are permanent. His mind was impaired by the injuries, and the physicians testified that he would probably never recover, and that his eyesight was greatly impaired. Appellee was suffering great pain up to the time of the trial. The size of the verdict, under all the circumstances, does not indicate that the jury were moved by passion or prejudice.

It was alleged in the petition that by reason of being struck by the handle bar of the hand car and being thrown between the cars "he was greatly bruised, wounded, and mangled on his head, arms, abdomen, back, and legs, and that he received a blow on his head." It is the contention of appellant that the allegations were not sufficient to permit proof of fits or spasmodic attacks as a result of congestive condition of the brain, or of impairment of the eyesight of appellee. The allegations were full enough to justify the evidence of which complaint is made. *Railway v. McMannewitz*, 70 Tex. 73, 8 S. W. 66; *Railway v. Mitchell*, 72 Tex. 171, 10 S. W. 411; *Railway v. Edling*, 18 Tex. Civ. App. 171, 45 S. W. 406. The rule laid down as to what may be proved under general allegations of injuries to certain members or organs of the body is thus stated in *Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878: "It is well settled in this state that a general allegation of damages will let in evidence of such damages as naturally and necessarily result from the wrongs charged; but, to admit proof of damages which do not necessarily result from the injury alleged, the petition must set up the particular effects claimed to have followed the injury." The rule announced is supported by all text-books on damages. Speaking of the rule in *Railway v. Curry*, 64 Tex. 85, the Supreme Court said: "The rule, however, is satisfied when, from the facts stated, the law infers other fact or facts; for whatsoever the law infers from a given state of facts the adverse party is presumed to know, and must take notice of, whether it is specially pleaded or not." In the *Cook Case*, above cited, certain evidence was held to have been erroneously admitted because no injury was alleged to any organ or member of the body

from which the injury proved would naturally or necessarily have followed. In the case now under consideration injury to head and spine was specifically set forth, and spasms and impairment of the organs of sight would naturally result from such injury. In a Massachusetts case a boy was shot, and the person who fired the shot was sued for damages, and it was held by the court: "If the plaintiff became subject to fits after the shooting, and if they were a part of the result of the injury, the plaintiff was entitled to recover for such damage without specially alleging it, as well as for the pain and disability which followed the injury." *Tyson v. Booth*, 100 Mass. 258. In the Massachusetts case above cited the allegation was that plaintiff was "injured in his spine, chest, head, and limbs," and it was held the allegation was "sufficiently comprehensive to embrace a heart disease, or an aneurism of the blood vessels situated in the chest." If heart disease and aneurisms of blood vessels can be held to "naturally and necessarily" result from injuries to the spine, chest, head, and limbs, fits and impairment of the sight can be held to have "naturally and necessarily" resulted from the injuries alleged in this case. We believe the decision in the *Mannewitz Case* is correct, and that it fully sustains the opinion of this court in this case. It may be noted in connection with this subject that the only evidence as to convulsions and the impairment of sight that was objected to was that of two doctors, although appellee testified without objection that the convulsions, or "spells," as he denominates them, and the weakened sight were caused by the injuries. No special exceptions were urged to the petition on the ground that it was too general in its allegations as to the injuries.

Appellee was an inexperienced minor when employed by appellant, and had been in its employment only nine days when the accident occurred. At the close of appellee's last day's work for appellant as a section hand the men were ordered to place the hand cars on the track in order to go in from the work, and after the cars had proceeded about a mile a train was heard coming, and the foreman ordered the men to move the cars more rapidly in order to reach a switch about three-fourths of a mile ahead. Appellee was in the third car, and on account of the rapid rate at which the cars were moving, under order of the foreman, the one immediately in front of the one on which appellee was riding was derailed and was run into by appellee's car, and he sustained the injuries of which complaint was made in the petition. The youth and inexperience of appellee were known to the foreman. The hand cars were being run in dangerous proximity to each other, but appellee was ignorant of the danger. Under these facts the court did not err in refusing to instruct the jury that the burden rested upon appellee to show that he had not been guilty of con-

tributory negligence. The facts did not make out a prima facie case of contributory negligence, and did not bring the case within the exceptions laid down in the case of *Railway v. Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538, to the general rule which places the burden of establishing contributory negligence upon the defendant.

The other assignments of error are based on the insufficiency of the evidence to sustain the verdict, and are disposed of by what has herein been held as to the facts.

The judgment is affirmed.

OLIVARAS v. SAN ANTONIO & A. P. RY. CO.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

RAILROADS — CHILD ON TRACK — VIEW OF TRAINMEN — ADMISSIBILITY OF EVIDENCE — NEGLIGENCE — INSTRUCTIONS.

1. Plaintiff's child was killed by a locomotive at a place where the track curved. Witnesses for the defendant company testified to experiments made with the same engine on another curve, which convinced them that the view of the engineer from the side of the engine on the outside of the curve would be so obstructed by the boiler as to be limited to a very short distance. There was evidence that the curve at the place of accident was one of three degrees, and that the curve at the place of experiment was between three and four degrees; and in the opinion of one witness, familiar with both, they were about the same. Experiments made at the place of accident formed the basis of similar testimony, and the limited view of the engineer was not seriously contested. *Held*, that the admission of the evidence of the first experiments was not ground for reversal.

2. In an action by a parent for the negligent killing of his child by a locomotive it is error to instruct that, if defendant railroad company's employes were acting as men of ordinary prudence would do in operating the locomotive and in maintaining a lookout "at the time they observed the child on the track," and as soon as they discovered it used all means to avoid injuring it, verdict should be for the defendant; since, in the event that plaintiff was free from contributory negligence, defendant would be liable for negligently failing to keep a lookout prior to the child's discovery.

Appeal from District Court, Karnes County; J. C. Wilson, Judge.

Action by J. M. Olivaras against the San Antonio & Aransas Pass Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

Dougherty & Dougherty, for appellant. Proctors, for appellee.

JAMES, C. J. Action for negligent killing of appellant's child. The petition alleged negligence, first, in the failure of defendant's employes operating the train to observe and discover the child on the track in time to avoid striking it, and their failure to keep a reasonable lookout along its track at the place of the accident; and, second, after dis-

covery of the child on the track, and the dangerous position thereon of the child, in not exercising proper care to avoid striking it. Defendant pleaded a general demurrer, general denial, and contributory negligence of plaintiff and his wife, the child's parents. The verdict was for defendant.

There was evidence supporting the issue of contributory negligence. There was also evidence supporting the defense that defendant's employes operating the train used ordinary care in respect to persons that might have been on its track at the place of this injury, in keeping a proper lookout, and that they were not guilty of negligence in failing to observe the child on the track earlier than they did, and also that they were not negligent in respect to efforts to avert the injury after they saw the child upon the track.

Under the first and second assignments we have the following proposition advanced by appellant as showing error: "In determining an issue as to whether or not the fore part of the engine obstructed the view of the employes of defendant company operating the engine so that they could not see a child upon a track at a point where the track curved, it was error for the court to admit testimony of the result of an experiment made by a witness as to how far he could see down the track on an engine standing on a curve of different degree on the track at a place four miles distant from the scene of accident." Defendant had testimony to the following effect: The train in question was a passenger going from Corpus Christi to San Antonio. The child was on the track about 4 miles south of Kenedy and about 23 feet south of a public road crossing, towards the train, and outside of the cattle guard. The track curved towards the west for a considerable distance before reaching this crossing and at the crossing, so that the engineer at his post on the east side of the cab could not see the crossing or the child where it stood on account of the engine being upon the curved track. The curvature of the track prevented his seeing over it. These circumstances, although the engineer was looking ahead, made it impracticable for him to see the child until the engine was within a few hundred feet of it. He had whistled at the post. The fireman was at his post, ringing the bell, and looking ahead also. The fireman, who was on the west side of the cab, on account of a clump of bushes which extended to the right of way fence on his side ahead of him, could only begin to see the cattle guards, which were painted white, from a bridge about 1,000 feet off, but not a child on the track where this one was; that he was ringing the bell and looking ahead to observe conditions, and he first saw the child when the train was within a few hundred feet of it, and that this was as early as he could observe the child; that he immediately notified the engineer, who immediately applied the air, and there was ample testimo-

*Rehearing denied January 12, 1904.

ny that the engineer did all that could have been expected of him under the circumstances to stop the train, but was unable to stop it in that distance. The testimony was conflicting.

The above assignments question certain testimony of witnesses Newberry and Seale. The witness Newberry's testimony objected to was as follows: "I was on my ranch when they were surveying and taking the angles. Mr. Seale was there, and the attorneys for the railway company were there. We had an argument about whether the men on the engine could have seen the child if they had been looking, and Mr. Goode said they could not, and I said that the engineer could see over that engine on every part of the track, and told them so, and they were going to stop the train when it came along, and let me look; but the train was late, and I could not stay there, and went on to Kenedy, and when we got there this other train from Houston was there, and they got me to go on the engine, and when I looked I was very much surprised that I could not see over the engine. That curve looked pretty much like the curve at my place, but the engineer could not see anything at all ahead of him. I was of the opinion that the engineer could see over his engine, and see the road all the time, and I was very much surprised that he could not see at all on account of the curve and the boiler." The testimony of the witness Seale objected to related also to the curve at Kenedy, and was as follows: "I got on there to see how far and in what direction a man could look sitting in the engine, and I took a seat on the right side in the cab of the engine, and the curve was to the left, and I could see some little bit down that way. Then I come across over to the fireman's side and took a look. It was on a curve that turned to the right, and I could not see any distance from that side as the track curved. I suppose I could see some sixty or seventy feet on that curve. On the right-hand side I could see down the track some distance. The curve comes to the right, and the engineer was on the inside of the curve. Looking out the other side, I could see only a very little way. The reason was that the boiler was in the way." The engine upon which these parties went at Kenedy was the same one which ran over the child. It was at Newberry's place where the accident occurred, and he was familiar with the track and curve at that place. His testimony and other testimony shows that the curve at Kenedy to which he and Seale refer in the testimony complained of was similar to and substantially the same as that where the accident occurred. He stated: "And they put the engine on a similar curve to the one where the child was killed, and when I looked I was very much surprised that I could not see over the engine. That curve looked pretty much like the curve at my place, but the engineer could not see anything ahead of

him at all. The reason he could not see was on account of the curve. The way the engineer was sitting at the curve he could not see the road ahead of him at all. The engine itself obstructed the sight. The boiler was so high the engineer could not see over it. His stature and mine are about the same. I don't know anything about the degree of the curve. I know it is a similar curve to the curve at my place." Defendant's witness Gallagher testified that the ordinary curve is about three degrees. "The track going towards the cattle guard is what we call a three-degree curve." That as to the curve at Kenedy he was not sure it was the same degree of curve all the way. It possibly was a compound curve; that is, more curved in one place than in another. He did not think it was a uniform curve. The end on the other side of the depot is the most curved, and the greatest curve there is four degrees. Further up it is a little less. On the whole he thought it was a four-degree curve. Newberry was allowed to testify: "Mr. Goode told me he did not think the curve at Kenedy was hardly so sharp as the one at my place, but I thought it was about the same."

From this evidence of Gallagher the jury could have found that the Kenedy curve, where Newberry and Seale made their observations, was somewhere between three and four degrees. Or from the testimony of Newberry they could have found the degree of curvature was the same, or practically the same, as that of the other track. The only objection to the testimony of Newberry was that the curve on which the engine was standing was not the same as the one on which the child was killed, and the curve was of a different degree. To Seale's testimony the objection was the same, and, in addition, that the witness was not shown to be an engineer, or familiar with an engine, and because it was not the same engine. (Seale was shown to be a surveyor of many years' experience, and the engine was shown to have been the same one which struck the child, so the objection that remains is that the curve was not shown to be the same.) If the curve was the same, persons not experts were competent to observe the lines of vision from the engine, and to testify to the results. The conditions were similar, and practically the same. It was the same engine. Newberry was about the same stature as the engineer on the engine that killed the child. The place, it is true, was different, but this was of no consequence as regards the admissibility of the testimony offered if it was accompanied by testimony showing the curve to be the same, or practically the same. The testimony is that the curves were similar, or practically the same; and even the testimony of Gallagher indicates that Newberry was about right. The purpose of appellee in offering the testimony was to show what the lines of vision were of the engineer and fireman, with the engine on such a track.

There does not appear to have been any conflict in the evidence as to the ability of the fireman to have seen the place of the accident for a long distance, except for the clump of bushes. There does not seem to have been any conflict in the fact that the engineer could not see over the engine, or that any degree of curve would to some extent have caused the engine to obstruct the view of the track ahead of him. Experiments were made with the same engine at the place of the accident, and the results testified to. It seems to us that the testimony concerning the similarity of the curves was sufficient to authorize the court to admit the testimony of experiments at Kenedy, and that the judgment ought not to be reversed for this matter. *Burg v. Ry. Co. (Iowa)* 57 N. W. 683, 48 Am. St. Rep. 419. Upon another trial the difference, if any, between the curves, can doubtless be better established. Testimony of this character ought not to be admitted if the difference in conditions is probably such as would have a tendency to confuse or mislead the jury in considering the matter at issue.

The third and thirteenth assignments are well taken.

The court, at defendant's request, gave the following instruction: "If you believe that the employés of defendant in charge of said engine were acting as men of ordinary prudence would have acted in operating said engine and in maintaining a lookout from said engine at the time they observed the child on the track, and you further believe that as soon as they discovered said child they at once used all means then within their power consistent with the safety of the engine and train to have avoided injuring said child, then you will find for the defendant." In this the jury were told to find for defendant if, at the time those on the engine observed the child on the track, they were acting with ordinary prudence in operating the engine and in maintaining a lookout. This clearly was calculated to cause the jury to ignore the issue of previous negligence in reference to keeping a lookout, and in not having discovered the child sooner. The rule appears to be settled in this state to the effect that, if the parents were guilty of contributory negligence in permitting the boy to be on the track, defendants owed plaintiff no duty except after discovering its danger. Previous negligence as to lookout would be immaterial. On the other hand, if they were not guilty of contributory negligence, then it was a question for the jury to say whether or not, under all the circumstances, defendant's employés were negligent in not sooner discovering its danger. *Ry. v. Vaughn* (Tex. Civ. App.) 23 S. W. 745; *Ry. v. Watkins*, 88 Tex. 24, 29 S. W. 232; *Ry. v. Staggs*, 90 Tex. 461, 39 S. W. 205; *Ry. v. Long* (Tex. Civ. App.) 74 S. W. 59.

The judgment is reversed, and the cause remanded.

MASTERSON v. HEITMANN & CO.*

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

CONTRACTS—AMBIGUITY—CONSTRUCTION BY PARTIES—APPEAL—ASSIGNMENTS REVIEWABLE—INFORMAL BRIEFS.

1. An order for the installation of an irrigation pump, reading, "I to furnish all the foundations and common labor," does not necessarily exclude the construction that the foundation was to be constructed under the direction of, and in accordance with plans and specifications to be furnished by, the seller.

2. Where, at the beginning of the performance of a contract for the installation of an irrigation pump, containing a provision that the buyer was to furnish the foundation and common labor, a question arose as to whose duty it was to give directions for the foundation, and the seller acquiesced in the buyer's construction that it was his (the seller's) duty, and sent a man to give such directions, and, in letters to the buyer, did not deny his duty, he could not, in an action on the contract, urge that it was the buyer's duty to construct the foundation without any direction from him, and that the buyer's failure to do so was the cause of delay in erecting the plant within the contract time.

3. Where the question of the sufficiency of evidence to sustain the verdict is raised by assignments in the brief, and the brief contains statements from the record showing that such assignment should be sustained, the Court of Civil Appeals ought not to refuse to consider the assignment, although appellant disregarded the rules of the court in the manner in which he prepared his brief.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by F. W. Heitmann & Co. against Branch T. Masterson. From a judgment for plaintiffs, defendant appeals. Reversed.

Hutcheson, Campbell & Hutcheson and Masterson & Masterson, for appellant. Ewing & Ring, for appellees.

PLEASANTS, J. Appellees brought this suit against appellant to recover the sums of \$148 and \$550, alleged to be the unpaid balances of the agreed purchase price of two pumps, with the necessary fittings and appliances, sold by them to appellant, and the further sum of \$1,410.62, alleged to be the reasonable value of certain goods, wares, and merchandise sold and delivered by them to the appellant. The answer of defendant admitted the balances claimed as due on the purchase price of the two pumping plants, and also admitted the correctness of the larger portion of the open account, but, as to certain items in said account which were specified in the answer, denied that same were purchased or received by defendant. The answer further averred that the pumping plant was purchased by defendant under a contract with the plaintiffs whereby they undertook to install said plant on defendant's farm, in Bexar county, and have the same ready for operation by the 1st day of May, 1901, but that plaintiffs failed to comply with their said contract, and did not con-

*Rehearing denied.

struct the plant within the specified time, and in fact never fully completed the construction of same; that the defendant had to complete the construction of said plant at his own cost and expense, in the sum of \$300; that, by reason of plaintiffs' delay in constructing said plant, defendant lost the crop upon his said farm, which was of the value of \$15,000; and defendant prayed for judgment against the plaintiffs for the value of said crop, and for the sum of \$300 expended by him in completing the construction of said pumping plant. To this answer the plaintiffs, by supplemental petition, replied as follows:

"(1) They denied that the defendant had sustained any loss or damage by reason of any of the matters alleged by him.

"(2) They pleaded to the effect, in substance, that the delay was caused by defendant's failure to perform his part of the contract—especially in failing to furnish the foundation for the pump, as in duty bound to do.

"(3) They further pleaded to the effect, in substance, that, if defendant had sustained any loss by reason of any breach on plaintiffs' part, the damaging consequences could and would have been averted by ordinary care on defendant's part, as in duty bound, so far as might be, by ordinary effort and moderate expense; and, further, that the claim for damages set up was fictitious and without merit, and was asserted merely as a pretense for avoiding payment of the plaintiffs' just demand, and as an excuse for delay in the payment thereof."

The trial in the court below by a jury resulted in a verdict in favor of the plaintiffs for the full amount claimed by them.

The record discloses the following facts: The appellant, being the owner of a farm in Bexar county, which he desired to irrigate, procured an engineer to make a topographical survey of said farm, run the levels, and prepare the plans for an irrigation plant. After the completion of these plans, appellant, with a map or sketch of same, went to appellees, who were engaged in the business of selling and installing pumps and other machinery for the operation of irrigating plants, and requested them to give him an estimate of the cost of installing a pump of sufficient capacity to furnish the water required by the irrigation plans. Appellant explained to appellees that unless the pump could be installed and put in operation by the 1st of May, 1901, he did not desire to purchase same. Appellees would not make a contract to furnish the pump by the 1st of May until they had sent a telegram to the factory to find if a pump sufficient for the work could be procured at once. After learning that such pump could be procured, they agreed with appellant to furnish him with same and have it installed and in operation by the 1st of May, 1901. The price agreed upon for the pump and necessary fittings and

the cost of installing same was \$1,000. When this agreement was made, appellant explained to the agent of appellees, with whom the contract was made, that he intended to use the boiler in use in a gin which he had on his farm, to supply the power for running the pump, and that he had on his farm the necessary piping for conveying the steam from the boiler to the pump; that appellant would have all the hauling done, furnish all the unskilled labor necessary for work of installing the pump, and furnish the material for the foundation; and these items were not included in making the estimate of the cost of the pumping plant. Appellant lives in the city of Galveston, and the farm on which the pumping plant was to be installed was near the town of Lacoste, in Bexar county. Appellees' place of business is at Houston, Harris county. On the day after this contract was made, appellees telephoned appellant, at Galveston, asking permission to substitute for the pump contracted for one that would cost \$100 more. In response to this request appellant met appellees' agent in Houston, and, after consulting with him in the matter, agreed to the substitution. Some days after this, appellees' agent requested appellant to sign a written order for the machinery. This order, so far as it bears upon the issues of this case, was as follows:

"April 6, 1901. F. W. Heitman & Co., Houston, Texas: You will please order for the undersigned, shipped to Lacoste, on or about April 10, 1901, one 8x12x12x10 Worthington compound duplex pump, with 60 feet of suction and discharge pipe and the necessary fittings you to furnish a man to superintend erection and setting of pump, I to furnish all foundations and common labor and necessary pipe to make steam connection, which is to be connected by you. Pump guaranteed to have a capacity of 1,200 gal. per minute against a 73-foot head, with a 60 h. p. boiler. Pump to be erected by May 1.

Cash with order..... \$550 00
Note due Nov. 1, 1901..... 550 00

"[Signed] Branch T. Masterson."

Appellees fully understood at the time the contract was made that the pump was wanted to furnish water for the purpose of irrigating appellant's crop, and that the crop would need the water by the 1st of May. Appellees ordered the pump shipped at once, and it reached appellant's farm on April 26th. Nothing further was done by appellees in the performance of their contract until May 1st, when they telephoned the Alamo Ironworks, at San Antonio, and arranged with that company to have the pump installed. On May 3d the Alamo Ironworks sent a man to the farm to take the measurements for the suction and discharge pipe for the pump. This piping was sent out to the farm on May 13th. On May 11th appellees addressed the following letter to appellant's manager on the farm:

"May 11, 1901. Mr. Max Reicherzer, Lacoste, Texas—Dear Sir: We have arranged with the Alamo Iron Works to attend to the setting of the pump sold Mr. Masterson. When you have the material for the foundation and the mason ready please communicate with them and they will send a man there to superintend the setting of the pump. Mr. Masterson called on us yesterday and is very anxious to get the pump started, and the only delay that can be caused now will be by you not having the material ready. Please take this up with the Alamo Iron Works, who will superintend the erection of the engine. F. W. Heltman & Co."

On May 19th appellant wrote appellees as follows: "I am just in receipt of a letter from the manager on my ranch to the effect that he went to see the Alamo Iron Works about the foundation for the pump on my plantation west of San Antonio, and they say you have to furnish plans. Under our contract everything was to be completed by May 1st. My whole year's crop is depending on your completing your work. This is a time contract, and while I know that you are loaded with contracts, that will not be any reason for me to lose my year's crop for want of the pumping plant being completed, so I beg to urge you to complete the work at all hazards. I don't want to have a heavy loss for either of us to bear as a result of the delay."

In reply to this letter, appellees on May 21st wrote appellant as follows:

"May 21, 1901. Mr. B. T. Masterson, Galveston, Texas—Dear Sir: We are in receipt of yours of the 19th inst. and in reply beg to state that we have telegraphed, telephoned and written to your manager at Lacoste to know if he has the foundation material for the pump and a man to lay the foundation. We are ready to send a man at any time if he has the material on the ground. We have been unable to hear from him. The Alamo Iron Works have today advised us that the machinists in San Antonio are all on a strike and we will have to send a man from here.

"As soon as we can hear from your manager, we will send a man there to erect the pump and complete the job.

"F. W. Heltman & Co."

The telegram referred to in the above letter as having been sent appellant's manager was sent on the same day the letter was written, and is as follows:

"Houston, Texas, May 21, 1901. To Max Reicherzer, Lacoste, Texas: Have you foundation material ready on the ground. Answer. F. W. Heltman & Co."

In reply to this telegram, appellant's manager wrote appellees the following letter:

"Idlewild P. O. May 22, 1901. F. W. Heltman & Co., Houston, Texas—Dear Sirs: I received your telegram asking me about having the foundation material ready for the Masterson pump. I have been waiting to hear from you to say what is needed. How

much rock, brick or sand and cement is needed.

"Please send me foundation plan and let me know what is needed.

"Max Reicherzer."

On May 23d appellant wrote appellees as follows:

"Galveston, Texas, May 23, 1901. Messrs. F. W. Heltman & Co., Houston, Texas—Gentlemen: Yours of the 21st to hand and contents noted. I am just in receipt of a letter from my manager at Lacoste enclosing your telegram to him asking if the material for the pump foundation was ready and on the ground. He stated that he doesn't know and has not been informed how much brick or stone or both will be needed for the foundation and has been waiting to hear from you in that regard. Now if you will either write or wire him the exact material and amount of same necessary for the foundation it can be placed on the ground all ready upon very short notice. I thought that the very purpose of the trip of the party you sent out there was to decide just such details as this. Now please take the matter up immediately, write to my manager exactly what you want out there, and it will be on hand, and then send our your man to put up the pump. It is of utmost importance that this pump be put up at once as there has been no rain there and crops are needing rain very badly.

"[Signed]

Branch T. Masterson."

Appellees in reply to this letter wrote appellant as follows:

"May 24th, 1901. Mr. B. T. Masterson, Galveston, Texas—Dear Sir: Replying to yours of the 23rd inst. beg to state that we have a man at Lacoste now setting your pump and have instructed him that if there will be any delay in getting the brick to put the pump on a timber foundation and get it started at the earliest possible moment.

"[Signed]

F. W. Heltman & Co."

The statement in this letter that appellees then had a man at the farm setting up the pump was not accurate. No one came to the farm to attend to the matter for appellees until May 25th, when the Alamo Ironworks sent out a man to designate the location for the pump, and give appellant's manager directions as to the necessary material for the foundation, and the manner in which same should be constructed. This man left after giving the necessary directions as to the foundation. The material for the foundation was promptly procured and placed on the ground by appellant's manager, but the foundation could not be constructed because appellees had failed to send anchor bolts with the pump. These bolts are necessary to fasten the pump to the foundation, and must be put into the foundation when it is being constructed, so that the cement will harden around them and hold them in position. Appellees' agent who made the contract testified that the anchor bolts were not a part of the pump, but were usually furnished with

a pump. Appellees' representative who gave directions as to how the foundation should be built promised to send the bolts out. They did not come promptly, and appellant's agent went to San Antonio and tried to get them from the Alamo Ironworks, but failed. These bolts were not received until June 10th. After their receipt the foundation was constructed promptly, and was completed on June 14th, and appellees notified that it was ready for the pump to be placed thereon. No one was sent out to put up the pump until June 30th. The work of erecting the pump and putting the same in operation was further delayed for a day or two because a foot valve had not been sent out with the pump. The man in charge of this work placed the pump in position and got it in operation on July 7th, at which time he left appellant's farm, and nothing further was done by appellees under their contract. As installed by appellees, the pump could not be operated so as to furnish water for the irrigation plant. The discharge pipe was four feet too short, and, as a consequence, did not bring the water to the top of the bank and connect with the conveying pipe. Appellant had this and other defects in the erection of the pump remedied at a cost of about \$300. The evidence shows that appellant's crop was greatly damaged by the failure to irrigate it, caused by the delay in erecting the pump. The evidence as to the amount of damage is meager and unsatisfactory, but we think there was sufficient evidence on this point to have authorized the jury to have found for the defendant for a portion of the damages claimed by him, in event they had found that plaintiff, under the facts in evidence, was responsible for the delay in the erection of the pump. Appellees' agent who made the contract with appellant testified that the delay in the erection of the pump was caused by the failure of appellant to construct the foundation, and that, under the contract, appellees were not required to furnish plans and specifications for the foundation, nor to superintend its construction.

Upon these facts, we are of opinion that the jury were not authorized to find that appellees were not responsible for the delay in installing and putting in operation the pumping plant which they had contracted to furnish appellant, and the assignment of error which assails the verdict as being unsupported by the evidence should be sustained. The order for the machinery, if it be treated as evidencing the entire contract between the parties, is not unambiguous in its terms as regards the foundation for the pump. The clause, "I to furnish all foundations and common labor," does not require a construction which would exclude the idea that the foundation was to be constructed under the direction and in accordance with plans and specifications to be furnished by the appellees. The language used in the contract bearing of this ambiguous character, the inter-

pretation put upon it by the parties should control in its construction. In the very inception of the work of performing the contract, the question as to whose duty it was to give directions as to the foundation arose, and appellant claimed that this duty devolved upon appellees. Appellees acquiesced in this construction of the contract, and finally sent a man to appellant's farm to give directions as to where and how the foundation should be constructed. In reply to the several letters written them by appellant and his manager, urging them to proceed with the work and to furnish plans for the construction of the foundation, appellees made no denial of the contention of appellant that it was their duty to furnish these plans, but in all of their letters and telegrams acquiesced in appellant's construction of the contract—that he was only required to furnish the material and labor for the construction of the foundation. Having given this construction to the contract, and induced appellant to rely upon their promise to comply with the contract as thus construed, it would be manifestly unfair to permit appellees to now say that it was appellant's duty to construct the foundation without any direction from them, and that his failure to do so was the cause of the delay in the erection of the plant. *Ry. Co. v. Johnson*, 74 Tex. 256, 11 S. W. 1113; *Long Bell v. Stump*, 86 Fed. 574, 30 C. C. A. 260; *Trust Co. v. Wabash (C. C.)* 34 Fed. 254; *Davis v. Shafer (C. C.)* 50 Fed. 764; *Leavitt v. Windsor Co.*, 54 Fed. 439, 4 C. C. A. 425.

Appellees object to our consideration of the assignment raising the question of the insufficiency of the evidence to sustain the verdict because appellant's brief is not prepared according to the rules. Appellant has failed in several respects to comply with the rules in preparing his brief, and we would probably not be required to consider any of the questions raised; but the issue as to the sufficiency of the evidence to sustain the verdict of the jury against appellant on his claim for damages being raised by assignment presented in his brief, and said brief containing statements from the record showing that said assignment should be sustained, we have concluded that we ought not to refuse to consider the assignment, notwithstanding appellant's disregard of the rules of this court in the manner in which he has prepared his brief. *McCarthy v. Life Ins. Co.*, 74 S. W. 921, 7 Ct. Rep. 667; *Ry. Co. v. McArthur (Tex. Sup.)* 70 S. W. 317.

As the question is presented in appellant's brief, it is not apparent that any error was committed by the trial court in the admission in evidence of appellees' account books and shipping receipts. The rules of evidence as to the circumstances under which such evidence is admissible, and the purpose for which it can be used, are fundamental; and, if any error was committed in the introduction of this evidence, it is not likely to be repeated upon another trial.

Because, in our opinion, the finding of the jury that appellees were not entitled to recover anything on their plea in reconvention is not supported by any evidence in the case, the judgment of the court below is reversed, and the cause remanded for a new trial. Reversed and remanded.

On Motion for Rehearing.

(Jan. 15, 1904.)

In overruling appellees' motion for a rehearing, we deem it proper to modify, or rather to express more accurately, the conclusions stated by us in our former opinion filed herein on November 11, 1903. We did not intend in that opinion to hold that under the evidence the trial court should have instructed the jury to find that appellees, under their contract with appellant, were required to furnish the plans and specifications for the foundation for the pump, and to superintend its construction. The jury should look to all the evidence in the case to determine upon whom the duty of furnishing the plans and specifications for the foundation and superintending the construction of same devolved; and, if the parties by their letters and acts had construed the contract in this regard, such practical construction should be accepted by the jury as the true intent and meaning of the contract. The statement in the last paragraph of our former opinion, to the effect that there is no evidence in the record to sustain the finding of the jury that appellees were not responsible for any of the delay in the erection of the pumping plant, is justified by the undisputed and unexplained fact that after the foundation was constructed there was a delay of two weeks on the part of appellees in proceeding with the work of erecting the pump. It is not shown, however, with any degree of certainty, what proportion of the damage claimed by appellant was caused by this delay. We have carefully considered the various points urged by appellees against our judgment reversing this case, but have reached the conclusion that it should not be disturbed, and the motion for rehearing is therefore overruled.

Overruled.

GARNER et al. v. BOYLE et al.*

(Court of Civil Appeals of Texas. Dec. 14, 1903.)

BONA FIDE PURCHASERS—NOTICE—EVIDENCE—SUFFICIENCY—RIGHTS OF VENDEES—POWERS OF ATTORNEY—CONSTRUCTION.

1. In a suit for the cancellation of a power of attorney and deed, for the recovery of the land conveyed by the deed, and for damages, evidence examined, and held sufficient to sustain findings that defendant had performed his contract to clear the title to the lands under the power of attorney, and had no notice of the claim of certain plaintiffs under an unrecorded deed executed prior to the power.

2. Where an attorney in fact, acting under a power authorizing him to clear the title to lands, and conveying him a half interest therein in consideration of his services, expended time and money in performing his part of the contract, without knowledge or notice of rights of others under a prior, unrecorded trust deed to the lands, he became vested with an undivided half interest in the land, which he could hold, as an innocent purchaser for value, against the claims of the cestuis que trustent, even conceding that the power of attorney was merely an executory contract, and vested in him at the time of its execution no present interest in the land.

3. The title of a vendee of one who has obtained title as innocent purchaser is good, though the vendee at the time of his purchase be charged with notice of the adverse equities.

4. An obligation in a power of attorney to recover land and clear the title to the same does not require the obligor to pay taxes, or any other debt due by the obligee for which a lien on the land might exist.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by F. T. Garner and others against John T. Boyle and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Mark G. Fakes, for appellants. Otto Pape, P. E. McMahon, and McKinney & Hill, for appellees.

PLEASANTS, J. This suit was brought by the appellants, F. T. Garner, Mrs. Ruby Wyndelts, joined by her husband, M. A. Wyndelts, Miss Pearl Garner, and Mrs. Annie M. Paschal, joined by her husband, John S. Paschal, against the appellees, John T. Boyle and James McMurry. The petition alleges, in substance, that plaintiffs Mrs. Wyndelts and Miss Pearl Garner are the owners in fee of an undivided one-half of the Arthur P. Garner survey of land, in San Jacinto county; the metes and bounds of said survey being set out in said petition. It then alleges that on or about the 8th day of July, 1901, the defendant John T. Boyle fraudulently procured from plaintiff Mrs. Paschal and her husband a power of attorney authorizing said Boyle to clear the title, and recover and take possession of any lands in the state of Texas belonging to the separate estate of Mrs. Paschal, and conveying to him, in consideration of services theretofore rendered and to be rendered by him under said power of attorney, an undivided one-half of any land belonging to Mrs. Paschal which he might recover for her; that, prior to the execution of said power of attorney, Mrs. Paschal, who then owned an undivided one-half of said Arthur P. Garner survey, conveyed her interest in same to plaintiff F. T. Garner in trust for the use and benefit of her then minor children, plaintiffs Mrs. Wyndelts and Miss Pearl Garner; that, while said conveyance in trust was not recorded in San Jacinto county at the time said power of attorney was executed, the defendants, Boyle and McMurry, both had actual notice of same, and understood that said power of attorney was

*Rehearing denied.

not intended to confer upon Boyle any authority with reference to the lands included within said conveyance, or to pass to him any interest therein; that, notwithstanding said knowledge on the part of the defendants, said Boyle, without incurring any expenses or doing anything towards clearing or perfecting the title of Mrs. Garner or her said coplaintiffs in said Arthur P. Garner survey, conveyed to his codefendant an undivided one-fourth interest therein. The prayer of the petition is for a cancellation of said power of attorney and said deed from Boyle to McMurry, for the recovery of the land thereby conveyed to McMurry, and for damages against both defendants for their alleged wrongful acts. The defendants filed separate answers, and each denied generally and specially the allegations of the petition as to notice of the conveyance from Mrs. Paschal to her children. The defendant McMurry pleaded that he was an innocent purchaser for value of the land conveyed to him by Boyle, and prayed that he be protected in said purchase. The defendant Boyle pleaded specially that he had performed all of the conditions required of him under said power of attorney, and thereby became the lawful owner of the undivided one-fourth interest in said land; that he had no knowledge whatever of any outstanding equities against said land, or any part thereof; that he had no notice whatever of said trust deed, and in good faith, for a valuable consideration, he conveyed to his codefendant, McMurry, of San Jacinto county, Tex., a one-fourth interest in said land; that at the time of said conveyance he had expended large sums of money in and about perfecting the title thereto, and believed himself to be the rightful owner of the interest conveyed. He further alleged that plaintiff Mrs. Paschal exercised ownership over said property, and induced him to believe that she owned the same and had authority to contract with reference thereto, and, relying upon her representations, he expended money and time in clearing her title to same, and if it should be held, for any reason, that he acquired no right in said lands under said power of attorney, that he has been damaged by the acts of plaintiffs in the sum of \$1,500, for which he prays judgment, and asks that he have a lien upon the land to secure same. He further prays for equity and general relief. The cause was tried in the court below without a jury, and judgment rendered in favor of the defendants—that plaintiffs take nothing by their suit. From this judgment, plaintiffs below prosecute this appeal.

The evidence in the case is practically undisputed, except upon the issue of whether the defendants, or either of them, acquired the land claimed by them without notice of the conveyance from Mrs. Paschal to her children. The power of attorney given by Mrs. Paschal and her husband to defendant Boyle is as follows:

"State of Texas, County of Harris. Know all men by these presents: That we, Annie M. Paschal, joined by her husband, John S. Paschal, residents of the City of Houston, Harris County, Texas, have made, constituted and appointed, and by these presents do make, constitute and appoint John T. Boyle, our true and lawful attorney for us, and in our name, place and stead, to ask, demand, recover and receive all and any lots, parcels or tracts of land, located and situated in any County in the State of Texas, belonging and being the separate property of Annie M. Paschal; and we do hereby authorize our said attorney, to institute in our names, any and all suits that may be necessary to be instituted in that behalf, giving and granting to our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as we might, or could do if personally present, hereby ratifying and confirming whatsoever our said attorney shall and may do by virtue hereof in the premises.

"And we do hereby agree and by this instrument hereby bargain, grant, sell, alien and convey a one-half interest in and to all those certain lots, parcels or tracts of land, located and situated in any county in the State of Texas, belonging to the separate estate of Annie M. Paschal, said interest being transferred and conveyed for the services heretofore rendered and hereafter to be rendered by the said John T. Boyle; it being expressly understood that the said John T. Boyle will personally be responsible and pay all expenses connected with the recovery of said lands.

"Witness our hands at Houston, this the 8th day of July, A. D. 1901. [Signed] John S. Paschal. Annie M. Paschal."

On July 23, 1895, Mrs. Paschal executed a deed whereby she conveyed to F. T. Garner, in trust for the use and benefit of her children Mrs. Wyndelts and Miss Pearl Garner, who were both then minors, all of the land owned by her in Polk and San Jacinto counties. At the time this conveyance was executed, Mrs. Paschal owned several tracts of land in Polk county, and an undivided half interest in the Arthur P. Garner survey, in San Jacinto county. It is not definitely shown that this deed was delivered to the trustee or the beneficiaries named therein, but it may be inferred from the evidence that such delivery was made. It was not recorded, however, until June 14, 1902. Each of the defendants swears positively that he never heard of said deed, and had no notice of the fact that Mrs. Wyndelts and Miss Garner, or either of them, claimed any interest in the land in controversy, until after the defendant Boyle had conveyed the interest acquired by him under said power of attorney to his codefendant, McMurry. As before stated, the evidence upon this issue is con-

flicting. Mrs. Paschal testified that she told defendant Boyle at the time she gave him the power of attorney that she had conveyed her Polk and San Jacinto county lands to her children. She is corroborated in this statement by one of her daughters who is not a party to the suit. H. F. Clifford, a son-in-law of Mrs. Paschal, testified that defendant McMurry told him some time before the power of attorney to Boyle was executed that Mrs. Paschal had conveyed the San Jacinto land to her children, and for this reason he would not buy the land from Clifford, who was trying to sell it for Mrs. Paschal. On the same day that the power of attorney was executed Mrs. Paschal also conveyed to Boyle, by deed, her lands in Polk county which she had previously conveyed to her children. This deed to Boyle was made for the purpose of enabling him to settle claims against the land, and sell same for Mrs. Paschal as her attorney in fact. Boyle does not seem to have any definite recollection as to why a deed was executed to this land, in addition to the power of attorney; and Mrs. Paschal testifies that she did not know the instrument was a deed, but supposed when she executed it that it was a power of attorney. Acting under this deed, Boyle compromised all adverse claims to the Polk county lands, and reconveyed to Mrs. Paschal her portion of same, which she subsequently sold. It is not shown that she accounted to Mrs. Wyndelts or Miss Garner for the proceeds of the sale of this land. After the execution of the power of attorney, Mrs. Paschal went with Boyle to San Jacinto county to investigate the condition of the Garner survey, in that county, and presumably for the purpose of assisting him in clearing the title and making sale of same. Boyle testified that he made several trips from Houston to San Jacinto county for the purpose of getting the title to the land in a marketable condition; that he employed a surveyor, and had the survey run out, and its lines established; that there were a number of adverse claimants to the land, and he employed an attorney to represent him in procuring releases from said claimants; that he procured said releases, and had same recorded; and that the title to said land is now clear. He has not paid the back taxes due on the land, because he could never get a statement from the county collector showing what amount was due by Mrs. Paschal. While the power of attorney does not require Boyle to pay taxes that were due on the land, he seems to have considered that he was under some kind of obligation to pay same. Since the sale by Boyle to McMurry, a suit has been brought and is now pending in San Jacinto county against the unknown owners of a portion of the Arthur P. Garner survey to recover taxes due on said survey from the year 1885 to 1893, inclusive; the amount of taxes and penalties claimed in said suit being \$551.87. After having the land surveyed, and procuring the releases

above mentioned, Boyle sold and conveyed his interest in same, acquired under said power of attorney, to the defendant McMurry, for a cash consideration of \$400. This deed from Boyle to McMurry was executed on May 14, 1902. On the 19th day of May, 1902, Mrs. Paschal and her husband executed a power of attorney to her son-in-law H. F. Clifford, authorizing him to enter upon and take possession of, and to mortgage or sell or otherwise dispose of, any and all lands in the state of Texas belonging to her. Both Mrs. Paschal and Boyle testify that the power of attorney to him had been revoked, and he expressly disclaims any further rights thereunder.

We think the evidence above stated sustains the judgment of the court below. Conceding, for the sake of argument, that the power of attorney from Mrs. Paschal to Boyle was merely an executory contract, and vested in him no present interest in the land, if at the time he procured said power of attorney he had no knowledge of the claim of Mrs. Paschal's children under the trust deed, and, without any notice of said claim, expended his time and money in performing his part of the contract, after such performance he became vested with an undivided one-half interest in the land, and could hold the same, as an innocent purchaser for value, against the claim of the children under the unrecorded deed.

The evidence being sufficient to sustain the findings that Boyle had performed his contract under said power of attorney, and that he had no notice of the claim of appellees under the unrecorded deed, none of appellant's assignments of error can be sustained. It is unnecessary to consider the assignments categorically or in detail. It is sufficient to say that, while the abstract principles of law invoked by the assignments are correct, all of them are predicated upon the untenable fact theory that the evidence is not sufficient to sustain the findings of the court that the defendant Boyle had no notice of the unrecorded deed, and that he performed his part of the contract under the power of attorney from Mrs. Paschal.

It becomes unnecessary for us to determine whether the deed from Boyle to McMurry was merely a quitclaim, and therefore would not support the plea of innocent purchaser. Boyle, by reason of his ignorance of the claim of plaintiffs under the unrecorded deed, having obtained a good title to the land, the title of his vendee would be equally good, notwithstanding the fact that such vendee might at the time of his purchase be charged with notice of such claim. *Hickman v. Hoffman*, 11 Tex. Civ. App. 607, 33 S. W. 257; 1 Story's Eq. Jur. 409.

In regard to the failure of Boyle to pay the taxes due upon the land, it is sufficient to say that it does not appear from the power of attorney or otherwise that his interest in the land was not to vest until the taxes due

thereon had been paid. His undertaking and obligation under said instrument was to recover the land, and clear the title to same, and this obligation did not require him to pay taxes or any other debt due by Mrs. Paschal for which a lien upon the land might exist.

We are of opinion that the judgment of the court below should be affirmed, and it is so ordered. Affirmed.

FOSTER v. ROSS et al.*

(Court of Civil Appeals of Texas. Dec. 1, 1903.)

STATUTE OF FRAUDS—AGREEMENT TO CONVEY LAND—WANT OF CONSIDERATION—WARRANTY OF TITLE—ACTION FOR BREACH—DEFENSES — TRANSACTION CONSTITUTING TRUST.

1. An agreement by a vendor, who had reserved a lien in his deed for the balance due on the purchase price, to buy in the land at a foreclosure sale in full satisfaction of his judgment for the balance due him, and to deed the land to the purchaser, or to some one named by her, in case she should within a reasonable time pay him a specified sum, was an agreement to convey land, within the statute of frauds, and should have been in writing.

2. The transaction did not constitute a trust.

3. Where a vendor, in consideration of the purchaser's agreement to forbear resisting his demand, against which there was no available defense, promised on a foreclosure of his lien to buy in the land in full satisfaction of his judgment for the balance due him, and to thereafter accept for the land from the purchaser a less sum than she owed, the promise was a mere gratuity; the purchaser not having parted with any right or assumed any burden in consideration thereof.

On Rehearing.

4. Where two independent actions between the same parties and growing out of the same transaction, one for breach of an alleged trust agreement and for enforcement of the same, and the other for breach of warranty of title, are consolidated, the judgment therein was severable, if two distinct judgments were not in fact rendered; and where a party aggrieved by the judgment as to the trust agreement appeals therefrom, but not as to the judgment as to the breach of warranty, which was in her favor, the court cannot review the latter judgment on cross-assignments of error by the adverse party, who did not appeal therefrom.

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Two separate suits by Corra Bacon Foster against J. H. Burnett for breach of an alleged trust agreement, and for enforcement of the same, and by the latter against the former for breach of warranty of title. Pending the suits, which were consolidated and tried together, Burnett died, and his executors, J. O. and Ellen B. Ross, were made parties thereto. Judgments were rendered against the executors as to the breach of warranty, and in their favor as to the trust agreement, and plaintiff appeals. Affirmed.

Burke & Tarvis and James R. Masterson, for appellant. J. R. Burnett, Edgar Watkins, and Frank C. Jones, for appellees.

*Writ of error denied by Supreme Court.

GILL, J. In 1893 Corra Bacon Foster, the appellant, bought of J. H. Burnett (now deceased) a tract of about 3,500 acres of land in Harris county, known as "Pasadena." The agreed price was \$60,000, and certain real estate in the city of Houston, belonging to appellant, and known as the "Brady Place," was accepted at a valuation of \$18,000 as part payment. Burnett deeded Pasadena to appellant, taking vendor's lien notes for the balance due, and reserving the lien in the deed. Appellant conveyed to Burnett the Brady place, giving a warranty deed therefor. Appellant thereafter made sales of parts of the Pasadena tract, taking vendor's lien notes therefor aggregating between nine and ten thousand dollars. These notes were valueless as mere notes, but valuable because of the liens. They were turned over to Burnett in lieu of his original lien on the land they represented. The notes executed by appellant to Burnett for the purchase money of Pasadena became due, and she found she could not meet them. She approached Burnett, and asked for time and opportunity to sell the land and pay them; her idea being that the value of the land exceeded the balance due, as evidenced by the notes. Burnett consented to cancel the debt if appellant would pay \$37,000 "in a few days." This she failed to do. Burnett thereafter sued upon the notes, foreclosed his lien, and bought in the land at foreclosure sale for \$500, which sum he credited on the judgment. He had discovered that there existed against the land which he had received from appellant a mortgage for \$3,250. This he found it necessary to pay off, with interest. This mere outline of the facts will be supplemented further on in this opinion as the questions presented may require.

Appellant brought this suit against Burnett, averring, in substance, that, prior to his foreclosure suit, Burnett had agreed to buy in the land at foreclosure sale in full satisfaction of his judgment, and deed same to her, or to some one named by her, in case she within a reasonable time should pay him \$37,000 cash. She was to find a purchaser for the land for that sum or more, to whom he would make the deed upon payment of the stipulated amount. She averred that, in pursuance of this arrangement, Burnett foreclosed his lien and bought in the land; that, by force of the agreement, he took the title in trust for her; that thereafter, within a reasonable time, she found cash purchasers for a greater sum than the amount named in the agreement, but that Burnett refused to perform his agreement, repudiated the trust, and sold a large portion of the land for large sums to purchasers having no notice of the trust, to her great damage, for which she asks redress, and for the enforcement of the alleged trust against the unsold lands. The consideration averred for the alleged undertaking on the part of Burnett was an agreement on the part of appellant to accept serv-

ice of the suit as brought in Galveston county, and make no resistance to the foreclosure. The controlling allegation with reference to the nature of Burnett's undertaking was to the effect that he should purchase the land at foreclosure sale, taking title to himself; that such purchase should be in full satisfaction of his judgment; and that in case she thereafter, within a reasonable time, paid him \$37,000, or found a purchaser who would buy the lands on terms to her advantage, enabling her to pay the \$37,000 and have something left to herself, Burnett should part with the land for that sum. The pleadings disclose no valid defense to Burnett's foreclosure suit, and the facts render it even more certain that she had none. Defendant answered by plea to the jurisdiction on the ground that by this suit plaintiff sought to set aside the judgment of another court. The pleas in bar were general denial, no consideration, the statute of frauds, and the statute of limitations of two and four years. Because of the mortgage on the Houston property, which Burnett found it necessary to discharge, he sued appellant on her warranty. This suit was by agreement consolidated with the suit above mentioned, and the two were tried together.

This, in general outline, is the nature of the litigation we are called on to review. The pleadings are unusually voluminous, covering nearly 50 pages of the record, but we believe a fuller statement of them unnecessary.

Pending the suits, Burnett died, and his executors were made parties. In appellant's suit, verdict and judgment was for defendant, but the judgment on the vendor's lien notes was declared satisfied by the purchase of the land at sheriff's sale. This judgment appellant seeks to reverse. In the suit on the warranty, judgment was for appellant, and appellees seek its reversal by cross-assignments of error.

To say the very least, the evidence justified the court in submitting the issue of the existence of the contract as averred by appellant, an effort on her part to comply with it, and its repudiation on the part of Burnett. So, if the errors assigned against the trial court in the submission of these issues are valid, the judgment should be reversed, and the cause remanded, unless for some reason of an absolute nature the judgment should be permitted to stand. Even if it be held that the facts establish the contract on which appellant relies, it falls to show that it was in writing. It also shows beyond controversy that it was entirely unsupported by a consideration; that appellant neither parted with any right, nor assumed any burden, in consideration of Burnett's alleged promise. These two we regard as reasons which require the affirmance of the judgment, without reference to the supposed errors of which appellant complains. Of the first, we deem it necessary to say no more than this: The contract, as averred, obligated Burnett to

reduce his undisputed rights to the form of a judgment, and to purchase the land in full discharge thereof. This being true, even if it be held that he, by electing to foreclose, lost the superior title which had been reserved in him by the recitations in the deed, his purchase, the undisputed effect of which was to satisfy the judgment, undoubtedly placed the title again in him. The promise, therefore, was an agreement to convey land, which should have been in writing. The transaction did not constitute a trust.

The second reason is equally clear, it seems to us. Stripped of all immaterial matter, the situation stands thus: Burnett held vendor's lien notes against appellant aggregating, when reduced to judgment, \$57,752.35. This not only bound appellant as a personal obligation, but stood as a lien upon the land. Appellant was without means, and prior to the suit found it impossible to sell the land for enough to take advantage of Burnett's \$37,000 proposition and discharge the debt. The obligation was past due, and it is not even pretended that she had any defense available against Burnett's right to sue and foreclose. She consented, therefore, to forbear a resistance she had no power to make against a demand she conceded at the time was valid. The suit was brought. The sale was made, and Burnett bought for \$500, instead of the face of his judgment. The inadequacy of this consideration has become immaterial to this inquiry, inasmuch as the court, in response to a prayer of appellant, has declared the judgment satisfied by the sale. Burnett was therefore not only pursuing an absolute right, but, according to appellant's own contention, took such a title to the land as served to discharge a \$57,000 judgment. His promise, therefore, to accept \$37,000 for the land within a reasonable time amounted to no more than an agreement at the time it was made to accept a smaller sum than the debt she owed—a promise which, under the facts, was a mere gratuity. For the reasons given, this phase of the judgment must be affirmed.

It was conclusively shown that Burnett's payment of the mortgage on the Brady place was a necessity which amounted to a breach of appellant's warranty. None of the pleas of appellant in bar of Burnett's demand were established. The defense that the transaction was an exchange of lands, each tract standing surety for the other, cannot be allowed. The Brady tract was conveyed to Burnett at an estimated value as a first payment on the larger tract, leaving Burnett's lien an incumbrance on the entire Pasadena tract to secure the balance due. The principle applied to breach of warranty in mere exchange of lands is manifestly inapplicable here.

The judgment in the warranty suit is therefore reversed, and judgment is here rendered in favor of appellees for the sum paid on the mortgage and interest. In any aspect

of the case, the result seems a hard one upon appellant; but the hardship is due rather to the fluctuation in values in the one case, and the undisclosed incumbrance in the other, than to the unjust operation of any rule of law. However this may be, we have declared what we believe to be the inevitable judgment upon the facts.

Reversed and rendered on cross-assignments.

On Motion for Rehearing.

(Dec. 17, 1903.)

We have carefully considered appellant's motion for rehearing, but have found no reason to alter our conclusion, in so far as the judgment in appellant's suit against Burnett is concerned. We have concluded, however, that we committed error in considering for any purpose appellees' cross-assignments complaining of the action of the trial court in the disposition of the suit of Burnett on the warranty. The question of practice presented was not called to our attention by appellees and was overlooked by us. Appellees did oppose the consideration of the cross-assignments, but only on the ground that they involved questions of fact, and appellees had not assailed the verdict by a motion for new trial. This objection was not sound as to one of the cross-assignments, as the question presented by that one was of law. It is now plain that the judgment in the consolidated cases was severable. Indeed, two distinct judgments may properly be said to have been rendered. From the judgment in the warranty case appellant did not appeal, and appellees have not appealed. It is not, therefore, before us in any form for revision. In such cases there must be an appeal. *Woeltz v. Woeltz*, 93 Tex. 548, 57 S. W. 35; *Anderson v. Silliman*, 92 Tex. 560, 50 S. W. 576.

Our judgment reversing that portion of the judgment of the trial court is therefore set aside, and the judgment complained of on this appeal is affirmed as originally ordered.

STATE v. FINNEY.

(Supreme Court of Missouri, Division No. 2.
Dec. 9, 1903.)

INTOXICATING LIQUORS — POLICE POWER —
DRUGGISTS — ALLOWING LIQUOR TO BE
DRUNK ON PREMISES — PHYSICIANS.

1. Rev. St. 1899, § 3051, declaring that any druggist who shall suffer alcohol or any intoxicating liquor to be drunk at or about his place of business shall be guilty of a misdemeanor, is not void as an unreasonable and unwarrantable exercise of the police power, as against a physician also running a drug store, who prescribes intoxicating liquors for his patient, and allows him to drink them in the drug store.

Appeal from Circuit Court, Bollinger County; R. A. Anthony, Judge.

J. M. Finney was convicted of allowing intoxicating liquors to be drunk at his drug

store, in violation of Rev. St. 1899, § 3051, and appeals. Affirmed.

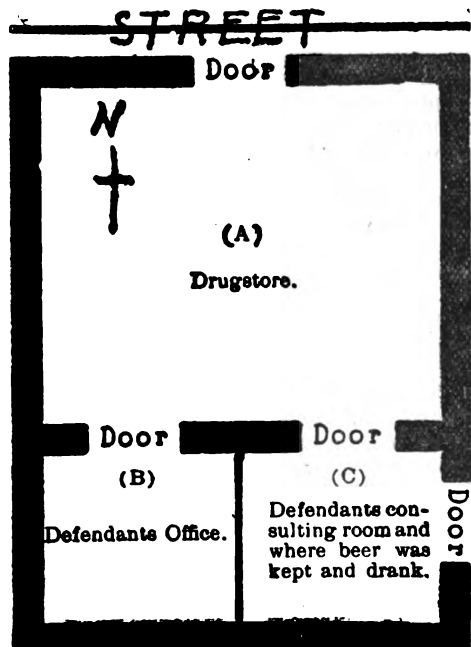
Moses Whybark, for appellant. Edward C. Crow and Bruce Barnett, for the State.

BURGESS, J. The defendant was convicted in the circuit court of Bollinger county and fined \$25 under an indictment charging that one J. M. Finney, late of the county and state aforesaid, on or about the — day of August, in the year 1902, at and in the county of Bollinger and state of Missouri, aforesaid, being then and there a druggist and proprietor of a drug store, and a pharmacist and a dealer in drugs and medicines, unlawfully and willfully then and there did suffer and knowingly permit intoxicating liquor, to wit, one pint of beer, to be drunk at and about his place of business, his drug store, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state.

The case was tried upon the following agreed state of facts:

"(1) That the defendant is a physician residing, and has for more than 25 years resided, in Bollinger county, Mo., and during all the time has been a regularly authorized and registered and practicing physician, according to the laws of this state. (2) That his residence is Leopold, in Bollinger county, Mo., whereat he is the owner of a drug store in connection with his profession as a physician, and owned and conducted such drug store at the date specified in the indictment, and a duly registered pharmacist. (3) That Herman Elfrank was one of his patients whom he had treated for typhoid fever, and during his convalescence he had recommended to him the use of beer in moderate quantities, until his strength had fully recuperated. (4) That the said Herman Elfrank called at his drug store for beer, during his convalescence aforesaid, and defendant prescribed it for him, and first wrote out a written prescription, and dated and signed the same as a physician, in which prescription the name of the said Herman Elfrank was written, he being the person for whom the same was prescribed, and further stating that such intoxicating liquor was prescribed as a necessary remedy, and the amount prescribed was one bottle—a pint; that thereupon, after the writing of said prescription for said beer, the same was sold to said Elfrank by defendant, at his drug store, beer as a part of his stock of drugs, and the prescription was filed and preserved as the law requires. (5) That the said beer was furnished to said Elfrank by defendant's clerk after said prescription had been written and filed and on the same day; that defendant was in his drug store when he wrote the prescription and when his clerk sold the beer, but the beer was in the back room of his drug store, and it was in that room that the beer was kept in stock and was delivered and drunk.

while defendant was in the main room of the drug store, which was in the front of the building, but in another room; that defendant neither consented nor objected to the drinking of the beer by the said Herman Elfrank in said back room where he obtained it, but knew that he drank the same at that place, as he had been and was his patient, and he had treated him for typhoid fever, with which disease he had been confined to his bed for fully three weeks, and when he prescribed the beer the said Elfrank was convalescent, but not fully recuperated from the after effects of the disease, and it was prescribed to him in good faith as a necessary remedy during his convalescence. (6) The following is a diagram of the building in which defendant's drug store was located when the beer was sold and drank:



(A) Drug store in which defendant was when beer was drunk.

(B) Defendant's office.

(C) Defendant's consulting room, where the beer was delivered and drank by Elfrank.

"On the foregoing state of facts, the question is submitted to the court whether the defendant is guilty of any offense under section 3051 of the Revised Statutes of 1899, which prohibits any druggist or dealer in drugs and medicines from suffering alcohol or intoxicating liquors to be drunk at or about his place of business.

"Charles G. Revelle, Prosecuting Attorney.

"J. M. Finney."

This prosecution is bottomed upon section 3051, Rev. St. 1899, which reads as follows: "Any druggist or dealer in drugs and medicines who shall suffer alcohol or intoxicating liquor to be drunk at or about his place of business, shall be deemed guilty of a misdemeanor, and upon conviction shall be pun-

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ished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months."

Defendant, both by motion and in arrest, raised the question as to the constitutionality of this statute, and in support of his position says that it imposes penalties for suffering the beer to be drunk, no matter what the purpose may be, and is an attempted exercise of the police power which is unreasonable and unwarrantable as against a physician who administers such liquors in good faith, on his judgment as a physician, to his patient, when the relation of physician and patient exists, as in this case. The rights of a physician to prescribe intoxicating liquors as a medicine for his patients may be conceded, but the practice of medicine and the business of a druggist are two different occupations, and the fact that a practicing physician may at the same time be engaged in the business of a druggist does not confer upon him as such any greater rights or privileges than are possessed by druggists who are not physicians. The law makes no distinction between the rights of persons engaged in the business of druggists, but as a police regulation, in the interest and well being of the citizens of the state and their morals, provides that intoxicating liquors shall not be drunk at the place of business of a druggist, and was clearly within the power of the Legislature to enact. It would be a strange law, even if not unconstitutional, which would permit a physician engaged in the business of a druggist to prescribe intoxicating liquors for his patients to be drunk at his place of business, and to deny the same privilege to other persons not physicians engaged in the same business. Furthermore, it would seem that a person whose health would permit him to go to a drug store to get intoxicating liquors upon the prescription of his physician would also permit him to take it or remove it from that place after having obtained it, to drink it.

As to the right of the state to absolutely prohibit the manufacture and sale of intoxicating liquors within its borders, and that such a prohibition is a lawful exercise of its police power, and is not in any way objectionable upon constitutional grounds, it is no longer a debatable question; and, this being so, we are unable to see why it may not, in the exercise of the same power, prohibit intoxicating liquors from being drunk at the place of business of druggists by whom sold; for it must logically follow, if their manufacture and sale can be prohibited, a druggist who sells them may also be prohibited from permitting them being drunk on his premises. Whether the law would be upheld with respect to sales made elsewhere, and the liquors taken to and drank upon the premises of a druggist who did not sell them in a prosecution against such druggist, is not involved in this case, as the agreed state of facts shows that the beer in question in the

case at bar was sold by defendant as a druggist, and drank upon his premises by his permission.

The statute applies to druggists and dealers in drugs and medicines, and the fact that a person engaged in such business is a practicing physician does not make it a special law. It applies to all druggists and dealers in drugs and medicines alike, and is neither local nor class legislation, and is not in conflict with the Constitution.

The judgment is affirmed. All concur.

TANDY v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri. Dec. 9, 1908.)

PERSONAL INJURIES—MEASURE OF DAMAGES—INSTRUCTIONS—LOSS OF SERVICE—DAMAGES—EXCESSIVENESS.

1. In an action by a husband to recover for loss of services, etc., caused by injuries to his wife, an instruction to assess plaintiff's damage at such sum as would be a fair compensation for any expense incurred by plaintiff as doctor's bills, for medicine, nurses, etc., not exceeding the amounts claimed for these items in the petition, and for such loss of service as was occasioned by the injuries, and for future loss of service which would in reasonable probability be occasioned by the injuries, not exceeding the amount claimed in the petition, was not erroneous, on the ground that it authorized the jury to place plaintiff's damages too high, although plaintiff's own evidence showed that as to some of the particulars specified he was not damaged to the amount claimed in the petition.

2. In an action by a husband for expenses of medical attendance and loss of his wife's services, occasioned by injuries to her, in which the evidence showed the first item of damage amounted to \$219.50, and that the wife was confined to her bed for eight weeks, and that her injuries, in the opinion of attending physicians, were serious, a verdict for \$600 was not excessive.

Valliant, J., dissenting.

In Banc. Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by C. W. Tandy against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle, Priest & Lehmann, Geo. W. Easley, Lon. O. Hocker, and Walter H. Saunders, for appellant. Seneca N. & S. C. Taylor, for respondent.

FOX, J. This cause was transferred to court in banc from division No. 1 of this court. The opinion in division No. 1, by the esteemed and learned judge, fairly and accurately states the facts in the cause, as well as the legal questions involved in it. With his permission I adopt the statement of the case as made in that opinion, which is as follows:

"The petition states, in substance, that plaintiff's wife was a passenger on one of defendant's street cars, that the car stopped to allow her to alight, and while she was in the act of doing so, but before she had time to alight, the servants of defendant negligently caused the car to start forward, which act threw her to the pavement and inflicted serious personal injuries to her. The damages sought to be recovered are thus stated in the petition: 'That by reason of said injuries plaintiff was compelled to incur an expense of \$150 for medical attendance, and to lay out for medicines and appliances the sum of \$50, and to furnish a nurse, and himself nurse his said wife, for a period of three months or more, which was reasonably worth at least \$300, and that the loss of her services, past and prospective, in addition to the foregoing items, injured plaintiff at least \$2,000.' The answer was a general denial, and a plea that the plaintiff's wife was injured through her own negligence in attempting to alight from the car while it was in motion. The evidence for the plaintiff tended to prove that the accident occurred in the manner stated in the petition, and that for the defendant tended to prove that it occurred in the manner stated in the answer. The plaintiff's testimony as to the extent of his damages was as follows: He had incurred a bill to his physician to the amount of \$158.50, but no part of it had been paid at the date of the trial. Of this bill, however, part had been incurred since the suit was begun. Before the suit was begun the doctor had paid 35 or 40 visits in all to the plaintiff's wife. For the first visit he charged \$26.50, and for each of the other visits he charged \$2. Plaintiff was questioned by his counsel to state what he had paid out for 'medicines, stimulants, and appliances,' and he answered, '\$20 to \$25.' He testified that one nurse, whom the doctor engaged, was there about 19 or 20 days, and he owed her \$2 a day for that service. Another nurse was there 5 weeks, for which she charged \$1 a day, and he had paid her on account \$15. Another was there 2 weeks, and her bill was \$8, which he had paid. Those were all the bills he had incurred for medical attendance, medicines and appliances, and nursing. The court gave an instruction directing the jury to return a verdict for the plaintiff if they should find from the evidence certain facts, and it also gave instructions directing a verdict for defendant under certain findings. No question is now raised as to those instructions. But the court gave the following instruction on the measure of damages, of which the defendant does complain: 'The court instructs the jury that, if they find for plaintiff, they will assess his damages at such sum as they believe, from the evidence, will be a fair compensation to plaintiff for any expense he has incurred as doctor's bills on account of the injuries to his wife, not exceeding \$150, and also for such expense, if any, as he incurred for medicines and appliances, made necessary by said injuries, not exceeding \$50, and also for any expense which he incurred for hired nurses, if any, not exceeding in all \$300, and also for such loss of service of his said wife, if any, as

gently caused the car to start forward, which act threw her to the pavement and inflicted serious personal injuries to her. The damages sought to be recovered are thus stated in the petition: 'That by reason of said injuries plaintiff was compelled to incur an expense of \$150 for medical attendance, and to lay out for medicines and appliances the sum of \$50, and to furnish a nurse, and himself nurse his said wife, for a period of three months or more, which was reasonably worth at least \$300, and that the loss of her services, past and prospective, in addition to the foregoing items, injured plaintiff at least \$2,000.' The answer was a general denial, and a plea that the plaintiff's wife was injured through her own negligence in attempting to alight from the car while it was in motion. The evidence for the plaintiff tended to prove that the accident occurred in the manner stated in the petition, and that for the defendant tended to prove that it occurred in the manner stated in the answer. The plaintiff's testimony as to the extent of his damages was as follows: He had incurred a bill to his physician to the amount of \$158.50, but no part of it had been paid at the date of the trial. Of this bill, however, part had been incurred since the suit was begun. Before the suit was begun the doctor had paid 35 or 40 visits in all to the plaintiff's wife. For the first visit he charged \$26.50, and for each of the other visits he charged \$2. Plaintiff was questioned by his counsel to state what he had paid out for 'medicines, stimulants, and appliances,' and he answered, '\$20 to \$25.' He testified that one nurse, whom the doctor engaged, was there about 19 or 20 days, and he owed her \$2 a day for that service. Another nurse was there 5 weeks, for which she charged \$1 a day, and he had paid her on account \$15. Another was there 2 weeks, and her bill was \$8, which he had paid. Those were all the bills he had incurred for medical attendance, medicines and appliances, and nursing. The court gave an instruction directing the jury to return a verdict for the plaintiff if they should find from the evidence certain facts, and it also gave instructions directing a verdict for defendant under certain findings. No question is now raised as to those instructions. But the court gave the following instruction on the measure of damages, of which the defendant does complain: 'The court instructs the jury that, if they find for plaintiff, they will assess his damages at such sum as they believe, from the evidence, will be a fair compensation to plaintiff for any expense he has incurred as doctor's bills on account of the injuries to his wife, not exceeding \$150, and also for such expense, if any, as he incurred for medicines and appliances, made necessary by said injuries, not exceeding \$50, and also for any expense which he incurred for hired nurses, if any, not exceeding in all \$300, and also for such loss of service of his said wife, if any, as

were occasioned by said injuries, and for future loss of service, if any, which the jury believe, from the evidence, will in all reasonable probability be occasioned to plaintiff on account of the injuries to his said wife, not exceeding \$2,000.' There was a verdict for plaintiff for \$600, in which nine of the jurors only concurred. The court rendered judgment accordingly, and the defendant appeals.

"When this appeal was taken, the constitutionality of the law authorizing three-fourths of the members of a jury to render a verdict in a civil suit had not been passed on by this court, and the cause was brought here for a decision on that question, which was properly raised and which gave this court jurisdiction. But the constitutionality of that law has been settled by this court in another case since this appeal was taken, and it is no longer a question. *Gabbert v. Railroad*, 70 S. W. 891. The only question in the case arises on the instruction relating to the measure of damages. We see that, as to the items of expense for medical attendance, medicines and appliances, and nurses, the instruction limits the jury only by the limits specified in the petition."

This clearly states the legal controversy in this case.

Opinion.

It is contended that the evidence in this cause shows that plaintiff was entitled to recover a much less sum than the limit as fixed by the court in the instruction complained of. It may be conceded that plaintiff, upon his own testimony, was entitled to recover only the sum of \$219.50 for doctor's bill, for medicines and appliances, and for amounts paid and incurred for the hire of nurses; and still we are of the opinion that there was no reversible error in the instruction given. The instruction, it is true, as to the items of damages enumerated, tells the jury that, in their assessment of damages, they must not exceed the amount claimed for all such items, \$500. It will be observed that the error complained of is predicated upon the terms of the instruction, "not exceeding the amount claimed for those items," which amounts are set forth in the instruction. In the consideration of the legal propositions arising upon this instruction, we must not overlook the entire terms of the declaration. The jury are plainly told "that, if they find for the plaintiff, they will assess his damages at such sum as they believe from the evidence will be a fair compensation to plaintiff." Then follows, "not exceeding the specified amounts." It must be remembered that this suit involved a claim for damages for loss of services of the wife. This item of damage includes future loss of service, which might in all reasonable probability be occasioned to plaintiff by reason of the injuries to his wife. The testimony of the attending physician was that, from his examination of the injuries received by Mrs. Tandy, they would, in his opinion, be permanent. The

presumption following the instruction given is that the jury obeyed it, and estimated the damages from the evidence, as they were instructed by the court; and this includes the negative presumption, to which the ordinary intelligence of a jury is entitled, that they did not estimate the damages upon the bare statement of the court, "not to exceed the sum" as designated in the instruction.

It is incumbent upon the appellant in all cases to point out to the appellate court some error prejudicial to his rights in the trial of the cause. There is no such error indicated by the disclosures in this record. Before this cause should be reversed, appellant should show in some particular of what the error consisted. As before stated, the presumption is that the jury obeyed the instruction, and based their finding, as directed, upon the evidence in the cause; and it nowhere appears in this record, nor is it contended in the briefs, that the verdict of the jury was the result of passion or prejudice. It will not do to simply say that the jury may have been misled by the instruction. It should, at least, be indicated somewhere in the record that they did not obey the instruction and make the estimate of damages from the evidence introduced. The record before us indicates clearly that the jury were not misled by this declaration on the measure of damages. It will be noted that the instruction upon the items of damages for loss of services of the wife tells the jury that they must not exceed the amount of \$2,000, as claimed in the petition. It is apparent that the jury did not regard the terms used by the court as to this item of damages in the instruction as a suggestion that they would be authorized to fix the damages at \$2,000, nor were they misled; for their estimate of the damages was far below that amount. It may be said that, as to that item, there was no definite proof, nor was it susceptible of such proof. However, the misleading feature of the instruction is equally applicable to that item; for, if the jury were misled and proceeded to assess the damages regardless of the proof, there is no reason for them to adopt the limit as expressed by the court as to certain items of damages, and reject it as to others. The verdict in the cause clearly shows that the jury were not misled by the instruction. The verdict was for \$600. This includes doctor's bills, nurse hire, etc., amounting, according to plaintiff's testimony, to \$219.50. This would make the estimate on the item for loss of wife's services, \$380.50. The testimony tended to show that she was confined to her bed for eight weeks, and that her injuries, in the opinion of the attending physician, were permanent. It certainly will not be contended that, if the jury adopted that view of the testimony, their estimate was excessive. There being no passion or prejudice indicated by the verdict in this case, it is the duty of the appellate court to give to the jury the benefit of the legal presumption that they

acted in obedience to the directions of the court. This presumption cannot be successfully rebutted by general surmises that the jury may not have predicated their verdict upon the testimony in the cause.

Entertaining the views as herein expressed, the judgment of the trial court is affirmed.

ROBINSON, C. J., and BRACE, MARSHALL, GANTT, and BURGESS, JJ., concur. VALLIANT, J., dissents.

STATE v. KELLY.

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

CRIMINAL LAW—CITY OFFICER—CONTRACT WITH CITY—INDICTMENT.

1. A member of the legislative body of a city is a city officer, within Rev. St. 1899, § 2346, making it a misdemeanor for a city officer to be interested in a contract with the city.

2. Though Rev. St. 1899, § 2346, making certain misconduct of a city officer a misdemeanor, provides for removal from office for such misconduct, he is not thereby exempted from criminal punishment therefor.

3. An indictment charging, in the language of the statute (Rev. St. 1899, § 2346), that the defendant, while a city officer, became interested, under an assumed name, in contracts for furnishing supplies for the city, is sufficient.

Appeal from St. Louis Court of Criminal Correction; Wm. C. Jones, Special Judge.

Charles F. Kelly was indicted for making a contract with the city of St. Louis while an officer thereof. From an order quashing the indictment, and judgment discharging the defendant, the state appeals. Reversed.

C. P. Williams, for the State. Dodge & Mulvihill, for respondent.

BLAND, P. J. The indictment is as follows:

"State of Missouri, City of St. Louis—ss. Circuit Court, City of St. Louis, April Term, 1902. The grand jurors of the state of Missouri, within and for the body of the city of St. Louis, now here in court duly impeached, sworn, and charged, upon their oaths present: That one Charles F. Kelly, at the city of St. Louis aforesaid, and on or about the third day of February in the year one thousand nine hundred and two, was a public officer of the said city of St. Louis, and an officer and a person holding a public trust in and for the said city of St. Louis, to wit, a member of the house of delegates, and of the municipal assembly of the said city of St. Louis (which said city of St. Louis was then and there a municipal corporation of the said state of Missouri), duly elected and qualified; and that the said Charles F. Kelly was then and there guilty of willful misconduct and misdemeanor in office, in this, to wit, that it was then and there provided by the

charter of the said city of St. Louis that no member of the municipal assembly of said city should be directly or indirectly interested in any contract with said city, or any department or institution thereof; and, further, that no elected or appointed officer of said city of St. Louis should be interested, directly or indirectly, in any contract with said city, either for work to be performed or supplies to be furnished; and that he, the said Charles F. Kelly, then and there unlawfully devising and intending to violate and evade the provisions of the said charter of the city of St. Louis aforesaid, and to betray and prostitute the trust and confidence reposed in him as such member of the house of delegates as aforesaid, did then and there unlawfully and fraudulently, under the assumed name of John J. Maher, make and enter into certain contracts with the said city of St. Louis, by and through the officers, agents, and servants of the said city, to perform work and furnish supplies to the said city, and to departments and institutions thereof, and to supply printing for sundry departments and institutions of said city, to wit, to print billheads, blanks, and other necessary stationery for the police department of said city, and to print bills pending before the city council and house of delegates of the municipal assembly of said city; and did then and there, unlawfully and fraudulently, under the assumed name of John J. Maher, perform the work and furnish the supplies under said contracts, to wit, said printing to said city and to the said departments; and did unlawfully and fraudulently, under the said assumed name of John J. Maher, collect from the said city the amounts to be paid for said work and supplies by the said city under said contracts, to an amount exceeding the sum of one thousand dollars; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. W. Scott Hancock, Assistant Circuit Attorney."

Defendant moved to quash on the following grounds: "First. Because the defendant was not at the time alleged in said indictment a 'city officer' within the meaning of the statute upon which said indictment is founded, and was not, therefore, amenable to said statute. Second. Because he is charged in said indictment with unlawfully devising and intending to violate and evade certain provisions of the charter of the city of St. Louis, which, if true, does not constitute a criminal offense against the law of this state. Third. Because said indictment does not charge this defendant with any criminal offense against the laws of this state. Fourth. Because said indictment is vague, uncertain, indefinite, and bad for duplicity. Fifth. Because the statute upon which said indictment is founded prescribes a penalty for its violation which is not enforceable by indictment."

The motion to quash was sustained, the indictment quashed, and defendant was discharged. The state appeals.

¶ 1. See Municipal Corporations, vol. 36, Cent. Dig. § 410

The indictment is based on section 2346, Rev. St. 1899, which reads as follows: "If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor; and any appointed officer becoming so interested shall be dismissed from office immediately by the mayor; and upon the mayor becoming satisfied that any elective officer is so interested, he shall immediately suspend such officer, and report the facts to the council; whereupon the council as soon as practicable, shall be convened to hear and determine the same; and if, by two-thirds vote of the council, he be found so interested, he shall be immediately dismissed from such office." It is not based on section 2105, as claimed by the state; the latter section (2105) having reference to officers holding office under some law of the state, and hence does not include city officers.

The respondent has filed no brief, and we are not advised by the one filed by appellant of the views entertained by the lower court in respect to the indictment, nor on what particular ground or grounds the indictment was held invalid. The first ground assigned in the motion is that defendant, being a member of the municipal assembly of the city, was not a city officer within the meaning of section 2346, supra. An officer is defined by Bouvier to be "one who is lawfully invested with an office," and legislative officers as "those whose duties relate mainly to the enactment of laws." "The test is that it is a part of the administration of government," said the Supreme Court of North Carolina in *Ellason v. Coleman*, 86 N. C. 235. In *Vaughn v. English*, 8 Cal. 39, it was held that the term includes all persons in any public station or employment conferred by the government. In *Morrill v. Haines*, 2 N. H. 246, it was held, "A representative of the state Legislature is a 'state officer.'" So also is a member of a municipal assembly a city officer.

But as the statute provides that a member of a municipal assembly may, for violation of the statute, be removed from office, the fourth ground of the motion seems to assume that removal from office is the only penalty with which he can be visited for a violation of this statute. This inference cannot be drawn from the section itself, nor is it reconcilable with other provisions of the Criminal Code, which provide, on conviction of certain officers of certain offenses, in addition to the penalty described, they shall be removed from office. No reason can be assigned for exempting a member of a municipal assembly of a city from the punishment prescribed for a violation of the statute. Certainly that he may be removed from office is no sufficient reason, or any reason at all, that he should be exempted from criminal punishment. The statute has not made the exemption, and it

is not within the power of the courts to ingraft one upon it in favor of this class of municipal officers.

There are some superfluous allegations in the indictment, but they may be rejected. When rejected, enough remains to expressly charge that the defendant, while a city officer, became interested, under an assumed name, in contracts for furnishing supplies for the city. The indictment charges the offense in the language of the statute, and is sufficiently definite and certain to fully inform the defendant with what he is charged, and we can see no substantial objection to it.

We reverse the judgment, with directions to the lower court to set aside its order quashing the indictment, and to overrule the motion to quash.

GOODE and REYBURN, JJ., concur.

LINDER v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

STREET RAILROADS—NEGLIGENCE—PERSONAL INJURIES—QUESTION FOR JURY—INSTRUCTION—MODIFICATION.

1. In an action against a street railroad for personal injuries it is a question for the jury whether it was negligence in a citizen, in daylight, to drive about 25 feet to cross, in full view of the motorman, a street car track on which a car was moving in his direction about 200 feet distant, although at a rapid rate of speed.

2. In an action against a street railroad for personal injuries the defendant requested the court to charge that by "ordinary care" is meant "such care as persons of ordinary prudence and caution would exercise in the same situation, and under like circumstances." *Held*, that the court's modification thereof by adding, "And the failure to exercise such care is negligence in the sense in which that term is used in these instructions," is not cause for reversal.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by J. L. Linder against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle, Priest & Lehman, for appellant. P. P. Mason, for respondent.

REYBURN, J. This action for personal injuries was begun before a justice of the peace of the city of St. Louis, tried anew in the circuit court, and from judgment for plaintiff defendant has appealed.

About 5 o'clock in the afternoon of October 1, 1900, plaintiff, a physician, residing in East St. Louis, was in a bookstore on the south side of Pine street between Seventh and Eighth streets. An alley extends southwardly from Pine street between the streets named, and the store in question was a door or two west of the alley. Plaintiff emerged from the bookstore, deposited the books he had purchased in his buggy, which was in front of the store, turned toward the west with the horse not hitched. As he came out

of the store he saw an east-bound car passing his vehicle, and before getting into the buggy he looked, and observed further eastward a west-bound car approaching Seventh street. After placing the books in his vehicle, he entered it, and started the horse, with the intention of crossing to the north side of Pine street and proceeding eastwardly. He passed the south track in safety, and was partially across the north track, when the west-bound car he had observed struck about the center of the rear wheel of the buggy, overturning it, and plaintiff, holding to the reins, was dragged a distance, variously estimated by different witnesses, before both conveyances were stopped. There was no proof of the distance between Seventh and Eighth streets, nor of the exact width of Pine street; but appellant in argument insists that the block lying between the first-named thoroughfares was an ordinary city block about 300 feet in length, and plaintiff estimated that his buggy had moved 20 feet from where it had been to the point of collision. The negligence averred in the complaint was the defendant's agents and servants in charge of the colliding car propelled same at a greater rate of speed than allowed by law and the ordinances of the city, and without giving notice of its approach to persons in front of said car by ringing the bell or gong or attempting to check the speed.

1. It is urged that the imperative instruction asked at the conclusion of the testimony on behalf of the plaintiff should have been given, as the plaintiff's own testimony showed he was guilty of such contributory negligence as barred his recovery. Accepting, as we are bound to do, the plaintiff's statement for the purpose of considering this instruction, the colliding car was about 200 feet away, if east of Seventh street, when he entered his vehicle, and he had traversed about 20 feet, when the accident occurred by the rapid approach of the car and the neglect of its motorman to check its excessive speed. The court, in effect, is asked to declare that to attempt to move a buggy about 25 feet on a public highway, but across two street car tracks, on the more distant one of which a car was seen drawing near about 200 feet distant, imputes such contributory negligence to the driver as to preclude recovery by him if the car strikes his vehicle. Extended to its logical length, it follows from defendant's contention that it was the legal duty of plaintiff to have yielded the right of way to and permitted the car to pass, and that a car at a distance of 200 feet is not sufficiently far away to permit crossing before it, even in a vehicle, safely, and without being chargeable with negligence. As has been frequently adjudged, the use of the streets in a city by the public, whether in vehicles or on foot, and for the operation of electric cars, is concurrent, and the rights of the private vehicle and of the electric car thereon are equal, and each mode of convey-

ance must be driven and operated by those respectively in charge to avoid injury, and with reasonable regard for the safety of the other. The reciprocal rights and duties of the citizens and of those in charge of street cars in the common use of public streets has been clearly and forcibly defined in recent expressions of the Supreme Court of this state: "This duty is just the same as between street cars and a citizen as it is between any two citizens when using a street. The traveling public has no right to demand such rapid transit on streets of a city as to amount to negligence in the running of the car. The citizen who is not in such a hurry, but is exercising ordinary care while upon the street, has rights that are just as sacred in the eye of the law as those of the hurrying crowds who demand such rapid transit; and if a street car company heeds the demands of the latter class, and thereby negligently injures the former, it must stand the consequences." *Schafstette v. R. R.*, 74 S. W. 821. And in an earlier case, approved in the last-quoted decision: "The sum of the adjudicated cases bearing upon the relative rights and duties of street cars and citizens traveling in vehicles drawn by horses or other animals is that both have a right to use the street, but that neither has an exclusive right. The operator of a street car is not necessarily obliged to stop the car every time a horse shies or scares at the approaching car, but when the operator of the car sees that a horse is frightened at the car it is his duty to manage his car in such manner as a man of ordinary prudence would do under the same circumstances, and it is always a question of fact for the jury whether such care in the running of the car has been observed. This duty may or may not lead to the necessity for bringing the car to a full stop. The duty of the company in this regard is just the same as the duty of one individual or citizen to another when they meet on the highway and the horse of the one becomes frightened at the vehicle of the other, or at anything upon the vehicle of another. Because a street car carries more people than any other kind of a conveyance, or because it is authorized to run more rapidly than a vehicle ordinarily can be legally driven, or because the rush and restlessness of the age make unreasonable demands for more and more rapid transit along the crowded thoroughfares of populous cities, it does not follow that a street car can be run in disregard of the rights of persons traveling by other means, nor that a street car company is exempt from the common-law duty of every one to exercise ordinary care, nor that it is only liable where the agents act wantonly, maliciously, and heedlessly." *Oates v. R. R.*, 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447. If defendant's motorman saw, or by the exercise of ordinary care could have seen, the peril of plaintiff, even though due in a measure to his own negligence, in

time to have avoided the accident, plaintiff was entitled to recover. In any aspect of this case, it was for the jury, and not for the court, to say whether it was negligence in a citizen in daylight to drive about 25 feet to cross, in full view of the motorman, a street car track upon which a car was moving in his direction, but about 200 feet distant, although at a rapid rate of speed. Both the plaintiff and the motorman of defendant's car were bound to the exercise of due care to avoid the collision, and, as a general rule, which party to such a catastrophe was in fault is a practical question properly to be relegated to the jury for determination.

2. The charge to the jury was made up of three instructions for the plaintiff, four given by the court of its own motion, and six at the instance of defendant; the only instruction refused, other than the demurrer to plaintiff's evidence, which defendant presses should have been given, being the definition of ordinary care asked in the language following: "By 'ordinary care,' as used in these instructions, is meant such care as persons of ordinary prudence and caution would exercise in the same situation, and under like circumstances," which the court modified by adding thereto: "And the failure to exercise such care is negligence in the sense in which that term is used in these instructions." The legal definition of negligence thus united to that of ordinary care in the form submitted by defendant did not impair the instruction, nor prejudice defendant in any wise; and appellant's strictures of other instructions we feel do not necessitate discussion. The instructions presented in clear and comprehensive manner the opposing theories of the respective parties, and the finding of the jury thereunder will not be disturbed.

Judgment affirmed.

BLAND, P. J., and GOODE, J., concur

VOELKER v. GRAND LODGE OF BROTHERHOOD OF LOCOMOTIVE FIREMEN et al.*

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

BENEFICIARY ASSOCIATION—CLAIM FOR CARE OF INSURED—IDENTIFICATION OF INSURED—EVIDENCE.

1. Where a rule of a beneficiary association required certificates to be paid at the insured's death to certain relatives, including parents, and insured's parents were living at his death, a friend to whom the certificate had been made payable on insured's representation that he had no relatives living is not entitled to recover out of the insurance expenses incurred in caring for the insured in his last illness and in burying him, pursuant to an agreement made when the insurance was taken; the sum payable on the certificate not being part of the insured's estate.

2. Evidence held sufficient to sustain a finding that a deceased member of a beneficiary association had lived under an assumed name, and was a son of parties who, under a rule of the order that the certificate was payable to parents in preference to those who were not relatives, claimed to recover on his benefit certificate.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Louis Voelker against the Grand Lodge of Brotherhood of Locomotive Firemen, and Carl Joergensen and another interpleaded. From a judgment in favor of the interpleaders, plaintiff appeals. Affirmed.

Thomas Morris, for appellant. Paul F. Coste, for respondents.

Opinion.

GOODE, J. This is a contest between rival claimants for the proceeds of a beneficiary certificate issued by the Grand Lodge of Brotherhood of Locomotive Firemen. The certificate was for \$1,500, bore the date May 8, 1898, and was issued to John Johnson, payable to "Louis Voelker, his friend." Johnson's application for the insurance was made November 20, 1898. In the application he stated that he resided at No. 1203 Chouteau avenue, was born in Texas, April 17, 1872, and would be 27 years old his next birthday. On the back of the application were blank spaces in which the medical examiner was required to insert the answers of the applicant in regard to his family history, which were required to be truthfully made to the examiner; also statements of the examiner himself concerning the physical condition of the applicant. In this report of the medical examiner the age of Johnson's father and mother, if they were then living, was stated to be 53 and 52 years, respectively; of a brother 21 years. It was also stated that their health was good; but there is a notation opposite those statements as follows: "This was eight years ago, when the applicant left home. He has heard nothing of them since, and does not know whether they are dead or alive." A rule of the brotherhood requires benefit certificates to be paid at the death of an insured member, first, to the widow; second, to his child or children; third, to his father; fourth, to his mother; fifth, to his brothers and sisters—if any of those relatives survive him. A member is given the right to designate as beneficiary whomsoever he chooses if he has none of the above-mentioned kindred. Johnson's application was unsatisfactory to the officers of the order, as it did not certainly state whether he had relatives to whom the benefit ought to go, according to the above rule, when he died; for, if he had, the certificate could not be made payable to Louis Voelker. Johnson was notified of the defect, and thereupon wrote a letter to an officer of the lodge in St. Louis, which Johnson desired to join. This letter was as follows:

*Rehearing denied January 5, 1904.

"St. Louis, 4-8, 1899.

"Mr. R. E. McKenzie—Dear Sir and Brother: In regard to your reply will say that my folks are all dead and would like to have certificate made out to Louis Voelker. That is the way I had it made out.

"Yours truly, John Johnson."

On receipt of this letter the certificate was granted with Voelker as beneficiary. Johnson died at St. Mary's Hospital in the city of St. Louis September 7, 1899. Proof of his death was made to the satisfaction of the grand lodge, and, as it refused to pay the proceeds of the certificate to Voelker, he instituted an action in the circuit court to recover it. The Brotherhood of Locomotive Firemen then filed an answer in the nature of a bill of interpleader, setting up the laws of the order in regard to the payment of death benefits, and that the proceeds of Johnson's certificate were claimed not only by Voelker, the named beneficiary, but by Carl D. Joergensen and Johanna D. Joergensen, as father and mother of the deceased. The brotherhood paid the fund into court with a prayer that the alleged parents of the deceased and Wm. C. Richardson, public administrator in charge of the estate, be made parties defendant and the brotherhood discharged. Pursuant to an order of the court commanding them to interplead for the fund said alleged parents filed their interplea, in which they averred that the deceased, John Johnson, was in truth their son, Julius Emil Joergensen, who was born April 17, 1870, in the town of Vester Aaby, Denmark. They further pleaded the rule of the order making certificates payable in the first instance to the parents of a deceased member, alleged that Voelker was not related to the deceased, John Johnson, or Julius Joergensen, and prayed judgment for the fund. Voelker filed an answer, denying that John Johnson and Julius Emil Joergensen were the same person, that said Johnson was the son of Carl D. and Johanna D. Joergensen, that he was born in Denmark, or that the interpleaders had any right to the fund. The issue thus joined is as to the personal identity of the deceased member. Was the man who lived and died in St. Louis under the name of John Johnson the same individual who was born in Denmark as the son of the interpleaders, or another person? If he was Julius Joergensen, and had assumed the name of John Johnson, it is conceded by the plaintiff that the interpleaders are entitled to the fund, less certain expenses incurred by plaintiff in caring for the deceased in his last illness and burying him, pursuant to an agreement he made with the deceased when the insurance was taken for his (Voelker's) benefit. The interpleaders resist any allowance to Voelker, and contend the entire amount should be paid to his parents.

As to whether or not Voelker is entitled to an allowance on account of said expenses is the only legal proposition involved in the

case, and may be disposed of at once. There is justice in Voelker's claim, but a deduction cannot be made in his favor if the interpleaders are the real beneficiaries. The fund is no part of the estate of the deceased, but belongs wholly to the lawful beneficiary, and is not subject to the defrayal of expenses incurred at the request of, or on agreement with, the deceased. If Johnson had living parents, the rule of the order forbade him to make a bargain with Voelker that the latter should care for him in sickness and bury him at death in consideration of a death benefit. He was bound to make the benefit payable to his parents. In fact, the by-law of the brotherhood made it payable to them.

On the question of the identity of the deceased member a mass of testimony was taken in this country and Europe, consisting of the depositions of the interpleaders, their children, and some of their friends in Denmark; letters which passed between them and their son Julius after he reached America; expert testimony as to the handwriting of the deceased, based on a comparison of it with Julius Joergensen's; testimony by the St. Louis friends of the deceased as to his resemblance or lack of resemblance to a youthful photograph of Julius Joergensen; and other facts. We have taken pains to go through all this evidence and reflect over it. At the conclusion of our investigation we find no sufficient reason to dissent from the conclusion reached by the trial judge that the deceased was Julius Emil Joergensen, the son of the interpleaders. The interpleaders are people in humble circumstances, living, as stated, in a small town in Denmark. They had five children, of whom three (two daughters and a son) are still living in that kingdom. Their fourth child, Julius E. Joergensen, was born April 17, 1870. In the year 1888, at the age of 18, he emigrated to America, and went at once to Kansas City, where he arrived in June, and remained about a year and one-half. While in Kansas City he worked for a gardener in the country near by, attending to hothouses and caring for teams. He wrote several letters of an affectionate tenor to his parents while there, telling them of his voyage across the ocean, his employment and prospects. From those letters we gather that he was desirous of obtaining railroad employment. The last letter he wrote from Kansas City was dated November 18, 1889. The next letter to his parents was written from San Antonio, Tex., June 8, 1890. In it he told of herding cows and horses on the plains in the Indian country, where he seems to have been employed as cowboy. One passage of that letter is seized by the plaintiff as supporting his theory of the facts. It is a statement of the writer that he had found a companion, while working with cattle in the Indian country, whom he discovered, after they had been acquainted about two months, to be from Sweden. A tie sprang up between them on

account of their coming from neighboring countries. The theory of the plaintiff is that this companion was the deceased, John Johnson; that he and Julius Joergensen became fast friends, used the same trunk in common, and that letters written to Julius Joergensen by his parents and relatives in Denmark and found in the trunk of the deceased after his death in St. Louis were left there by Julius Joergensen while the two friends were living together and both using the trunk in common. It should be stated that one strong circumstance to identify Johnson as Joergensen is the fact that numerous family letters were found in Johnson's trunk addressed to Julius Joergensen, and sometimes to Julius Johnson. Voelker and other St. Louis associates swore they noticed the letters in the trunk with those superscriptions, and on one occasion inquired of Johnson how he happened to have letters addressed to a man by the name of Joergensen; that Johnson replied they were letters written to a friend whom he had known in Texas eight years before, and that they got in the trunk because the two made common use of it. Julius Joergensen wrote letters to his parents from San Antonio until December, 1892, and perhaps longer; but we find none in the record later than that date. From those letters it appears that he roved a great deal in Texas, associating with persons of different nationalities, and following different occupations, finally becoming a locomotive fireman, and working as such more than a year. How much longer cannot be gathered. While in Kansas City he signed several letters written to his parents with the name Julius Johnson. In writing from San Antonio he subscribed his letters indifferently Julius Emil Joergensen and Julius Johnson; but gave the address which his parents should use in writing to him as Julius Johnson, Lone Star Bakery, San Antonio, Texas, and afterwards as 13 North Flores street, San Antonio, Texas. The interpleaders testified that their son wrote them other letters signed John Johnson, but none of those was put in evidence. No reason is given why he changed his name to Johnson, nor does the evidence in the case throw any light on this circumstance. Neither is there any testimony that Johnson is the English form for the Danish name Joergensen. Letters written by the parents and their testimony prove a correspondence continued between them and their son at infrequent intervals after 1892 until March 27, 1899, which is the date of the son's next and final letter. It was written from St. Louis, and is as follows:

"St. Louis, Mo., March 27, 1899.

"My dear parents: Yes long is it since I last wrote to you and I am almost ashamed to write, but I hope that this letter may find you all well and in good health.

"I am very well and have good work on the railroad and make good money.

"I intend to be home with you next Christ-

mas for a little while and hope to find you all together once more. Yes, it is now eleven (11) years since I left and parted from you all at home, but the Lord be praised and thanked he has done everything so wonderful well for me I have never been sick one day in all the long time I have been here. Yes I believe he is now on my track and will hope that we still once more may meet at home in the old country and if not that we all may meet here above in the eternal habitations where it is good to be because it is our best home.

"Yes dear, it is very hard for me to write this letter, but I know you will all be glad to hear from me and I hope you can read it.

"I am longing very much to hear from you and will soon write again.

"Do not be worried for me as I am very well.

"Now I will close for this time with a friendly greeting to all my brothers and sisters and yourselves from me, your faithful and affectionate son.

"[Signed]

Julius E. Joergensen.

"Farewell.

"My address is Julius Johnson, St. Louis, Mo., North America."

That was the last communication, so far as the record discloses, from Julius Joergensen to his parents. All the correspondence which passed between the parties is in an affectionate strain, and gives the impression that the son had been raised by pious, God-fearing parents, and remembered their admonitions. His letters frequently breathe homesickness and the desire and hope of visiting his family soon. We find no traces of Julius, under the name of Joergensen, from the time of the last letter, and it seems that after that date his parents had no tidings of him.

The deceased person, who bore the name of John Johnson, appeared in the city of St. Louis, so far as the evidence reveals, in 1894, and secured employment from Gustav Weber, a soda water manufacturer, as stableman. He worked for Weber from March 3, 1894, to August 30, 1897. After that he obtained work as fireman with the Terminal Railway Company, and continued in that service until his death. While with Weber, he became acquainted with Louis Voelker, the plaintiff, and the two became friends. Johnson stated to several acquaintances in St. Louis, including Voelker and Weber, that he had no relatives living. These statements were made at the time he took the benefit insurance. He also stated that he was born in Texas, and that his parents had lived in either Sherman or San Antonio; the witnesses were not positive which place. The handwriting of the letters written by Julius Joergensen to his parents was compared with signatures of Johnson affixed to various railway papers, while he was fireman, and to his application for insurance in the brotherhood. The evidence was quite contradictory as to whether the writing was by the same person. A photograph of Julius Joergensen, taken when he was 18

years old, was exhibited to persons who knew John Johnson in St. Louis, and they differed as to whether the photograph of the boy resembled the man they knew. Some witnesses were positive it represented the same person, and others equally positive that it was totally unlike Johnson. There is testimony that Johnson was a large man, weighing 170 pounds; whereas Julius Joergensen was only 5 feet 4 inches, and weighed about 150 pounds when he left Denmark. This evidence is of small value, because the boy may have grown into a large man. Both Joergensen and Johnson, as they were known to their acquaintances, had fair hair and skin, blue eyes, and were of the Scandinavian type of men. There was evidence that Johnson stated to friends in St. Louis that he was of Swedish descent, and this testimony, and other facts above stated, concerning the letter written by Joergensen in Texas, in which he speaks of forming a friendship with a Swede, the presence of the Joergensen letters in Johnson's trunk, and his statement that they had belonged to a friend in Texas, are put forward by the plaintiff's counsel to maintain the theory that Johnson, instead of being Julius Emil Joergensen, was another person, to wit, the Swedish friend Joergensen had known while herding cattle in Texas.

Several facts emerge from the evidence which strike our minds as particularly significant. It is certain that Julius Joergensen left San Antonio and came to St. Louis after 1892, and wrote letters from St. Louis to his parents as late as March, 1899. If he and Johnson were different persons who had been acquainted in Texas, it is strange they lived in St. Louis for several years without forming mutual friends who knew them as two individuals. If the plaintiff's theory be true, Johnson and Joergensen must have been about St. Louis a great deal from 1894 to 1899; but none of the associates of Johnson speak of ever seeing him in company with Joergensen, or of knowing such a man. Julius Joergensen had charge of horses in Kansas City and San Antonio, and was afterwards a locomotive fireman in the latter place. When we first learn of Johnson in St. Louis he is working as a stableman for Weber, and afterwards gets employment as a fireman. It would be a noteworthy coincidence if the Swedish friend whom Joergensen knew in Texas should subsequently become, as he did, a railway fireman, and still later prosecute the same business in St. Louis, as we know Julius Joergensen did, from the letter written to his parents in March, 1899, in which he spoke of working on a railroad. We know, too, that, from an undisclosed motive, Julius Joergensen sometimes called himself Johnson, and had his parents address him as Julius Johnson. If their testimony is to be believed, he occasionally wrote to them under the name of John Johnson. When the deceased made application for the insurance he stated he was born April 17, 1872. Julius Joergensen was born

April 17, 1870. It is another coincidence if Johnson's friend in Texas was born on the same day of the same month he was. Julius E. Joergensen has never been heard of by his relatives or parents in Denmark since Johnson died. That Johnson dissembled concerning his past appears from his telling the medical examiner, when he made application for insurance, that his parents were living, and in good health, eight years before, when he left home, but that he had heard nothing from them since, and declaring a month or two thereafter that his folks were all dead. While the case is mysterious, the proven facts strongly incline us to the belief entertained by the learned trial judge that the deceased, John Johnson, was Julius Emil Joergensen, who, for some reason, chose to conceal his identity after he came from Texas to St. Louis. If we leaned to the opposite belief, we would be much disposed to yield our own judgment in favor of that of the court below on the issue of fact presented; for this is peculiarly a case in which the manner of witnesses while testifying and the impressions gleaned during the trial are important.

Judgment affirmed.

BLAND, P. J., and REYBURN, J., concur.

KENNETH INV. CO. v. NATIONAL BANK OF THE REPUBLIC OF ST. LOUIS.

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

BANKS—FORGED CHECKS—PAYMENT—NEGLIGENCE—EVIDENCE—EXAMINATION OF PASSBOOK—FORGERIES BY BOOKKEEPER.

1. To prove negligence in paying checks purporting to be drawn by plaintiff against his account with defendant bank, it is competent to show that a check merely stamped with plaintiff's name, but not signed by any one, was paid, though the money drawn by it was not converted by the forger, but used by plaintiff.

2. Ten days cannot be arbitrarily fixed as sufficient time, under all circumstances, for a bank depositor to examine his passbook, after it has been balanced and returned to him with canceled vouchers.

3. A bank depositor is not bound by the examination of its passbook, nor to be treated as though it had made none, where its clerk to whom it intrusts such duty had forged checks, which had been paid, if ordinary care was used in selecting the clerk.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by the Kenneth Investment Company against the National Bank of the Republic of St. Louis. Judgment for plaintiff. Defendant appeals. Affirmed.

Alfred T. Hebard, for appellant. Edward T. Parish, for respondent.

BLAND, P. J. This is the second appeal of this case. The opinion on the former appeal will be found in 96 Mo. App. 125, 70 S. W. 173, to which we refer for a statement of the controlling facts in the case. The issues on the retrial were submitted to the court

without the intervention of a jury. The finding and judgment of the court were for the plaintiff. Defendant appealed. On the second trial the date and other particulars of all the checks forged by Chatard and paid by the defendant bank were brought out, and additional evidence was heard as to the character of the forgeries, and the degree of diligence exercised by defendant's paying teller to detect the forgeries at the time the checks were paid by him.

The plaintiff, for the purpose of proving negligence on the part of the teller, offered and read in evidence, over the objection of the defendant, a check for \$50 that was stamped with plaintiff's name with a rubber stamp, but was not signed by Davis or any other person. It is admitted that the money drawn by this check was not converted by Chatard, the forger, but was used by plaintiff in its business. For the reason that the money drawn on this check was properly applied, it is contended by defendant that it was inadmissible to show negligence in the payment of the forged checks. We do not think the check was competent to show negligence generally on the part of the paying teller, but was competent as tending to prove negligence in paying checks purporting to be drawn by the plaintiff against its account with the defendant bank.

The court declared the law to be that what is a reasonable time in which a depositor in a bank should examine his passbook, after it had been balanced and returned to him with the canceled vouchers, is a question of law, but refused to declare, as a matter of law, that 10 days was a reasonable time in which to make such examination. We do not think 10 days should be arbitrarily fixed as the time for making the examination in every case, but that it is a reasonable time in which to make the examination when the depositor and bank reside in the same town or city, and so held when the case was here before, and also in the case of *McKeen v. Bank*, 74 Mo. App. 281.

The defendant moved the court to declare the law to be, in effect, that while the plaintiff was not bound by any of the examinations of the passbook made by Chatard, if at the time of such examinations it contained any of his forged checks, yet it was in no better position than if it had made no examination whatever, and for that reason could not recover, but the court refused to so declare. In *Wachsman v. Columbia Bank*, 8 Misc. Rep. 280, 28 N. Y. Supp. 711, it is held that the depositor exercised ordinary care by intrusting the duty of examining the passbook and vouchers to the usual agent (the bookkeeper) in the ordinary course of business, although he (the bookkeeper) was a forger, and that the depositor was not estopped to assert the forgeries by mere delay in discovering them; that the delay did not make the account a stated or conclusive one, and only cast upon him the burden of impeaching it for mistake, and proving the checks were forged. In

Weisser's Adm'r's v. Denison, 10 N. Y. 68, 61 Am. Dec. 731, checks forged by the confidential clerk of the depositor were paid by the bank, and charged to the depositor in his passbook, with the forged checks and others, and returned to the depositor; and the clerk, at the request of the principal, examined the book and reported it correct, and the principal did not discover the forgeries until several months afterwards, when he immediately notified the bank. In an action to recover the balance, it was held the bank could not retain the amount of the forged checks; that to deny a recovery would be, by a legal fiction, to charge the depositor with the tortious and even criminal acts of the servant. In *Frank v. Chemical National Bank*, 84 N. Y. 209, 38 Am. Rep. 501, under a somewhat similar state of facts, it was held that plaintiff would not be estopped from questioning the accuracy of the account, and that defendant was liable for the balance, deducting the forged checks. In *McKeen v. Bank*, 74 Mo. App. 281, and *Quattrochi Bros. v. Bank*, 89 Mo. App. 500, we held that the depositor was bound to examine his passbook, when written up and returned to him with the canceled vouchers, within a reasonable time, and to give prompt notice to the bank of any errors, frauds, or mistakes therein. It seems to us this is a reasonable requirement, and that if a forged check is returned, with the passbook, to the depositor, charged to his account, which through his negligence he fails to discover, and the bank suffers damages thereby, he, rather than the bank, should suffer the loss. But we have never held, and do not think it sound law to hold, the depositor estopped to charge the bank with the forged checks, if he has used ordinary care in the examination of his passbook and returned checks, and failed to discover the forged checks and to give notice thereof; nor do we think he should be estopped if he fails to make any examination whatever, provided it is shown that the bank was negligent in paying the forged checks. To hold otherwise, it seems to us, would be a serious modification of the rule thoroughly grounded in the jurisprudence of both England and this country since the decision in 1762 of Lord Mansfield in *Price v. Neal*, 3 Burr. 1354, which is, "If a bank pay the money of its depositor on a forged check, no matter under what circumstances of caution, or however honest in the belief in its genuineness, if the depositor himself be free of blame and has done nothing to mislead the bank, all the loss must be borne by the bank." U. S. Bank v. Bank of Ga., 10 Wheat. 333, 6 L. Ed. 334; *National Park Bk. v. Ninth National Bk.*, 46 N. Y. 77, 7 Am. Rep. 310; *Hardy & Bros. v. Chesapeake Bk.*, 51 Md. 562, 34 Am. Rep. 325; *Smith v. Mercer*, 6 Taunt. 76; *Kedington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190; *Howard & Preston v. Mississippi Valley Bk. of Vicksburg*, 28 La. Ann. 727, 26 Am. Rep. 105; *Mackintosh v. Elliot National Bk.*, 123 Mass. 393; *First National Bk. v. State Bk.*, 22

Neb. 769, 36 N. W. 289, 3 Am. St. Rep. 294; *Brown v. Daugherty* (C. C.) 120 Fed. 526; 2 Daniel on Negotiable Instruments (3d Ed.) §§ 1359-1655; 2 Morse on Banks & Banking, 463. A rule that would require that the examination should be made by the depositor in person, or that would charge him with the fraud of his trusted employé, should be intrust to him the examination, would be a harsh one, and at war with the relation which a bank sustains to its depositor, and very much weaken the salutary rule that "a bank, in paying money on the check of its depositor, does so at its peril, and takes the risk of the check being genuine."

There was evidence pro and con as to the character of the forged checks, and as to the degree of diligence exercised by the defendant's paying teller in cashing the checks.

The court, at the instance of plaintiff, declared the law as follows:

"(4) If the court, sitting as a jury, believes and finds from the evidence that the checks in question, aggregating \$1,093, were forgeries, then the plaintiff is entitled to recover said amount, less \$78 paid into court, with interest at six per cent. on the balance (\$1,015) from the 8th day of October, 1894, the date of the institution of this suit, unless it believes and finds from the evidence that defendant used reasonable care and skill in detecting said forgeries before paying such checks.

"And unless the court further finds and believes from the evidence that the plaintiff did not within a reasonable time after the 13th day of June, 1894, when its bankbook was balanced, make an examination of its returned checks, passbook, and checkbook, to ascertain and determine if said check for \$78 was a forgery, and notified defendant thereof, and that by reason of said failure on the part of plaintiff the defendant was especially damaged thereby.

"In regard to such examination, and the duty of plaintiff to make the same, the court declares the law to be that the plaintiff was not wanting in proper care in the examination of its said accounts, if it intrusted to some competent person the duty of making that examination for it.

"And the court further declares the law to be that if such person was the bookkeeper of plaintiff, and that he forged said checks, then the knowledge of such person (in this case, one Chatard), the bookkeeper of plaintiff, gained in the commission of such forgeries, or as bookkeeper of plaintiff in handling such checks, passbook, and bankbook, was not imputable to plaintiff.

"And if said Chatard withheld and failed to disclose the knowledge which he had thus acquired from plaintiff, then plaintiff is not bound by the knowledge which Chatard had thus acquired.

"And the court further declares the law to be that if plaintiff, in selecting its bookkeeper to have charge of its passbook, checkbook, and returned checks, used ordinary care (that is,

the same care which a person of ordinary prudence would use under similar circumstances), then the plaintiff was not guilty of negligence in intrusting such duty to its bookkeeper. Nor was the plaintiff required, after imposing such duty upon its bookkeeper, to go further, and make a personal inspection, through its officers, of such books and checks aforesaid, but, in imposing such duty on such bookkeeper, plaintiff acted with ordinary prudence; that is, such prudence and care as a person in like circumstances would use and employ."

We think this instruction is in harmony with the former decisions of this court, and that the last paragraph is supported by the decisions of the New York courts, supra, and is supported by reason and the practice of merchants to intrust the examination of their passbooks to a trusted employé.

The finding and judgment are supported by the law and the evidence, and the judgment is affirmed.

CARPENTER v. RELIANCE REALTY CO. et al.

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

PROPERTY—LATERAL SUPPORT—EXCAVATION—MUNICIPAL CORPORATIONS—CHARTER—ORDINANCE—ESTOPPEL—BUILDING CONTRACT.

1. The right to lateral support pertains only to the ground itself in its natural state, not to incumbering buildings or improvements.

2. The owner of an unimproved lot or his licensee has the right to excavate for the purpose of erecting a building thereon, by using reasonable care, and giving timely notice to the owner of adjacent buildings.

3. Responsibility to prevent injury resulting from the removal of earth contiguous to buildings devolves on the owner of the buildings, on receipt of timely notice of a purpose to make an excavation by the owner of the contiguous lot or his licensee.

4. The cost of shoring up, underpinning, or taking whatever precautions may be needed to prevent injury to adjacent structures from excavating when carefully done, falls on the owner of the adjacent structures.

5. St. Louis City Charter, art. 3, § 26, par. 12, providing that the municipal assembly shall have authority to "provide for the safe construction, inspection and repair of all private and public buildings within the city," does not authorize an ordinance limiting the depth a lot owner can excavate on his premises without taking care of contiguous buildings at his own expense.

6. In an action to enjoin the excavation of a lot contiguous to plaintiff's buildings, beyond the depth limited by a city ordinance, unless defendants adopted measures, at their own expense, to protect plaintiff's buildings, on which claim for relief is grounded exclusively on the ordinance, a contention that defendants are estopped to repudiate the ordinance because, in notifying plaintiff of their intention to excavate, they called plaintiff's attention to the ordinance in the notice, is untenable.

7. Defendants called plaintiff's attention to an ordinance when notifying him to protect his walls against an excavation they were about to make adjacent to plaintiff's buildings. Plaintiff replied by citing the ordinance himself, and

¶ 2. See *Adjoining Landowners*, vol. 1, Cent. Dig. §§ 23, 33.

asking if the excavation would exceed the limit named therein, but, receiving no reply, instituted an action to compel defendants to adopt measures at their own expense to protect plaintiff's buildings, in accordance with the terms of the ordinance. *Held*, that defendants were not estopped to attack the validity of the ordinance.

8. A contract between defendants (a lot owner and a construction company employed to erect a building on the lot) provided that the construction company should protect the adjacent walls. *Held*, that a contention by plaintiff, in an action to compel the defendants to adopt measures at their expense to protect his adjacent buildings from damage by excavation, that he was entitled to enforce the contractual provision against the construction company, is untenable, since he was no party to the contract, and did not sue on it, or refer to it in his petition.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by James M. Carpenter against the Reliance Realty Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

Collins & Chappel, for appellants. T. K. & C. R. Skinner, for respondent.

Opinion.

GOODE, J. The Reliance Realty Company and the Hill-O'Meara Construction Company are corporations. The former owns a lot on the northeast corner of Olive and Sixth streets, in the city of St. Louis, which fronts 50 feet on the north line of Olive street, and extends north 114 feet along the east line of Sixth. The plaintiff, James M. Carpenter, owns two lots adjoining the realty company's lot. One of them fronts on the east side of Sixth street, and is contiguous to the realty company's lot on the north. The other is immediately east of the lot of the realty company. So the two surround the realty company's lot on the north and east sides. In 1898 Carpenter had a building on his Sixth street lot, 3 stories high for a distance of 30 feet from the front, and thence 2 stories high the further distance of 20 feet. The foundation walls under the 3-story portion of that building were of stone, and extended 8 feet below the level of the curb on Sixth street. The foundation under the 2-story part extended $2\frac{1}{2}$ feet below said level, and below the surface of the ground. On plaintiff's east lot, to wit, the one fronting on the north side of Olive street, he had a building of brick and iron, 4 stories high for a depth of 80 feet, and 1 story high the further depth of 34 feet. The west wall of that building, contiguous to the realty company's lot, was of brick, and the foundation, for a depth of 11 feet, was of brick, and 28 inches thick, and for the further depth of 1 foot was 3 feet thick, and laid in hydraulic cement mortar. Both the buildings are alleged to have been old, but their age is not stated in the evidence. During said year the Reliance Realty Company began to improve its lot, the purpose being to erect thereon a 10-story

office building, of the steel construction type; and such an edifice was in fact erected, and is now known as the "Carleton Building." In making the improvements, it was necessary to excavate the realty company's lot to the depth of 18 feet or more, in order to put in a basement and a foundation strong enough to uphold the lofty superstructure intended to be erected. As this excavation would penetrate the earth below and immediately adjacent to the foundations of the plaintiff's two buildings, measures to insure the safety of the foundations were required. With that end in view, the Hill-O'Meara Construction Company, to whom the contract for the erection of the Carleton Building had been let by the Reliance Realty Company, delivered a written notice to the plaintiff on November 8, 1898, telling him it was the intention of the construction company to make an excavation on the realty company's lot to a depth of 15 feet below the curb level, and notifying the plaintiff to take such steps as he saw fit to sustain, protect, and underpin his contiguous walls so as to preserve them from injury. The notice called plaintiff's attention to section 73 of Ordinance No. 18,964 of the municipal assembly of the city of St. Louis, approved April 7, 1897. That ordinance is now section 106 of the municipal code of 1901, and reads as follows: "The legal depth for excavations to the bottoms of footing shall be nine feet for dwellings and fifteen feet for business buildings—to be measured from the curb level on the party line. Whenever an excavation shall be carried to a greater depth than the legal depth above given, it shall be the duty of the person making or causing such excavation to be made to preserve any contiguous legal wall or walls from injury and sustain, protect and underpin the same at his own cost and expense, so that the said wall or walls shall be and remain practically as safe as before such excavation was commenced. He shall give timely written notice to adjoining property owners of his intention to do so, and adjoining property owners shall permit the occupancy of their ground and buildings so that their walls may be underpinned and sustained. If such excavation shall not be carried to a depth greater than the legal depth above given, the owner or owners of such adjoining or contiguous wall or walls shall preserve their walls from injury and so sustain, protect and underpin the same at their own cost and expense that said wall or walls shall be and remain as safe as before such excavation was commenced, and said owner or owners of adjoining or contiguous wall or walls shall be permitted to enter upon the premises where such excavation is being made for that purpose, when necessary." On November 9th Carpenter replied to the notice of the Hill-O'Meara Construction Company, saying that the notice stated the excavation would be made to a depth of 15 feet along both of his lines, but

that he had seen the plans and specifications for the new building, and they called for an excavation of 18 feet; that, inasmuch as the notice did not explicitly declare the excavation would be limited to 15 feet, he asked for information as to the full depth intended to be excavated. He also called the attention of the construction company to the aforesaid municipal ordinance, and said, if the construction company would inform him that it did not intend to dig deeper than 15 feet, he would proceed without further delay to protect his walls; otherwise he would expect the construction company to protect them. No reply was made to this letter, and on November 17th Carpenter filed a petition in the circuit court of the city of St. Louis against the Reliance Realty Company and its officers and the Hill-O'Meara Construction Company and its officers, in which he averred that the defendants were about to excavate to a depth of 18 feet, and asked that they be restrained from proceeding with the work until they had, at their own cost and expense, protected and underpinned his walls so as to preserve them from injury. The petition stated that plaintiff's buildings were occupied by tenants; that the proposed excavation endangered the buildings; that the defendants, in disregard of their duty, had refused to protect his walls at their own cost and expense, and, if they were allowed to proceed without providing adequate safeguards, there was great danger to the lives and limbs of plaintiff's tenants, and of irreparable damage to his buildings. A bond was given, and a temporary restraining order granted. The order enjoined the defendants, their agents and servants, from making any further excavation on the Reliance Realty Company's lot without, at their own expense, sustaining, protecting, and underpinning plaintiff's walls contiguous to the realty company's lot on the east and north, so as to preserve said walls from injury, and so that they would remain practically as safe as before defendants commenced to dig.

Answers were filed by the Hill-O'Meara Construction Company and its officers, admitting plaintiff's ownership of the two lots; that the defendant corporation, when this suit was instituted, was in possession of the realty company's lot; and denying the other allegations of the petition. The Reliance Realty Company answered that on the 6th day of October, 1898, it had let the contract for the erection of a 10-story building to the Hill-O'Meara Construction Company, and that the construction company had entered the premises as an independent contractor, with the sole and absolute control thereof; that the construction company was not the agent or servant of the realty company, but had agreed with the latter company to thoroughly protect all work liable to be injured during the erection of the contemplated building, and to take great care to protect the adjoining property, and repair any damage done

to the same; that it had further agreed to do the requisite shoring to prevent the caving in of the adjoining buildings. Said answer further averred that the refusal of the Hill-O'Meara Construction Company to protect and underpin the plaintiff's walls was without the realty company's connivance and consent, and that the realty company had made demand of the construction company to shore plaintiff's walls. The officers of the realty company filed a general denial.

The evidence showed the facts above stated, and that, after the temporary restraining order was granted, the Hill-O'Meara Construction Company underpinned the plaintiff's walls at an expense of some \$2,600. There was evidence that the excavation for the new building would extend, in places, to a depth of more than 15 feet. In addition to underpinning plaintiff's walls—that is, building a foundation under them—the construction company shored them up.

The contract between the realty company and the Hill-O'Meara Construction Company contained these clauses:

"The contractor shall thoroughly protect all work liable to be injured during the construction of the building and shall take great care to protect adjoining property, and shall repair any damage done by him to same."

"He shall take proper care of the ends of sewers in the manner directed by the architect and shall do all requisite shoring and bracing to prevent caving in of streets and adjoining buildings."

On the final hearing in the circuit court the temporary restraining order was made perpetual, and, after their motion for new trial had been overruled, the defendants appealed to this court.

1. By a stream of decisions, beginning with *Charles v. Rankin*, 22 Mo. 568, 66 Am. Dec. 642, and extending to *Obert v. Dunn*, 140 Mo. 476, 41 S. W. 901, the rule has been established in this state that the owner of a parcel of ground is entitled to lateral support for it, and his neighbor may not dig the adjacent earth away, so as to cause his ground to crumble, but that the right to lateral support pertains only to the ground itself in its natural state, not to incumbering buildings or improvements. This doctrine is widespread, and needs no elaboration, but simply to be stated. By virtue of it, plaintiff was without a just claim to have the reliance realty company's lot remain in its natural state in order that his buildings might be supported by the soil around them. The realty company, or its licensee, the construction company, had the right to excavate the contiguous lot, using reasonable care in the work, and giving timely notice to plaintiff that it would be done, which duties were observed. On receipt of the notice, responsibility for the safety of his buildings devolved on the plaintiff, and he was the one to prevent injury resulting from the removal of the contiguous earth. *Charles v.*

Rankin, *supra*; Larson v. Met. R. R., 110 Mo. 219, 19 S. W. 416, 16 L. R. A. 330, 33 Am. St. Rep. 439; Obert v. Dunn, *supra*.

2. The claim is made that, as Carpenter's buildings were ancient, he had acquired a prescriptive right to lateral support for them. As stated, we find no evidence in the record that they were ancient, and this point is hardly before us. There was a decision in the case of Casselberry v. Ames, 13 Mo. App. 575, in favor of the creation of such a right; but the question was re-examined in the later case of Handlan v. McManus, 42 Mo. App. 551, and the doctrine of the first one renounced. The authorities bearing on the proposition were extensively reviewed in the latter case, and shown not to support the previous decision. The doctrine of prescriptive right to lateral support for buildings has been held generally to be one peculiar to English jurisprudence, and inconsistent with the rules recognized by the American courts in regard to the acquisition of easements by prescription. In this country the inclination is to require not only a long use of one's own tenement, but an adverse use of the tenement of another, in order to create a prescriptive right in favor of the former tenement against the latter. Hence American courts have rejected the doctrine of ancient lights, to which the right of lateral support for buildings is akin. The question was gone into extensively in the note to Larson v. Met. R. R., 33 Am. St. Rep. 439, where we find this conclusion announced on page 464: "So far as our researches extend, therefore, it would seem that no American case in which the question has been directly raised, except one, has sustained the right, and that this single exception is no longer deemed a sound authority in the court from which it emanated. On the other hand, there are several cases in which courts of last resort have emphatically rejected as unsound the theory that the right of support can be gained by prescription." As suggested above, the argument which has told against the presumptive acquisition is that as the claimant of lateral support does not encroach on the premises of the adjoining owner, enjoy an adverse use, or have possession of them, the presumption of a license or grant, which in theory underlies a prescription, does not obtain.

3. The duties of a man who is about to excavate his lot, in respect to his neighbor's building, are to promptly apprise the latter of his intention, and to use reasonable care in conducting the excavation so as to prevent injury to the building, if possible. If liability for resulting loss is thrown on him, it is not because he infringes his neighbor's rights in making the excavation, but from his doing the work in a negligent manner, and in recognition of the rule of law that, when a man makes any use of a legal right, he must do so in a way not to needlessly injure others. The cost of shoring up, under-

pinning, or taking whatever precautions may be needed to prevent injury to adjacent structures from excavating when carefully done, falls on the adjoining proprietor. *Charles v. Rankin*, and other cases, *supra*.

4. Some other principles need to be noticed in this connection. The rules governing the right to lateral support are the same for subsoil as for surface support. It was suggested in one decision that an inordinate excavation would be an unreasonable use of the land, and that an owner ought to be denied the right to dig beyond a certain depth without saving the adjacent owner harmless. But this distinction never took root in the law, because it was inconsistent with the dominion which accompanies the ownership of property. One proprietor has no right to incumber his soil with structures in expectation of having them supported by his neighbor's soil. That would be partially appropriating his neighbor's land to his own use, as it would also be an assertion of the right to build on his own ground, and a denial of the same right to his neighbor. *Larson v. R. R.*, 33 Am. St. Rep. 454; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243.

5. It is ancient and elementary law that a proprietor has dominion not only over the surface of the land he owns, but over the space above and below the surface, to any extent he chooses to occupy it. In populous cities, where buildings vary much in size, some being low and small, while others are of great height and enormous weight, this rule had proved inconvenient, and has been corrected in some instances by statutes fixing a maximum depth to which a lot owner may excavate without incurring the burden of protecting adjacent buildings, but providing that if he digs deeper he must protect them. The Legislature of Missouri has passed no law of the kind. The theory of those statutes is that the average building will only require a foundation of a certain depth, and, if an owner puts in a foundation that deep, he may presume he has anticipated any use his neighbor is likely to make of his lot, and provided against injury from it, and that persons who want to dig deeper may be justly required to safeguard contiguous walls, of legal depth, at their own expense. But such legislation completely changes the common law, and can only be enacted by the law-making body of the state, or by a municipality to whom the power to enact it has been granted by its charter or other statute. Apart from the particular ordinance before us, we have not found, during much research, any attempt to change the rule of the common law by a municipal ordinance throwing the burden of protection on the party excavating. All such innovations appear to have been made by statute. *McMillen & Mauks v. Watt*, 27 Ohio St. 306; *Jencks v. Kenny* (Super. N. Y.) 19 N. Y. Supp. 243; *Dorrity v. Rapp*, 72 N. Y. 307; *Kethhem v. Newman*, 116 N. Y. 422, 22 N.

E. 1052. In *Dorrity v. Rapp*, supra, the New York Court of Appeals declared that at common law an owner of land contiguous to a building is not bound to safeguard or strengthen the building when he excavates on his lot, or do more than excavate carefully, but that the Legislature of New York had interposed to regulate the right to excavate in the cities of New York and Brooklyn, and provided for the protection of buildings at the expense of a person excavating below a certain depth. The statute considered in that case is similar to the ordinance before us, and imposes on an owner who intends to excavate his lot more than 10 feet below the curb of the street the duty of protecting adjacent walls and supporting them so that they will remain stable. The statute was treated as an innovation and a positive change of the law on the subject.

A state Legislature has inherent power to change the law in this regard, as in all others, when the change does not infringe some constitutional rule of property; but a city has no power to do so unless the Legislature delegates it. The attempt to shift the burden of protecting contiguous walls from owners to excavators in the city of St. Louis, when an excavation is to go deeper than 15 feet, was made by a municipal ordinance, not by a state statute; and the ordinance is assailed by the defendants as in excess of the city's legislative power. It is defended by the plaintiff as a legitimate exercise of the city's police power, and a performance of its charter right and duty to provide for the safe construction of buildings inside the city limits.

What is called the "police power" appertains to the sovereignty of a state, but is exercised by that sovereignty through the agency of municipalities, as well as through direct statutory enactments, operative throughout the commonwealth. That is to say, the power to enact regulations for the welfare, health, and good morals of a community within the limits of a city or town is largely delegated by the state to its municipal governments. But in every case of municipal legislation under the guise of the police power, express or implied authority for the ordinance must be found in the charter of the city or in some other statute. A city can only exercise such powers as are expressly granted to it by the state, or fairly implied from or incident to powers expressly granted, or essential to the declared purpose of the corporation. *City of Independence v. Cleveland*, 187 Mo. 384, 87 S. W. 216; *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637, 68 S. W. 761; *Knapp v. Kansas City*, 48 Mo. App. 485. The only statute from which authority to pass the ordinance in question can be derived is the clause of the charter giving the St. Louis municipal assembly authority to "provide for the safe construction, inspection and repairs of all private and public buildings within the city." Municipal Char-

ter, art. 3, § 26, par. 12. The deduction that the city, by virtue of that grant of power, may ordain that a lot owner cannot dig on his premises beyond a certain depth without taking care of contiguous buildings at his own expense, and thereby revolutionize a fundamental rule of property and the law of the land, is, we think, unwarranted. Such a regulation goes directly not only to the use of property, but to the right of property, as the essence of property in a thing consists in use, dominion, and enjoyment, rather than in title or possession.

In *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226, it was held that a statute relating to the city of St. Louis, and providing that every house erected on Forest Park Boulevard should be set back forty feet from the edge of the street, was not a proper exercise of the police power of the state, but rather a confiscation of private property for public use without compensation, and therefore was unconstitutional and void. Interference with a man's right to improve his land as he chooses, and other governmental interferences against common right, are somewhat jealously watched by the courts, and they scan pretty closely the language of municipal charters to see if a particular interference was clearly authorized. *Succession of Irwin*, 33 La. Ann. 63; *State v. Schuchardt*, 42 La. Ann. 49, 7 South. 67.

The charter authority to provide for the safe construction of buildings has reference, we think, to the material to be used, the thickness of the walls, and similar matters which concern the people at large and tend to promote public safety. It is well for a city to see that buildings are strongly built, in order that their occupants may not be endangered; see that foundations are deep enough to be secure; walls of a certain thickness; that plumbing is sanitary; that fire escapes are provided, and noncombustible materials used. *Tiedeman, State & Federal Control*, § 150. All those regulations tend directly to promote the public health and safety. And maybe ordinances to enforce all of them might be upheld under the power to provide for the safe construction of buildings, though they are commonly enumerated in grants of legislative powers to cities. But the public is not concerned as to who shall bear the expense of protecting walls from damage by excavations, and the conclusion may not be drawn, in the interest of the community, that the city is empowered to shift the expense from owners to excavators, against the settled rule of law, by virtue of a charter provision authorizing it to provide for the safe construction of buildings. That authority to make the excavator bear the expense is not expressly given by such a clause is plain. Neither is it necessarily implied from the words of the clause, or incidental to the legislative power expressly conferred by it, because buildings may be as well protected if their owners bear the expense as if excavat-

ors do. Authority to throw the burden on the latter is certainly not essential to the declared purpose of the municipality. As those are all the powers a city has, it follows that the right to enact the ordinance in question as a police measure has not been delegated to the city of St. Louis by the state. Not only have we found no decision holding such an ordinance valid as an exercise of the city's police power, but it far transcends, in its revolutionary effect on the law, any municipal act which to our knowledge has been upheld as valid under a charter empowering a city to regulate the construction of buildings. The purpose of the Legislature of this state to keep the rules prescribed by the mayor and the municipal assembly of St. Louis in harmony with the law of the state plainly appears from the fourteenth paragraph of the section of the charter in which is found the supposed power to enact the ordinance in question. That paragraph says the lawmaking body of the city may pass all ordinances, not inconsistent with the provisions of the charter or the laws of the state, that may be expedient in maintaining the peace, good government, health, and welfare of the city.

In *Grand Ave. R. R. v. Lindell R. R.*, 148 Mo. 637, 50 S. W. 302, the Supreme Court said: "The ordinances of a city adopted in pursuance of its charter, granted by the state, have the force and effect of laws within said city, and are binding upon all persons who come within the scope of their operation, so long as they are not in conflict with the Constitution, and are in harmony with the general laws and policy of the state." That ordinances are invalid if inconsistent with the laws of the state was declared in *St. Louis v. Packing Co.*, 141 Mo. 375, 42 S. W. 954, 89 L. R. A. 551, 64 Am. St. Rep. 516; *Paris v. Graham*, 83 Mo. 94; *In re Dunn*, 9 Mo. App. 255; *Kansas City v. Hallett*, 59 Mo. App. 160; and in many other decisions. The general principle is recognized and stated in Judge Cooley's authoritative work on Constitutional Limitations, and the numerous cases cited in support of the text (7th Ed., p. 279). Of course, the Legislature may, by charter or other statute, confer on a city the right to enact laws at variance with general legislation and state policy, but not at variance with the Constitution. But the authority to provide so radical an alteration in the law ought to be clear. The grant of power to regulate the construction and repair of buildings signifies no intention on the part of the Legislature of Missouri to authorize the municipal assembly of St. Louis to change the obligations and duties of adjoining proprietors, and ought not to be construed as validating such an attempt.

In *Slaughter v. O'Berry* (N. C.) 35 S. E. 241, 48 L. R. A. 442, an ordinance which provided that a city should do the work and furnish the materials for a sewer connection within three feet of a building was held void, as an unreasonable invasion of the rights of property. The ordinance was enacted pursuant to the

city's charter power to put in a sewer system, but was nevertheless held to be ultra vires, as being of no service to the public, nor necessary to the effective execution of the power to provide sewerage. The opinion deals instructively with the point in hand, and, while we quote but an excerpt, the whole ought to be read, for it sheds a clear light on the question of how far municipal action may go, and still be a legitimate exercise of some granted authority, and when it becomes, instead, an illegitimate encroachment on private rights: "Where a city has the power to erect a public improvement, and to control, manage, and protect the same, the line of demarcation is so small and so delicately drawn between such power and the rights of the individual citizens of the corporation that it is difficult to run and mark it so as to give the corporation its proper powers without infringing upon individual rights and property rights. But as delicate as this duty is, it seems to us that in this case the line of demarcation is plainly apparent. But if it was in doubt, it would have to be resolved against the defendants, and in favor of the plaintiff's individual rights. 1 Dill. Mun. Corp. par. 89; *State v. Webber*, 107 N. C. 962, 12 S. E. 598 [22 Am. St. Rep. 920]; *Edgerton v. Goldsboro Water Co.* (N. C.) 35 S. E. 243 [48 L. R. A. 444]. We are therefore of the opinion that the city had the right to require that this connection should be made by its licensed officer; that materials furnished should be proper for such work, and subject to the inspection and approval of the city inspector; and that the work of putting them in should be done under the supervision of the city inspector. But we are also of the opinion that the city had no right to compel the plaintiff to buy the material from it, nor had it the right to compel the plaintiff to pay it to do the work we have specified and pointed out above in this opinion."

The ordinance we are considering was examined heretofore by this court in *Eads v. Gains*, 58 Mo. App. 586. But as the excavation in that case did not extend below the depth prescribed as one to which an excavator may go without protecting an adjoining wall, the part of the act with which we are concerned was not involved in the decision. The last part of the ordinance, which says owners must themselves protect their buildings against damage from excavations not deeper than 15 feet, was held valid, as declaratory of the common law; but the court was careful to limit its decision as to the validity of the ordinance to that part.

Plaintiff's counsel has cited us to certain decisions of the Supreme Court of this state, based on ordinances of St. Louis and other cities, which prescribe a maximum speed for railway trains and street cars, and the care operatives of street cars must take to prevent injury to persons and property, and holding that an action lies for damages in favor of a person who is injured on account of a violation of the prescribed rules. *Jackson v. R. R.*, 157

Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; *Hutchinson v. R. R.*, 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710. There has been much wavering in the decisions on that proposition, and the following cases hold that such ordinances afford no civil remedy for compensation: *Fath v. R. R.*, 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; *Senn v. R. R.*, 108 Mo. 142, 18 S. W. 1007; *Moran v. Car Co.*, 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 542; *Byington v. R. R.*, 147 Mo. 673, 49 S. W. 876; *Badgley v. St. Louis*, 149 Mo. 122, 50 S. W. 817; *Anderson v. R. R.*, 161 Mo. 411, 61 S. W. 874. Whatever the law of the subject may be, the decisions holding that, if the regulation is not observed, a civil liability accrues to a person injured in consequence of its nonobservance, are not in point in this case. Such ordinances are enacted under charter provisions whose obvious purpose is to enable a city to make rules to protect life and property from the dangers incident to the careless operation of trains and street cars; and it is apparent that the ordinances are not ultra vires or in conflict with the law of the land, but are, instead, within the words and spirit of the delegated power, and consistent with the policy of the state.

The main proposition in the present case, as we conceive it, is not whether a liability would have accrued in favor of the plaintiff and against the defendants if the former had suffered injury by the latter disobeying the ordinance in question, but whether the city had power to pass the ordinance. If power to pass it was lacking, it is a nullity, and affords the plaintiff no standing for relief. We are constrained to the opinion that the portion we are dealing with was not within the legislative capacity of the city. The doctrine which to our minds is the one that ought to control the disposition of this cause was once expressed by a learned jurist in the statement that a municipal corporation may not restrain or prohibit a person from exercising his rights under the law of the land unless the power to restrain or prohibit is expressly given by the charter, or necessarily results from what is expressly given. *Carey v. Washington*, Fed. Cas. No. 2,404. Authority to abate nuisances is held not to empower a municipality to declare something a nuisance which is not one at common law or by statute; that is, to alter the law in regard to what is a nuisance. *Allison v. City of Richmond*, 51 Mo. App. 133; *St. Louis v. Packing Co.*, 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551, 64 Am. St. Rep. 516. Those decisions rest on a principle which invalidates the ordinance in question in so far as it attempts to alter the rule of law prevalent elsewhere in the state. The police powers of a city ought to be construed with reasonable liberality, but, before an ordinance is enforced which will change a fundamental theory of the law so that the change will be sensibly felt in the law's practical effect, its validity should fairly appear from some stat-

ute delegating the power to enact it, not be implied simply because the result would be wholesome. *Knapp v. Kansas City*, supra.

The conclusions to be drawn from what we have said are that the burden of underpinning and protecting the plaintiff's buildings was unjustly imposed on the Hill-O'Meara Construction Company; that the defendants fully performed their preliminary legal duty in giving notice of the intended excavation, and thereafter had the right to excavate to whatever depth they chose, without regarding the plaintiff's buildings further than to exercise care to avoid injury to them. They had the right to proceed with the excavation, and depend on the plaintiff to take care of his wall. He refused to do this, and, instead, forced the construction company to do it. Whatever expense was necessarily incurred by that company in underpinning the walls, or otherwise protecting them, was an expense he ought to have borne, and which, as it was paid for his benefit, he ought to repay. It was decided in *Eads v. Gains* that when a property owner does not protect his building after notice, thereby compelling the excavator to incur expense in protecting it, the latter is entitled to recover his outlay. That decision settles the right of the Hill-O'Meara Construction Company to be reimbursed the necessary expense they were put to in underpinning the plaintiff's building. Of course, some part of the expense the construction company went to may have been unnecessary. That is a matter to be further ascertained from evidence.

6. Plaintiff's counsel insists that, whether the ordinance be valid or not, as the construction company called plaintiff's attention to it in the notice sent to him, said company thereby adopted the ordinance as valid, and could not afterward repudiate it. In answer to this contention, we may say that the petition contains no allegations concerning the conduct of the construction company in that regard, but grounds plaintiff's claim to relief exclusively on the ordinance, and not on an estoppel against the construction company by virtue of its reference to the ordinance. To determine the case in favor of the plaintiff on that fact would be to render a judgment outside the pleadings and the issues on which the case was decided in the court below, and without affording the construction company an opportunity to defend against the estoppel. *Walker v. Owen*, 79 Mo. 563. But there is no element of estoppel in the matter, at best. It is true, the construction company called the plaintiff's attention to the ordinance when it notified him to protect his walls; but it is also true that in his reply he cited the ordinance himself, and asked if the excavation would exceed 15 feet. His inquiry was not answered, and he instituted the present suit. No fraud was perpetrated on him, nor was he misled by the circumstance to his disadvantage. The validity of the ordinance was a legal question, and he is

presumed to have had as much knowledge of the law as the construction company. A case arose in the District of Columbia (Fowler v. Saks, 18 D. C. 570, 7 L. R. A. 649) in which an ordinance somewhat like the one under review, but relating to a party wall, was held valid on the ground that one owner of a party wall has no right to tear it down, and, if he does, is liable for damages. But the building commissioners of the District of Columbia had provided, pursuant to an act of Congress, that one owner of a party wall might demolish it on condition of rebuilding it entirely at his own expense. The condition was upheld, because, as the commissioners had power, under the act, to change the law, they had power to prescribe the conditions. In that case it was said one cannot take the benefit of a building ordinance, and repudiate its burdens. But the remark meant, as appears from the context, that one owner of a party wall could not take it down by virtue of the building regulations, and then repudiate the conditions which those regulations attached to the right to take it down. There something had been done by the party to be estopped which would entail loss to the other party unless he was estopped. He had torn down the wall, to his co-owner's detriment, and sought to evade the expense of rebuilding it, which the law said he must incur, and which it was necessary he should incur in order that his co-owner might be made whole. In the present case the construction company did not tear down the plaintiff's wall, or in any way damage it. It merely mentioned the building ordinance in a notice which did him no injury.

7. It is further contended that, as the construction company bound itself by contract with the realty company to protect the adjacent walls, the contract was made for the benefit of plaintiff, as the owner of those walls, and he is entitled to enforce it. This position is untenable. That clause of the contract between the construction company and the realty company which the plaintiff invokes was designed as an indemnity to the latter company against any possible loss it might be called on to make good on account of injury to the adjacent walls or the street, and was in no sense a contract for the benefit of the plaintiff or the city, or one on which either could sue. The observance of the contract might have, and doubtless would have, redounded incidentally to the plaintiff's benefit, but that circumstance gave him no right of action on it. *Koken Ironworks v. Livers*, 147 Mo. 580, 49 S. W. 507; *Howsmon v. Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Blum v. O'Connell*, 99 Mo. 357, 12 S. W. 791; *New Haven v. R. R.*, 62 Conn. 253, 25 Atl. 316, 18 L. R. A. 256. Moreover, we think a just construction of the contract between the construction company and the realty company did not bind the former to underpin the building, as

they were compelled to do by the injunction, but only bound the construction company, as between it and the realty company, to save the buildings from harm; and, if they had been harmed (as they were not), the only party that could have sued on the contract was the realty company, and it only after it had been damaged by paying for the injury done to the buildings. The indemnity clause certainly cannot be held to have inured to plaintiff's benefit in such sense as to relieve him from the duty of taking care of his walls, and from all the expense necessary to do it, and transfer the duty and expense to the construction company. If it had that effect, it was equivalent to awarding the plaintiff a large sum of money by virtue of a contract to which he was no party, and for which he advanced none of the consideration. The realty company owed him no duty to protect his buildings, and could not have contracted for his benefit, except as a gratuity, which no one will say was its intention, or the construction company's understanding. The realty company was contracting solely for its own benefit, and to guard against any loss that might befall in the course of erecting the new building. Moreover, the plaintiff did not sue on the contract, or refer to it in his petition. At the trial the realty company, not the construction company, introduced the contract in evidence, but plaintiff did not then amend his petition in an endeavor to take advantage of the contract. Hence a decision in his favor on this point, as on the preceding one, would be outside the issues. *Walker v. Owen*, supra; *Hollmann v. Lange*, 143 Mo. 100, 44 S. W. 752; *Evans v. Kunze*, 128 Mo. 670, 31 S. W. 123.

We have thus gone over the several propositions raised and discussed by counsel, and have reached the decision that the plaintiff was not entitled to restrain the defendants from proceeding with the erection of their building until they had, at their own expense, sustained, protected, and underpinned plaintiff's walls, as the writ of injunction required them to do. The judgment is therefore reversed, and the cause remanded, with the direction that the injunction be dissolved.

BLAND, P. J., and REYBURN, J., concur.

SKINNER v. E. F. KERWIN ORNAMENTAL GLASS CO.

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

SALES — CONDITIONS — EVIDENCE — IMPLIED WARRANTY — PURPOSE INTENDED — EXPERT TESTIMONY.

1. In an action for the price of certain appliances sold by plaintiff to defendant, proof that the appliances were worthless for any purpose whatever, and that defendant was ignorant of the kind of appliances needed, and relied on plaintiff's judgment, was competent on the question of implied warranty.

2. From the fact that apparatus ordered was intended by the purchaser for a particular purpose known to the seller, an implied warranty arose that it was reasonably fit for such purpose.

3. If a fan and piping were sold for the purpose of exhausting or taking out dust from a room in the purchaser's factory, and the seller knew the purpose for which it was intended, and the purchaser relied on the seller's judgment, the seller could not recover if the appliance was not suitable, and he was so notified within a reasonable time.

4. In an action for the price of a fan and piping sold to defendant to exhaust or remove dust from its factory, caused by the working of sand-blast machinery, evidence as to what would be a suitable apparatus, and of defects in the one furnished, was competent as tending to show that that furnished was entirely worthless, and was also competent in aid of the defense that the purchaser relied on the seller's judgment.

5. The matter involved questions not within common experience, and it was suitable that the jury have the aid of expert testimony.

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by George J. B. Skinner against the E. F. Kerwin Ornamental Glass Company. Judgment for plaintiff, and defendant appeals. Reversed.

Frank K. Ryan, for appellant. J. Carter Carstens, for respondent.

REYBURN, J. This proceeding was begun by filing in the office of a justice of the peace of the city of St. Louis the following complaint:

"Plaintiff states that the defendant is and was at the times herein mentioned a corporation duly incorporated under the laws of this state.

"Plaintiff states that defendant is indebted to him in the sum of..... \$145 as per written proposition submitted to defendant, to and for putting in a certain fan and piping selected by defendant from American Blower Catalogue (February 21, 1902).

"Plaintiff further states that there is a further charge of..... 7 for repairing said fan on March 7th.

\$152

"Plaintiff further states that he has completed said contract composed of said written proposition and order to do the work, that he has furnished the labor and material in accordance therewith, and that the defendant company has refused and failed to pay all or any part of the same."

The printed abridgment of the record displays the following history of the jury trial in the circuit court: Plaintiff offered evidence tending to support the allegations of the petition, including evidence that plaintiff had made to defendant a proposition in writing to furnish a fan, with piping, according to drawings, plans, and specifications therefor, and as shown by the catalogue of the American Blower Company, both mentioned in the petition, for the price of \$145, and without express warranty, and defendant instructed plaintiff to put such fan in its fac-

tory as proposed; that plaintiff furnished the fan and piping to defendant, and placed them in defendant's factory under the latter's direction, and in accordance with such plans and drawings, in skillful and workmanlike manner; that plaintiff later, at request of defendant, replaced a blade of the fan, the reasonable price of which would be \$7. Defendant introduced evidence tending to prove that plaintiff was shown by its president its sand-blast room when it was filled with dust from the workings of sand-blast machinery, and informed by him that he wanted something to take out the dust in the room caused by such sand-blast machinery; that plaintiff was experienced in the business of furnishing such fans, piping, and apparatus for exhaust purposes, for such purposes as removing dust, foul air, etc., from premises, and said that he would furnish a fan or blower, with piping and attachments, that would exhaust or remove the dust from the room for the sum of \$145, and defendant then accepted such offer; that the fan, piping, and attachments installed were not reasonably fit for the purpose of defendant, and as soon as such apparatus was ready for operation, and within three or four days after using it, defendant notified plaintiff either to put it in working order or to remove it; that by error plaintiff had mailed and addressed to the Krenning Glass Company a proposal, which, after above conversation between plaintiff and defendant's president, was received by defendant, to furnish a fan with attachments for the sum of \$145, not containing any express warranty of the work to be done by such fan and attachments, and not stating the purpose for which the apparatus was intended; that plaintiff knew the purpose for which defendant intended to use the fan, piping, and attachments, and defendant had no opportunity to test them before they were put in operation, and the fan, piping, and attachments were worthless for defendant's purpose. Defendant also offered to prove that these mechanical appliances, as then constructed and located upon defendant's premises, were worthless for any purpose whatever, which latter testimony was objected to by plaintiff, and excluded by the court. Defendant offered testimony tending to show that when purchasing the fan it was ignorant of the kind of apparatus proper to remove the dust from its sand-blast room, and had relied on the judgment and skill of the plaintiff to furnish such apparatus or fan, piping, and attachments as would accomplish such purpose, but plaintiff's objection to this testimony was sustained by the court. Defendant also tendered the testimony of experts to establish what would be a suitable exhaust apparatus for the purpose of removing dust from the defendant's sand-blast room, and to assign the reasons why the plaintiff's fan and piping were unfit for such purpose, and to show the proper and usual

¶ 2. See Sales, vol. 43, Cent. Dig. § 772.

construction of such fan, piping, and apparatus therefor; all of which the court excluded upon plaintiff's objection. Defendant further offered testimony that it did not request plaintiff to repair the fan, and the blade was broken while the fan was being tested.

The court, of its own motion, charged the jury as follows: "That if they find from the evidence that plaintiff made a proposition in writing, with plans and drawings, all as introduced in evidence, to the defendant, to furnish a certain fan as shown by the American Blower Company's catalogue introduced in evidence, with piping therefor, according to the terms of said proposition and plans and drawings, and to put the said fan up in defendant's factory according to said plans and drawings for the price and sum of \$145, and without warranty of said fan, express or implied, as defined by other instructions herein given; and that defendant thereupon told plaintiff to put said fan in defendant's factory as proposed; and you further find that plaintiff furnished said fan and piping therefor to defendant, and placed the same in defendant's factory under defendant's direction, and in accordance with such plans and drawings, in a skillful and workmanlike manner—you must find for the plaintiff, on that part of his demand, in the sum of \$145, together with interest thereon at the rate of six per cent. per annum from the 21st day of March, 1902, the date of filing this suit." And at the request of defendant gave the following instructions: "If the jury believe from the evidence that the plaintiff was shown by the president of the defendant its sand-blast room when same was filled by dust from the workings of said blast machinery, and plaintiff was told by said president that he wanted something to take out the dust from said room raised by said sand-blast machinery, and that plaintiff said that he would furnish a fan or blower with piping and attachments that would exhaust or remove said dust for the sum of \$145, and that defendant was ignorant as to the kind of apparatus proper for such purpose, and relied on the skill and judgment of plaintiff as to same, and that defendant then and there accepted such offer, then there was an implied warranty that said articles were reasonably fit for the said purpose; and if you further believe that said fan, piping, and attachments as furnished by the plaintiff were not reasonably fit for the above purpose, and that defendant, as soon as the apparatus was ready for operation, or three or four days after first using said fan apparatus, notified plaintiff to put same in working order or to remove it, then you will find for the defendant, although you should believe from the evidence that plaintiff mailed to the Krenning Glass Company, by mistake, a proposal, addressed to said company, which was afterwards received by the defendant, to furnish a fan with attachments for the sum

of \$145, without containing any express warranty as to the work to be done by said fan and attachments, or without stating the purpose for which said apparatus was intended. If the jury believe from the evidence that the plaintiff examined the room of the defendant used for sand-blast machinery while same was being operated, and was then told by the representative of defendant that it wanted something that would take out from said room the dust caused by the operation of said machinery, and that plaintiff said that he would furnish a fan with attachments that would do so for \$145, and that the defendant was without skill in regard to such a matter, but relied upon the experience and judgment of plaintiff, and that such offer was then accepted by the defendant, then there was an implied warranty on the part of the plaintiff that said apparatus should be reasonably fit for the aforesaid purpose; and if you further believe that such apparatus, or fan with attachments, when furnished, was not reasonably fit for such purpose, and that as soon as defendant had an opportunity to test said apparatus, or within three or four days thereafter, it notified plaintiff to make said apparatus so that it would take out said dust or remove said apparatus from said premises, and that same was subject to plaintiff's order, and that plaintiff failed to pay any attention to said notice, then your verdict will be for the defendant, although the written proposal furnished by the plaintiff to defendant does not state the purpose for which said fan and attachments were intended, or contain any express warranty in regard thereto. If the jury believe from the evidence that the plaintiff was a manufacturer or dealer in exhaust and blow piping, and that he agreed to furnish and set up in the sand-blast room of the defendant a blower or fan with piping and attachments to be applied for exhausting dust therefrom, and that plaintiff knew the defendant wanted same for the said purpose, and that the defendant had no opportunity to test said fan, piping, and attachments or apparatus before same was put in operation, and that the defendant was inexperienced in regard to such apparatus, and relied upon the plaintiff's judgment in regard to same, then there is an implied warranty that said fan, piping, and attachments or apparatus shall be reasonably fit for the aforesaid purpose, and your verdict will be for the defendant, if you believe and find from the evidence that said apparatus was not so fit, if it further appears that as soon as defendant had an opportunity to test said apparatus, or within three or four days thereafter, it notified the plaintiff to put said apparatus in working order, or to remove same from defendant's premises." The jury found a verdict for plaintiff for \$152, and defendant appealed.

1. If appellant purchased the fan, by se-

lecting it from the catalogue exhibited to him, without relying on the judgment of respondent, and the latter furnished the article designated, then manifestly there was no room for any implied warranty; but from the proof introduced and tendered by appellant the contract of sale imported a warranty by legal implication that the fan and appurtenances would be fitted for the use for which they were required and supplied, and would perform the work for which they were designed of expelling the dust caused by the sand-blast machinery from that portion of defendant's premises in which such machinery was located. "The adaptation of a machine to the uses for which it was made is always warranted." *Comings v. Leedy*, 114 Mo. 454, 21 S. W. 804; *Smith v. Hightower*, 76 Ga. 629. Without any express agreement, but from the fact that the apparatus was ordered by defendant for a particular object known to plaintiff, an implied warranty would arise that it would be reasonably fit for the uses for which it was intended, and would accomplish the purpose for which it was sold. "The principle is elemental that when a dealer contracts to supply an article in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied." *Armstrong v. Tobacco Co.*, 41 Mo. App. 254; *St. Louis Brewing Ass'n v. McEnroe*, 80 Mo. App. 429; *Creasy v. Gray*, 88 Mo. App. 454. This, the theory of the defense, appears to have met partial recognition in the instructions given to the jury, but was discarded in the admission of testimony. This proposition is interwoven in the first, second, and third instructions given at instance of defendant, but the defendant was entitled to show that in the purchase of the fan and its equipment it was in ignorance of the kind of apparatus appropriate for the uses intended, and that it relied upon the expert skill, experience, and judgment of plaintiff to furnish such machinery as would attain the purpose sought. *Benjamin, Sales* (6th Ed.) § 16, p. 644. The testimony tendered by defendant was competent and proper for such purpose, and should have been admitted.

2. The instructions asked by defendant and refused by the court were as follows: "If the jury believe from the evidence that the fan and piping sued for were sold by the plaintiff to the defendant for the purpose of exhausting or taking out dust from the sand-blast room of the defendant, and that such purpose was known to the plaintiff when selling same, and that said fan and piping were worthless for that purpose, and that said articles as placed upon and attached to defendant's premises by the plaintiff were and are of no value for any other purpose, then your verdict herein will be for the defendant. If the jury believe from the evidence that

the fan and other articles sued for were sold as an apparatus by the plaintiff to the defendant to be set up on defendant's premises for the purpose of exhausting or taking out dust from the sand-blast room of the defendant, and that such purpose was known to the plaintiff when selling same, and that the plaintiff failed to set up on said premises and deliver to the defendant a fan and other articles or apparatus suitable for the above purpose, then the defendant was not bound to accept the fan and other articles or apparatus set up and tendered; and if the defendant did refuse to accept same as not being of such description, and notified the plaintiff within a reasonable time after said apparatus was set up and tendered to put said fan and piping or apparatus in working order or remove same, then the plaintiff cannot recover. The court instructs the jury that if it appears from the evidence that the defendant, as soon as it had an opportunity to test plaintiff's fan and piping or apparatus, or within one or two days thereafter, notified plaintiff to put it in working order or remove same, then such notice must be taken to have been given within a reasonable time, and as meeting all the requirements of this case in regard to notice on part of defendant that it rejected plaintiff's fan and piping under the circumstances mentioned in the other instructions herein." If, after a reasonable opportunity to test them, the fan and appurtenances were found to be worthless, either for the purpose for which they were ordered by defendant or for any other purpose, the consideration for their purchase wholly failed; and defendant's testimony tending to show such fact was competent, and the first and second of above instructions predicated thereon would have correctly announced the law, and should have been given, if they had further required the finding that defendant relied on plaintiff's judgment in furnishing a fan, instead of one of its own selection; but in the form asked were, in that regard, defective. *Comings v. Leedy*, supra; *St. Louis Brewing Ass'n v. McEnroe*, supra; *Smith v. Bartlett*, 96 Mo. App. 550, 70 S. W. 393; *McCormick, etc., Co. v. Brady*, 67 Mo. App. 292; *Schoenberg v. Loker*, 88 Mo. App. 387; *Danforth v. Crookshanks*, 68 Mo. App. 311.

3. The expert testimony of defendant, offered to show what would be a suitable apparatus to exclude dust from the defendant's sand-blast room, and explanatory of the infirmities in the machinery furnished by plaintiff, should have been received. It was competent to show by proper testimony that the appliances supplied were defective and insufficient for the intended purpose, and what character of apparatus would have relieved the condition sought to be remedied. As the matter involved questions not within the common experience and the ordinary information of men in general, but which belonged rather to the domain of scientific knowledge, it was

proper that the jury should have the benefit of witnesses possessing peculiar skill or information in that department of mechanical research and proficiency to which the questions related. Rogers on Expert Testimony (2d Ed.) p. 21; Monahan v. Coal Co., 58 Mo. App. 68; Gavisk v. Railroad, 49 Mo. 274. This testimony was also competent as tending to show that the fan was worthless for any purpose, and upon the theory of the defense sought to be established that it relied upon the plaintiff to furnish a suitable fan such testimony was admissible as tending to prove that it was unsuitable for the purpose for which it was bought.

The judgment is therefore reversed, and the cause remanded.

BLAND, P. J., and GOODE, J., concur.

PETERSON v. WESTMANN.

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

DRUGGIST—NEGLIGENCE—INJURY—CONTRIBUTORY NEGLIGENCE—EVIDENCE—INSTRUCTIONS.

1. One who sent a bottle labeled "Carbolic Acid" to a drug store to be filled with arnica—it being returned to him, without any change of label, filled with carbolic acid—was not guilty of contributory negligence because he used the carbolic acid to his injury, not heeding the label, supposing the liquid to be arnica.

2. Negligence of a medical student, who had recommended arnica for a crushed finger, in not discovering that the liquid sent by a druggist was carbolic acid, instead of arnica, cannot be imputed to the injured person, so as to preclude him from recovering for the druggist's negligence.

3. Where a druggist was given a bottle labeled "Carbolic Acid," and was asked for arnica, but filled it with carbolic acid, and did not attach a new label, his negligence was the proximate cause of injury to one who used the carbolic acid, supposing it to be arnica.

4. A jury's finding, based on conflicting evidence and approved by the trial court, is conclusive with the appellate court.

5. In an action for the loss of a finger from the use on a bruise of carbolic acid, which a druggist had furnished when arnica had been called for, an instruction that, if the injury that made amputation of the finger necessary was the bruise, there could be no recovery, was properly refused, where there was no evidence that the bruise was so severe as to necessitate amputation.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by John Peterson against Frank H. Westmann. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Thos. G. Rutledge, for appellant. Carter & Sager and John B. Denver, for respondent.

BLAND, P. J. This suit was commenced before a justice of the peace, where plaintiff filed the following complaint: "Plaintiff states that on the 31st day of March, 1902, he bruised and injured his finger; that, being desirous of relieving the pain caused by such

injury, he sent his agent to the drug store of defendant to procure arnica to apply to said injury; that said agent asked defendant for arnica, but defendant, instead of giving plaintiff's agent arnica, negligently and carelessly gave him carbolic acid; that plaintiff, being ignorant of the fact that he had received carbolic acid instead of arnica, applied said carbolic acid to his finger; that said carbolic acid ate into the flesh of said finger and rendered it unfit for use; that said finger is still unfit for use, and plaintiff has been unable to follow his ordinary avocation in life since the 21st day of March, 1902, to his great loss; that plaintiff has suffered and still suffers great pain and anguish from the hurt to his finger caused by said carbolic acid, and has been put to great expense for medical attention and medicine; that, in consequence of the premises, he has been damaged in the sum of five hundred (\$500) dollars. Wherefore plaintiff prays judgment against defendant for the sum of five hundred (\$500) dollars and his costs." The cause was appealed to the circuit court, where, on a trial anew, plaintiff recovered judgment for \$500, from which defendant duly appealed.

The evidence shows that plaintiff is a stone mason, and, while laying a stone in a wall, the end of the middle finger of his right hand was caught under the stone and bruised. Plaintiff worked on until night, and then went to his home, which was over a drug store kept by the defendant. After he arrived home, he asked for a penknife for the purpose of boring a hole in the nail of the injured finger to let out the bad blood that had gathered under the nail. A medical student named Baird was boarding at plaintiff's house, and was present, and advised plaintiff to put arnica on the finger, to take out the soreness. Plaintiff's wife had previously, on several occasions, bought carbolic acid of the defendant, and had at this time a bottle containing some carbolic acid, which she poured out, and then washed the bottle. The bottle had a carbolic acid label on it. After she had washed the bottle, she handed it to her son Leo, a boy 12 years old, who was given a nickel by his father (the plaintiff), and told to go down to defendant's drug store and get a nickel's worth of arnica. The boy did as he was told, and returned in a few minutes with the bottle, with the same label upon it, and filled with carbolic acid. The student, Baird, picked up the bottle and looked at it, but did not discover that it contained carbolic acid, and told plaintiff to wet a rag with the arnica and wrap up his finger. Plaintiff got a rag, saturated it with the contents of the bottle, and wrapped his finger up, and poured a few drops of the acid on the rag. The next morning the plaintiff looked at his finger, and put some more carbolic acid on it, supposing it to be arnica, and went to work. In a few days he was compelled to go to a doctor, who found the end

of the finger so badly burned and cooked by the acid that he had to cut it off at the first joint. The boy Leo testified that he asked the defendant for a nickel's worth of arnica; that the defendant took the bottle, and went back of the counter, and handed it to him filled; that defendant did not put a fresh label on the bottle; that he (witness) had never heard of arnica before. The defendant testified that he had been in the drug business since 1876; that when Leo came into the store he had a bottle with a carbolic acid label on it, fresh and clean, with skull and crossbones, and, when he got ready to wait on the boy, he took the bottle, and asked him, "Carbolic acid?" Leo said, "Yes, sir;" that the boy asked for carbolic acid, and he repeated after him, "Carbolic acid," and he said, "Yes, sir;" that the label was marked "Carbolic Acid," in red letters, and the word "Poison" was written on it in red letters. Plaintiff's witnesses testified that the label was scratched and partly washed off when the bottle was sent by the boy for the arnica.

The court gave the following instructions for the plaintiff:

"(1) If the jury believe from the evidence that on or about March 31, 1902, the plaintiff sent his son to the drug store of the defendant to procure arnica; that said son asked the defendant for arnica, and the defendant sold and delivered to him carbolic acid instead of arnica; and if you believe from the evidence that, in so selling the plaintiff carbolic acid, the defendant failed to use ordinary care, as defined in instruction No. 2—then you will find your verdict in favor of the plaintiff, if you find that the plaintiff and his agent exercised ordinary care at the time.

"(2) By the term of 'ordinary care,' as used in the instructions, is meant that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances. A failure to exercise ordinary care, as so defined, is negligence.

"(3) If the jury finds for the plaintiff, they should assess his damages at such a sum as they may find from the evidence will be a fair compensation to him, first, for any pain of body or mind caused by the loss of the first joint of the middle finger of his right hand, and directly caused by such injury; second, for any loss of earnings resulting directly from said injury; third, for any loss necessarily incurred for medicines and medical attention—not to exceed the sum of \$500, the amount sued for.

"(4) The court instructs the jury that, in considering its verdict, the jury must not be governed by sympathy for plaintiff because he met with an injury, nor have any prejudice or feeling either in favor of or against plaintiff or defendant, but the jury should, in arriving at its verdict, be governed solely by the evidence in the case and the instructions of the court. And the court further in-

structs the jury that the burden of proof is upon the plaintiff to show by a preponderance of the evidence (that is, by evidence which is, in your opinion, entitled to greater weight than that offered by the defendant) that the plaintiff was guilty of the negligence alleged."

For the defendant, the court gave the following instructions:

"(5) The court instructs the jury that, if you believe from the evidence that the boy Leo Peterson asked the defendant for carbolic acid, that then the plaintiff cannot recover, and your verdict must be for the defendant.

"(6) The court instructs the jury that, if you believe from the evidence that defendant exercised ordinary care in filling plaintiff's order, that then plaintiff cannot recover."

The court refused the following instructions asked by defendant:

"(a) The court instructs the jury that, under the pleadings and evidence in this case, the plaintiff is not entitled to recover, and you will find your verdict for the defendant."

"(c) The court instructs the jury that if you believe from the evidence that the injury to plaintiff's finger, which made necessary the amputation of the end of the finger, resulted from a bruise or blow, that then plaintiff cannot recover, and your verdict must be for the defendant.

"(d) The court instructs the jury that although you may believe from the evidence that the defendant was negligent, and that he delivered the plaintiff's son carbolic acid, when he was asked for arnica, yet if you further believe from the evidence that the bottle had a legible label, showing the character of the contents as poisonous, and that the character of the contents was open and obvious to the plaintiff, or to his wife or those caring for him and using the contents, then and in that case the plaintiff assumed the risk of using the contents, and your verdict must be for the defendant.

"(e) The court instructs the jury that, in order to recover in this case, the plaintiff must establish by a preponderance of the evidence (1) that the boy, Leo Peterson, asked defendant for arnica, and made it clear to him that he wanted arnica; (2) that neither the defendant, nor his wife, nor Baird, the medical student, knew the character, appearance, or effects of the use of carbolic acid; (3) that the injury of defendant resulted as a natural consequence from the act of the druggist; (4) that neither plaintiff, the plaintiff's wife, the medical student, Baird, nor the boy, Leo Peterson, were guilty of negligence that contributed to the injury of plaintiff; (5) that the injury resulting in the amputation of the finger did not result from some other cause than the use of carbolic acid. And unless you find that all of the above was established by a preponderance of the evidence, your verdict must be for the defendant.

"(f) The court instructs the jury that if you believe from the evidence that the defendant delivered the bottle to the boy Leo Peterson with a legible label, marked 'Carbolic Acid,' that then plaintiff cannot recover, and your verdict must be for the defendant."

The main contention of defendant is that, conceding he was negligent in giving the boy Leo carbolic acid instead of arnica, his negligence was not the proximate cause of the injury; that the negligence of Baird in not discovering the mistake when he picked up the bottle and looked at it after it had been filled and returned, and the failure of the plaintiff to notice or heed the label on the bottle, were acts of negligence that intervened between the selling and the using of the acid, and, on account of these intervening negligences, the sale was not the proximate cause of the injury. The same label was on the bottle when it was returned as when sent to the defendant to be filled with arnica. Plaintiff saw the label on the bottle, and knew what it was, when he sent his son with it to the defendant for arnica. If he noticed the label when the bottle was brought back, he saw that no new label had been placed upon it; that the bottle was in the same condition as when sent, except it had been filled with what he supposed to be arnica. In these circumstances, we do not think the label apprised him of the fact that the bottle contained carbolic acid. Had defendant attached a new and fresh label, advertising the contents of the bottle as carbolic acid, and plaintiff, without noticing the label, had used the acid or used it in disregard of the warning the label would have conveyed, his injury might be attributable to his own negligence; but the label, under the facts of the case, did not advise the plaintiff of the contents of the bottle, and negligence cannot be attributed to him for disregarding it.

It seems strange that Baird, a medical student, when he picked up the bottle and looked at it after it had been returned filled with carbolic acid, did not discover the mistake. But we do not think his negligence, if he was negligent, in failing to make the discovery, was an intervening negligence that precludes a recovery by plaintiff. Baird in no sense of the word was the agent of the plaintiff. Plaintiff did not employ him, or even solicit his advice. All that Baird did was to recommend an application of arnica to take the soreness out of plaintiff's finger, and, when the bottle was returned, to tell plaintiff how to apply it. If Baird had recommended carbolic acid, and plaintiff had applied it on his recommendation, then the error of Baird would have been the proximate cause of the injury. But Baird recommended a harmless drug. This drug, according to plaintiff's evidence, was called for by the plaintiff's son and agent, who was sent to defendant's drug store; and, instead of furnishing the harmless drug, defendant

negligently furnished a deadly poison, and failed to attach a new label to advertise the contents of the bottle to be poison. It seems to us that, under this evidence, his negligence was the proximate cause of the injury. That these were the views of the learned trial court is clearly indicated by the instructions given to the jury.

The facts in this case are the very opposite of the facts in the case of *Fowler v. Randall* (Mo. App.) 73 S. W. 931, cited and relied on by the defendant. In the *Fowler* Case the druggist supplied the drug (morphine) called for by the agent sent for it, and the person who used it and the agent both knew that morphine had been supplied. The injury (death) was caused by an overdose, not through ignorance of the drug or its effect upon the human system, but through the negligence of the person who took it. In the case at bar, a poison was furnished when a harmless drug was called for, and the poison was used by the plaintiff in the belief that he was using the innocent drug that had been sent for.

Defendant insists that the testimony of the druggist that the boy called for carbolic acid is more likely to be true than that of the boy, who said he called for arnica. Whether or not the boy called for arnica was the controlling issue of fact in the case. The jury found that he did call for arnica; that the mistake was made by the druggist. This finding was approved by the trial court, and is conclusive on us, as an appellate court.

The defendant moved the court to instruct the jury that, if they believed the injury that made it necessary to amputate plaintiff's finger resulted from the bruise, plaintiff could not recover. The court very properly refused this instruction for two reasons: First, because there is no evidence proving or tending to prove that the injury was so severe or involved so much of the finger as to necessitate amputation; second, because the instruction entirely ignores the action of the carbolic acid on the finger. The other refused instructions may be dismissed with the remark that they did not correctly state the law of the case, and that those given did properly state the whole law of the case.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

BAIRD v. HEIBEL et al.

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

INJURY TO EMPLOYE—GUARDING DANGEROUS MACHINERY—INSTRUCTING AS TO DANGER—ACTION ON STATUTE—PLEADING—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

1. At common law the master is not required to guard dangerous machinery, though he might be liable for allowing a person, too young and inexperienced to appreciate the danger and assume the risk, to expose himself to the hazard.

2. Failure of a master to instruct an employé as to a danger which he otherwise learned does not affect the master's liability.

3. Where a petition sufficiently states a cause of action based on a public statute of the state, it is immaterial that it does not mention the statute.

4. Under Rev. St. 1899, § 6433, providing that belting, shafting, gearing, and drums, when so placed in establishments as to be dangerous to employes therein, shall be guarded, when possible, it is a question of fact whether it was practicably consistent with the effective use of a machine to guard the cogwheels thereof, by which an employé was injured.

5. Where a master fails to guard the cogwheels of a machine as required by Rev. St. 1899, § 6433, the servant does not assume the risk thereof, though he may be guilty of contributory negligence if the danger is so great that a prudent person of his years and capacity would have declined to face it.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Frank Bair, by his next friend, Agnes L. Hein, against Peter Heibel and others. Judgment for plaintiff. Defendants appeal. Reversed.

Louis A. Steber, for appellants. Klene & Welsh, for respondent.

Statement.

GOODE, J. In September, 1901, appellants engaged the respondent, who was at that time 17 years of age, to work in a box factory conducted by them in the city of St. Louis. One of the machines used in the factory was a planer. This machine stood upright, the planing blade resting about half the height of a man of medium size above the floor. In front of the blade was a platform on which one end of the board to be planed was laid. The board was then pushed forward until it was taken hold of by rolling cylinders, drawn through the machine, and planed as it passed through. The pictures in the record look as though the machine was three or four feet in width. It had at either side large and small cogwheels, which ran into each other and turned the cylinders. The machine was operated by belts and pulleys. It was attended by Henry Heibel, one of the firm. Respondent, Bair, worked behind it, his principal task being to carry boards away from the planer after they were planed; but he also oiled the machinery in the factory, shoveled sawdust, and nailed boxes. He testified that it was part of his employment to help in front of the planer now and then; that sometimes Henry Heibel would want his assistance, and would then lift his finger as a signal for him to come forward. This is denied by the witnesses for the appellants. There was contradictory evidence as to whether the plaintiff had been warned that the planer was dangerous, and to keep away from it; but it is certain he knew the danger incident to being about it—particularly the risk of getting his arm or clothing caught in the cogwheels—for on this

point he testified himself that he knew and appreciated the danger of letting his hands or person come in contact with the cogs. knew he would get hurt if he did so, and did not claim he was too young to fully understand the hazard. When the accident that gave rise to this litigation occurred, he had been working in the factory, at the duties mentioned, for three months. Bair's own version of how he got hurt is that Henry Heibel was trying to force a board 15 or 16 feet long into the planer, but, as the board was saturated with water and had swelled, the rollers would not draw it in; that Heibel raised his finger for him (Bair) to come forward and assist in shoving the board; that he did so, and the two pulled it from between the rollers. They then endeavored to force it back, and, while pushing it, plaintiff lost his balance and fell against the machine, his right arm striking against the cogwheels on one side, which caught the arm and crushed it so badly between the wrist and elbow that it had to be amputated. The cogwheels at the sides of the planer were open and unguarded. The testimony of the witnesses for the appellants is totally different, and is to this effect: There was no board in the planer at the time of the accident, but just then Henry Heibel was straightening out some lumber he intended to plane, and getting it where he could handle it conveniently. The respondent, Bair, was doing nothing immediately before he was hurt; was simply standing by the planer, with his arm over the top, and near the cogwheels. Suddenly, by some careless movement, his arm was brought into contact with the cogwheels, and caught by them. The first any one in the factory knew of the accident was when Bair screamed. Then the machinery was stopped as soon as possible, and his arm extricated from the wheels. One fact slightly tends to corroborate this version of the affair, for, when the machinery was stopped, Bair, instead of being in front of the planer, was at the side of it, where the witnesses said they saw him before he was caught. In explanation of this circumstance, he swore he sprang from the front to that side after his arm was seized by the cogs. Appellants are accused of negligence in the following particulars: Ordering the respondent to help force the board into the machine—a dangerous task, but not known to be by him. Appellants knew the machine was dangerous, and operated it in a careless manner, which caused the injury. Plaintiff was inexperienced and uninstructed as to the dangerous character and condition of the machine, and, had he been instructed by the appellants in reference to its unprotected and exposed condition, he would have been forewarned, and not injured. Appellants were negligent in not protecting and covering the cogwheels, and the injury would not have occurred, had the wheels been cov-

ered. At the conclusion of the testimony an instruction was requested by the appellants, and refused by the court, that, under the law and the evidence, the plaintiff could not recover.

The following instructions were given to the jury:

For the plaintiff:

"(1) The court instructs the jury that if they find from the evidence that the planer mentioned in the evidence was a dangerous machine, and known to be so by defendants, or that defendants operated the same in a negligent and careless manner, or that defendants permitted the cogwheels on said planer to be and remain unprotected and dangerous when operated, and that plaintiff, by direction of defendants' foreman, Henry Heibel, was at the time of his injury assisting said foreman in forcing a board into said machine, and while doing so he was caught and injured by said cogwheels, and that the defendants knew, or by the exercise of ordinary care would have known, of said danger, then the law imposed on defendants the duty of so boxing and guarding said cogwheels as to protect plaintiff and others from injury, or to give to him reasonable notice of such danger; and if the jury further find from the evidence that the danger from the machinery aforesaid, as used by defendants, was not apparent to a party of the age and experience of plaintiff, as shown by the evidence, and that he did not have sufficient or reasonable notice of such danger, and that plaintiff, without any negligence on his part, by reason of his youth and inexperience, or reliance upon directions given him, failed to appreciate the danger of forcing a board into the planer, and was injured in consequence, the defendants will be responsible therefor, and the jury will find for the plaintiff.

"(2) If the jury believes from the evidence that plaintiff was injured by reason and on account of the failure to cover or protect the cogwheels on defendants' planer mentioned in the evidence, and that said planer was unsafe and dangerous to plaintiff and others in defendants' employ, by reason of the fact that said cogwheels were not covered or guarded, to work in and about the same, then plaintiff's right of recovery herein will not be defeated by knowledge on his part, if he had knowledge, of the condition thereof, if it was not so dangerous as to threaten immediate injury, or if he might reasonably have supposed that he could safely work about it, by the use of care and caution, and if he did use all the care incident to the condition in which he was placed, considering his age and experience, as shown by the evidence.

"(3) If the jury find that the cogwheels on defendants' planer were, at the time plaintiff was injured, unsafe and dangerous, by reason of not being properly protected or covered, and that said defect rendered said

planer dangerous, then, although such defect was visible, and the danger of operating said machine in the manner described in the evidence was apparent to one of mature years, or one accustomed to operating a planer, yet, if the jury find that plaintiff was at the time young and inexperienced, and, by reason of his youth and inexperience, and lack of instruction and caution, he was not aware of the danger to himself from the use of such planer, then plaintiff's right to recover in this action will not be defeated by the fact that said danger was visible and apparent.

"(4) The court instructs the jury that although they may find from the evidence that the cogwheels on defendants' planer were visible, and the danger of operating it was apparent to a person of mature years, or to one accustomed to the use of such a machine, yet if the jury further find from the evidence that, by reason of the youth and inexperience of plaintiff, and the lack of instruction and caution, he was not aware of the danger to himself from said cogwheels, the fact that they were visible or apparent will not defeat his right to recover in this case."

Appellants saved an exception to these instructions.

By the Court: "The court further instructs the jury that the terms 'ordinary care, prudence, and caution,' as used in these instructions with reference to the plaintiff, Frank Bair, means such care as a person of the age, experience, and intelligence of the plaintiff, as shown by the evidence, would usually exercise under like or similar circumstances, and failure to exercise such care is negligence."

For defendant:

"(1) The jury are instructed that the mere fact that the plaintiff is a minor will not, alone, excuse any want of ordinary care, caution, or prudence on his part. The jury must take into consideration his age, experience, intelligence, and general conduct in work, as well as such instructions or warnings as to dangers to be apprehended from moving machinery in defendants' establishment as, from the evidence, they may believe and find were given to plaintiff by defendants or other employes of defendants. And if, from the evidence, the jury believe that plaintiff failed to be guided by or disregarded such instructions or warnings, if any, and was injured through his own negligence, carelessness, or recklessness in approaching too close to, or bringing his person in direct contact with, moving machinery, and thereby contributed to or caused the injuries complained of, the verdict must be for the defendants.

"(2) Even though, from the evidence, the jury may believe that the cogwheels were not safely or securely guarded, or were so placed as to be dangerous to persons employed therein or thereabout while engaged

in their ordinary duties, yet if, from the evidence, they further believe and find that if at the time plaintiff was hurt he was not engaged in his ordinary duties, and was not exercising ordinary prudence and caution, and had placed his arm carelessly over the cogwheels, and a coat on said arm was caught therein, dragging and forcing his arm into said wheels, your verdict must be for the defendants."

From a verdict in favor of the respondent, this appeal was taken.

Opinion.

Respondent's counsel insist in their brief that this is an action founded on common-law negligence, not one controlled by the statute requiring dangerous machinery to be guarded. We question whether a case was made out at common law, for it would be doubtful, but for the statute, if appellants were under obligation to protect the cogwheels by guards, negligent in failing to guard them, or responsible for the accident. It seems there is no rule of the law requiring dangerous machinery to be fenced or guarded, and that the master is not answerable if a servant of full capacity is injured in consequence of working about unguarded machines. *Schroeder v. Car Co.*, 56 Mich. 132, 22 N. W. 220; *Townsend v. Langles (C. O.)* 41 Fed. 919; *Sullivan v. Mfg. Co.*, 113 Mass. 396; *Clarke v. Barnes*, 37 Hun, 389; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 806; *Sanborn v. Railway*, 35 Kan. 292, 10 Pac. 860; *Lore v. Mfg. Co.*, 160 Mo. 608, 61 S. W. 678. The master might be liable for permitting a young and inexperienced person to be exposed to such a hazard, and, when an accident of this character happens, in determining the common-law liability of the master, the age, capacity, experience, and knowledge of the danger possessed by the injured minor bear on the problem, as establishing or overthrowing the defense of assumed risk. But Bair was 17 years old; had had experience while working 3 months with and near the machine; knew the cogs were unguarded; that there was risk of getting caught in the wheels; that he needed to be careful to keep his hands or person free from contact with them; and fully appreciated the danger, according to his own statement. According to his testimony, too, it was part of his regular employment to assist in front of the planer when called on. If there was no duty to screen the cogs—and it seems, from the foregoing authorities, and others that might be cited, there was none, independent of the statute—Bair's injury would appear to have happened in the course of his regular employment, as the result of a risk incident thereto, rather than from any negligence of the appellants. If his case is to stand on the common law alone, it falls within the scope of the cases cited above, and is nearly identical in facts with

the first three. The unguarded cogwheels were in plain view, and so obviously dangerous that the respondent neither needed instruction regarding their danger, nor lacked capacity to realize it. The specification of negligence that Bair was inexperienced and uninstructed as to the danger of the machinery, and would have escaped injury if he had been instructed, was not made good. Neither was the specification made good that the machine was operated in a negligent manner and so as to injure him, unless that specification is taken to mean that it was operated carelessly because operated without a cover. It may have been for the jury to decide whether Bair sufficiently understood the risks incident to operating the machine to realize the hazard of attempting to force the board into it, but certainly he did not need to be told the danger of contact with the cogwheels. In fact, failure to instruct him in regard to the danger of the cogwheels had nothing to do with the injury, which, if we believe him, resulted from his losing his balance while pushing the board, and lurching against the wheels, not from ignorance that they were dangerous. On the contrary, if we accept the version of the appellants, Bair simply laid his right arm in a careless manner against the wheels, and was caught—a result he knew enough to anticipate, had he been thinking what he was doing. What part, then, does omitting to instruct him concerning the dangerous character of the machine play? We cannot see that that pretended neglect of duty by the appellants has any relevancy.

But a statute of the state bears directly on the case, and we cannot ignore it in determining this appeal, although the respondent's counsel, for some reason, repel statutory help. The circuit court founded its instructions on the statute, as is manifest from reading them. Nor is it of any moment that the petition makes no mention of the act, since it is a public one, and the allegations of the petition sufficiently state a cause of action based on the appellants' failure to comply with its requirements. "The belting, shafting, gearing and drums, in all manufacturing, mechanical and other establishments in this state when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of its danger shall be conspicuously posted in such establishments." Rev. St. 1899, § 6433. The purpose of that statute is to provide for the safety of employes in a mode which the common law does not, as was decided in *Lore v. Mfg. Co.*, supra, where it was said: "The act is remedial and salutary. The purpose of the Legislature was to preserve the lives and limbs of those whose daily life is spent working on and about machinery wielding irresistible mechanical power, and was obviously

intended to make plain the duty of the master to his servants employed around or about dangerous machinery, and to modify the common-law doctrine that in the absence of a statute the master was not bound to fence his dangerous machinery. A failure to comply with such a statute is negligence. As said by the Court of Appeals in *Collott v. Mfg. Co.*, 71 Mo. App. 171, 'The failure of the master to so guard the gearing, etc., of his machinery, would be a violation of a statutory duty, and be negligence per se.' The character of the required guards is defined by the statute itself. They are required to 'be safe and secure.' The facts of this action, as sworn to by the respondent, are not materially dissimilar to the facts in the *Lore Case*. It was the duty of the appellants to protect the cog-wheels attached to the planer, if this could be done; that is, if it was practicably consistent with the effective operation of the machine. Whether it could or not was a fact for the jury to decide. There is evidence in the record tending to show it could be done without inconvenience to the defendants, but the expert witness spoke dubiously, and without having seen the planer or the factory. The jury should be instructed to find whether it was possible or not. If it was, a case of negligence was made out against the appellants, which laid them liable for damages for respondent's injury, unless his own carelessness caused the injury. The instructions were too imperative in taking for granted that the wheels should have been guarded, because we think that was a matter the law does not pronounce on absolutely. It was a fact to be found, as the evidence stood. If it was practicable to guard the wheels, the appellants were negligent, and the respondent did not assume the risk of injury by working around them in their exposed state. *Lore v. Mfg. Co.*, supra. Certainly the doctrine of assumption of risk does not stand in the way of respondent's recovery for an injury suffered from appellants' disobedience of a statute intended to protect him and other employes. If the policy of the unwritten law, as declared in adjudged cases, forbids a master to exempt himself by an express contract from liability for a negligent injury to a servant, a fortiori he may not become exempt by the servant's implied assumption of the risk of injury from a danger to which the master exposed the servant in disregard of the law's policy as declared by statute. A contract to relieve a master from the consequences of his negligence is ineffective, because it is supposed to be contrary to the public weal. *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149. And it is surely negligence in the master to disregard a statutory mandate as to means to be taken for the safety of his servants, whatever may be thought of applications which have been made sometimes of the rule in regard to contracting against negligence, so as

to render the master liable when the servant was injured by an obvious risk taken without protest. In so far as this rule is operative, the doctrine of assumed risk must be operative.

The true question is as to the respondent's contributory negligence, and of that he did not convict himself by simply working around the uncovered cogwheels, unless the danger was so great that a prudent person of his years and capacity would have declined to face it. *Settle v. Railway*, 127 Mo. 336, 80 S. W. 125, 48 Am. St. Rep. 633; *Pauck v. Provision Co.*, 159 Mo. 467, 61 S. W. 806. Assuredly, the court would have acted unjustly, had it declared the risk to be that extreme, as a legal deduction. A finding by the jury that it was could hardly be upheld. Hence there was no wrong done in refusing the instruction for a verdict in defendants' favor.

Contributory negligence might be charged against the respondent on another ground, namely, that he carelessly laid his arm against the cogs, as the appellants' witnesses swore. The court so instructed, and submitted that defense to the jury, as was proper.

Besides the error of assuming the cogwheels could be guarded, which appears in the first of the respondent's instructions, the third and fourth instructions for him are erroneous in predicating as a basis for a verdict the possible fact that respondent was not instructed or cautioned as to the danger. He did not need to be, to enlighten him; and there was no averment of negligence founded on failure to post a notice, as the statute requires to be done when dangerous machinery cannot be guarded. The contention of the respondent and the theory of the petition were that it was possible to guard the wheels, and the appellants' duty to do so.

Judgment reversed and cause remanded.

BLAND, P. J., and REYBURN, J., concur.

SCAMELL v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

CARRIER OF PASSENGERS—INJURY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LOSS OF SERVICES—PLEADING.

1. Where evidence conflicted as to whether a passenger left a street car voluntarily while it was in motion, or was thrown from it by the car's sudden starting, the questions of the company's negligence and his contributory negligence were for the jury.

2. After the father's decease, a minor's services belong to the mother while he lives with and is supported by her.

3. A mother's right to recover for loss of a minor's son's services is not impaired by the

*Rehearing denied January 5, 1904.

¶ 2. See *Parent and Child*, vol. 37, Cent. Dig. §§ 70, 73.

fact that the loss occurred pending a contract between him and the one who caused the loss, to which she was a stranger.

4. Where a petition alleges that plaintiff is the mother of one injured, that he is a minor, that his father was dead at the time of the injury, and that she has lost and will lose his services and earnings, any defect in stating the relationship of master and servant between her and her son is cured by a verdict in her favor.

5. Where one was 19 years and 3 months old when injured, and was earning \$11 per week, and considerable expense has been incurred for medicine and medical aid, and his recovery is incomplete, a verdict of \$1,500 in favor of his mother for loss of services is not excessive.

Appeal from St. Louis Circuit Court; S. P. Spencer, Judge.

Action by Fannie Scamell against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

See 76 S. W. 660.

Boyle, Priest & Lehman, for appellant. A. R. Taylor, for respondent.

REYBURN, J. In view of the errors assigned, the petition herein is exhibited intact, thus: "The plaintiff states that she is the mother of Harry Scamell, who is a minor of the age of — years, and that the father of said Harry Scamell was dead at the times herein stated; that the defendant is, and at the times herein stated was, a corporation, by virtue of the laws of Missouri, and used and operated the railway and cars herein mentioned as carriers of passengers for hire—as a street railway company; that on the 9th day of October, 1901, the defendant, by its servants in charge of its south-bound car on Jefferson avenue, received the plaintiff's said son as a passenger thereon, and, for a valuable consideration paid by said son to the defendant, the defendant undertook and agreed with him to carry him in safety as such passenger on said car to his destination as a passenger on said line, to wit, Laclede and Jefferson avenues, and to there stop said car and allow him a reasonable time and opportunity to alight in safety from said car. Yet the plaintiff avers that the defendant, unmindful of its undertaking and of its duties in the premises, did fail and neglect to stop said car at said point of his destination a reasonable time to allow him to alight in safety from said car, but, on the contrary, whilst said car was stopped at said point to enable passengers to alight therefrom, and whilst her son was in the act of alighting from said car whilst so stopped, and before he had a reasonable time or opportunity to do so, did negligently cause and suffer said car to start forward and to move, whereby plaintiff's son was caused to be thrown and to fall from said car, and be struck by a north-bound car, and to be seriously and permanently injured upon his legs, back, spine, arms, and wrist, dislocating his right wrist, tearing the ligaments from the bones of his

wrist, and causing him internal injuries. And plaintiff avers that defendant and its servants in charge of its said north-bound car were further negligent in running said car rapidly to and past said south-bound car, whilst it was stopped and discharging passengers therefrom, and without looking out for persons and passengers alighting from said car, and slowing up and stopping said car, to avoid injuring them, and in failing to give signal of the approach of said car, which negligence directly contributed to cause said injuries to plaintiff's said son; that, by said injuries to her son, plaintiff has lost and will lose his services and the earning of his labor until he shall arrive at the age of twenty-one years, and has incurred and will incur large expenses for medicines, medical and surgical attention, and nursing, and caring for her said son, to her damage in the sum of five thousand dollars, for which she prays judgment." The defendant pleaded a general denial, and a special defense of contributory negligence, in that the plaintiff's son negligently and carelessly jumped from a moving south-bound car after it had left the usual stopping place for passengers to alight, and from the side of the car next to another track, on which a north-bound car was moving, and came in contact with such car, and that he jumped from the south-bound car without looking or listening to see or hear whether a car was coming upon the north-bound track, when by looking and listening he might have seen and heard such north-bound car, and avoided collision therewith.

The facts in evidence, somewhat abridged, are that plaintiff, a widow, accompanied by her son, who was then 19 years and 3 months old, living with his mother, were on a south-bound car on Jefferson avenue at about half past 8 o'clock p. m. October 9, 1901. The car was an open car, with seats extending across, and running boards to facilitate passengers in getting off and on either side. Plaintiff and her son were towards the rear portion of the car; the plaintiff seated at the end of a seat, with the east running board next to her, and her son seated next to her on the other side. She signaled as the car drew near Laclede avenue, but it ran by the corner before stopping. She then got off in safety, and walked westwardly, although the conductor rang for the car to start as she had one foot on the ground and the other on the running board. The son had arisen to his feet, and was standing on the body of the car, preparatory to getting off, when the conductor signaled the motorman to go on. The car moved with a jerk, and threw him upon the eastern track, but erect and upon his feet, where he was immediately struck by a car from the opposite direction, and suffered grave injuries. The testimony of plaintiff and her son was fully supported by the statements of passengers on both cars, some of

whom also testified that no signal was given by the north-bound car. On behalf of defendant, the evidence of its servants and other witnesses tended to show contributory negligence on part of the young man, and that he had stepped or jumped off the car; some deposing that the car was in motion at the time.

1. The imperative instruction asked by defendant at the close of the testimony was not justified on either ground urged, and was properly rejected. The evidence was in conflict, but the testimony offered by plaintiff, if given credence by the jury, warranted and supported the conclusion that, without fault on his part, defendant had been remiss in its duty as a common carrier of passengers towards the plaintiff, and the casualty thereby occasioned. The proof introduced in defense of the action tended to establish the charge of the defendant in its answer that plaintiff's son himself had been guilty of contributory negligence in jumping from the car while in motion, after it had left the usual point for passengers to alight, and in so getting off such south-bound car without looking or listening for the approaching north-bound car, when by so looking and listening he might have seen and heard such car, and avoided collision therewith. In the state of the opposing testimony thus exhibited, where the facts in evidence admitted of different construction and inference, the question whether negligence was imputable to the injured party or to the defendant was correctly committed to the jury.

2. The general rule of law dominant in this state is that *prima facie* the services of the minor children belong to the father during his lifetime, and upon his decease to the mother, if she be surviving, upon whom the burden of their maintenance during minority is imposed. The widow, upon the death of her husband, succeeds to his obligation and duty towards their minor children. She becomes, in his place, and as his successor, the head of the family, and upon her devolves the shelter, clothing, and education of the minor children; and, in turn, she acquires the reciprocal right to their services and becomes entitled to their earnings till they attain majority, qualified, however, and subject to the condition that such right to their earnings exists and endures if and so long as such minor children make their home with, and are supported by, her. *Matthews v. Railway*, 26 Mo. App. 75; *Mauerman v. Railway*, 41 Mo. App. 348; *Wood, Master & Servant* (2d Ed.) § 21; *Guion v. Guion's Adm'r*, 16 Mo. 48, 57 Am. Dec. 223; *Dooley v. Railway*, 45 Mo. App. 309; *Hennesey v. Brewing Co.*, 63 Mo. App. 111. The plaintiff, as surviving parent, was entitled to the earnings of her minor son until he arrived at full age, while he lived with her and made her residence his home; and if deprived of his earnings, or upon the diminution of them,

by the unlawful act of the defendant, she was entitled to redress against the latter, regardless and irrespective of the fact that the injury to her son, by which his earnings were lost to her, or became reduced, occurred pending a contractual relationship existing between her son and defendant, or by breach of a contract entered into between them to which she was a stranger, and no wise in privity.

3. The right of the father, or, in event of his decease, abandonment, or desertion, the successive right of the mother, to the earnings of the minor children during their minority, and during the period he or she performs the parental duties dictated by nature and imposed by law, originates not by virtue of the relationship of parent and child, but is based on the relationship of master and servant. The parental tie of parent and child may exist, but the custody and support may have been abandoned by the parent in various ways, and the situation of master and servant therefore not be presented, and the right to earnings of the minor child have ceased or been suspended. The obligation of the parent to support the minor children, primarily incumbent upon the father, and, in the contingencies mentioned, secondarily devolved upon the mother, and the right of either to the earnings of such children, are correlative and interdependent—the right springing from the duty—and both exist, continue, and cease together. It therefore becomes an essential averment, in an action by a parent to recover for loss of earnings of a minor child, that the child injured was the servant of the parent who has been deprived of his services. The rule of the common law in all actions by a father *per quod servitium amisit* was that an averment of loss of services was requisite; and the modern code, while extinguishing fictions and technical forms of action, has not dispensed with constitutive averments essential to a cause of action. *Dunn v. Railway*, 21 Mo. App. 188; *Matthews v. Railway*, 26 Mo. App. 75; *Mauerman v. Railway*, 41 Mo. App. 348; *Schmitz v. Railway*, 46 Mo. App. 380. This rule is as applicable to one as to the other parent, and, in an action by the mother to recover for the services of a minor child, the statement of the cause of action must also negative the original right of the father by declaring that he is dead, or has abandoned the child and forfeited the right on his part, as well as alleging that the minor is supported by her and has a home with her, so that it appears that she is performing the parental duties. *Wood's Law of Master & Servant* (2d Ed.) § 23. The petition herein is assailed as destitute of any allegations of facts from which the relationship of master and servant can be inferred, and lacking any express allegation of its existence, and therefore failing to state facts constituting a cause of action; and the motion in arrest,

filed and overruled, assigns and directs attention to such imperfection as fatal to recovery. In *Dunn v. Railway*, 21 Mo. App. 188—the first case relied on by defendant—there was no allegation in the petition that the injured boy was the servant of his father, the plaintiff, or that by reason of the injury the plaintiff had been, or in the future would be, deprived of his services, but the averment was made in these words: "And said son has been permanently disabled from labor, and plaintiff has by said injuries to his son been damaged in the sum of \$5,000, for which sum he prays judgment." This presentment of plaintiff's right of action was held insufficient, as not equivalent to an averment that plaintiff had lost his son's services. In *Matthews v. Railway*, 26 Mo. App. 75—an action by the widowed mother—the rule of the decision above was adhered to by a majority of the court; but the writer of the opinion dissented, distinguishing the case from the *Dunn Case*, and on his own behalf stating that the inferential allegations of the petition were sufficient to apprise defendant that plaintiff claimed as part of her recovery damages for loss of services. The weight and force of these decisions by this court have been impaired by subsequent cases reviewed and decided in the Kansas City Division. In *Buck v. Railway*, 46 Mo. App. 535, the petition contained the narrow recital, "By reason whereof plaintiff has laid out and expended large sums of money, to wit, \$1,000, for nursing, drugs, and medical attendance for his said son, and has and will be deprived of the services of his son, of the value of \$4,000." The objection that the petition did not state facts sufficient to constitute a cause of action appears to have been first presented to the appellate court, and it was held not seasonably made; and the failure to urge it in the court below, where it could have been met by an amendment, was held to operate as a waiver of the objection. The language of the court being: "The rule is now well established by the adjudications in this state that, if a material matter is not expressly averred in the pleading, but is necessarily implied from what is stated therein, the defect is cured by verdict in favor of the party pleading. If the defendant in such case pleads to the merits, he thereby waives the objection to the mere formal defects, and will not be heard at the trial or on appeal to object that the petition does not state a cause of action. Such an objection can only be interposed when the petition fails to state any cause of action, not where one is defectively stated. *Grove v. City of Kansas*, 75 Mo. 672; *Bawie v. Kansas City*, 51 Mo. 454; *Elfrank v. Seiler*, 54 Mo. 134; *Spurlock v. Railroad*, 93 Mo. 533 [6 S. W. 349]; *Berthold v. Ins. Co.*, 2 Mo. App. 311; *State v. County Court*, 51 Mo. 522. The worst that can be said of plaintiff's pe-

tition is that it defectively stated the plaintiff's title to the right of action, not that it wholly failed to state a title at all, and therefore it is not subject to the objection that it did not state a cause of action." In *Hennesey v. Brewing Co.*, 63 Mo. App. 111—an action by the mother—the question arose in the form whether, from the bare allegation that plaintiff was the sole surviving parent, the inference could fairly be deduced that the deceased minor son was the servant of the plaintiff at time of his death; and the same learned judge who announced the opinion of the court in the *Buck Case* referred to it, but further held that the petition was insufficient, as it did not allege a loss of services, directly or inferentially. The petition herein, in clear terms, alleges that plaintiff is the mother of the injured boy, his minority, and that his father was dead at the time of the accident; and the concluding paragraph expressly sets forth that, by the injuries to her son, plaintiff has lost and will lose his services and the earnings of his labor until he shall arrive at the age of 21 years, and has incurred and will incur large expenses for medicines, medicinal and surgical attention, and nursing, and caring for her son, to her injury and damage in the sum named, for which judgment is prayed. The loss of services is distinctly averred, and the allegations made are abundant, from which to deduce by fair inference the relationship of master and servant, and the legal right of plaintiff, as surviving parent, to the services of her minor son until his arrival at his majority. That the petition is cured and perfected by and after the verdict, under the liberal statute in force in this state, appears beyond reasonable dispute. At most, there was here presented a petition based on a good cause of action, if susceptible of legal proof, but defectively stated, and certainly it is good after judgment. *Salmon Falls Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504; *People's Bank v. Scalzo*, 127 Mo. 164, 29 S. W. 1032; *Seckinger v. Mfg. Co.*, 129 Mo. 590, 31 S. W. 957; *Rev. St. 1899, § 672*.

4. The imputation that the amount of the verdict of the jury is excessive is devoid of merit. The proof demonstrates that the son was 19 years and 3 months old at time of the occurrence, and was earning a salary of \$11 per week. The jury was entitled to weigh the probability of the value of his services increasing with experience and age. There was also evidence of substantial expenses, incurred or expended, for medicine, medical and surgical aid, and at time of trial his recovery was incomplete; and, under the testimony, the assessment of damages by the jury at the sum of \$1,500 was justifiable, and will not be disturbed.

The judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

McELROY et al. v. PHINK.

(Supreme Court of Texas. Jan. 14, 1904.)

On motion for rehearing. Motion denied.
For former opinion, see 76 S. W. 753.

GAINES, C. J. In the opinion in this case it is erroneously stated that Judge Stayton participated and concurred in the decision of the case of *Johnson v. Brown*, 51 Tex. 65. That was an error, as has been pointed out in the argument upon this motion, and we take occasion to correct it. He was not a member of the court when that case was decided. In *Kennedy v. Upshaw*, 64 Tex. 411, Judge Stayton did cite *Johnson v. Brown*, but did not discuss it. But we still think our conclusions as expressed in the opinion in this case correct, and therefore the motion for a rehearing is overruled.

PATTON et al. v. COX et al.

(Supreme Court of Texas. Jan. 18, 1904.)

COSTS—TAXING—STATUTE—CONSTRUCTION—OMISSION OF CLERK—PAYMENT OF JUDGMENT—RETAXING—JURISDICTION.

1. Under Rev. St. 1895, art. 2324, making it the duty of the clerk to tax costs in every case in which final judgment has been rendered, the taxing of the costs is not an adjudication by the clerk, but is simply the performance of a ministerial duty.

2. The court in which a judgment was rendered in a cause transferred to it from another county has jurisdiction to retax the costs, though the principal, interest, and costs adjudged against the defendants have been paid off, where it appears that costs that should have been taxed were omitted by mistake of the clerk.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by John P. Cox and others against George M. Patton and others. From a judgment affirming a judgment for plaintiffs (75 S. W. 871), defendants bring error. Reversed.

Davis & Cocke, for plaintiffs in error. D. A. Kelley, for defendants in error.

BROWN, J. The defendants in error obtained from the judge of the district court of McLennan county a writ of injunction to restrain the plaintiffs in error and the sheriff of that county from enforcing an execution issued out of the said court in the cause styled "George M. Patton, Executor, against John P. Cox et al.," for collection of costs which accrued in that cause, but were not taxed in the bill of costs at the time the judgment was settled. The case was tried before the judge of that court, who filed the following conclusions of fact:

"(1) I find that the case formerly pending in this court, styled 'Geo. M. Patton, Ex'r, v. Jno. P. Cox et al.,' and No. 8,652 in this court, was originally brought in the district court of Hill county in February, 1893, and was No.

2,634 in that court, and that at the fall term, 1893, of said court, an order was entered requiring the plaintiff Patton to pay all costs of court up to that time, and that he did so; that the case was tried three or four times in Hill county before it was transferred to the district court of McLennan county, which was on the 13th day of April, 1899; that in the transcript sent up on transfer of said cause from the district court of Hill county to the district court of McLennan county, which was certified to on May 1, 1899, there was a bill of all the costs of the case from its inception down to the date of the transfer, as shown by the various fee-books of Hill county, as follows." We omit the itemized bill of costs from this statement of facts, because it is unimportant as the case is now presented to us.

"(2) I further find that said Patton obtained judgment in this court in said cause No. 8,652 on the 18th day of February, 1901, for \$1,690.53, with 6% per annum interest, together with all costs of suit against the defendants therein, to wit, J. P. Cox, D. M. Matthews, John D. Warren, and H. M. Leary, which judgment also provided that these defendants have the same judgment over against their indemnitors, D. A. Kelley and Alice G. Herring, as executrix of the estate of M. D. Herring. The defendants in the case carried it to the Court of Civil Appeals, giving W. W. Seley and Meredith A. Sullivan as sureties on the appeal bond. And the judgment was affirmed by the Court of Civil Appeals on January 8, 1902, and judgment there entered, as shown by the mandate, that plaintiff Geo. M. Patton, executor, aforesaid, do recover of the said plaintiffs, Cox, Matthews, Warren, Leary, Kelley, Herring, as executrix aforesaid, as principals, and their sureties, Seley and Sullivan, 'the amounts adjudged by the court below, and all costs in this behalf expended, and this decision be certified below for observance.'

"(3) I further find that said Herring and Kelley on the 7th of April, 1902, paid to the attorney of said Geo. M. Patton \$1,803.50 in full settlement as to principal and interest of said judgment.

"(4) I further find that said Herring and Kelley on the 22d of April, 1902, paid to the clerk of the district court of McLennan county \$140.15, being the balance of costs due, as per the record in the Court of Civil Appeals in the case aforesaid of Geo. M. Patton, Executor, v. Jno. P. Cox et al., except as to the defendants' witnesses.

"(5) I further find that said Herring and Kelley paid the fees of the defendants' witnesses in said case of Patton v. Cox et al. during May, 1902, and that the said Herring and Kelley paid \$68.75 fee for transcript of the record in said case of Patton v. Cox et al. on said appeal.

"(6) I further find that the said Herring and Kelley paid all the costs incurred in said case in the Court of Civil Appeals on the

10th of April, 1902, \$31.20, and also all costs of the Supreme Court.

"(7) I further find that the execution complained of in plaintiff's petition herein was issued by the clerk of the district court of McLennan county, Texas, on the 30th day of May, 1902, in said case No. 8,652, styled 'Geo. M. Patton, Ex'r, v. Jno. P. Cox et al.,' and was issued against John P. Cox, D. M. Matthews, John D. Warren, H. M. Leary, D. A. Kelley, Alice G. Herring, as executrix of the estate of M. D. Herring, deceased, as principals, and W. W. Seley and Meredith A. Sullivan, as sureties, for the sum of \$137.67, for costs due officers and witnesses of the district court of Hill and McLennan counties in said cause, as set forth in the following bill, to wit:

Issuing writ	\$ 1 00
Swearing witnesses	2 00
Oath without certificate	3 00
Swearing and impaneling jury	35
Filing papers	1 35
Entering each order of judgment	2 25
Issuing execution and return	1 50
One-half transcript to McLennan county	2 50
Total	\$ 13 95
Sheriff's fees summoning witnesses	1 80
Jury fee	5 00
Witness attendance	96 92
Stenographer's fees	20 00
Total	\$137 67

—All of which were incurred in district court of Hill county, except stenographer's fees, \$20, which had been allowed by the district judge upon trial in McLennan county previous to the one appealed from, and \$1.50 charged for issuing and return of said execution. The witness fees which make up the charge of \$96.92 in the foregoing bill is made up of the following items, to wit:

H. P. Harris	\$ 8 32
J. H. Williams	13 00
W. R. Henderson	15 20
B. N. Wills	14 00
D. B. Cauble	12 80
W. R. Jackson	12 80
J. R. Ballard	3 00
M. V. Rites	7 00
C. R. Hamm	6 40
R. M. Davis	4 40
Total	\$96 92

"All these fees accrued while the case was pending in the district court of Hill county.

"I further find that the costs contained in the execution complained of were not entered upon the feebook kept by the clerk of the district court of McLennan county until after the affirmation and settlement of the judgment and costs in the case of Patton v. Cox et al., as hereinbefore stated, and that the costs complained of in the said execution were not contained in the transcript of the said case on appeal as aforesaid, and that after the judgment and costs had been paid by plaintiff herein, as hereinbefore stated, that the clerk of this court, with the advice and assistance of the attorney of said Patton, made up the said costs complained of in said exe-

cution from data contained in the record and papers in the case sent by transfer as aforesaid from the district court of Hill county to the district court of McLennan county, and cost bill paid by Patton, and in his possession, and that costs thus taxed were put upon blank fee bills and pinned to the feebook, and upon this the execution for costs was issued. All of said costs, except the witness fee of J. R. Ballard for \$3, and the \$1.50 for issuing and returning said execution, were paid by defendant Patton, and have not been paid by plaintiff. The \$5 jury fee was incurred prior to the fall term, 1896, and was finally adjudged against Patton, and the remainder of the Hill county costs accrued after 1896, and were paid by Patton on and before October 16, 1899, and the stenographer's fee of \$20 was paid by him more than two years before this suit was filed. Ballard's fee was not paid by Patton. After the judgment in No. 8,652 was entered in this court, and before the appeal was taken, defendants therein made a motion to retax costs; but none of the items here involved were included in said motion, or in the judgment entered thereon. I find that all of said Hill county costs, except the witness fees of C. R. Hamm for \$6.40, and R. M. Davis for \$4.40, were taxed on the feebook in Hill county, and are shown in the bill of costs which accompanies the transcript from that county to McLennan, and that they, and the stenographer's fee of \$20, except the \$5 jury fee adjudged against Patton, could have been properly entered on the feebook in McLennan county as part of the costs in said cause, and copied into the transcript on appeal of said cause No. 8,652, and that affidavits of said Hamm and Davis were sent down with the record from Hill county, proving up their attendance as witnesses, and that their names and amounts as claimed were included in a bill of costs made out by the clerk of Hill county for Patton on May 6, 1899, and by him paid October 16, 1899. After the injunction was issued in this case, the sheriff returned the execution enjoined, indorsed, 'Returned this 10th day of June not executed by order of plaintiff.'

Patton filed an answer in the district court, and also a cross-bill, in which he admitted that the execution was improvidently issued; and he did not resist a judgment enjoining that execution, but insisted that the court should not enjoin the issuance of executions in the future upon the said judgment. He set up, with proper allegations, the bill of costs for which the execution had been issued; alleged that it accrued in the former suit, and that it had not been paid by the defendants in the judgment, but had been paid by himself; that it had been omitted by the clerk when the bill of costs was taxed. He prayed the court for judgment against the plaintiffs for the amount of the said bill of costs, and also asked for any relief to which he might be entitled upon the

facts alleged. The court entered judgment perpetuating the injunction, and enjoining all the parties from issuing execution upon the said judgment in the future. The district court held that it had no jurisdiction to retax the costs in the case, and refused any relief to Patton. The Court of Civil Appeals affirmed the judgment of the district court.

The judgment of the district court in the case of George M. Patton, executor, against John P. Cox et al., adjudged the costs in favor of the plaintiff against the defendants, but did not fix any amount of costs to be collected, nor did it specify the items of costs to be allowed. The affirmance of that judgment by the Court of Civil Appeals did not change its effect in this particular. Article 2324, Rev. St. 1895, directs the taxing of costs and issuing of executions in the following language: "From and after the adjournment of every district or county court it shall be the duty of the clerk thereof to tax the costs in every case in which a final judgment has been rendered against the party liable therefor under such judgment, and which have not been paid by him, and to issue execution for the enforcement of such judgment and the collection of such costs." The taxing of the costs is not an adjudication by the clerk of the items specified, nor of the amount, but is simply the performance of a ministerial duty, which, if erroneous, may be corrected by the court upon a motion made for that purpose.

The fact that the defendants in that judgment paid off the principal and interest adjudged against them, and the costs which had been taxed by the clerk, did not constitute a bar to retaxing the cost. *H. & G. N. Ry. Co. v. Jones*, 43 Tex. 133. In the case cited the costs had been taxed against the defendants, and execution issued, which was levied upon his property; but no sale was made for want of time, and the sheriff returned the execution into court. Before the meeting of the court the defendant in execution filed a motion to retax the costs, and after the term began he filed an additional motion, setting up other grounds. The court entered an order retaxing the costs, rejecting some items. The defendant paid to the clerk the amount of costs allowed by the court. On the next day the plaintiff made a motion for the court to reconsider its judgment retaxing the costs, which was done, and the costs again taxed, allowing fees which had been previously disallowed. This judgment was approved by the Supreme Court. The district court had jurisdiction to retax the cost in this case, and erred in refusing so to do.

Upon the trial the district judge found and specified the particular items and amount of costs in the case of Patton, executor, against Cox et al., which had been omitted by the clerk from the bill on which execution was issued, and found that the costs had been paid by Patton, and had not been paid to him by the plaintiffs in the injunction suit, but de-

clined to enter judgment for the amount. Having acquired jurisdiction of the case, the district court had authority, and it was its duty, to adjudicate the rights of the parties as they appeared from the evidence and the pleadings in the injunction suit. The defendant admitted that the execution enjoined was improperly issued, and pleaded his claim for cost in reconvention against the plaintiffs in the execution, and he was entitled to have judgment entered in his favor for the amount found to be due him. *Lockart v. Stuckler*, 49 Tex. 765; *Witt v. Kaufman*, 25 Tex. Sup. 384; *Willis v. Gordon*, 22 Tex. 241; *Seymour v. Hill*, 67 Tex. 385, 3 S. W. 313. In *Lockart v. Stuckler*, above cited, an execution issued by the clerk for costs was enjoined upon application of the defendant upon the ground that some of the items of costs were incorrect. The trial court, upon an examination of the facts, retaxed the costs and rendered judgment in favor of the clerk against plaintiff in the injunction for a sum larger than the cost bill embraced in the execution. This judgment was approved by the Supreme Court of this state in that respect, but reversed on other grounds.

The district court erred in not entering judgment for George M. Patton, executor, against the plaintiffs, for the amount found to be due from them to him for costs paid by him for which they were liable under the judgment in the former case. It is therefore ordered that the judgments of the district court and of the Court of Civil Appeals be reversed, and that this court proceed to enter upon the findings of fact filed by the district judge such judgment as the district court should have entered. It is therefore further ordered that the plaintiff in error George M. Patton do have and recover of and from John P. Cox, J. D. Warren, H. M. Leary, D. M. Matthews, Alice G. Herring, D. A. Kelley, W. W. Seley, and M. A. Sullivan the sum of \$128, with 6 per cent. interest thereon from the 6th day of October, 1902, together with all costs of the Court of Civil Appeals and of this court; that John W. Baker go hence without day, and that all costs incurred by him be paid as herein adjudged against the other parties; that the said John P. Cox, J. D. Warren, H. M. Leary, D. M. Matthews, Alice G. Herring, D. A. Kelley, W. W. Seley, and M. A. Sullivan recover of George M. Patton, executor, all costs of the district court; and that this judgment be certified to the district court of McLennan county for observance.

SHINN et al. v. BOYD et al.*

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

BROKERS' SALES—COMMISSIONS—CONTRACT.

1. Defendants agreed to pay a broker a certain commission if he should procure purchas-

*Writ of error denied by Supreme Court.

ers for a specified number of acres of land. The broker procured a purchaser for a less quantity than that specified, and then with others agreed with defendants to purchase a portion, sufficient, with the former purchase, to make up the quantity specified, but subsequently the broker procured a cancellation of the latter contract of purchase, return of the money paid, etc. *Held*, that the broker was not entitled to any commissions under the contract.

Error from District Court, Harris County; W. P. Hamblen, Judge.

Action by T. O. Shinn and others against T. F. Boyd and others. Judgment in favor of defendants, and plaintiffs bring error. Affirmed.

Ewing & Ring and W. G. Love, for plaintiffs in error. A. R. Masterson and Brockman & Kahn, for defendants in error.

PLEASANTS, J. Plaintiffs in error brought this suit to recover from defendants in error T. F. Boyd and Adam Reel the sum of \$2,025, alleged to be due them as commissions on the sale of land made by them for defendant Boyd under the following written agreement:

"Article of Agreement. Article of agreement entered into this 27th day of April, 1901, by and between Drs. Purdy and Boyd, parties of the first part, and C. W. Harral and T. O. Shinn, parties of the second part, witnesseth: That whereas said parties of the first part are joint owners of an undivided 1,300 acres in the Elizabeth Turnbow League of land in Hardin County, Texas, and are desirous of selling 300 acres in said 1,300 acre tract: Now, therefore, the said parties of the first part hereby agree to and with said parties of the second part that in consideration that said second parties will endeavor to make a sale of three hundred acres out of said 1,300 acre tract for the sum of forty dollars per acre that said second parties shall have the right to make such sale any time up to 6 o'clock p. m. Monday, the 29th day of April, and in the event that said parties find a purchaser or purchasers for all or 200 acres thereof on the terms hereinafter mentioned, that the parties of the first part will allow and pay to said parties of the second part a commission of 5% on the amount of the sale at \$40.00 per acre and will give and allow to said parties of the second part in addition to said commission, any and all sums that they may be able to sell said land at, over \$40.00 per acre, and said first parties bind themselves in case of sale at a price in advance of said \$40.00 per acre to make a deed or deeds therefor at such advance price; provided that said purchaser or purchasers shall pay to said first parties in cash as earnest money the sum of \$2,000 for each 100 acres sold, and said first parties agree that they will at once proceed to have said lands partitioned (which it is believed can be done amicably and without suit), and have set apart

three tracts of 100 acres each of the average of the 1,300 acres that may be set off to said first parties to be at once conveyed to the purchasers on their paying the balance of the purchase money, and that any contract of sale made by said second parties shall provide for the payment for the land on the partition and conveyance thereof as hereinbefore stated, time to be made of the essence of the contract, and in case of default of the purchaser the earnest money to become forfeit as liquidated damages, and said first parties will obligate themselves in case they fail for the period of 60 days to procure a partition of said land, at the election of the purchasers to refund the earnest money.

"Witness our hands at Houston, Texas.

"[Signed] K. F. Purdy, T. F. Boyd,
"T. O. Shinn, C. W. Harral,
"Per Shinn."

The petition alleges that within the time specified in the contract for making the sale of said property plaintiff sold 150 acres of said land to John Watson for \$9,750, of which amount \$3,500 was paid in cash to Boyd and Purdy, and Boyd and Purdy executed and delivered to Watson a contract of sale for said land, setting forth the terms thereof, and acknowledging the receipt of \$3,500 as part payment of the purchase money; that on the same day the plaintiff sold an additional 150 acres of said land to J. D. Bone and others for the sum of \$7,500, \$2,500 of which was paid in cash to the said Boyd and Purdy, and a like contract of sale was executed and delivered to the said Bone and others; that afterwards the said Bone and others mutually agreed to rescind said sale, and said purchase money so paid by the said Bone and others was returned to them by Boyd and Purdy, and said contract canceled; that the said Harral and Shinn sold more than 200 acres of said land, and thereby earned and became entitled to receive from Boyd and Purdy 5 per cent. of the purchase price of 150 acres of said land at the rate of \$40 per acre, amounting to \$300, and to the additional sum of \$3,750 as the excess price over \$40 per acre, at which said land was sold to said Watson—making a total of \$4,050; that the said Purdy paid to the plaintiffs his share of said commissions and compensation, but that the defendant Boyd failed to pay his half thereof, or any part of it, and is still indebted to plaintiffs for said sum of \$2,025; that, after having made said contract of sale, the defendant Boyd refused to consummate same, although the purchaser was able and ready and willing to complete the purchase thereof. Plaintiffs also alleged that after said land was partitioned a portion of same was taken in the name of Adam Reel, and there was an alternative allegation that said land was either owned by Boyd, and the title taken in the name of Reel in trust for Boyd, or, if owned by Reel, that Boyd was his agent, and was authorized to make the contract sued upon. The prayer

of the petition is for the recovery of said sum of \$2,025 against both defendants and for foreclosure of an attachment lien against the interest of defendants in the 1,300-acre tract of land described in the petition.

The defendants answered by general demurrer and general denial, and also pleaded specially in bar of plaintiffs' right to recover: That the contract of sale of 150 acres of said land alleged by plaintiff to have been made with J. D. Bone and others was in fact an agreement by which plaintiffs and George D. Hunter, T. W. Archer, and J. D. Bone contracted with defendants for the purchase of 150 acres of said land upon the terms stipulated in the contract between plaintiffs and Boyd and Purdy. That after the execution of said contract of sale plaintiffs and their associates addressed to said Boyd and Purdy the following written request for a rescission of said contract: "Houston, Texas, May 2, 1901. To Messrs. Purdy & Boyd, or Either: We hereby propose and offer to surrender to you your contract of sale and earnest money receipt for the sale and conveyance of 150 acres out of the Elizabeth Turnbow League, in Hardin County, Texas, in consideration of your paying to us the sum of \$2,500.00 on or before five o'clock p. m. Saturday, May 4th, 1901, and to release you from all liability, by reason of said contract and earnest money receipt, on receipt by us of said sum." That in accordance with said request the plaintiff and Harral and their said associates were released from said conditional sale, and the earnest money paid by them was returned to them, and the sale negotiated by said plaintiff T. O. Shinn to himself and his associates was, through the instrumentality of plaintiff Shinn, abrogated and canceled, leaving only the negotiated sale of 150 acres to John Watson, which was 50 acres below the margin of acreage that plaintiff should negotiate a sale for, to entitle him to any commission under any event, according to said conditional contract. The trial in the court below by a jury resulted in a verdict and judgment in favor of defendants.

The evidence showed that the plaintiffs, acting under their contract with Boyd and Purdy, as alleged in the petition, entered into a contract with John Watson on the 29th day of April, 1901, by which he agreed to purchase 150 acres of said land, and to pay therefor the sum of \$9,750 upon the terms stated in the contract of Boyd and Purdy with plaintiffs. On the same day plaintiffs, as agents of Boyd and Purdy, made a contract with J. D. Bone, by which he agreed to purchase 150 acres of said land for the sum of \$7,500 upon the terms specified by Boyd and Purdy in their said contract with plaintiffs. Thirty-five hundred dollars was paid to Boyd and Purdy on the Watson contract and \$2,500 on the contract with Bone. Plaintiffs were interested in the Bone contract as joint purchasers with him of the 150 acres contracted to be sold him. The contract with Watson was never consummated

by a sale of the land to him, and he demanded a return of the money paid by him after the expiration of the 60 days within which Boyd and Purdy were to procure a partition of the land. This money was not returned to him, however, and on July 3d he transferred his rights under his contract to Messrs. Hart and Sturges. After their purchase from Watson, Hart and Sturges demanded a deed from defendants, and offered to pay the balance of the purchase money due under Watson's contract. Defendant Boyd refused to convey his interest in the land to Hart and Sturges, and they sued him and recovered the money paid him by Watson. On the 2d day of May, 1901—four days after the execution by Bone of his contract to purchase 150 acres of the land—he and those interested with him in said purchase, including the plaintiffs, addressed to Boyd and Purdy the communication set out in defendant's answer asking that said contract of sale be rescinded. This request was granted by Boyd and Purdy, and the \$2,500 paid them on said purchase was returned to plaintiffs and their associates in said contract.

We shall not discuss the various assignments of error presented in appellants' brief, because, under our view of the law applicable to the undisputed facts, no other verdict than one in favor of defendants could have been rendered, and therefore any errors that may have been committed upon the trial of the case were immaterial. Under the contract upon which plaintiffs seek to recover the defendant Boyd and his associate Dr. Purdy only agreed to pay plaintiffs commissions for the sale of the land on condition that they secured purchasers for as much as 200 acres. In order to make up this quantity of land, the 150 acres sold by plaintiffs to J. D. Bone and associates must be included. The undisputed evidence shows that plaintiffs, who were interested with said Bone and others in the purchase of said 150 acres, procured the cancellation of said contract of sale and the return of the money advanced thereon shortly after the contract was executed, and before either party thereto could, by its terms, demand its completion. Having thus voluntarily procured the rescission of the contract, upon the complete performance of which by them their right to commissions for the sale of any of the land depended, they cannot hold defendants liable for any commission under the contract sued on.

This view of the case necessarily leads to an affirmance of the judgment of the court below, and it is so ordered. Affirmed.

On Motion for Rehearing.

(Jan. 12, 1904.)

It is earnestly insisted by learned counsel for appellants, in a motion for rehearing filed by them in this cause, that we erred in affirming the judgment of the court below on the ground that appellants having procured a rescission of the contract of sale to Bone and

others, and thereby reduced the number of acres contracted to be sold to less than 200, were not entitled to the commission agreed to be paid them by appellees under the contract upon which the suit was brought. In support of this contention it is urged that under the contract sued on appellants' right to commissions was not dependent upon the actual sale of the land, but accrued and became complete when a purchaser was procured by them, and a contract of sale executed between such purchaser and the appellees; and the subsequent rescission of such contract of sale could not affect appellants' right to their commissions. This view of the case would be perfectly sound were it not for the fact that appellants were themselves associated with Bone as purchasers in the contract of sale made by him with appellees, and were the active agents in procuring its rescission. Under their contract with appellees, appellants were not prohibited from becoming the purchasers of the land. They could have taken it all, and would only have been required to pay appellees therefor the sum of \$40 per acre, less their 5 per cent. commission. Let us suppose that, instead of procuring the two contracts for the sale of the land, they had simply executed an agreement with appellees to purchase the land upon the terms upon which, under their contract, they were authorized to sell it, and had afterwards procured a rescission of such agreement and the return to them of the earnest money paid thereunder to appellees, under such circumstances it goes without saying that they would not be entitled to any commission, unless by the terms of the contract of rescission their right to such commission was preserved. We think the case we are considering is not different in principle from the one supposed. Appellees agreed by their contract to pay appellants a large commission provided a purchaser was found for as much as 200 acres of their land, and, as suggested by counsel for appellants, in order to protect themselves in the payment of this commission, required that the purchaser advance as earnest money a large portion of the purchase price of the land. Appellants having, in order to procure a contract of sale of a sufficient quantity of said land to entitle them to their commission, agreed to purchase a portion of said land for themselves, and having paid to appellees their portion of the earnest money required to make their agreement of purchase binding, cannot, after inducing appellees to release them from their contract of purchase and return to them their earnest money, be allowed to recover of appellees commissions which were dependent upon said contract of sale. The case of *Gilder v. Davis* (N. Y.) 33 N. E. 599, 20 L. R. A. 398, relied on by appellants to sustain their contention, holds that it is only when the broker is not responsible for the noncompletion of the contract of sale that he is entitled to a commission for procuring such contract. The question of appellants' right to recover upon a quantum meruit the reasonable value of their

services in procuring the sale of the 150 acres of the land to John Watson is not raised by the pleadings.

We think it clear that under the facts no recovery can be had upon the contract upon which the suit was brought, and the motion for rehearing is overruled. Overruled.

NEW YORK & TEXAS LAND CO. v. DOOLEY.*

(Court of Civil Appeals of Texas. Dec. 2, 1903.)

PUBLIC LANDS—PATENT—ERRONEOUS DESIGNATION OF GRANTEE—IDEM SONANS—AGREEMENT TO LEASE LAND—STATUTE OF FRAUDS—GROUND OF DEMURRER—ADMISSIBILITY OF FIELD NOTES—PURCHASE OF LAND—SUBMISSION OF ISSUE—STATUTE OF LIMITATIONS—REPUDIATION OF TENANCY.

1. "Doorley" is idem sonans with "Dooley."
2. A patent was issued to "Doorley." The original field notes spelled the grantee's name correctly as "Dooley." The identity of the grantee with plaintiff was clearly proven, and defendant's witness swore that the land was located by Dooley, and intimated that he had bought it from him. *Held*, that the error in the patent did not vitiate plaintiff's title.

3. An agreement to look after land and pay taxes on it for the use of it is not within the statute of frauds, the agreement being terminable at any time by the owner.

4. A pleading is not subject to demurrer for failing to allege that an agreement concerning land was in writing, as that is a matter of proof.

5. Field notes are admissible to show a mistake in the patent in relation to the name of the grantee.

6. Where all the evidence tends to prove a fact, so that but one finding could be made by the jury, it is proper for the court to withdraw the issue from them and decide the matter itself.

7. In trespass to try title, a witness under whom defendant claimed, while evidently desiring to create the impression that he had purchased the land, would not swear that he paid anything for it, or that he got a deed, or that there was even a verbal sale to him. *Held*, that the refusal to submit to the jury the question of a sale was proper.

8. The statute of limitations does not begin to run in favor of a tenant until he repudiates his tenancy.

Appeal from District Court, Kinney County; J. M. Goggin, Judge.

Action by W. C. Dooley against the New York & Texas Land Company. Judgment for plaintiff, and defendant appeals. Affirmed.

West & Cochran, for appellant. J. S. Morin, E. O. Jones, and Joseph Jones, for appellee.

FLY, J. This is an action of trespass to try title to 80 acres of land, which was instituted by appellee against appellant, and which resulted in a verdict and judgment for appellee. The land in controversy was patented to appellee by the state of Texas on August 3, 1880. Appellant claims the land through a deed from Philip Palmer and wife.

*Rehearing denied January 12, 1904.

¶ 4. See *Frauds*, Statute of, vol. 22, Cent. Dig. § 353, 356.

In the patent to the land the name of appellee was written "Doorley," instead of "Dooley," and the second assignment of error is based on this mistake. The names are idem sonans. *Bosse v. Cadwallader* (Tex. Sup.) 24 S. W. 798; *Oline v. State* (Tex. Cr. App.) 31 S. W. 175; *Railway v. Daniels*, 1 Tex. Civ. App. 700, 20 S. W. 955; *Russell v. Oliver*, 78 Tex. 16, 14 S. W. 264. In the original field notes of the surveyor upon which the patent is based, the name is spelled correctly, and the identity of the man to whom the patent was issued with appellee was clearly proven. Palmer, the witness for appellant, swore that the land was located by W. C. Dooley, and also intimated that he had bought the land from Dooley. There can be no doubt that appellee is the man to whom the land was patented.

Appellee alleged that Palmer agreed to look after the land for him and to pay taxes on it for the use of it; and appellant, in its first and twelfth assignments of error, seeks a review of the action of the court in not sustaining a demurrer to the supplemental petition, and in not instructing a verdict for appellant, on the ground that the allegations showed an agreement within the purview of the statute of frauds. There was no agreement to lease the land for a longer term than one year, but it could have been terminated at any time by appellee entering into possession. Neither was it an agreement which was not to be performed within the space of a year from the making thereof. *Railway v. Wood*, 88 Tex. 191, 30 S. W. 859, 28 L. R. A. 526.

The supplemental petition, which set up the agreement above mentioned, was not subject to demurrer for not alleging that the agreement was in writing. That was a matter of proof. *Doggett v. Patterson*, 18 Tex. 158; *Cross v. Everts*, 28 Tex. 523; *Gonzales v. Chartier*, 63 Tex. 36; *Robb v. Railway*, 82 Tex. 392, 18 S. W. 707.

Appellant objected to the admission in evidence of the field notes of the land in controversy, recorded in the county surveyor's office, on the grounds that the recitals therein could not be used to show a mistake in the name in the patent, and were irrelevant and incompetent. The objections are without merit, and were properly overruled. The patent was based on the field notes, and we think they were clearly admissible. The whole of the testimony, outside of the field notes, showed beyond the peradventure of a reasonable doubt that appellee was the person referred to in the patent; and, if the field notes had not been admitted, the jury must necessarily have found that "Doorley" was intended for "Dooley." All the evidence tending to prove that fact, there was nothing for a jury to find in connection with it, and the court very properly refrained from submitting the matter to the jury.

The witness Palmer did not swear that he bought the land from Dooley, and, while evi-

dently desiring to create the impression that he might have bought the land, he would not swear that he paid anything for the land, that he got a deed to it, or even that there was ever a verbal sale to him by Dooley. His testimony was too vague and uncertain to raise an issue of a purchase on his part. If he did not remember getting a deed to the land, appellant could not have expected the jury to find that one was executed. The special charges raising the issue of a sale were properly refused.

The charge is not open to the criticisms urged against it by appellant. There was testimony to show that Palmer was a tenant of appellee, and that he did not repudiate his tenancy, and consequently the statute of limitations did not begin to run. The court did not interfere, in the instructions, with the power of the jury to pass upon those facts.

The judgment is affirmed.

WESTERN UNION TELEGRAPH CO. v. NOLAND.

(Court of Civil Appeals of Texas. Jan. 6, 1904.)

APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY.

1. Where the damages recovered in an action against a telegraph company for negligence in transmission of a message, together with interest thereon, amount to \$100, the cause is appealable to the Court of Civil Appeals; the interest being a part of the damages and of the "amount in controversy."

Appeal from Brown County Court; S. C. Coffee, Judge.

Action by C. H. Noland against the Western Union Telegraph Company. Dismissed without opinion. Motion to certify cause to Supreme Court. Motion overruled.

Arch Grinnan, for appellant.

FISHER, C. J. At a former day of this term* this appeal was dismissed on the ground that the amount in controversy was less than \$100. A re-examination of the appellee's pleading filed in the justice's court shows that the amount in controversy was \$99.76, with a prayer for interest upon that amount, which, according to the judgment of the court, was \$7.18. Appellee's action is for damages against the telegraph company arising from its negligence in transmitting a message. This court has recently held that in cases of this character the item of interest is recoverable as a part of the damages sustained by the plaintiff. Therefore, in setting aside the order dismissing the case and reinstating the same, we considered the interest on the amount named in the plaintiff's petition as a part of the amount in controversy. If a sum could be recovered merely as interest as an incident of a

* 1. See Appeal and Error, vol. 2, Cent. Dig. § 261.
*No opinion.

debt, of course this rule would not apply, and this court would have no jurisdiction. We are of the opinion that the decisions of the Supreme Court which are cited in the case of G., O. & S. F. Ry. Co. v. Sheperd, 76 S. W. 800, 8 Tex. Ct. Rep. 460, fully determine and settle this question. Therefore we deem it unnecessary to certify to the Supreme Court.

Motion overruled.

UNITED MODERNS v. COLLIGAN.*

(Court of Civil Appeals of Texas. Jan. 2, 1904.)

MUTUAL BENEFIT ASSOCIATIONS—BY-LAWS—EFFECT—SUICIDE.

1. The constitution and by-laws of a mutual benefit society are a part of the benefit contracts made with its members, who are charged with notice thereof.

2. Where a mutual benefit certificate provided that the member was entitled to benefits according to the constitution and laws of the order, and the member, in addition to the terms of the certificate, agreed to be bound by the order's constitution, laws, rules, and regulations, he was bound by a provision of such laws that self-destruction of a member, whether sane or insane, should render his certificate null and void.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by Lizzie Colligan against the United Moderns. From a judgment in favor of plaintiff, defendant appeals. Reversed and rendered.

J. J. Eckford and M. B. Johnson, for appellant. Maurice E. Locke, for appellee.

RAINEY, C. J. The United Moderns, a mutual benefit society, issued to Thomas Colligan, one of its members, a benefit certificate insuring his life for \$2,000 in favor of his wife, Lizzie Colligan. Thomas Colligan committed suicide, and Lizzie Colligan instituted this suit to recover the insurance. The United Moderns plead that the act of suicide nullified the policy. In response to a special issue the jury found that he did commit suicide. The plaintiff then moved the court to enter judgment in her favor notwithstanding the verdict, upon the ground that the conditions of the contract, as shown by the undisputed evidence, were not such as to render his suicide a sufficient defense to her action. The motion was granted, and judgment entered for plaintiff. This action of the court raises the only issue presented on this appeal.

We adopt appellee's statement as our conclusions of fact, as follows:

"The defendant is a mutual benefit society incorporated under the laws of Colorado for the purpose of doing business throughout the United States and in such other countries and provinces as its board of managers may determine upon from time to time. The board of managers has power to adopt by-laws, and

to 'amend, change, repeal, re-enact, or enlarge' the same. The contract is written, and is embraced in three instruments: The certificate of membership, executed by the defendant, and bearing an indorsed acceptance thereof signed by Thomas Colligan; the application for membership, executed by Thomas Colligan; the defendant's constitution and laws, a pamphlet of 65 pages. By order of the trial court, the original application for membership and constitution and laws have been sent up with the transcript. The certificate of membership and the indorsed acceptance thereof are copied in full in the statement of facts. All these papers were put in evidence by the defendant, and there is no dispute about the verity or the contents of any of them.

"The provisions of the certificate of membership pertinent to this litigation are as follows: 'The Supreme Lodge of United Moderns hereby certifies, that Thomas Colligan of Dallas Lodge No. 112 of United Moderns, located at Dallas, Texas, is entitled to all the rights and benefits of membership according to the constitution and laws of this order, and in consideration of the statements made in the application for beneficiary certificate and in answer to questions asked in the medical blank (the truth of which said member guarantees), is entitled to participate in the beneficiary guarantee fund of the order as upon a contract of life insurance for thirty days, renewable by the member as provided by the constitution and laws of the order, to the amount of two thousand (\$2,000.00) dollars, which sum, as provided in the constitution and laws of the order, shall be paid as follows: Accident Benefit. * * * Old Age Benefit. * * * Mortuary Benefit. Within ninety days after satisfactory proof of the death of said member there shall be paid to Mrs. Lizzie Colligan, wife, if living, if not, then to the legal heirs of the member aforesaid, such balance, if any, of the amount named in this certificate as may remain unpaid to the member, as follows: If not exceeding three thousand dollars, in cash. * * * This certificate is issued in consideration of the statements made by said member in the application for membership, and in answer made to questions asked in the medical blank, and in reliance thereon, and upon the express condition that the said member shall, in every particular, while a member of said order, comply with all and singular of the constitution, laws and regulations of this order. * * *"

"Thomas Colligan's acceptance of this certificate of membership, indorsed thereon, is as follows: 'This certifies, that I accept the within certificate and the benefits conferred, fully understanding and agreeing, that the same is to be and remain a liability upon the order, only upon condition: First, that the statements made by me in my application for membership and to the medical examiner are true; second, that I pay or cause to be paid

*Rehearing denied January 9, 1904, and writ of error denied by Supreme Court.

¶ 1. See Insurance, vol. 28, Cent. Dig. § 1854.

all assessments, dues, or money payable to the order, promptly, on or before the day the same becomes delinquent; third, that I fully comply with the constitution, laws, and regulations of the order. The within certificate to be and remain null and void for and during any such failure, or default upon my part, as aforesaid.'

"The provisions of the application for membership pertinent to this litigation are as follows: 'I, Tom Colligan, of Dallas, street and No. 647 S. Ervay, state of Tex., hereby make application for certificate of membership and benefit, to the amount of \$2,000, and for that purpose make the following statements as the basis of the application: * * * I, Tom Colligan, of Dallas, state of Tex., do hereby warrant that each and all the particulars and statements contained in this application for insurance are true, complete and full; and I do hereby acknowledge, consent and agree that any untrue statement made herein, by me or on my behalf, or to any medical examiner, whether written by my own hand or not, or any concealment of facts by me or any one else, shall forfeit and cancel all rights to any benefit under the above named application; and I hereby expressly waive any and all provisions of law now existing or that may hereafter exist, preventing any physician from disclosing any information acquired in attending me in a professional capacity or otherwise, or rendering him incompetent to testify as a witness in any way whatever. I agree to be bound by the constitution, laws, rules and regulations of the order enacted from time to time by the supreme lodge, or other duly authorized authority, and that the order shall be under no liability to me or my beneficiaries during any period of time when I shall be in default on payments due from me to the order, or otherwise not in "good standing" with the order. I further agree that if a note has been given for any part of my fees, or for any part of the monthly payments on my beneficiary certificate, no claim can arise on the beneficiary certificate, and the same shall be held to be void, if the note is not paid when due, and while any default or overdue payment shall exist on the note; and reinstatement of the insurance can only be made within the time after said default, and in the manner and under the conditions as provided by the by-laws of the order in relation to a default or failure to make the monthly payments; and further, that in case of a claim arising before payment of the note, any balance of fees, and of monthly payments accruing up to the time of the claim, evidenced by the note and remaining unpaid, may be deducted from the claim, whether said note is due or not.'

"The provisions of the defendant's constitution and laws pertinent to this litigation are as follows: The defendant maintains two funds. One of these is called the 'General Fund,' and is used for the payment of

expenses. The other is called the 'Beneficiary Guarantee Fund,' concerning which it is said: 'All collections, less the general fund, are placed in the beneficiary and guarantee fund, and can be disbursed only for the payment of approved death and other losses, taxes and licenses, if any, under state laws, and for costs incurred, if any, in defending against fraudulent claims.' Article 11 related to 'Payment of Benefit,' and section 3 reads as follows: 'Upon the death of a member in good standing, the order shall, within ninety days from and after the receipt of satisfactory proofs of the same, cause to be paid from the beneficiary and guarantee fund to the beneficiary named by the member, as recorded on the books of the order, or to his or her heirs or legal representatives, as the case may be, the sum to which the beneficiary is entitled, according to the terms of the benefit certificate.' Article 21 has no caption, though several of its sections have. Section 2, which has none, reads as follows: 'If any member dies in consequence of a duel or at the hands of justice or by reason of the practice of any pernicious habit that obviously tends to shorten life, or by self-destruction, whether sane or insane, or by the use of intoxicating liquors, or in consequence of the violation of any criminal law of any state, province or municipality, then in such cases the beneficiary certificate, together with all claims by reason of membership, shall be null and void, but the board of managers, in their discretion, if they consider the circumstances surrounding such death warrant it, may without prejudice pay any sum, in such case, not exceeding the full amount.' The defendant society has three classes of members, beneficiary members honorary members, and social members. The defendant's supreme chancellor (who signed the certificate of membership in this case) has power to grant special dispensations, and at his discretion to grant dispensations to subordinate lodges or officers 'to dispense with any law or rule of the order for any special occasion or specified period of time.' The constitution and laws of the defendant society impose numerous regulations upon the conduct of its members, and provide a machinery for trying and punishing those guilty of infractions of such regulations. Members must visit the sick, must pay dues to the local lodge, must not form pernicious habits tending to shorten life, must not offend other members, must not go into the saloon business, must not reveal lodge secrets, must not recommend unfit persons for membership, must not distribute unapproved circulars, or in any way violate the constitution, laws, or ritual; and for any sins of commission or omission they may be duly tried and disciplined."

Conclusion of Law.

The United Moderns being a mutual benefit society, the constitution and by-laws of the order enter into and become a part of con-

tracts made with its members, and such members are charged with notice thereof. *Splawn v. Chew*, 60 Tex. 535; *Thomas v. Leake*, 67 Tex. 472, 3 S. W. 703; *Supreme Lodge, K. P. v. Knight*, 117 Ind. 496, 20 N. E. 479, 3 L. R. A. 409. The benefit certificate issued to Thomas Colligan in its terms specifies that he "is entitled to all the rights and benefits of membership according to the constitution and laws of the order." This of itself makes the constitution and laws a part of the contract, and the other parts of the benefit certificate must be construed in the light of the laws of the order. In addition to the terms of the certificate, Colligan, in his application for membership, agreed to be "bound by the constitution, laws, rules and regulations of the order," etc. In his acceptance of the certificate he agreed to "comply with the constitution, laws, and regulations of the order," all of which we think clearly shows that the parties at the time of making the contract contemplated that the laws of the order formed a part of the contract of insurance. We do not appreciate the force, if any, of appellee's contention that by the provisions of the certificate "the rights of membership are one thing and that the right of participation in the beneficiary fund is another thing." Insurance by the order is only granted to members thereof, and participation in the beneficiary guaranty fund of the order is one of the benefits accruing to those members who insure, and the benefit granted to Colligan is included in the clause, "is entitled to all the rights and benefits of membership according to the constitution and laws of this order," stated in the benefit certificate issued to him. The laws of the order clearly provide that "self-destruction, whether sane or insane," will render the beneficiary certificate null and void. This became a condition of the certificate binding upon Colligan, and, having breached this condition by committing suicide, the right of participation in the beneficiary guaranty fund of the order was lost. The insurance having been forfeited by the act of suicide, it was optional with the order whether or not it would pay to Lizzie Colligan anything. She has no such rights, by virtue of the certificate, as entitles her to invoke the power of the courts to enforce payment.

The judgment is reversed, and here rendered for appellant.

FLANNERY v. CHIDGEY.*

(Court of Civil Appeals of Texas. Dec. 2, 1903.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—CONTRACTS—NURSING OF HUSBAND—IMPLIED CONTRACT—SERVICES—STATUTE OF FRAUDS—COMMUNITY PROPERTY.

1. Rev. St. 1895, art. 2970, enables a married woman to contract debts for necessities furnished herself and children, and for the bene-

fit of her separate estate. *Held*, that the wife's separate estate is not liable for services in nursing the husband, though contracted for by her.

2. A parol promise by an executrix to pay for nursing of her testator was void under the statute of frauds (Rev. St. 1895, art. 2543, § 1), as the promise of an executrix.

3. A parol promise by a widow to pay for the nursing of her husband is void under the statute of frauds (Rev. St. 1895, art. 2543, § 2), as a promise to answer for the debt of another.

4. Though the nursing of a husband was performed under a contract with the wife void because of her inability to contract, his estate was liable for the services under an implied promise.

5. A widow and executrix is liable for the debts of her husband, and of the community, to the extent of his separate property, and community property coming into her hands.

6. Where land is conveyed to a married woman during the life of her husband, and it is not shown that there was any recitation in the deed making it her separate estate, it is presumably community property.

Appeal from Bexar County Court; Robt. B. Green, Judge.

Suit by Henry Chidgey against J. B. Flannery, executor of the estate of Elmira V. Ewalt, deceased. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

Keller & Keller, for appellant. Robt. T. Neill, for appellee.

FLY, J. This is a suit instituted by appellee, in the justice's court for \$175 alleged to be due by the estate of Mrs. Elmira V. Ewalt for services as nurse rendered W. D. Ewalt, the husband of Elmira V. Ewalt, in his last sickness, amounting to \$160, and services rendered in same capacity to Mrs. Ewalt in her last sickness, amounting to \$15. The suit is based on allegations of an express contract of Mrs. Ewalt to pay for the services rendered her husband, made before and after his death. Appellee recovered judgment for amount sued for in justice's court, and for a like sum on appeal to the county court.

It appears that, W. D. Ewalt being sick in 1900, Mrs. Chidgey was engaged as a nurse at divers times between March and December of that year. W. D. Ewalt died on January 1, 1901, and Mrs. Elmira V. Ewalt, his widow, on January 3, 1901, filed an application for probate of the will of her husband and for letters testamentary. On January 22, 1901, the will was probated, and Mrs. Ewalt was appointed executrix of the will, without bond, as provided therein. In that will practically everything possessed by the testator was bequeathed to his wife. No account for the services performed by Mrs. Chidgey was presented to the independent executrix. On January 7, 1902, Mrs. Elmira V. Ewalt died, leaving a will in which J. B. Flannery was appointed executor. Although it does not appear in the statement of facts, it appears from the petition and from an exhibit attached thereto that the account was presented to the executor, and by him rejected. There is some testimony which tends

*Rehearing denied January 13, 1904.

to show that W. D. Ewalt had some community property at his death.

The theory upon which the pleadings were prepared and on which the case was tried was that the property in the hands of the executor had been the separate estate of Mrs. Ewalt, and that she had before and after her husband's death expressly agreed to pay the debt due Mrs. Chidgey. The evidence is very weak and unsatisfactory as to Mrs. Ewalt attempting to contract for the services of Mrs. Chidgey, but the question will be discussed as though it was fully proved, because the principles that are hereinafter stated apply as fully to an explicit written contract as well as one of any other character. Under the common law the existence of the wife was merged in her husband, and she had no power to make contracts except through his authority, or for necessities for herself and children. That principle of the common law has not been wholly abandoned in Texas, and in no instance, save in those expressly prescribed by statute, is the married woman given the power to make contracts. The only statutory authority given to a married woman to enter into contracts is embodied in article 2970, Rev. St. 1895, as follows: "The wife may contract debts for necessities furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property." The authority so granted is strictly construed, and no appeal to the equitable powers of a court can be made to bind the wife by her contracts not executed under the provisions of the statute. *Magee v. White*, 23 Tex. 180; *Haynes v. Stovall*, 23 Tex. 625. The necessities named in the statute are those for the married woman and her children, and not for her husband.

In the case of *Magee v. White*, above cited, this matter was thoroughly discussed, and, after citing and quoting from several chancery cases, the court concluded: "So we think that if, in this state, the wife's property is to be held liable for articles furnished to the husband because they are necessities, it will be in the husband's power to squander the proceeds of the property as it comes into his hands, out of which he should support himself and his family, and charge his expenses for necessities upon his wife's separate estate, thus subjecting it to a burden which the law never intended it to bear."

Again, in elucidation of the *Magee-White* opinion, it was said in *Haynes v. Stovall*, above cited: "It was held that the separate estate could be held liable, according to the provisions of the statute, for debts contracted by the wife herself, or by her authority, for necessities furnished herself or children, or for expenses incurred by the wife for the benefit of her separate property, and where such expenses are reasonable and proper. It was held that the wife was under no legal obligation to maintain the husband out of

her separate estate; that the rules applied by courts of chancery in England to estates limited to the sole and separate use of married women were not applicable to the wife's statutory separate estate in this state; and that the expressions to be found in the opinions of this court, in the cases of *Christmas v. Smith* [10 Tex. 123], *Brown v. Ector* [19 Tex. 346], and *McFaddin v. Crumpler* [20 Tex. 374], to the effect that the wife's separate estate is liable in equity, independent of the statute for necessities for the husband, or for his children by a former marriage, were dicta, and were not to be regarded as authoritative decisions of this court."

In the case of *Hutchinson v. Underwood*, 27 Tex. 255, it was said: "Under the view of the law taken by the court below, it will be perceived that the wife's separate property may be charged on an account made, or a promissory note executed by her, for necessities for her husband, or other members of the family than himself and children. Whatever difference of opinion there may formerly have been upon this question, the law upon it must now be regarded as settled by this court against the rule laid down in the instructions given to the jury in this case."

Again, in the case of *Harris v. Williams*, 44 Tex. 124, it was said: "The wife is under no legal obligation to maintain the husband out of her separate estate. It is the duty of the husband to support his wife and children. Hence the wife's estate cannot be charged with necessities for the husband, or with debts contracted by him for the support of the family when not acting as her agent."

It is claimed, however, that Mrs. Ewalt, after the death of her husband, promised to pay for the services of Mrs. Chidgey. Only one witness, Mrs. Martin, testified as to this, and she said: "I heard Mrs. Ewalt say she intended to pay Mrs. Chidgey for her services. That was after Mr. Ewalt's death. * * * She said if she did not pay it in her lifetime she would pay it in her will; she had no ready money." The statements made by Mrs. Ewalt were not communicated to Mrs. Chidgey. There was no consideration for the promise, if the language could be so styled. The promise to pay, if the language proved can be construed to be a promise, was one that comes clearly within the purview of the statute of frauds. It is obnoxious to the provisions of both sections 1 and 2 of article 2543 of the Revised Statutes of 1895.

While the evidence does not disclose a state of case by which the separate property of Mrs. Ewalt would be liable for the debt declared on, still the labor was performed, and W. D. Ewalt received the benefit of it, and his estate was liable under an implied promise to pay for the services received by him; and if any of his separate estate, or any community property of himself and wife, not exempt under the laws of Texas, came into the hands of his wife after his death, she would be liable to the extent of the value of

such property for the debts of her husband or the community.

Although an express contract upon the part of Mrs. Ewalt to pay the debt is alleged in the petition, and that contract would not bind her, the facts alleged also show that the community estate of the Ewalts was liable on an implied contract for the services performed for Mr. Ewalt, and are sufficient to form the basis for a judgment against the community property. The lands conveyed to Mrs. Ewalt before her marriage, and that conveyed to her by her husband, were her separate estate, and not liable for the debt sued for; but the record shows that one parcel of land was conveyed to Mrs. Elmira V. Ewalt, during the life of her husband, by Johanna Toepperwein, and it does not appear that it recited in the deed that it was the separate estate of Mrs. Ewalt. The presumption of law is that it was community property.

The judgment will be affirmed, the only restriction on it being that the estate of Mrs. Ewalt shall be liable for \$160 of the debt to the extent of the value of the community estate that existed at the time of the death of her husband, as well as any separate estate left by him, her whole estate being liable for the services, valued at \$15, rendered for Mrs. Ewalt. The judgment is affirmed.

MISSOURI, K. & T. RY. CO. v. HARRISON.*

(Court of Civil Appeals of Texas. Dec. 19, 1903.)

CARRIERS—UNWARMED CAR—TRANSPORTATION BY CONNECTING CARRIER—STIPULATION AGAINST NEGLIGENCE—LIABILITY OF CONTRACTING CARRIER—INSTRUCTIONS ON WEIGHT OF EVIDENCE—EXPENSE OF SICKNESS—EVIDENCE TO SUPPORT RECOVERY.

1. A carrier advertising to run an excursion train, without change of cars, from a point on its own line over the lines of connecting carriers, is liable for an injury to a passenger from negligently furnishing an unwarmed car, which occurs while the car is being operated by the connecting carriers, though the latter are also negligent in failing to inspect the car on receiving it.

2. A carrier advertising to run an excursion train, without change of cars, from a point on its own line, over the lines of connecting carriers, cannot relieve itself from liability for an injury to a passenger from negligently furnishing an unwarmed car, which occurs while the car is operated by the connecting carriers, by stipulating in the excursion ticket, which is made up of attached coupons—one for each carrier—that, in selling it, it "acts as agent only, and is not responsible beyond its own line."

3. In an action by a passenger for injuries from an unwarmed car, the court, after instructing as to what facts would justify plaintiff's recovery, added: "But if you believe * * * that the defendant furnished the plaintiff * * * with a reasonably comfortable car to ride in, * * * then the defendant performed all the duty it owed plaintiff; and, if you so believe, your verdict will be for defendant." *Held*, that the charge was not objectionable as making the defendant an insurer of the condition of the car.

4. Where there is no evidence in a personal injury action that sums expended for medicine and doctors' bills were reasonable, it is error to charge that a recovery might include all necessary and reasonable sums so expended or incurred.

Appeal from District Court, Hopkins County; H. C. Conner, Judge.

Action by P. E. Harrison against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Modified.

T. S. Miller and Perkins, Craddock & Wall, for appellant. Crosby & Dinsmore, for appellee.

BOOKHOUT, J. This is an action for damages for personal injuries to plaintiff and his wife, alleged to have been sustained by them as passengers on a trip from Winnsboro, Tex., to Geneva, Ga., caused by contracting cold in the coach. There was a trial before a jury February 7, 1903, resulting in a verdict and judgment for appellee for \$3,500. Defendant appealed.

It is contended that the court erred in the second paragraph of the charge, which reads:

"If you find for the plaintiff on the issue last above submitted, and you further believe that, in consequence of getting cold in said car from Winnsboro to Shreveport, plaintiff and his wife, or either of them, contracted cold, and you believe such cold resulted in sickness to the plaintiff and his wife, or either of them, as alleged by plaintiff, and you believe that the cold and sickness of plaintiff and his wife, or either of them, if any, was directly and solely caused by the negligence, if any, of the servants of defendant on its own line, or if you believe the employes of the connecting carriers, or either of them, failed to furnish plaintiff and his wife with a reasonably warm and comfortable car to ride in after they left Shreveport, and you believe the plaintiff and his wife were compelled to ride in a cold and uncomfortable car after leaving Shreveport, and you believe the servants of the connecting carriers, or either of them, were guilty of negligence, as that term is hereinbefore defined, in failing to furnish the plaintiff and his wife with a reasonably warm and comfortable car, if you find they so failed, and you believe the negligence, if any, of the defendant, on its own line, as above explained, concurring with the negligence, if any, of the connecting carriers, or either of them, was the cause of the sickness of plaintiff and his wife, or either of them, then you will also find for the plaintiff such sum as will now, in cash, compensate plaintiff for the physical pain and mental anguish, if any, that he and his wife, or either of them, suffered and will suffer in consequence of such sickness, if any, and the effect, if any, of plaintiff's sickness upon his ability to labor and earn money, and all necessary and reasonable sums he has paid or incurred for medicine and doctors' bills for himself and wife in

*Rehearing denied January 9, 1904.

consequence of such sickness. But if you believe from the evidence that the defendant furnished the plaintiff and his wife with a reasonably comfortable car to ride in from Winnsboro to Shreveport, then the defendant performed all the duty it owed to plaintiff, and, if you so believe, your verdict will be for the defendant, or if you believe the defendant did fail to furnish the plaintiff and his wife a reasonably comfortable car from Winnsboro to Shreveport, and was negligent, and that plaintiff and his wife suffered cold from the trip to Shreveport, yet you will find for the defendant on the issue of sickness unless you further believe the negligence, if any, of the defendant, on its own line, contributed to cause, and concurred in causing, the sickness. Or if you believe the negligence, if any, of the connecting carriers alone, was the cause of the sickness, you will find for the defendant on the issue of sickness."

The trial judge, after having given a full definition of negligence, instructed the jury in the first paragraph of the charge, in effect, that if appellee and his wife were passengers upon appellant's train, operated by it between Winnsboro and Shreveport, La., and the day was cold and disagreeable, and the servants and agents of appellant failed to provide them with a reasonably warm and comfortable car, and such failure constituted negligence on the part of appellant, and, as a proximate result of such negligence, appellee and his wife, or either of them, became cold, and suffered therefrom, then appellant would be liable to appellee for such suffering. No objection is made to this paragraph of the charge.

It was shown that the tickets purchased by appellee and his wife, and by virtue of which they became passengers upon appellant's train, were excursion coupon tickets. The first coupon was from Winnsboro to Shreveport, and there was attached one coupon entitling them to passage over the line of each of the connecting carriers. The tickets stipulated that in selling the tickets the appellant company "acts as agent only, and is not responsible beyond its own line." It is insisted that the appellant could lawfully limit its liability to injuries occurring on its own line, and, it having done so, there can be no recovery against it for injuries occurring on the connecting lines. It is held that a selling carrier may by contract limit its obligation as to safe transit of passengers over several connecting lines to its own line. A carrier cannot, however, relieve itself from responsibility for want of ordinary care. *Harris v. Howe*, 74 Tex. 534, 12 S. W. 224, 5 L. R. A. 777, 15 Am. St. Rep. 862. In the instant case the uncontroverted evidence showed that the appellant advertised and held out to the people of Hopkins and adjoining counties, including Rains county, that it would run through trains, without change of cars, from Winnsboro to Birmingham, Ala. It furnished

a car which was defective, in that the steam pipes for heating it were broken and useless for that purpose, and the break indicated that such had been the condition of the pipes for a long time, and such condition could be easily discovered by inspection. The only other means for heating the car was a small stove in one end of the car, and no fuel was provided for the stove. The train was made up by appellant on its lines, and it had employes at Greenville, whose duty it was to inspect all cars, including stoves, steam pipes, and heating apparatus. There is evidence that appellee and his wife were directed to, and did, take this car. There is evidence to justify the finding of the jury that the car was not kept reasonably warm and comfortable between Winnsboro, the station where appellee and his wife took passage, and Shreveport, the terminus of appellant's line, and that by reason thereof they suffered and were injured. Under these facts the limiting by appellant of its liability for injuries to those occurring on its own line would not relieve it from liability if its act in furnishing the car and delivering the same to the connecting carrier was negligence.

Appellant, under its first assignment of error, presents the proposition that "where the act of one wrongdoer is separate and independent of, and not in association or concert with, the act of another wrongdoer, who does the same or a similar act, there is no joint liability of such wrongdoers. Each is liable only for the injury caused by him, and neither is liable for such injury as may have been caused by the other. It having been shown by the evidence that each of the companies owning the several lines constituting the through route from Winnsboro, Tex., to Geneva, Ga., was acting for itself, and that the tickets of the plaintiff and his wife, with the coupons attached, constituted with each of such companies a separate contract, the charge of the court was erroneous, in making the appellant liable for such injuries as resulted from the negligence of the carriers other than the appellant." If an accident occurs from two causes, both due to negligence of different persons, but together one efficient cause, then all the carriers whose acts contributed to the accident are liable for an injury resulting, and the negligence of one furnishes no excuse for the negligence of the other. *Ry. Co. v. McWhirter*, 77 Tex. 360, 14 S. W. 26, 19 Am. St. Rep. 755, and authorities cited. Nor is it necessary that the negligent acts of the different persons shall concur in point of time. If the injury is produced by the concurrent acts of negligence of two or more persons, although their acts are distinct and separate, they incur a joint liability for the injury they produce. *Gonzales v. City of Galveston*, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17; *Pugh v. Ry. Co.*, 101 Ky. 77, 39 S. W. 695, 72 Am. St. Rep. 392; *Carterville v. Cook*, 129 Ill. 155, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248. In

the case of *Gonzales v. City of Galveston*, above cited, it was shown that lumber had been piled in a public street of Galveston by a firm of lumber dealers. A drayman hauling lumber loaded diagonally on his dray turned into the street from an alley, and, in passing the pile of lumber, came in contact therewith, and knocked off some heavy pieces on the opposite side from him, striking the child of the appellant, Gonzales, and severely injuring it. In a suit against the city to recover damages for the injury to the child, a recovery was sought on the theory that the placing of the lumber in the street was unlawful; that the city authorities knew it was there, and wrongfully and negligently suffered it to remain there. The liability of the city was based upon its negligence in failing to remove the lumber. The city contended that, conceding the city had notice that the lumber was piled in the street, and that it was negligent in not causing the same to be removed, yet the injury was caused by an intermediate agency—by the act of the drayman as the proximate cause—and the city was not liable. In disposing of this contention, the court says: "We do not think this is the principle governing this case. If it should be held that it was negligence on the part of defendant at the time of the injury to have failed to remove the obstruction from the street, and this failure and the act of the drayman, both concurring, caused the injury, the city would be liable. This would be true whether the act of the drayman was negligent or not." The court further held that "if the presence of the lumber pile in the street was at the time chargeable to the negligence of the city, and such negligence, together with the act of the drayman, caused the injury, it would be, in part, the proximate cause." The appellant, having advertised that the excursion train would start on its lines at a point designated, and that it would run a through train without change of cars, undertook to provide suitable cars for the through trip; and if it furnished a defective car, and delivered the same to the connecting carrier, it must have contemplated that the connecting carrier might also continue to operate such car on the trip. The act of the appellant in furnishing a defective car, and in delivering the same to the connecting carrier, was negligence; and, it having undertaken to operate a through train without change of cars, the appellant became responsible for injuries resulting from such defects while such car was being operated by the connecting carrier. Between Shreveport, La., and Meridian, Miss., the weather was cold and disagreeable, and the car was cold and uncomfortable, and appellee and his wife suffered therefrom. At Meridian, Miss., the car was cut out of the train, and another substituted therefor. The evidence showed that the defect in the heating equipment of the car was such that it could and should have

been discovered upon inspecting the car. It seems that the conductor of the train from Winnsboro to Shreveport had actual notice of the defect. If it be true that the connecting carrier was negligent in failing to inspect the car and in operating the defective car, this would not relieve appellant from its negligence in providing a defective car for the through trip. If the connecting carrier was negligent in failing to inspect the car, then, under the facts shown, the appellant and such connecting carrier were both liable, and appellee could recover from both or either of them. This was the principle announced in the charge complained of, and in this respect the charge is correct.

The charge is not subject to the criticism that it is upon the weight of the evidence, in assuming that the appellant furnished the car for the trip. As stated, the uncontroverted testimony was to the effect that the appellant undertook to operate a through train without change of cars from Greenville to Birmingham, Ala. The court was authorized to assume this as an established fact. Nor did the court err in failing to limit the appellant's liability to such injuries as were suffered by appellee and his wife on appellant's line. The appellant could not by contract relieve itself from its negligence in furnishing the defective car. Its negligence in furnishing the defective car, under the facts stated, was the proximate cause of the injuries to appellee and his wife. While it was not the sole cause, it was the concurring cause—such as might reasonably have been contemplated as involving the result, under the attending circumstances. 84 Tex. 7, 19 S. W. 284, 31 Am. St. Rep. 17. In addition to the authorities cited as bearing upon the questions discussed, see *Seale v. Ry. Co.*, 65 Tex. 274, 57 Am. Rep. 602; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; 1 *Sherman & Redfield on Neg.* § 31; *Jones v. George*, 61 Tex. 353, 48 Am. Rep. 280. *Sutherland on Dam.* (3d Ed.) § 36, p. 113, and section 38, p. 116.

Complaint is made that one clause of this paragraph of the charge is upon the weight of evidence, in that it makes the appellant an insurer as to the condition of the car. The clause complained of reads: "But if you believe from the evidence that the defendant furnished the plaintiff and his wife with a reasonably comfortable car to ride in from Winnsboro to Shreveport, then the defendant performed all the duty it owed plaintiff; and, if you so believe, your verdict will be for the defendant." This was a defensive charge, in which the court gave the converse of the propositions wherein he announced the principle upon which a recovery could be had by appellee. This charge does not state affirmatively that appellant would be liable if it did not furnish a reasonably warm and comfortable car. No special charge was requested by the appellant. We are of the

opinion that the charge, when considered in connection with the preceding paragraphs, is not subject to the criticism made.

It is further insisted that the charge is erroneous in authorizing a recovery against appellant for the necessary and reasonable sums paid or incurred by appellee for medicine and doctors' bills for himself and wife, because there was no evidence that the sums so paid were reasonable. This criticism is just, and appellant's contention in this respect is sustained. *Wheeler v. Ry. Co.*, 91 Tex. 356, 43 S. W. 876; *Ry. Co. v. Rowell*, 92 Tex. 147, 46 S. W. 630; *Ry. Co. v. Warren*, 90 Tex. 566, 40 S. W. 6. Appellee, however, offers to cure this error by remitting the amount of these bills, \$210, as shown by the evidence.

There was no error in refusing appellant's special charge No. 2 in reference to the burden of proof. The court's charge placed the burden of proof upon appellee, and it was not necessary to repeat the same.

The judgment will be reformed, and credited with \$210, as of the date of its rendition in the trial court, and, as reformed, the same is affirmed. The costs of this appeal are taxed against appellee. Reformed and affirmed.

HAIGLER v. POPE.

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

TRESPASS TO TRY TITLE—DEFENSE OF ADVERSE POSSESSION—QUESTION FOR JURY.

1. Where, in trespass to try title, defended on the ground of adverse possession under the 10-years statute of limitations, there was evidence tending to show such possession by defendant, or persons holding under him, of at least a portion of the lot in controversy, it was error to refuse to submit the question of limitations to the jury.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Action by J. H. Pope against E. P. Haigler. From a judgment for plaintiff, defendant appeals. Reversed.

James & Yeiser, for appellant. J. P. Hamer, for appellee.

KEY, J. This is an action of trespass to try title, the subject-matter being a town lot situated in the city of Austin. Appellee was plaintiff, and appellant defendant, and the original petition was filed October 24, 1902.

One of the pleas relied on by the defendant was the 10-years statute of limitations. After hearing all the testimony, the trial court directed a verdict for the plaintiff, and the correctness of so doing is the only question presented for decision.

On January 8, 1889, the defendant executed a deed of trust to Jas. V. Bergen, trustee, with a covenant of general warranty of title, conveying the property in controversy, to secure a note executed by the defendant to the plaintiff. Thereafter a suit was com-

menced in the district court of Travis county, which on May 18, 1891, resulted in a judgment for Pope and against Haigler for the amount of the note, and foreclosure of the lien on the property. Under an order of sale issued to enforce that judgment, the property in controversy was on August 18, 1891, sold and conveyed to Lula C. Templeton, who thereafter conveyed it to John H. Pope, the plaintiff. Adjoining the lot in controversy is a lot owned by two of the defendant's children, upon which is a residence in which the defendant has resided since 1896. For several years the entire lot in controversy was inclosed by a fence, which connected with the fence inclosing the lot on which the residence was situated. The defendant submitted testimony tending to show that for more than 10 years next preceding this suit, and after title had passed from him under the foreclosure sale, he, or persons holding under him, had been in exclusive, continuous, and adverse occupancy of the house on the adjoining lot, and in adverse possession of, and using at least a portion of, the lot in controversy. However, during that time much of the fence—perhaps half of it—was removed; and, for two or three years of the time required to constitute the bar, all of the lot was not inclosed, nor was it all, during that time, in the actual possession of the defendant. But there was testimony tending to show that during the time of the break in the larger inclosure the defendant had a smaller inclosure on one end of the lot, which he used as a cowpen. As to the exact dimensions of the latter, the evidence was uncertain. There was also testimony tending to show that during all the time referred to the defendant was asserting claim to the entire lot.

The record indicates that the trial court was of the opinion (1) that the evidence was too uncertain as to the location and dimensions of the cowpen to warrant a verdict and judgment for the defendant for that part of the land; and (2) that as the defendant had not been in actual possession of the remainder for 10 consecutive years, and had failed to show that he claimed under some character of written instrument fixing the boundaries of his claim, his plea of limitation could not prevail.

Whether or not the court was correct on the first point, we deem it unnecessary to decide, as upon another trial the location and dimensions of the cowpen can be shown.

On the other question, however, the trial court fell into error. *Pearson v. Boyd*, 62 Tex. 541; *Craig v. Cartwright*, 65 Tex. 413; *Simpson v. Johnson* (Tex. Sup.) 46 S. W. 628; *McCarty v. Johnson* (Tex. Civ. App.) 49 S. W. 1099; *Native v. Raymond* (Civ. App.) 59 S. W. 311, 1 Tex. Ct. Rep. 210. In the last case cited, it was shown that for more than 10 years the defendant had been in actual adverse possession of a portion of a survey, claiming all of it; and, although he

claimed under no muniment of title fixing boundaries, the Court of Civil Appeals held that he had acquired title to the entire survey under the 10-years statute of limitations. That was the only question involved in the appeal, and, as the Supreme Court refused to grant a writ of error, that case may now be regarded as final authority on that point.

Our conclusion is that the trial court erred in not submitting to the jury the question of limitation, and therefore the judgment will be reversed, and the cause remanded. Reversed and remanded.

**FARLEY v. MISSOURI, K. & T. RY. CO.
OF TEXAS.***

(Court of Civil Appeals of Texas. Dec. 19, 1903.)

**SERVANT'S INJURIES—DAMAGES—ADEQUACY
OF VERDICT—APPEAL—PREJUDICIAL
ERROR.**

1. In an action for servant's injuries, evidence examined, and *held* not to show that a verdict for \$1,000 was so small as to indicate that it was the result of passion, prejudice, or mistake so as to warrant the Court of Civil Appeals in setting the same aside, after the trial court had refused to do so, under Rev. St. 1879, art. 1448, providing that new trials may be granted as well when the damages are too small as when they are too large.

2. On appeal by plaintiff from a judgment for him on the ground of inadequacy of the verdict, error in the admission or exclusion of evidence on issues found in his favor is harmless.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Action by E. Farley against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, he appeals. Affirmed.

Wolfe, Hare & Semple and Smith, Templeton & Tolbert, for appellant. T. S. Miller and Head & Dillard, for appellee.

TALBOT, J. Farley brought this suit in the district court of Grayson county to recover damages sustained by reason of personal injuries alleged to have been inflicted upon him through the negligence of the defendant railway company while at work in its repair shop as a machinist. There was a trial by jury, and a verdict and judgment for plaintiff for \$1,000. Plaintiff, being dissatisfied with the amount of this judgment, has perfected an appeal to this court.

Plaintiff alleged, in substance, that on December 22, 1901, he was in the employ of defendant as a machinist in its shop at Denison, Tex.; that in the performance of his duties it became necessary for him to operate an electric crane or car constructed in said shop, to be used in moving engine wheels and axles to and from a wheel lathe where they were prepared for use in constructing and repairing locomotives; that said crane or car was propelled by electricity, and was operated on a track, like a locomotive,

elevated about 10 feet above the floor of said shop. He charged negligence on the part of defendant in the construction of said crane or car and said track, and that both were negligently permitted to become out of repair, the wheels to become worn, and the parts of same to become loose and insecure, and the timbers on which same rested to spread, so that the crane would run off the track; that defendant had notice of the condition of the said crane and track and that the same was dangerous; that about December 15, 1901, he (plaintiff) learned that the crane and track were out of repair, and reported this condition to his foreman, and the foreman promised to repair and fix them; that about 4 o'clock a. m., December 22, 1901, while plaintiff was moving a pair of driving wheels of a locomotive with said crane, it, together with said wheels, fell from the said track down upon plaintiff, and broke his right leg between the knee and hip, cut a gash in his head, burned his left forearm with electricity, bruised and injured his left elbow, shoulder, back, spinal column, and left leg; that said injuries are permanent, have caused mental and physical pain, and will prevent him from doing any work; that said injuries have and will in future cause his time, worth \$125 per month, to be a total loss, have and will in future cause him to incur expense for medicine and doctor's bills in the sum of \$1,000; that when he was injured it was dark, and impossible for him to know the condition of the crane, and he supposed the same had been fixed. Defendant denied the allegations in plaintiff's petition, and pleaded specially contributory negligence and assumed risk.

The track on which the crane or car was operated was about 12 feet above the floor of the shop in which plaintiff was at work at the time he was injured. The rails of said track were made of ordinary railroad rails, and were about 12 feet apart. The crane had four wheels, two of which ran on each rail of this track, and, together with the driving wheels of the locomotive, which were being moved by plaintiff, were very heavy. On account of the defective construction of the crane or track, or by reason of the spreading of the track because of the same becoming loose or worn and otherwise out of repair, the crane and wheels ran off the track, fell, and injured plaintiff. The defendant railway company was guilty of negligence in the respects alleged by plaintiff, and such negligence was the proximate cause of plaintiff's injuries. There was no contributory negligence on the part of the plaintiff, and the verdict of the jury and judgment of the court are warranted and sustained by the evidence.

It is insisted that the damages allowed by the verdict and judgment are manifestly too small to compensate plaintiff for the injuries sustained, and that the trial court erred in not granting plaintiff a new trial. Our stat-

*Rehearing denied January 9, 1904.

ute provides that new trials may be granted as well when the damages are manifestly too small as when they are too large. Rev. St. 1879, art. 1448. Many cases may be found in which the question of excessiveness of the verdict has been discussed and passed upon by our courts, but the research we have been able to make has brought to our knowledge but few where the smallness of the verdict was under consideration. To the rarity of such verdicts is doubtless due the paucity of our decisions on the subject. As to the character of plaintiff's injuries and the damages sustained by him, he testified in substance as follows: "I know that the crane fell on me. It knocked me down, cut a hole in my head, mashed my arm up, and burned my wrist with an electric wire, I suppose it was. I did not see it. It gashed my head a pretty good cut, mashed my left arm considerably, burned my left wrist and forearm, my right leg was broken right in through the thigh between the knee and the hip. It was broken, I should judge, about six inches above the knee. I know I cannot use my right leg only when they lift it up—this whole hip and whole leg. It seems my left leg was injured. It was a flesh injury mostly. My left heel was mashed until it hurts me now to lie on it. A certain way on the heel it hurts me a great deal. My back was hurt. None of the rest of my injuries seem to pain me as much as my back and hip. I have pain yet under my ribs. Acute pain is low down, running down in my hip bones. I have had a great deal of pain, and have yet, in my hip bones. I do not know much about what was done there after the crane fell on me. I know they carried me home, and the doctor was called. I cannot tell how I got out from under the crane, but I got out myself. I cannot tell you how I did it. They carried me home on a stretcher and put me to bed. I took my bed on account of injuries. I guess I did not get out of bed for about six months. Dr. Acheson, the company physician, was my physician, and he treated my injuries. My injuries caused me pain, and I have never been free from pain yet. At the time these injuries were inflicted, I should judge I suffered a good deal. They gave me opiates, so they told me. I know my injuries hurt me. I had a great deal of pain at the time, especially my back and hip pained me. I have suffered pain since that time. I have never been without it. I have not seen a minute without it. I am sixty-one years old past. These injuries were inflicted over a year ago—a year ago the 22d of last month. Before I was hurt, my health had always been reasonably good. I was never sick to amount to anything. Some six or eight months before I got hurt I had some stomach trouble, caused by my teeth. I had the teeth taken out, and after that I had good health. I commenced work at my trade as an apprentice before I was eighteen years old, some-

thing over forty years ago. During that time I do not suppose I lost two weeks from my work on account of sickness. I was never sick, to speak of, at all during that time. Since I got hurt my hair has turned considerably. It has turned a great deal in the last year, and makes me look a great deal older. At the time I was injured I was paid standard wages in the shop, thirty-three cents per hour. I was working ten hours a day and drawing eleven hours' pay. I got eleven hours' pay for week day nights, and Sunday I got pay for fifteen hours for working ten hours. I worked every night. Never lost a night. Since I got hurt I don't suppose I could do much work. I have not been able to try. I have to go on my crutches. I cannot walk at all. Cannot bear any weight on my right leg. This seems to be caused by my hip. My right leg is a good deal shorter than the other. I judge it is an inch or more shorter. This leg is crooked now. It is crooked at the place where it was broken. My knee is stiff. It has been that way ever since I was hurt. The trouble in my right hip, I suppose, was caused from my being hurt. I never had any trouble with it before. Before I was hurt there was never any difference in the length of my legs, and I was never troubled with my right knee. (Witness stands up and exhibits his legs to the jury.) I should judge that my injuries affected my nervous system. I can hardly do anything; hardly write or do anything else. I cannot use my right hand very much. I can do nothing like that. I go to jerking and trembling. Am bothered a great deal about sleeping. I cannot lie well on my back on account of my right leg. I cannot lean over on that leg because the knee is so stiff it sticks the foot up. And when I turn over on the left side I have to put a pillow between my legs to keep them apart. I cannot lie with them together at all. I cannot lie with the right leg across. There is so much pain in my right hip. Before I was hurt my nerves were good, so far as I know. I never had any trouble with my nerves. I have not worked since I was hurt. Since I was hurt I have gone on my crutches to the coal bin and got a small coal scuttle full of coke, one that would hold about half an ordinary coal scuttle, and took it in one hand and moved one crutch, and then took it in the other hand and moved the other crutch, and got into the house. I have done that a number of times to help the women folks. That is all the work I have done since I was hurt. I have not made any effort to get any employment. If I had tried to find any at all, I could not have done it. I have not felt able, since I was hurt, to try to get employment. I am considerably nervous now. I am in pretty good order, I know, but still I couldn't do much labor. Before I was injured I weighed 180 pounds, and now I weigh 186." On cross-examination he testified: "When I worked in the daytime I got the same wages:

that is, I worked 10 hours and got 10 hours' pay at 33 cents per hour. My wages then was an average of about \$100 a month, I guess. They would average more than ninety."

Plaintiff's wife testified: "After he was hurt he was brought home, and has been there at home all the time since then. When he was brought home that night he appeared to be suffering. He was suffering with his back. He complained of his back and hip and arm. He did not complain of the limb that was broken, but the limb that was mashed he complained of. The right limb was broken, the other one was mashed. He complained of the left limb. He has never quit complaining. His misery seemed to be about 5½ or 6 months. We used opiates all the time to numb his pain. 'I administered these medicines to him.' He has not done any work since he was hurt."

Dr. Acheson testified that he was the local physician for the defendant railway company. That he had known plaintiff for a number of years. That plaintiff's health had been excellent with the exception of one spell of sickness extending over two or three days about three years ago. "He has not been weak or sickly to my knowledge. I was called to attend to the plaintiff's injuries about the 22d day of December, 1901. Plaintiff remained under my care for several months. In the beginning I visited him two or three times a day, dropping afterwards to twice a day, and finally diminishing to one visit a day. During that time I made thorough examinations of the plaintiff. For a period of two or three weeks the examinations were daily. Plaintiff had received contusions upon the body which resulted in the fracture of the right thigh bone and the injury of the lower portion of the spine, and some bruises and injuries on the other parts of the body. Plaintiff's condition following his injuries was one of prostration attended by fever, indigestion, and disability, which made his case for a time almost hopeless. Shortly after that his digestion made the secretions become more perfect, and the fracture was repaired, though very slow about repairing. At the end of six months he became able to move around the house. The plaintiff, as a result of his injuries, has not fully recovered. I don't believe he will be able to do as much in the future as when he was injured. The injury received by plaintiff caused severe pain and suffering, which extended over a period of several weeks. I do not know whether the plaintiff is now suffering pain or not. After the plaintiff received his injuries he was confined to his bed for about two months or more. This length of time was absolutely necessary on account of his injuries. The plaintiff's injuries have affected his ability to work and get around. The injuries have affected the system in such a way that it is painful for him to assume the stooping po-

sition, but I cannot say how much nor how long this condition will continue. The right leg is likely shorter than the left. He has not been able to use it. The bone where it was broken has joined together at the place of fracture, and is slightly crooked, as is normal, and as it ought to be. The bone where it was fractured has grown back, and the bone is not weak by the fact that it is crooked; and the thigh bone is not normally straight, but crooked. Plaintiff's injuries affected his nerves and nervous system, and this condition continued for a period of over six months. The only broken bone in plaintiff's body was his right thigh bone, which is now healed, and there is a good union. Plaintiff's case has progressed, and continued improvement is expected in the future. I do not know whether plaintiff could get along without his crutches or not. That would depend on how far he might want to go. There was no break or dislocation of any bones except the right thigh bone, and that is healed. There was no break or dislocation of any of the bony tissue about his arm. Plaintiff's spinal cord was in no way injured, but there were bruises on his back. There were no breaks or dislocations to plaintiff's knees or ankles. Plaintiff's age would necessarily make his recovery from injuries slower than it would in a young person, as far as the nervous or muscular system is concerned. It takes longer to right the secretions and repair the injuries to muscular and nervous system, and the bruises are generally slower in the case of old people, but in the repair of bones old people generally encounter repair quicker than young people." This witness testified by deposition given December 9, 1902. Plaintiff's expectancy was about 14.09 years. "In my surgeon's report made immediately after the accident I said that there was a fracture of the right femur on the lower third, a scalp gash, and bruises on the arms and back; and these were the only troubles I found. The bone, where it was fractured, is stronger than before it was broken."

The rule upon the question involved in this suit, as stated in *Southerland on Damages* (1st Ed.) vol. 1, p. 810, seems to have been generally recognized. He says: "Where there is not a legal measure of damages, and where they are unliquidated, and the amount thereof is referred to the discretion of the jury, the court will not ordinarily interfere with the verdict. It is the peculiar province of the jury to decide such cases under appropriate instructions from the court, and the law does not recognize in the latter the power to substitute its own judgment for that of the jury. Although the verdict may be considerably more or less than in the judgment of the court it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mis-

take." The testimony of the witnesses in this case, if literally true, would unquestionably entitle plaintiff to a verdict for a larger amount of damages than awarded him. Taking into consideration, however, all the circumstances of the case, and the action of the lower court in reference thereto, can it be said that this court ought to conclude that the verdict rendered was the result of "accident or perverted judgment, and not of cool and impartial deliberation"? In the case of *Elwood v. Western Union Tel. Co.*, 45 N. Y. 553, 6 Am. Rep. 140, cited by counsel for appellee, it is said by Rapallo, J., speaking for the court: "It is undoubtedly the general rule that, where unimpeached witnesses testify distinctly and positively to a fact, and are uncontradicted, their testimony should be credited, and have the effect of overcoming a mere presumption. But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. The general rules laid down in the books at a time when interest absolutely disqualified a witness necessarily assumed the witnesses were disinterested. That qualification must, in the present state of the law, be added. And, furthermore, it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of the witness for the simple reason that no other witness had denied them and that the character of the witness is not impeached." See, also, *Allison v. Gulf, Col. & S. F. Ry.* (Tex. Civ. App.) 29 S. W. 425; *Newton v. Pope*, 1 Cow. 110; *Lomer v. Meeker*, 25 N. Y. 381; *Wait v. McNeill*, 7 Mass. 261. Numerous cases may be found in the reports of our own courts in which it has been said in effect that, although the court might be of the opinion that the verdict of the jury was too large, yet appellate courts should be very cautious in disturbing them, especially when the court below had overruled a motion for a new trial. In the case before us the plaintiff was present in court and testified. The jury was afforded an opportunity to observe his appearance and manner of testifying. Notwithstanding he claimed to have suffered from nervousness and great mental and physical pain since the date of his injuries, yet he further testified that he had increased in weight during that time 6 pounds; that at the time he received his injuries he weighed 180 pounds, and at the date of the trial he weighed 186 pounds. When reminded of his increase in weight, he remarked upon the witness stand, "I am in pretty good order, I know, but still

I couldn't do much labor." This remark, together with plaintiff's appearance and demeanor, were circumstances and legitimate evidence for the consideration of the jury in determining the weight to be given to plaintiff's testimony and in determining the actual extent of his injuries and suffering. That they concluded from this and other evidence the same had been exaggerated by the oral statements of the witnesses is evident by their verdict, and we do not feel authorized to say that such conclusion was not justified. The testimony of Mrs. Farley adds but little strength to plaintiff's case, and, notwithstanding the testimony of the physician relative to plaintiff's suffering and the time he suffered, yet it occurs to us that the jury might have reasonably concluded from other portions of his testimony and other circumstances of the case that the only real injury plaintiff sustained was a fracture of the leg. Dr. Acheson testified: "In my surgeon's report made immediately after the accident I said that there was a fracture of the right femur on the lower third, a scalp gash, and bruises on the arm and back; and these were the only troubles I found." He further states that the bone where fractured is stronger than before it was broken. His testimony to the effect that it was painful for plaintiff to assume a stooping position was evidently based on what plaintiff told him about it, as the injuries to plaintiff's back appear so slight, from the physician's description of them, as to indicate no permanent or serious hurt. The witnesses were in the presence of the court and jury. Both heard them testify, and had a better opportunity of judging of their credibility than this court could possibly have. This advantage of the trial judge and jury has often been adverted to by our Supreme Court in passing upon similar questions to the one involved here, and that court has usually been very slow to set aside the verdict of the jury where, as in this case, a motion for a new trial had been overruled by the judge who presided at the trial. Upon the whole case as it appears to us, we are not prepared to say that the amount of the verdict is manifestly too small, and that we would be warranted in setting it aside.

The other assignments of error relate to rejection of evidence, charge of the court, and newly discovered evidence bearing upon issues decided by the jury in favor of the plaintiff. We have examined these assignments, and believe no error was committed, except possibly in the charge complained of. The issues, however, to which these rulings relate, having been found in favor of plaintiff, the errors therein, if any, are harmless, and we deem it unnecessary to discuss them, as they cannot affect, in our opinion, the disposition to be made of this appeal.

We conclude that the verdict in this case is not so small as to indicate that it was the result of passion, prejudice, or mistake, but

is warranted and sustained by the evidence, and the judgment of the court below is therefore affirmed.

HARPER et al. v. MARION COUNTY.*

(Court of Civil Appeals of Texas. Dec. 5, 1903.)

COUNTY TREASURER—ACTION ON BOND—AUDITOR'S REPORT—FAILURE TO EXCEPT—OPENING CASE FOR ADDITIONAL TESTIMONY—CONTRADICTION OF REPORT—OFFICIAL RECORD—ADMISSION OF CERTIFIED COPIES.

1. An action on a county treasurer's bond was referred to an auditor for findings of fact. The auditor reported that the treasurer was not chargeable with a certain sum, except a portion thereof "which he admits to have received, as shown by Exhibit A to his answer. * * * There is no proof, except from his own admission, that he had received" any of the sum. The report continued: "His report as treasurer * * * to the commissioners' court * * * shows that he received" the same sum admitted in the answer, "and that amount was still reported on hand in his last report to the commissioners' court." On the trial this much of the auditor's report was objected to because the defendant's sureties were not bound by the treasurer's statements not required by law, such as the last statement of the amount of money on hand. *Held* that, in view of the finding that the treasurer's report to the commissioners' court showed that he had received the amount charged to him in the auditor's report, the admission of the other portions of that report was harmless error.

2. An auditor's report which has not been excepted to is conclusive, and cannot be contradicted on the trial.

3. Opening the trial of a suit on a county treasurer's bond, after argument has begun, to let in evidence, consisting of depositions then on file, fixing the time at which certain sums were received by the defendant treasurer, is not an abuse of discretion.

4. A county treasurer elect filed his official bonds December 5, 1896, which were approved on December 30, 1896, on which day he qualified. On March 23, 1897, he was removed from office. In an action on his bond, an auditor's report, which was not excepted to, showed that between December 5, 1896, and March 23, 1897, he had received certain sums. *Held*, that evidence showing that these sums were received between December 30, 1896, and March 23, 1897, did not contradict the report, so as to make its admission erroneous.

5. A county treasurer was appointed by the commissioners' court December 30, 1895. He was elected as his own successor in November, 1896. He qualified December 30, 1896, and was removed from office March 23, 1897. In an action on his bond thereafter instituted, the then comptroller made a deposition, in 1901 or 1902, to which were attached as exhibits copies of warrants drawn by his predecessor on the tax collector commanding him to pay the amount specified to the defendant ex treasurer. These warrants were dated, the first, September 1, 1895, and the other, September 1, 1896, and were paid, as shown by the treasurer's indorsements, the first in 1896, and the second in 1897. *Held*, that the fact that in the certificates to these copies the comptroller recited that they were for the school funds for the years beginning September 1, 1901, and September 1, 1902, did not prevent their introduction in evidence.

6. Certified copies of warrants, and indorsements thereon, in the office of the county comp-

troller, are admissible, though it is not shown that they are correct, or that the certifying officer had personal knowledge of the facts shown therein.

7. The statement of a county treasurer, kept in the office of the State Treasurer, and certified by him to be correct, is admissible in evidence.

Appeal from District Court, Marion County; J. M. Talbot, Judge.

Action by Marion county against John M. Harper and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This suit was instituted by Marion county against John M. Harper and the sureties on three separate bonds executed by him for the school fund, as county treasurer, to recover moneys alleged to have been collected by him, and for which he failed to account. A trial resulted in a judgment against the sureties on the third bond, to wit, T. H. Stallcup and D. N. Alley, to reverse which they have prosecuted this appeal. On the 30th of December, 1895, John M. Harper was appointed, by the commissioners' court of Marion county, county treasurer of that county, and on January 6, 1896, he executed his bond and duly qualified. Thereafter one of the sureties on his bond for the school fund desired to withdraw from said bond, and on the 11th day of February, 1896, Harper executed a new bond for the school fund, which was filed and approved on the same day. At the election held in November, 1896, John M. Harper was elected as his own successor to the office of county treasurer of Marion county. He presented to the commissioners' court his official bond and his bond for the school fund on December 5, 1896, which bonds were approved on December 30, 1896, on which day he qualified. Thereafter, on March 23, 1897, Harper was removed from office, and this suit filed on December 2, 1897. On the 9th day of June, 1902, on application of the defendants, an auditor was appointed by the court, and he was authorized "to hear evidence upon due notice to the parties, and state the account between the plaintiff and the defendants in this cause, confining himself to a statement of the account, and of the facts upon which he bases his statement, without any conclusions of law upon the facts so found by him, and that he make and file with the clerk of this court his report at least twenty days before the first day of the next term of this court." The auditor filed his report in accordance with the order appointing him. No objections were filed by either party to the report. At the close of the testimony the court instructed a verdict for plaintiff, and judgment accordingly followed.

L. S. Schluter, for appellants. Armistead & Prendegast and J. F. Jones, for appellee.

BOOKHOUT, J. (after stating the facts).

1. Upon the trial the appellants objected to the introduction in evidence of the following parts of the auditor's report: "Harper is not

*Rehearing denied January 9, 1904.

chargeable with the \$3,360, as alleged by the plaintiff to have been paid him by J. C. Hart, tax collector of Marion county, for taxes levied by Marion county to pay the interest on the bonds held by the school fund for the years 1895, 1896, and 1897, except the sum of \$1,680, which he admits to have received, as shown by Exhibit A to his answer, filed herein January 8, 1898, and which I have charged to his debit, as hereinbefore shown. There is no proof, except from his own admission, that he had received any interest on said bonds. His report as treasurer of Marion county to the commissioners' court of said county shows that he received from J. C. Hart, tax collector of Marion county, on account of bonds and interest from all told \$1,682.56, and that amount was still reported on hand in his last report to the commissioners' court, in 1897." It is insisted that the sureties are not bound by statements made in the reports of Harper as treasurer, not required by law, such as the statement of the amount of money on hand, and that such statements are not prima facie evidence against the sureties. It is held that the statement in the report of a county treasurer of the balance on hand at the time of making his report is not required by the law to be made by him, and is not admissible in evidence against the sureties. *Coe v. Nash*, 91 Tex. 113, 41 S. W. 473. The auditor's report does state that Harper's report to the commissioners' court "shows that he received from J. C. Hart, tax collector of Marion county, on account of bonds and interest from all told \$1,682.56." Here is a distinct finding by the auditor that Harper had received that amount, and the auditor's report, not having been excepted to, made a prima facie case against the sureties for such amount. This finding is not affected by the additional statement of the amount shown to be on hand in his report to the commissioners' court, or the admission made in the exhibit attached to his pleading. Had these statements and admissions been excluded, the result must have been the same. We hold that if there was error in not sustaining the exception to the admission made in the exhibit attached to his pleading, and the statement made in his report to the commissioners' court, showing the balance on hand, the same was harmless. There was no error in excluding the report of John M. Harper, upon which the auditor based his finding that Harper had received \$1,682.56 from J. C. Hart, tax collector of Marion county, on account of bonds and interest. The purpose for which this report was offered was to contradict the auditor's report. That report, not having been excepted to, was conclusive, and could not be contradicted. *Whitehead v. Perie*, 15 Tex. 7; *Boggs v. State*, 46 Tex. 10; *Earle Mfg. Co. v. Hana-way*, 90 Tex. 581, 40 S. W. 13. For the same reason, there was no error in excluding the receipt of Rowell, successor as county treasurer to Harper. This receipt tended to con-

tradict the auditor's report, and it does not show out of what fund the money paid on said vouchers arose.

2. After the evidence was closed and the argument begun, the plaintiff asked permission to introduce in evidence the depositions of R. M. Love and J. W. Robbins, then on file. To this counsel for Stallcup and Alley objected, because the effect and purpose of said testimony is to supplement, amend, and contradict the auditor's report, and because the original report fixed no liability on these defendants, and the effect of the proof was to fix such liability, in that it is shown by the auditor's report that between the 5th day of December, 1896, and the 23d day of March, 1897, said Harper had received \$6,342.13, and by the depositions offered in evidence it was shown that said sum was received between December 30, 1896, and March 23, 1897, and that said Harper received no part of said sum between December 5, 1896, and December 30, 1896. It was further objected that the testimony comes too late, and plaintiff had filed no objections to the auditor's report. It is held that it is within the discretion of the trial judge to admit testimony after the evidence has been closed and the argument begun, and, unless the record shows that there has been an abuse of such discretion, his action will not constitute reversible error. *Ry. Co. v. Holliday*, 65 Tex. 519; *Ry. Co. v. Johnson*, 5 Tex. Civ. App. 24, 23 S. W. 827. It does not appear that there was any abuse of discretion in this case. The plaintiff, not having excepted to the auditor's report, could not introduce evidence to contradict it. Does the evidence offered and admitted contradict the auditor's report? As stated in the exception, the auditor's report showed that between the 5th day of December, 1896, and the 23d day of March, 1897, Harper had received available school funds in the sum of \$6,342.13, while the depositions read in evidence showed that said sum was received between December 30, 1896, and March 23, 1897, and that no part of said sum was received between December 5, 1896, and December 30, 1896. The purpose of the testimony was to show that the account of Harper stood the same on December 30, 1896, that it did on December 5, 1896. This evidence did not contradict the auditor's report. Evidence that Harper received from the state certain moneys between December 30, 1896, and March 23, 1897, does not contradict a statement that such moneys were received between December 5, 1896, and March 23, 1897. Both statements are consistent, and in this case both are true. The fact that on December 30, 1896, a new bond was approved, and the effect of the testimony was to place liability for the defalcation on the makers of that bond, cannot affect the question. The bond was filed with the commissioners' court on December 5, 1896, and the report of the auditor showed the condition of Harper's account on that day, while the bond was not

approved and did not become effective until December 30, 1896. The testimony of Love and Robbins showed that the account stood the same on December 30, 1896, that it did on December 5, 1896. There was no error in admitting the testimony.

3. In their sixth assignment of error, appellants complain of the action of the court in overruling their exceptions, and in admitting in evidence Exhibits A and B, attached to the deposition of R. M. Love. These exhibits purport to be copies of warrants drawn by R. W. Finley, comptroller, on the tax collector of Marion county, commanding him to pay the amounts specified therein to John M. Harper, county treasurer of said county. The first warrant is dated September 1, 1895, and is for \$3,000. On the back thereof is a receipt of John M. Harper, showing that he received from J. O. Hart, tax collector of Marion county, the amount of said warrant during the months of March and April, 1896. The second exhibit was a copy of a warrant similarly drawn, dated September 1, 1896, for \$2,800. On the back of this is the receipt of John M. Harper as treasurer, showing that he received the amount thereof from J. O. Hart, tax collector of Marion county, between February 1, 1897, and March 23, 1897. Across the back of each of these warrants, in red ink, appear the words, "Marked paid Comptroller." The objection to the admission of these coupons or warrants, and the indorsements thereon, was that they are immaterial and irrelevant, and that they purport to show the status of Harper's account in his capacity as county treasurer, as taken from certain books, and it is not shown that said books were correctly kept, or that the witness knew of the transaction himself, but that he did not know who made said entries, and in order to render said exhibits, coupons, and statements admissible, it ought to be first shown that the books from which the same were taken were correctly kept, and that the entries therein made are correct entries. They further objected on the ground that they tended to contradict the auditor's report made in this cause, and filed in this court, and that no objection had been filed by the plaintiff to said report, and that the same did contradict said report, and that the evidence, after the case was closed upon the facts, came too late. We are of the opinion the evidence is not subject to the exceptions made. The objection made does not comprehend an exception that the warrants show upon their face that they were drawn for the apportionment for the school year beginning September 1, 1901, and ending August 31, 1902, and not for the school year beginning September 1, 1895, and ending August 31, 1896, and the school year beginning September 1, 1896, and ending August 31, 1897, as contended by plaintiff. However, if such exception had been made, we do not believe there was error in admitting the testimony. It seems, the deposition of Love was taken

in 1901 or 1902. In each of the certificates to the copies of the warrants appears the statement that the warrant is for the school fund for the year beginning September 1, 1901, and ending August 31, 1902. This is clearly a mistake. It arose, presumably, by the witness using the printed blanks for that year in preparing copies of the warrants. The first warrant, having been drawn by R. W. Finley, comptroller, and dated September 1, 1895, and paid in March or April, 1896, by J. C. Hart, tax collector of Marion county, to John M. Harper, county treasurer of Marion county, shows that it must have been for the school year beginning September 1, 1895, and ending the 31st of August, 1896. For similar reasons, the second warrant was for the year beginning September 1, 1896, and ending August 31, 1897.

It is further contended that warrants and the indorsements thereon are not admissible in evidence because it is not shown that they are correct, and it is shown that the witness Love had no personal knowledge of the facts. These warrants and the indorsements thereon were kept by the Comptroller in performance of duties imposed upon him by law, and became archives of his office; and it was competent for him to testify in reference thereto, and to furnish certified copies thereof, and such certified copies were admissible in evidence. For the same reasons, there was no error in admitting in evidence the statement of the account of John M. Harper as county treasurer, kept in the office of the State Treasurer, and certified to by him as correct.

There was no error in instructing a verdict; the evidence of the defalcation and amount thereof, as shown by the auditor's report, being undisputed.

The assignments not discussed were not believed to be meritorious, and are overruled.

The judgment is affirmed.

HOUSTON & T. O. R. CO. v. DUGGER.*

(Court of Civil Appeals of Texas. Nov. 4, 1903.)

RAILROADS—CATTLE—DESTRUCTION OF PROPERTY—BREAKING RAILROAD CATTLE GUARDS—DUTIES OF PROPERTY OWNER—CONTRIBUTORY NEGLIGENCE.

1. An owner of land adjoining a railroad right of way owed no duty to make repairs to railroad cattle guards in order to prevent cattle on the railroad right of way from breaking through the guards and injuring his property.

2. Where an owner of cotton destroyed by cattle breaking into his inclosure from a railroad right of way had no opportunity to move the cotton or make the pen in which it was stored stock proof before the cattle tore down the pen and destroyed the cotton, it was not error for the court, in an action against the railroad company for the damages so sustained, not to submit the owner's contributory negligence in failing to take such precautions.

*Rehearing denied January 13, 1904.

¶1. See Railroads, vol. 41, Cent. Dig. §§ 356, 364, 1512.

Appeal from Burnet County Court; Ike D. White, Judge.

Action by G. T. Dugger against the Houston & Texas Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

S. R. Fisher, J. H. Tallichet, and Baker, Botts, Baker & Lovett, for appellant. T. E. Hammond, for appellee.

KEY, J. The questions presented in this appeal have been considered, and the conclusion reached that no reversible error is shown. The contention that as to the cotton which was destroyed by the live stock that entered appellee's farm through openings made in his fence by appellant the issue of contributory negligence was presented by the testimony, and should have been submitted by the court, is overruled. It was not appellee's duty to put in cattle guards or make other repairs on appellant's road. *Railway Co. v. Young*, 60 Tex. 201; *Railway Co. v. Adams*, 63 Tex. 200; *Railway Co. v. Knoepfl*, 82 Tex. 270, 17 S. W. 1052.

As to the contention that appellee could, at a reasonable expense, have moved the cotton, or made the pen in which it was stored stock proof, it is sufficient to say that the testimony does not show that he had opportunity so to do before the cattle tore down the pen and destroyed the cotton, and for that reason, if for no other, the trial court correctly refused to submit the issue of contributory negligence.

Judgment affirmed.

HOUSTON ICE & BREWING CO. v. PISCH.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK—NEGLIGENCE OF FELLOW SERVANTS.

1. An employe in a brewery, injured by the falling of a pile of kegs he was to wash, having known of the slanting slippery floor and of the throbbing from the engine, assumed the risk thereof.

2. The washhouse foreman in a brewery, who has no authority to employ or discharge, and the person who piles up kegs to be washed, are fellow servants of one engaged in washing them, so that he cannot recover of the master for injury from the falling of the kegs on account of the negligent piling, or the negligence of the foreman in giving no notice when seeing the kegs leaning.

Error from District Court, Harris County; Chas. E. Ashe, Judge.

Action by John Pisch against the Houston Ice & Brewing Company. Judgment for plaintiff. Defendant brings error. Reversed and rendered.

Baker, Botts, Baker & Lovett, for plaintiff in error. Ed S. Phelps and Wm. W. Anderson, for defendant in error.

GILL, J. John Pisch sued the Houston Ice & Brewing Company for damages for personal injuries alleged to have been sustained by him through the negligence of the company. A trial by jury resulted in a judgment for the plaintiff, and the company seeks by writ of error to secure its reversal.

Plaintiff averred, in substance, that he was in the employ of the company, which was engaged in the manufacture and sale of beer; that in its factory was maintained an apartment known as a "workroom," where the kegs and barrels designed to contain the beer were stored, repaired, inspected, and cleaned; that a part of the duties of his employment was to inspect, wash, and stack kegs; that on the day of the accident he was directed by the foreman of the washhouse gang (one Florian) to uncork and inspect a certain pile or stack of kegs; that he proceeded to do so, and while so engaged the pile suddenly began to fall, and he was struck and injured. The allegations charging negligence are as follows: "That said kegs so falling and rolling were empty, or nearly so, with hoops protruding beyond each end, and had been stacked or piled about two days previous to said date by defendant, acting by and through its negro servant or servants, careless or incompetent, in an unstable, unsafe, and improper way and manner, and to too great height in said washroom, near said pitch machine and near defendant's engine or engines, on an inclined plane floor, tin-covered, slippery, and shaky, where said kegs were likely to be shaken down and caused to fall, and were so shaken and caused to fall by the action of the defendant's machinery and engine or engines while in operation, or otherwise caused to fall, through no fault of plaintiff, all of which defendant well knew, or could have known by the use of reasonable diligence; and by reason of defendant's negligence in these matters, as hereinbefore shown, plaintiff, without fault or negligence on his part, sustained the injuries and damages complained of." "But plaintiff expressly alleges and declares that his injuries were directly caused by defendant's negligence in failing to exercise ordinary care to protect him from injury while engaged in his work, and in failing to select competent servants to stack the kegs that fell upon him, and in failing to establish proper regulations for the stacking of kegs in said washroom." Defendant answered by general denial and pleas of contributory negligence, assumed risk, and that the injury was due to the negligence of a fellow servant. The evidence adduced establishes the nature of defendant's business as alleged. Plaintiff, with several others, constituted the washhouse gang, whose duties required them to handle, stack, inspect, and clean the kegs designed to be used as receptacles for beer. The washhouse was a large room in defendant's factory designed for repairing, washing,

*Rehearing denied.

and inspecting beer kegs, and several thousand were stacked in the room at the time of plaintiff's injury. It was necessary to use large quantities of water in cleansing the kegs, so the floor of the room was slightly inclined that the water might run off. It was also covered with tin. There was a piece of machinery known as the "pitch machine" in the room, and there is testimony tending to show that the operation of this machinery caused the floor to throb and shake. It was in operation at the time of the accident; and there was testimony also to the effect that the stack of kegs which caused the injury was caused to fall by kegs thrown from the "pitch machine" being dumped against the pile of kegs. The pile of kegs which fell and injured plaintiff had been stacked two days before by a negro, who was a member of the washhouse gang. Plaintiff was within six feet of him at the time, and saw them stacked. They were placed end on end to a height of 5 kegs, and there were about 40 kegs in the stack. Florian was the washhouse foreman. It is not contended that he had the power to employ and discharge the men under him. He was within a few feet of the pile of kegs when he directed plaintiff and another to uncork and inspect them. The proof is undisputed that the pile was stacked in the usual manner, and as every other pile in the house was stacked, so far as general method was concerned. But plaintiff's testimony showed that the hoops were new and smooth, and protruded over the ends of the wooden staves, thus making it easier for them to slip, and that the negro piled them very rapidly. Plaintiff himself testified that he saw nothing unusual about the stack when he went to work on it or afterwards. He and his co-workman were engaged in inspecting a keg five or six feet away from the pile in question when it fell and damaged him. There was no proof on the issue of competency of the negro who stacked the kegs; none on the allegation that they had been improperly stacked, except as above stated; none on the allegation of failure to make rules for the safety of the employes. Plaintiff testified that the jarring of the machinery caused the kegs to fall. One of his witnesses swore that that and the kegs from the "pitch machine" caused them to fall. No witness said they were improperly stacked. It was shown without dispute that plaintiff was an old hand at his task; had been in the employ of defendant some time; knew that the machinery shook the floor; knew the usual manner in which kegs were stacked in the building, that being a part of his daily duty; and knew also of the slick and slanting floor. Upon this state of facts the trial court charged the jury in effect that, if the plaintiff's injuries were due to the negligent failure of

the company to properly stack the kegs and to keep them properly stacked, they should find for plaintiff, unless he knew or ought to have known of their unsafe condition. The jury was further instructed that plaintiff assumed the risk of the slanting, slippery, and tin-covered floor, this being a condition of which he knew.

The plaintiff bases his right to recover upon two propositions: First. The duty to have the kegs safely stacked, and to keep them in such condition, was a nonassignable duty, involved in the rule requiring the master to furnish a safe place to work. Second. He insists the proof shows that Florian saw the kegs were leaning before he sent plaintiff to work about them, and such knowledge on his part was knowledge of the company, which imposed the duty of notifying the plaintiff of his danger.

The defendant assigns several reasons for the reversal of the judgment, but, as we shall notice only one, we shall not state the others. Its contention is that when the master furnishes safe premises in which to work, and safe materials, tools, and machinery to work with, he has discharged his duty to the servant in that respect, and that in the mere details of the work he is not required to follow his servants up; that in this case the master had furnished a safe house, safe machinery, and a safe floor for plaintiff's use; that the entire duties of plaintiff and his co-workmen consisted in handling and working about kegs; that the stacked kegs in the room were never a fixed and permanent condition, but an ever changing one, due to the very nature of the work; that the negro who stacked the kegs was the fellow servant of plaintiff, as was also Florian, the foreman, and the negligence, if any is shown, was that of fellow servants.

It is conceded that the fellow-servant doctrine is applicable to corporations of the nature of appellant, our statute on the subject not applying to such concerns. This being true, the proposition seems to be incontrovertible. Of the slanting, slippery floor plaintiff knew, of the throbbing engine he knew, and knowing assumed the risk. If the kegs were negligently stacked, it was the negligence of the negro. If Florian saw the leaning kegs, he also was a fellow servant, and the result is the same. The following cases seem to us conclusive upon the point: *Direct Nav. Company v. Anderson* (Tex. Civ. App.) 69 S. W. 174; *Wells, Fargo Co. v. Page* (Tex. Civ. App.) 68 S. W. 528; *Ry. Co. v. Farmer*, 73 Tex. 89, 11 S. W. 156; *Young v. Hahn*, 70 S. W. 950, 6 Tex. Ct. Rep. 106. We conclude, therefore, the judgment of the trial court should be reversed, and the judgment should be here rendered for appellant, and it is so ordered.

Reversed and rendered.

McCABE & STEIN v. FARRELL et al.*

(Court of Civil Appeals of Texas. Dec. 12, 1903.)

RAILROAD CONSTRUCTION CONTRACT—ACTION FOR WORK—INSTRUCTIONS—PLEADING—EVIDENCE—HARMLESS ERROR.

1. In an action against a firm of contractors for work done, evidence considered, and *held* sufficient to show that one L., in making the contract, acted for the firm, and not as an independent subcontractor.

2. The petition in an action against a firm of railroad contractors and L., a third defendant, on a contract for labor done, etc., alleged a joint cause of action against the firm and L., and did not allege that the latter made the contract sued on as their agent, and it was objected by the former that the submission of an issue as to whether L. in fact acted as their agent was not justified by the pleadings; but the firm, in addition to tendering a specified sum, which they alleged was all that was due, pleaded specially, denying that they were partners with L., or ever made any contract with plaintiff, and alleged that if the latter made any contract he made it with L., and that L. had no relation to them except as a subcontractor with reference to the work in question. *Held*, that this plea, to which the law supplied a general denial without a replication, put L.'s agency in issue, rendering it the duty of the court to submit such issue if warranted by the evidence.

3. Defendants cannot assign error to the judgment in favor of codefendants, where they have asserted in their pleadings no right or equity against either of such codefendants.

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Action by H. T. Farrell and others against McCabe & Stein and others. From a judgment for plaintiffs against McCabe & Stein, and in favor of the other defendants, defendants McCabe & Stein appeal. *Affirmed*.

Wynne, McCart, Bowlin & McCart, for appellants. R. E. Beckham and Robt. G. Johnson, for appellee.

CONNER, C. J. Appellee sued the firm of McCabe & Stein and one E. L. Le May for the contract price of certain labor done, etc. in the construction of the railroad of the Texas & Southern Railway Company. As alleged, the contract therefor was made with McCabe & Stein and Le May jointly as contractors of said railway company, and prayer was for judgment against them for the amount of the alleged balance due, with foreclosure of the asserted lien against the railway. Final judgment was for appellee against McCabe & Stein for \$1,058.28, and in favor of Le May and the railway company, hence this appeal by McCabe & Stein.

The charge of the court is assailed as erroneous in that, among other things, the jury were instructed, in substance, that, if they should find from the evidence that the contract declared upon had been made by Le May as an authorized agent of McCabe & Stein, said firm was liable for such unpaid sum as the jury should find was due appellee

by virtue of the labor, etc., done under the contract. The grounds of objection, which will be disposed of in the inverse order of their presentation, are that "said charge was not justified by the plaintiff's pleadings in the case, as plaintiff alleged a joint cause of action against E. A. Le May and McCabe & Stein, and did not allege that E. A. Le May had made the contract sued upon as the agent of McCabe & Stein; (b) because the evidence did not warrant such charge, in this: that there was no evidence showing that E. A. Le May in making the contract sued upon was acting as the agent of McCabe & Stein."

We think the evidence not only authorized the submission of the issue, but that it is also sufficient to sustain the verdict and judgment thereon in appellee's favor. Appellee testified, in substance, that he applied to the chief engineer of the defendant railway company for employment, and was by him referred to McCabe & Stein; that he then wrote to McCabe & Stein, and in response received a letter from Le May to come to Sherman; that he went to McCabe & Stein's office in Sherman, and there found Le May, apparently in charge of their office, and agreed with him as to the price to be paid for hauling done by him, without disclosing his connection with McCabe & Stein, and that he never heard of Le May being a subcontractor of McCabe & Stein's until after he had done the hauling claimed; that from December to March McCabe & Stein had paid him for his work on estimates and orders from Le May; that McCabe directed him to do some of the work; that the teams and implements used by Le May belonged to McCabe & Stein; that McCabe & Stein paid him for hauling on Le May's estimates; that when he made the contract with Le May he was to be paid by McCabe & Stein. McCabe testified, in substance, that he might have directed Le May to answer plaintiff's letter; that such things occurred in their office every day; that when plaintiff applied to him for payment of the bill sued on he declined to pay it, because it was for more than the work was worth, but made no claim that the same was owing by Le May as subcontractor. John C. King, a witness for defendants, testified, in substance, that he worked for McCabe & Stein, using their teams on the work. V. E. Stein, of the firm of McCabe & Stein, testified, in substance, that he was present when plaintiff presented his bill for balance sued for, and that at that time there was no objection on their part to paying what was honestly due him; that the teams, implements, and tools used by Le May belonged to McCabe & Stein, and that there had been no settlement between them and Le May. In addition to which appellants, among other pleas, contested the extent of appellee's claim, alleging that but \$121.80 was due appellee thereon, which amount they tendered in court, and prayed to be discharged from "further liability to him." From all which it seems clear

*Rehearing denied January 9, 1904, and writ of error denied by Supreme Court.

to us that the jury were authorized to conclude that Le May in making the contract with appellee was acting for and in the interest of McCabe & Stein, and not as an independent subcontractor, as appellants specially answered.

But what of the first objection made to the charge? As alleged, the contract was with McCabe & Stein and Le May. As proved, McCabe & Stein made the contract by their agent Le May, who was relieved on that ground, and appellee hence failed in his proof and case as to Le May. There was no objection to the evidence, and it is perhaps to be doubted whether advantage of what may be plausibly urged as constituting, at most, a mere variance between the allegation and proof, can be made available on objection to the charge. *Moffatt v. Sydnor et al.*, 13 Tex. 628; *Hutchins v. Bacon*, 46 Tex. 414. We will not rest our conclusion upon this ground, however, as it may be in conflict or seeming conflict with the case of *Peyton v. Cook* (Tex. Civ. App.) 32 S. W. 781, and inasmuch as there is another ground upon which we conclude the objection under consideration must be overruled.

In addition to the tender hereinbefore mentioned, appellants also pleaded specially as follows: "Third. Said defendants specially deny that they were partners with defendant Le May, or ever made any contract with plaintiff concerning the matters alleged in plaintiff's petition, and that if plaintiff ever made any contract with any person relating to same, that he made such contract with defendant Le May, and that said defendant Le May had no relation to them except that he took from them a subcontract to do himself the work of hauling piling and lumber on the part of the railway mentioned in plaintiff's petition, these defendants being the contractors to do same under a contract with the defendant railway company, and of this they put themselves upon the country." This plea, to which the law supplies the general denial without a replication, put in issue Le May's true relation to the contract and to McCabe & Stein. Under his general denial appellee could prove any fact disproving the material allegations of the special plea. *Winn v. Gilmer*, 81 Tex. 345, 16 S. W. 1058. If Le May was the agent as shown, and made the contract in behalf of McCabe & Stein, only, then he was not a mere subcontractor, making individual contract as such, as is in effect alleged in the special plea. The agency, therefore, of Le May, and the consequent liability of appellants, having been put in issue by the answer, it was the clear duty of the court to submit the issues as was done, notwithstanding the absence of a specific presentation of such state of case in the petition; for the law of the case which the statute requires the court to charge is the law arising upon the issues made by the evidence and the pleadings, and the pleadings comprehend both petition and answer. Rev. St.

1895, art. 1183; *Fitzhugh v. Connor* (Tex. Civ. App.) 74 S. W. 84.

Appellants also assign error to the judgment in favor of Le May and the railway company. They have, however, asserted no right or equity against either in their pleading, and we think it manifest appellants have no cause of complaint in these particulars.

The judgment will be affirmed.

THAYER et al. v. CLARKE et al.*

(Court of Civil Appeals of Texas. Dec. 29, 1903.)

HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTIONS—PROPERTY ACQUIRED DURING MARRIAGE—REBUTAL OF PRESUMPTION.

1. Texas lands acquired during marriage are presumed to be community property.

2. Personal property acquired during marriage is presumed to have been earned by one or the other or both members of the community.

3. Texas lands were conveyed to a husband, who, together with his wife, resided in New York. On an issue as to whether the lands were community property it was shown that by the laws of New York during the coverture all property acquired by the joint efforts of husband and wife was his separate property, as well as all his real estate, in which the wife merely had a right of dower, though the wife could take property in her own name as if she were sole. It was not shown by what title the husband held the money with which the land was bought. *Held*, that the presumption that the land was community property was rebutted.

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Suit by Maria L. Clarke and others against W. W. Thayer and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Baker, Botts, Baker & Lovett, for appellants. E. P. & Otis K. Hamblen, for appellees.

GILL, J. W. W. Thayer, Sr., and Maria Cochran intermarried in 1848 in the state of New York, and thereafter lived together as man and wife in that state until 1863, when Maria, his wife, died intestate. They were never at any time in Texas. During the existence of this marriage there were deeded to the husband certain lands in this state, the deed being executed by a brother of Maria Cochran, naming the husband as vendee, and reciting a cash consideration. Maria left surviving at her death her husband and Maria Louise Clarke and Maria Cochran Skinner, the latter two being the children of said marriage, and her sole heirs at law. The purposes of this opinion do not require that these lands, which consist of many separate tracts, should be more fully described. In 1866, W. W. Thayer, Sr., married the appellant Mary L. Thayer, by whom he had two children,

*Rehearing denied.

¶ 1. See *Husband and Wife*, vol. 24, Cent. Dig. § 515.

viz., Elmer J. Thayer (who died the — day of 18—, leaving a will devising his estate to his mother), and the appellant W. W. Thayer, who, for convenience, will be referred to herein as W. W. Thayer, Jr. W. W. Thayer, Sr., died intestate in 1887, leaving surviving him as his sole heirs at law his wife, Mary, W. W. Thayer, Jr., and the appellees, children of his first wife. At the time of the death of W. W. Thayer, Sr., he was still seised of a large portion of the lands above mentioned, but had sold a part, using the proceeds as his own. The appellees, children of the first marriage, brought this suit as sole heirs of their mother and joint heirs with appellants of their father, alleging that the lands so acquired were the community property of their father and mother, and praying for its distribution among the heirs according to its status as such under the laws of this state.

Appellants answered, admitting the marriages; the acquisitions of lands in Texas, as alleged; the heirship of appellees and appellants; the residence and permanent citizenship of all concerned in the state of New York; but they denied that the first wife of W. W. Thayer, Sr., had ever at any time any community interest in any of the lands mentioned in the petition. They further averred that said lands were conveyed to Thayer, Sr., by deed of date of 1854; that Maria Cochran Thayer was not a party to said conveyance; that from a date prior to their marriage until after the latter's death the common law of England, in so far as it affected the right of married women to property acquired during coverture, was in force in New York, and is still in force and effect; that under the provisions of said law the first wife had in said lands only an inchoate right of dower, which was lost by the fact that her death preceded that of her husband; that the money with which such lands were purchased was acquired by the husband during the marriage with his first wife, and was by the law of New York his separate property, and that thereupon the lands purchased therewith became his separate property; that therefore he had the right to sell the same during his lifetime, and that such lands as he was seised of at his death passed according to the laws of descent and distribution of Texas—that is to say, an undivided one-fourth to each of his children, subject to the one-third life estate in favor of the second wife. A trial before the court without a jury resulted in a judgment according to plaintiffs' theory of the case, and defendants have appealed.

Inasmuch as there is no controversy as to what the form of the judgment should be in case the one contention or the other should prevail—that matter being controlled by certain undisputed facts and an agreement of the parties—we will not burden this opinion with a detailed descriptive statement of the sales made by Thayer, Sr., or their relation to the tracts remaining unsold. To cover

these matters we adopt the findings of fact of the trial judge, though we cannot assent to the presumption indulged by him, for the reasons which we will shortly disclose. The contention of appellees is that the law of this state controls the status of the title of real estate situated here, and this without reference to the domicile of the owners, and that an application of this rule to the facts of this case upholds the judgment of the trial court that the land in question is community estate. The subproposition is that mere proof of marital domicile in New York, the prevalence of the common law there, and the acquisition of the lands during marriage is insufficient to rebut the presumption indulged under the Texas law. Appellants' contention is that under the facts the law of New York controls, and that the presumption of community estate is conclusively rebutted. No other questions are presented for our decision. When plaintiffs showed, as they did, the intermarriage of their parents, the acquisition of Texas lands during the marriage, and the death of their parents intestate, they could rest, for they had made out a *prima facie* case. The presumption indulged under the Texas law that all lands acquired during the marriage are community property rests upon the further presumption that it was acquired by funds earned during the marriage. These are rebuttable presumptions, and when the basic one is shown to be unfounded in the particular case the other falls for lack of support. It is also the law in this state that all personal property acquired during marriage is presumed to have been earned by one or the other or both members of the community during the existence of the marriage, and this presumption prevails until it is made to appear that it was owned by the one or the other prior to the marriage, or was acquired during marriage by gift, devise, or descent. In view of these principles it is plain that the status of the title to real estate acquired in this state during marriage does not at last depend upon the fact that it was acquired during marriage, but upon the method of its acquisition. The fact of the marriage does no more than control the presumption to be indulged until the actual facts are made to appear. In the absence of the facts, or, if the facts are consistent with the presumption, the property is adjudged to be community. If the facts rebut the presumption, the judgment is otherwise.

Much of the briefs of both parties is devoted to a discussion of the question as to whether the laws of Texas or of New York (the matrimonial domicile) should control the status of the title of the real estate in question, and many authorities are cited and reviewed. We are not inclined to enter the broad field covered by the briefs on this question. It would serve no useful end, and would unduly lengthen this opinion. If the rules stated above are sound, the situation is much simplified, and such a discussion rendered unnec-

sary. We state briefly what, in our opinion, is the law upon the point: It is well settled that as to all personal property acquired during coverture the law of the matrimonial domicile controls, such property having in theory no fixed situs. As to all real estate so acquired the law of the state in which it is situated controls, so that in conveying or incumbering it, wherever the transaction may occur the evidence of the sale or incumbrance must be executed according to the requirement of the law of the state of its situs. So of the law of descent and distribution. And in all jurisdictions, so far as we know, where property is exchanged, that received in exchange is held by the same title as that parted with. So, if the husband buy real estate with his separate money, the real estate is his, wherever located. The presumption growing out of the fact of its acquisition during marriage affects only the burden of proof, and is a mere detail which becomes immaterial when the facts are established. According to the facts of this case the common law as to the rights of husband and wife prevailed in the state of New York at the date of the first marriage until the death of the first wife, except as modified by the legislative acts set out in the findings of fact filed by the trial judge. Notwithstanding these modifications, all property belonging to the wife at the date of the marriage became the property of the husband, and this was true until 18—. During the entire coverture all property of whatever kind acquired by the joint efforts of the husband and wife was the separate property of the husband. In all his real estate she had her right of dower, which, being inchoate, lapsed at her death, which preceded his.

The amendments and modifications shown by the proof did not affect the husband's separate right to the marital earnings and acquisitions. Such right remained unimpaired. They simply clothed the wife with power to hold in her own right all property thereafter acquired by her by gift, devise, or descent, together with rents, profits, and accretions, and to control it and dispose of it as if she were a feme sole. Such property was acquired and held in her own name, and was her separate and distinct estate, over which the husband had no power of disposition or control. We thus have this situation under the proof in this case: The appellees, heirs of the first marriage, have sued alleging that the property in controversy is community estate of the first marriage. There is no contention that their mother owned at the date of her death an undivided interest therein in her separate right. A community interest is averred, which was subject to the husband's control, and liable for his debts contracted during the marriage. The appellees nowhere contended that the husband had purchased the lands with funds partly belonging to himself and in part to his first wife, and that thereby a trust resulted in

her favor, or that he bought with funds wholly belonging to her whereby a trust resulted in her behalf; and yet by the undisputed proof the money by which the lands were acquired must, under the New York law, have been either hers in her separate right or his absolutely. Even if the sum had been jointly owned by them in undivided interests, these interests would not have been community, but the separate property of each. If, then, the husband invested such sum in Texas lands, a trust equal to an undivided half interest would have resulted to her separate use.

We mention these features of the case to show that under no phase of the proof could the appellees' allegations be true, and to show further that the presumption growing out of the acquisitions of the lands during marriage was conclusively rebutted. It was not shown by any direct proof by what title the husband held the money by which the land was bought, but the fact that under the laws of New York the wife could hold property in her own name, and did so hold valuable estates, renders it improbable that the money with which these lands were acquired was hers to any extent or in any sense.

One of the presumptions indulged under the laws of Texas adds strength to this conclusion. We speak of the presumption that all property held during marriage was acquired during marriage, and by the joint effort of the marital partners. Here we have a husband making a purchase during marriage. There is no proof of how or where he procured the money with which the purchase was made. The presumption is it was earned by him or them during marriage. If this is true, then it was his separate funds, for the laws of his state declare it to be his. That the property, if purchased with his separate funds, became his separate property, is conceded, and the doctrine announced in *Blethen v. Bonner*, 98 Tex. 141, 53 S. W. 1016, and *Oliver v. Robertson*, 41 Tex. 422, is not assailed, and in each of them real estate bought in Texas with funds acquired in a common-law state during marriage were adjudged the separate property of the husband. The broad statement in *Heidenheimer v. Loring*, 6 Tex. Civ. App. 568, 26 S. W. 99, was not necessary to the decision of that case, and, if inconsistent with the conclusions announced in the two cases above cited, must, of course, yield. We do not regard it as necessarily inconsistent, for, as said in *Blethen v. Bonner* (Tex. Civ. App.) 71 S. W. 291: "It is suggested that this view involves the enforcement of the law of a sister state by a Texas court in the disposition of property here situate. But not so. We have merely ascertained the law of Massachusetts as a fact in determining the quality or extent of the title to money acquired in Massachusetts by a citizen of that state and brought into and invested in this state. We simply

determined the character of Blethen's title to the money with which the land in controversy was purchased, and applied thereto the laws of Texas."

For the reasons given, the judgment of the trial court is reversed, and remanded for trial and partition in accordance with these views. Reversed and remanded.

TEXAS & P. RY. CO. et al. v. COGGIN.

(Court of Civil Appeals of Texas. Dec. 5, 1903.)

EVIDENCE—ADMISSIONS—ABANDONED PLEADINGS.

1. Abandoned pleadings containing admissions against interest are admissible, notwithstanding they are neither signed nor sworn to by the party sought to be bound.

2. Where an action for injuries to cattle shipped was tried on a second amended petition, the original and first amended petitions (which had been abandoned), alleging a less number of cattle injured or killed, and a smaller amount of aggregate damages than averred in the last petition, were admissible, the statements therein being relevant as admissions against interest.

Appeal from District Court, Taylor County; J. H. Calhoun, Judge.

Action by T. J. Coggin against the Texas & Pacific Railway Company and others. From a judgment for plaintiff, defendants appeal. Reversed.

Stanley, Spoonst & Thompson, J. H. Barwise, Jr., and J. M. Wagstaff, for appellants. Cunningham & Oliver and Legett & Kirby, for appellee.

SPEER, J. Appellee sued appellants to recover for injuries to a shipment of cattle. In his original petition is contained this allegation: "That by reason of such negligence and rough switching by defendants, and by reason of the long delay caused by the negligence of the defendants' agents, said cattle were beat, bruised, killed, crippled, gaunted, and starved, and otherwise damaged, to such an extent that 126 head were killed and died from the effects of such negligence, and the remaining 510 head that survived said negligent treatment were beat, bruised, gaunted, starved, and crippled to such an extent that they were damaged \$4.00 per head, and in the aggregate \$2,040.00; that the 126 head of cattle that were killed and died from the effects of the negligence aforesaid were nearly all cows with calf, and were reasonably worth on the market at Memphis, Texas, \$25.00 per head, and in the aggregate \$3,150.00, making a total damage to said train load of cattle \$5,190.00."

By the first amended original petition it is alleged: "That by reason of said negligence and rough handling of said train of cattle by defendants, and by reason of the long delays caused by the negligence of defendants,

said cattle were beat, bruised, crippled, gaunted, starved, many of them killed and otherwise damaged, to such an extent that 136 head were killed and died from the effects of such negligence, and the remaining 500 head that survived said negligent treatment were beat, bruised, gaunted, starved, and crippled and otherwise greatly damaged; that said train load of cattle in the condition in which they should and would have arrived at Memphis, Texas, by the exercise of proper care and prompt shipment on the part of defendants, would have sold on the market at Memphis, Texas, on the date of their arrival, at \$25 per head, and in the aggregate at \$15,900; that in the damaged condition in which said cattle arrived at Memphis, Texas, the 136 head that were dead and died from said improper treatment were without value; that 75 head of the remaining 500 were so badly crippled and hurt by defendants as to only have a market value at Memphis, Texas, on date of their arrival of \$8.00 per head, and the remaining 425 head were crippled, gaunted, drawn, skinned, and otherwise injured by defendants so as to only have a market value of \$15 per head on date of their arrival at Memphis, Texas, making a total damage to said cattle by said negligence of defendants in the sum of \$8,925.00." While by yet another amendment, being the pleading upon which he went to trial, the injuries and damages were thus pleaded: "That by reason of such negligent and rough handling of said train of cattle by defendants, and by reason of the long delays caused by the negligence of defendants, and by reason of the long delays without eating and without rest, and the exposure to the cold mud and rain as aforesaid, said cattle were beaten, bruised, crippled, gaunted, starved, exhausted, drawn, emaciated, many of them killed, and otherwise damaged to such an extent that 136 head were killed and died from the effects of such negligence, and the remaining 500 head that survived said negligent treatment were beaten, bruised, gaunted, starved, crippled, drawn, exhausted, emaciated, and otherwise greatly damaged to such an extent that said train of cattle were damaged thereby in the aggregate \$9,525.00; that said train load of cattle were very high grade cattle, and in the condition in which they should and would have arrived in Memphis, Texas, by the exercise of ordinary and proper care and promptness on the part of defendants, would have sold on the market at Memphis, Texas, upon their arrival there, at \$25.00 per head, and four of said cattle, being high-bred bulls, would have sold for \$150.00 each, and in the aggregate at \$16,500.00; that in the damaged condition in which said cattle arrived at Memphis, Texas, the 136 head that were dead, and died from said improper treatment, including said four bulls, were without value; that 75 head of the remaining five hundred were so badly crippled, bruised, and otherwise damaged and hurt by

¶ 1. See Evidence, vol. 20, Cent. Dig. §§ 716, 718, 719.

defendants to only have a market value at Memphis, Texas, upon their arrival there, of \$8.00 per head, and the remaining four hundred and twenty-five head were crippled, gaunted, drawn, skinned, bruised, and otherwise injured and damaged by defendants by said improper treatment, so as to only have a market value of \$15.00 per head on their arrival at Memphis, Texas, making a total damage to said cattle by said negligence of defendants in the sum of \$9,525.00."

Upon the trial the defendants offered in evidence the original petition, as well as the first amended original petition, "for the purpose of showing the condition of plaintiff's cattle, and for the purpose of showing the number claimed to be killed, and the causes which he alleges produced the damage and injury," and to the introduction of which the plaintiff objected, "for the reason that the same were immaterial, and were not signed or sworn to by the plaintiff," which objections were sustained by the court, and the evidence excluded. This was error. That abandoned pleadings containing material admissions against interest are admissible in evidence is no longer an open question in this state. And it is immaterial upon the question of admissibility that such pleadings are not signed or sworn to by the party sought to be bound. *Barrett v. Featherstone*, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245; *Houston, E. & W. T. Ry. Co. v. De Walt (Sup.)* 70 S. W. 531, 5 Tex. Ct. Rep. 1006; *Felton v. Talley (Civ. App.)* 72 S. W. 614, 6 Tex. Ct. Rep. 473; *Prouty v. Musquiz (Tex. Civ. App.)* 59 S. W. 568; *Southern Pac. Co. v. Wellington (Tex. Civ. App.)* 57 S. W. 856; *Jordan v. Young (Tex. Civ. App.)* 56 S. W. 762; *G., H. & S. A. Ry. Co. v. Eckles (Tex. Civ. App.)* 54 S. W. 651. The relevancy of the proposed testimony fully appears from the above excerpts from the pleadings, and after a careful reading of the testimony we cannot say the error was harmless.

Reversed and remanded.

On Motion for Rehearing.

(Jan. 4, 1904).

It is urged upon us that, if the matter upon which we have reversed the judgment in this case was error, nevertheless we should not reverse unless we were able to say that the error affected the result on prejudiced the appellant. But we do not so understand the rule. Our supreme court in *Missouri, K. & T. Ry. Co. v. Hannig*, 91 Tex. 350, 43 S. W. 509, say: "The true rule is, that in such a case, in order to hold that the error does not require a reversal of the judgment, it ought clearly to appear that no injury could have resulted from the admission of the evidence." We have heretofore followed the rule laid down in the *Hannig Case*. *Fort Worth Iron Works v. Stokes (Civ. App.)* 76 S. W. 231, 8 Tex. Ct. Rep. 245.

Motion overruled.

HALL v. KEATING IMPLEMENT & MACHINE CO.*

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

CHattel Mortgages—CONSTRUCTION INSTRUMENTS—NECESSITY OF RECORD—MERCHANDISE—MORTGAGE—RIGHTS OF MORTGAGEE—BANKRUPTCY—PREFERENCES—BANKRUPT'S ESTATE.

1. A contract for the sale of certain wagons, providing the price at which they are severally sold, and the terms of sale, and binding the buyer to execute his notes to the seller on the terms specified in the contract, on receipt of the goods, and further providing that the title to and ownership of all goods which might be shipped thereunder, and their proceeds, in case of sale, should remain in, and be the property of, the seller, and subject to his order, until the buyer should have made full payment in money, is a chattel mortgage, not only as against third persons, but also as between the parties thereto.

2. Where the sellers of certain property, who took notes secured by mortgage thereon, assigned the notes to another, the latter became the mortgagee, and had the right, as against other creditors of the mortgagor, to purchase the mortgaged property from the mortgagor in payment or part payment of the debts secured by the mortgage.

3. Property of a bankrupt, purchased before the institution of proceedings in bankruptcy, is no part of the bankrupt's estate.

4. Liens secured to a manufacturer on goods sold to a merchant, by provisions of the contract of sale that the title shall remain in the manufacturer until the goods are paid for, are not within the purview of the statute invalidating mortgages attempted to be made by the owner upon merchandise daily exposed for sale in the regular course of business.

5. A contract of sale under which the seller retains title to the property until it is paid for according to the terms of the agreement is valid upon the instant of its execution, regardless of registration, as against all parties except lien creditors and subsequent bona fide purchasers or mortgagees, and can be enforced as between the parties and all others except such creditors and purchasers or mortgagees.

6. The provisions of the bankruptcy act invalidating liens which, for want of record, or for other reasons, would not have been valid as against the claims of creditors of the bankrupt, does not avoid liens secured by an unrecorded chattel mortgage, which is valid against all parties except lien creditors and bona fide purchasers or mortgagees.

Appeal from District Court, Runnels County; John W. Goodwin, Judge.

Action by R. A. Hall, trustee in bankruptcy of R. L. Maddox, against the Keating Implement & Machine Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Appellant, as trustee for the bankrupt estate of R. L. Maddox, brought this suit against appellee to recover certain personal property alleged to belong to the bankrupt estate. The defendant, in its answer, in addition to a general denial, pleaded title and ownership in itself. The case was tried without a jury, and judgment rendered for the defendant. From this judgment the plaintiff

*Rehearing denied January 12, 1904.

† 5. See Sales, vol. 42, Cent. Dig. § 1262.

has appealed. No findings of fact or conclusions of law were filed by the trial judge, but the testimony supports the statement concerning the facts made in appellee's brief; and, therefore, in deference to the judgment, we adopt such statement as our findings of fact:

"On January 17, 1901, Shutler & Hotz, of Chicago, Ill., acting through their state agents, Keating Implement & Machine Company, sold to R. L. Maddox a car load of Shutler wagons, by written contract of sale, providing the price at which said wagons were severally sold, and the terms of sale (the several items aggregating about \$1,372.40), and binding said Maddox to execute his notes to Shutler & Hotz on the terms specified in the contract, upon receipt of the goods. In said contract it was provided, among other things, 'that the title to and ownership of all goods which may be shipped as herein provided, or during the current season, shall remain in and their proceeds, in case of sale, shall be the property of first party [meaning Shutler & Hotz] and subject to their order until full payment shall have been made by the undersigned, in money.' The goods arrived at Ballinger, Runnels county, Texas, on or about February 7, 1901; and thereupon said Maddox, in pursuance of his contract so to do, executed and delivered to Shutler & Hotz his two promissory notes, for \$686.25 each, payable at First National Bank, Ballinger, Texas, with interest at 8% from August 7, 1901, until maturity, and 10% thereafter. Said notes, by their terms, matured, respectively, November 15, 1901, and December 15, 1901, and represented the purchase price of the car load of wagons above referred to.

"Subsequent to the execution of the notes, and before the maturity thereof, and before the transactions hereinafter mentioned, Shutler & Hotz indorsed and delivered said notes to Keating Implement & Machine Company; and thereafter, on or about October 28, 1901, W. O. Garrison, a representative of the Keating Implement & Machine Company, with said notes and contract above described in his possession, came to Ballinger, endeavoring to collect said notes; they being wholly unpaid, and Maddox being in an insolvent condition. At that time said representative lodged the contract with the county clerk of Runnels county, and caused same to be duly registered as a chattel mortgage. Failing to collect the notes, it was agreed that they should be settled as far as practicable by the return of the unsold wagons; credit to be made upon the notes for the value of the goods so returned. In pursuance of that arrangement, Keating Implement & Machine Company, on the date referred to, retook the goods remaining unsold, to the value of \$740.60, made an inventory of same, collected and stored them together at a particular place in Maddox's place of business, and segregated same from property belonging to Mad-

dox; and it was then and there understood that said goods were then and there delivered to Keating Machine & Implement Company to become its property, and that Maddox thereupon became entitled to and was allowed the credit above referred to on his said indebtedness under his said notes. Thereafter Keating Implement & Machine Company arranged with Maddox to handle said goods as their agent, without any title or interest therein passing to the said Maddox; said Maddox agreeing to sell said goods on commission for cash only, and account to said Keating Implement & Machine Company for all sales made at the invoice price of said goods, with freight added; and said Maddox was to receive as his compensation such sums as he might get, over the invoice price of said goods. If any sales were made on credit, the said company was to receive the entire proceeds of such sales. After making the arrangement described, Maddox and the Keating Company considered the goods as being the property of the company, and that Maddox was handling the same simply as sales agent. Subsequently, and before the transaction hereinafter referred to, Maddox sold one of the wagons on credit for \$82.50, and, complying with his contract, forwarded the note taken for purchase price of the wagon to the Keating Company. About November 21, 1901, certain creditors of Maddox, including the Keating Company, filed petition in involuntary bankruptcy against Maddox, charging him with having unlawfully preferred certain other creditors, and thereby committing acts of bankruptcy. About November 23d the Keating Company removed its wagons, etc., from the Maddox store building; same being still open for business, and continuing open until some time in December. In due course Maddox filed his answer to the proceedings in bankruptcy, and thereafter, on December 10, 1901, was duly adjudged a bankrupt; and on December 23, 1901, R. A. Hall was duly appointed trustee and qualified.

"After the reference of the case to the referee, the Keating Company filed its claim with the referee, setting up the existence of its claim and lien against the wagons, and note which had been transmitted to it as the proceeds of the wagon which Maddox had sold as above described; and stating, in connection with its claim and assertion of lien, that the property in controversy was in its possession, but held subject to the order of the trustee herein. The trustee declined to entertain the claim of lien of the Keating Company, and made demand upon it to return the goods, and refused to pay any dividend upon their claim in the bankruptcy proceedings, and made no offer or attempt to adjust their lien on the goods, or value the property; but it was shown upon the trial that the Keating Company, in taking the goods at the valuation agreed upon with Maddox, had taken the same at a fair and

just valuation. The trustee in bankruptcy instituted suit to recover the property in controversy from the Keating Company, claiming that their possession of same was acquired under circumstances constituting an unlawful preference, that their mortgage lien was void, and that the property in controversy constituted assets of the bankrupt estate for the benefit of general creditors. It was shown that, for more than four months prior to the proceedings in bankruptcy, Maddox was insolvent, and that Keating Company knew of his condition. It was not shown what creditors, if any, were in the same class with the Keating Company, nor that, if said transaction before described were allowed to stand, said company would receive a larger percentage of its debt than other creditors of the same class. It was also affirmatively shown that there was never any agreement that said chattel mortgage should not be recorded."

M. C. Smith, for appellant. Etheridge & Baker, for appellee.

KEY, J. (after stating the facts). Without considering in detail the appellant's assignments of error, we overrule all of them, and hold that the defendant's answer was not subject to the demurrer and exceptions urged against it, and that the contract between Shutler & Hotz and Maddox was a chattel mortgage, under the laws of Texas, not only as against third parties, but also between the parties to the instrument. *Harling v. Creech*, 88 Tex. 300, 31 S. W. 357; *Singer Mfg. Co. v. Rios* (Tex. Sup.) 71 S. W. 275, 60 L. R. A. 143. From this it follows that, when Shutler & Hotz assigned the notes to appellee, the latter became the mortgagee, and had the right to purchase the property in controversy from Maddox, the mortgagor, in payment or part payment of the debt secured by the mortgage; and, the testimony showing that such purchase was made before the proceeding in bankruptcy was begun, the property was no part of the estate of the bankrupt.

Following the ruling of our Supreme Court, we also hold that liens of this character are not within the purview of the statute invalidating mortgages attempted to be made by the owner upon merchandise daily exposed for sale in the regular course of business. *Bowen v. Lansing Wagonworks*, 91 Tex. 385, 43 S. W. 872.

We also sustain appellee's contention that such contract of sale is valid upon the instant of its execution, regardless of its registration, as against all parties except lien creditors and subsequent bona fide purchasers or mortgagees. Being valid, it can be enforced as between the parties, and all others except those included in the two classes above referred to. *Bowen v. Lansing Wagonworks*, supra.

The contention of appellant that appellee's

purchase of the property was unlawful, under the provision of the bankrupt law prohibiting preferences, cannot be sustained. It is true that the bankruptcy statute condemns all alleged liens "which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt." But as shown by the cases just cited, the contract between Shutler & Hotz was a valid lien. It is also true that the same statute nullifies, as to creditors, transfers and incumbrances made by the bankrupt within four months prior to the filing of the petition, if made with intent to defraud creditors; but it was not shown that the sale by Maddox to the appellee was made with such intent.

No error has been shown, and the judgment is affirmed. Affirmed.

ROBERTSON & HOBBS v. CAYARD.

(Supreme Court of Tennessee. Dec. 5, 1903.)
MASTER AND SERVANT—RAILWAY CONTRACTORS—PERSONAL INJURIES—EVIDENCE—SUFFICIENCY—CHAMPERTY.

1. In an action against railway contractors for personal injuries to a locomotive engineer, received in the course of his employment by defendants, by alleged defective appliances, evidence examined, and held to support a verdict for plaintiff.

2. Under Act 1821, c. 66, denouncing certain acts as champertous, and declaring as a penalty that a champertous agreement in regard to a suit would bar the maintenance of such suit, the penalty existed by virtue of the act only, and on its repeal by Acts 1899, p. 321, c. 173, the existence of a champertous agreement did not bar the suit to which it related, but merely affected the validity of the agreement.

Appeal from Circuit Court, Cocke County; G. McHenderson, Judge.

Action by E. C. Cayard against Robertson & Hobbs for personal injuries. Judgment for plaintiff, and defendants appeal. Affirmed.

G. W. Pickle and Wiley Jones, for appellants. R. E. L. Mountcastle and G. W. Gorell, for appellee.

McALISTER, J. Plaintiff below recovered a verdict and judgment against Robertson & Hobbs in the sum of \$5,000 as damages for personal injuries which resulted in his death.

The suit was brought by E. C. Cayard in his lifetime, and after his death it was prosecuted under the statute for the benefit of his widow and child.

The facts disclosed in the record are that the defendants, Robertson & Hobbs, were contractors, and at the time of the accident were engaged by the Southern Railway Company in changing the grade of its track east of Newport. E. C. Cayard was employed by said contractors in the capacity of a locomotive engineer, whereby it became and was his duty to operate an engine with an attached train of cars in hauling dirt between the steam shovel and the fill, a distance of

something more than a mile. The track over which the train was being run was on a steep grade for a few hundred yards from the shovel to the top of the hill, and then down a heavy grade to the temporary trestle where the fill was being made. The plaintiff was a member of the night crew, and the accident occurred in the nighttime.

It is alleged that in September, 1900, Cayard undertook to run said engine with a train of cars from the steam shovel to the fill, and that in consequence of said defect in the engine and the insufficient equipment of brakes and brakemen he was unable to control the speed of the train, and, the same becoming unmanageable, the engine ran out upon said trestle, which broke through, thereby precipitating the engine and cars to the ground below, and inflicting the injuries which resulted in plaintiff's death.

The gravamen of the action is that the said Cayard was furnished by defendants with a defective engine—that is to say, one with a steam jam out of repair; and that the cars were not provided with sufficient brakes, nor with a sufficient complement of brakemen. The alleged defect in the engine is more specifically described in the amended declaration, which avers that said engine "had a weak, defective, and patched-up steam jam, with weak, worn, rusted, and defective screws and taps, which were not strong enough to stand a sufficient pressure of steam to hold or control said engine and cars."

It is further alleged in said amended declaration that said cars were old, rickety, defective, and unfit for use, and were entirely without brakes, excepting two out of thirteen, or about that number, constituting the train at the time of the injury.

It is then alleged that said trestle was not of sufficient strength to support the weight of said engine, being constructed of wood, with small, shaky, rickety poles for its support, and small, weak timbers throughout, improperly and insufficiently placed, braced, and supported.

There is ample evidence in the record to show that the engine was defective in the particulars alleged in the declaration, and it is reasonably certain that, but for these defects, the accident would not have happened.

It is also shown in the proof that the cars were not provided with sufficient brakes and brakemen, especially in view of the defective condition of the engine—a fact which was known to the foreman of Robertson & Hobbs. The foreman, one Layman, was in charge of the night shift, and the other employes were subject to his orders and control. The trains were made up under his direction and supervision.

The red line cars, which were heavier, were never used before on the night shift. The proof shows that there were 13 cars in this particular train, and that only 2 of them had upright brakes, and it is shown that the side brakes with which they were provided

were not intended for use in controlling the train. It is further shown that there was only one brakeman of this train.

It is probable from this proof that, if the cars had been properly provided with brakes and brakemen, the accident would have been avoided, notwithstanding the defects in the engine.

The trestle was 30 feet high, and was built at the foot of a steep incline. It was very defectively constructed, and wholly insufficient to sustain the weight of the engine. However, it was not expected that the engine would be drawn upon this trestle, and it was contrary to orders to do so. The rule was for the cars to be backed upon the trestle, and their contents dumped therefrom. It is insisted that Cayard was guilty of such contributory negligence that he is not entitled to a recovery. It is said that he knew of the defects in the engine, and that he knew of the insufficiency in equipment of the cars with brakes and brakemen, and that he was apprised of the weakness of the temporary trestle.

It may be stated as a conclusive answer to the last suggestion that, as a matter of fact, the engineer did not voluntarily take his engine upon this trestle, but that it became unmanageable on account of the defects described, and went upon the trestle, despite his efforts to prevent it.

On the night of the accident, Cayard was put in charge of engine 52 on the night shift for the first time. Prior to this time he had been running a different engine on the night shift, with better equipment and brakes. When he mounted his engine on the night of the accident he was informed by the engineer who had been operating that engine during the day, and also by Layman, the foreman, that the steam jam or brake did not work perfectly, but they both assured him that the train could be controlled by the brake in its then condition, and that it was safe to operate it. It appears that Layman, the foreman, had used this engine in drawing the train up from the water tank just before it was placed in charge of Cayard, and that he, with Cayard, examined it, assuring the latter, as he left the engine, that it was all right, and that it could be operated safely. It was known to Layman at the time that the train was one of unusual weight, and that it was not supplied with the usual equipment of brakes. It is not insisted that Cayard knew of the insufficient equipment of the cars with brakes and brakemen. It is only contended that he should have known. It appears that Layman, the night foreman, although accustomed to attend the engine on these trips, for some reason not appearing, left the train before it started down the grade.

It is well settled that the question of contributory negligence is a matter for the settlement of the jury, and their verdict in this case has settled that issue in favor of the plaintiff. Moreover, we find ample evidence

to support the verdict of the jury, and the assignment of error to the contrary is overruled.

It is next assigned as error that the court struck out the plea of champerty interposed by the defendant company. The plea stricken out by the court is as follows:

"That the contract entered into by plaintiff and his attorney, W. H. Jones, under which contract this suit is being prosecuted, is champertous and void, in that the said W. H. Jones was and is to pay the expenses of this suit, and to receive 20 per cent. of the amount recovered if the recovery is small, and less per cent. on a larger judgment, as a fee in the case; and that, in the event no recovery is had against the defendants herein, he, the said Jones, is to receive no fee or other compensation for his services, said fee being entirely contingent upon the recovery herein."

It is said that the court, in striking out this plea, proceeded upon the assumption that the champerty law had been repealed by statute (chapter 173, p. 321, Acts 1899). It is insisted that in this assumption the court was in error; that the statute in question only repealed certain sections of the Code upon the subject of champerty and maintenance, and does not assume to legislate on the law of champerty as it existed and was recognized prior to the passage of the law repealed, which was Act 1821, c. 66. It is argued that Act 1821, c. 66, was an extension of the common-law idea of champerty, and especially an enlargement of remedies provided against it. It is claimed that champerty at common law was not only a cause for dismissal of a suit, but was an indictable offense, and that the act of 1821 denounced certain acts as champertous which were not so regarded prior to its enactment. It is stated in the case of *Douglass v. Wood's Lessee*, 1 Swan, 394: "By the common law, or rather, perhaps, by ancient statutory enactments which became incorporated into the common law long before the 32 Henry VIII, c. 9, champerty was known and recognized as an offense falling within that numerous class denominated 'offenses against public justice,' and was punishable by fine and imprisonment, and so was the offense of maintenance."

It was also said by this court in *Webb v. Armstrong*, 5 Humph. 381, as follows:

"The statute, by pointing out the means to ascertain champertous agreements by bill and by interrogatories formally propounded, did not intend to restrict, but amplify, the remedies for punishing such agreements. Before the statute and since the statute, if it satisfactorily appear to the court in proof that the suit in its origin and progress is affected by champerty, it is the duty of the court not to permit itself to become the organ and instrument to consummate such agreements, but to repel the plaintiff and his suit." In 4 Blackstone's Commentaries, p.

135, champerty at common law is thus defined, viz.: "A bargain with a plaintiff or defendant campum partire to divide the land or other matter sued for between them, if they prevail at common law, whereupon the champertor is to carry on the parties' suit at his own expense."

It is insisted that the act of 1821 was an extension of the common law, since it was made an offense under this statute to agree upon the payment of a contingent fee, although the champertor has not agreed to bear the expense of the lawsuit. It is claimed in argument that the repeal of our champerty statute simply restores the law of champerty as it existed at common law prior to the enactment of the statute. It is denied, on the other hand, by counsel for the plaintiff, that the repeal of the statute has the effect to revive the common law as it existed prior to the passage of the statute. Counsel cite in support of this position *State v. Slaughter*, 70 Mo. 484. The clear intimation of this court in *Heaton v. Dennis*, 103 Tenn. 162, 52 S. W. 175, is that the state, by repealing the champerty statutes, has changed its entire policy on this subject. It is not necessary, however, that this question should be definitely decided in the present case.

It is further denied that at common law in England or in this country proof of a champertous agreement constrained a dismissal of the suit, but that it only invalidated such illegal contracts. 4 Encyc. of Pl. & Pr. 370.

It was held in *Byrne v. R. R. (C. C.)* 55 Fed. 44, that the statute, and not the common law, inflicted this penalty of dismissal, and the federal courts have declined to follow this provision of our statute.

The question presented herein arose in the case of *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991. Said the court:

"The question raised by the present assignment of error is not whether a champertous contract between counsel and client is void, but whether the making of such a contract can be set up in bar of a recovery on the cause of action to which the champertous contract relates. We must answer this question in the negative. It was wisely said by the Supreme Court of New York in the case of *Thalhimer v. Brinkerhoff*, 3 Cow. 623. [15 Am. Dec. 308], that: 'The right of litigation may be abused, and proper remedies for groundless and vexatious litigation must exist, but the remedies for the abuse of client's right should be such as not to impair the free use of the right itself. As the justice or injustice of the claim cannot be known before the termination of the cause, the checks upon unjust litigation must, in general, consist, not in excluding the suit or the suitor from the courts, but in redress following the decision or justice upon the merits of the case.'"

This is in accord with the views of this court. The precise question under consider-

ation was decided in the case of *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388. That was a bill in equity to establish the title to a tract of 700 acres of land in Bourbon county, in the state of Kentucky. Among other defenses, it was alleged that an agreement in writing had been made between Bond, the plaintiff, and one Engles, by which Engles undertook at his own expense to prosecute a suit for the 700 acres in dispute, and as a consideration for his trouble was to have one-half of the land, and that the suit was prosecuted under that agreement; that it was, therefore, a case of champerty and maintenance, forbidden by law, in which the court could give no relief. But the court held that, although the English statutes which had been adopted in Kentucky punished the offense, and declared the contract for maintenance void between the parties, the right of plaintiff was not forbidden by such an agreement, and it might be prosecuted against the defendants, whether the contract with Engles was valid or void.

The same rule has been declared in other American cases, viz., *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Robison v. Beall*, 26 Ga. 17; *Allison v. C. & N. W. R. Co.*, 42 Iowa, 274. So, in *Hilton v. Woods*, L. R. 4 Eq. 432, it was strenuously urged that the bargain between the plaintiff and Mr. Wright, under which the suit was instituted, amounted to champerty and maintenance, and consequently disqualified the plaintiff to sue, and that the court was bound to dismiss the bill. But the Vice Chancellor said: "I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that whenever the right of plaintiff in respect of which he sues is derived under a title founded on champerty or maintenance, his suit will, on that account, necessarily fail. But no authority is cited, nor have I met any, which goes to the length of deciding that, when a plaintiff has an originally good title to the property, he becomes disqualified to sue for it by having ventured into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise." See, also, *Elborough v. Heirs*, L. R. 10 Eq. 367; *Evans v. Prothero*, 1 De G., M. & G. 572.

We are of the opinion that the statement in *Webb v. Armstrong*, supra, that before the statute proof of a champertous agreement would constrain a dismissal of the suit was inadvertently made. That case arose after the passage of the statute, and was, of course, governed by the statute, which superadded to the common law the penalty of a dismissal of the suit. But at common law, as we have seen from the authorities, proof of a champertous contract between a client and his solicitor did not destroy the right of the former to prosecute the original cause of action. It only vitiated the illegal contract. Without deciding the question whether the

repeal of the statute revived the common law, it is clear that it does not leave in force a penalty which existed only by virtue of the statute.

We find in this record no reversible error, and the result is the judgment must be affirmed.

LEGERE v. STATE.

(Supreme Court of Tennessee. Dec. 5, 1903.)

HOMICIDE—EVIDENCE—ALIBI—INSTRUCTION—
AFFIDAVITS FOR NEW TRIAL—FILING—
GROUND OF REFUSAL—ERROR.

1. Where a witness in a prosecution for homicide had made previous statements contradicting those made on the trial, evidence that, subsequent to such contradictory statements, and while negotiating for his release from prosecution for the same homicide in consideration of turning state's evidence, he had made statements corroborative of those made on the trial, was not admissible.

2. Where the proof fairly raises the defense of an alibi in a prosecution for murder, the jury should be instructed that if this proof, in connection with the other proof in the case, raises a reasonable doubt as to whether the accused was at the place of the homicide, or at a different place, the defendant should be acquitted.

3. Where, in a prosecution for homicide, after judgment has been entered, sentence passed, and an appeal granted, an application in good faith is made, the same morning, for time, before adjournment of court, to prepare affidavits in support of a motion for a new trial—it being stated by counsel that knowledge of the fact which was the basis of the motion had just come to them—a proper case is presented for the court to exercise its discretion to set aside the grant of appeal and give opportunity to the defendant to submit affidavits, and a refusal to exercise the discretion on the erroneous idea that it did not exist is error.

Appeal from Circuit Court, Hancock County.

F. M. Legere was convicted of murder in the first degree, and appeals. Reversed.

H. T. Coleman, R. L. Davis, L. M. Jarvis, C. W. Margraves, and J. A. Susong, for appellant. The Attorney General, for the State.

BEARD, C. J. The plaintiff in error was jointly indicted with one Perry Meyers for the killing of John Davis and Grant Seals on the evening of the 7th of June, 1902. Subsequently Meyers asked a severance, which was granted him by the court. About the same time the state entered a nolle prosequi as to the killing of Grant Seals, and then placed the plaintiff in error on trial alone for the homicide of John Davis, the result of which was his conviction of murder in the first degree. Motion for a new trial having been overruled, the case has been appealed to this court, and many errors are assigned upon the action of the circuit judge.

The verdict in the case rests largely upon the testimony of Perry Meyers, who was used by the state as a witness. An examina-

* 2. See Criminal Law, vol. 14, Cent. Dig. §§ 1833, 1834.

tion of the record satisfies us, if not essential to sustain the theory of the state, that at least this testimony was very important to it. This being so, it was proper, under the peculiar circumstances of the case, while the state had the full benefit of it, under an application of the rules of law, yet the plaintiff in error should be safeguarded so that undue weight be not given to it. Immediately after the killing of Davis and of Seals, the record discloses that both Legere and Meyers were arrested upon a warrant charging them with the murder of these men. At the coroner's inquest held the day following the arrest, Meyers testified he had been with Legere and the deceased during the day of the killing, but that neither he nor Legere had anything to do with it. Subsequently, upon the preliminary examination before a magistrate, he was examined, and again, under oath, reiterated the statement as to the innocence of himself and of Legere of the crime charged against them. On both occasions he gave a detailed account of what occurred while in company with the murdered men, and of the separation of Legere and himself from them while they were still alive, and of their acts and movements during the evening and night following this separation. As a result of this preliminary examination, both these parties were held to answer the charge of murder at the next term of the circuit court of Hancock county, at which time the joint indictment was found against them. After this, and before the trial took place, Meyers was in some way released from jail, where he had been for some months confined upon this charge. Soon after his release, negotiations were entered upon by his father and himself with the prosecutor, which resulted in an agreement that, in consideration of his turning state's evidence against Legere, as far as he (prosecutor) could control the matter, Meyers should be relieved of any further prosecution for this offense; and at the same time a bond was executed to the father, in the penalty of \$1,000, by the prosecutor and a surety, in which they undertook to prevent all further criminal procedure looking to the conviction of the son. Thus assured, Meyers became a witness for the state, and on the trial of the case testified that Legere killed Davis and Seals about dusk on the evening of the 7th of June, 1902, using his own gun for the purpose of shooting Seals, and that he then violently took from the witness a Smith & Wesson revolver, with which he shot Davis to death, and, turning, finished Seals, who was still alive. He further swore that the testimony which he had given under oath at the coroner's inquest and the preliminary examination as to the innocence of Legere was given under duress; that, immediately following the homicide, Legere had extorted from him a promise to testify as he did, under a threat that he would kill him if he did otherwise. For the purpose of corroborating this testimony as to the killing by Legere, the

state, over the objection of the counsel for Legere, was permitted to show by the father and by the sister of the witness that after his release from incarceration, and evidently at or about the time he was negotiating for relief from prosecution, he gave to them practically the same account as to the killing by Legere of these parties as was detailed by him on the witness stand. The action of the court in admitting this corroborative testimony has been made a ground for the first assignment of error in this court. That there was error in this, we have no doubt. The general rule is, where evidence of contradictory statements is offered to impeach the credit of a witness, testimony that on former occasions he made statements consistent with those made by him on the witness stand is inadmissible. This seems to be the rule in England at this time. The courts in America have grafted certain exceptions upon this rule, and so fixed are they that it may be considered now that of themselves they constitute an independent rule. And so, it may be said, it is now established in this country that where it is charged the testimony of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive of personal interest, it may be supported by showing he had made a similar statement before that relation or motive existed. However little support such testimony may give to the impeached witness, yet it has been held to be competent upon the ground that the consistent statement had been made at a time that there was little, if any, temptation to speak an untruth with regard to the matter afterwards brought into controversy. The rule embracing these exceptional cases has been frequently recognized in this state; but in no case, so far as we have been able to discover, has the corroborative testimony been admitted where it was clear the statement so relied upon was made at a time when it was to the interest of the witness to make a false statement, and his probable motive was to use it in fortifying himself when attacked or impeached. We have a number of cases where such confirmatory evidence as this has been allowed, expressly or by necessary implication, upon the ground that such statements were made at a time when no motive existed to misrepresent the facts. *Hayes v. Cheatham*, 6 Lea. 2; *Dosset v. Miller*, 3 Sneed, 76; *Queener v. Morrow*, 1 Cold. 11; *Third Nat. Bk. v. Robinson*, 1 Baxt. 479; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085; *Graham v. McReynolds*, 90 Tenn. 674, 18 S. W. 272.

While it "sometimes is a matter of nice judgment to determine that no motive existed at a given time to misrepresent the facts" (*Spurlock v. Brown*, 91 Tenn. 240, 18 S. W. 868), it is not so in the present case. At the time these statements relied upon as being confirmatory were made, there was every temptation for the witness to falsify the facts. He was still in the hands of the law,

resting under an indictment for this murder, and was seeking to make an arrangement by which, upon furnishing testimony to the state, he could escape its meshes. In addition, they were incompetent because made at a time later in date to that at which the contradictory declarations were made. *Conrad v. Griffey*, 11 How. 481, 13 L. Ed. 779; *Ellicott v. Pearl*, 10 Pet. 416, 9 L. Ed. 475.

The inadmissibility of such testimony is clearly announced in *Queener v. Morrow*, supra. That was a case where an effort was made to corroborate two witnesses who were assailed upon the ground of their general bad reputation, and also by proof of previous contradictory statements. To sustain their credit, the plaintiff, who had produced them as witnesses, was permitted to show previous declarations consistent with those given in evidence, but made subsequent to the contradictory statements in question.

The court, after agreeing to the reasonableness of the rule as to the admission of such testimony within proper limitations, said: "To allow consistent statements, for the purpose of giving support to the credit of the witness, made after the contradictory representations by which it is sought to impeach him, would be to put it in the power of every unprincipled witness to bolster his credit, and perhaps escape the just consequences of his own false representation and tergiversation. And it would be still worse to hold that the statement of an arraigned felon, in vinculis, offered, perhaps, as a bribe to his discharge, and made after the contradictory statement proved against him, and at a time when he was laboring under a motive to misrepresent the facts, might be received. This cannot be allowed, because of its tendency to corrupt the administration of justice, as well as the inherent absurdity of such a principle."

Upon reason as well as upon authority, we hold the exception made to this testimony by the plaintiff in error was well taken, and that the circuit judge was in error in permitting it to go to the jury.

We think the circuit judge was also in error in his instruction to the jury as to the effect of testimony submitted by the defendant below as to his defense of an alibi. On this subject his charge was as follows: "The defense of an alibi is very conclusive, if certainly, clearly, and fully established; but it can only be conclusive when taken as true, and it is shown that there was no possibility of presence at the time or place of offense, when that is necessary. The defense of the alibi is liable to abuse not only when a design exists to practice a fraud on the state, but often, where that design does not exist, by ignorant mistakes as to the particular hour at issue, and by reason of lapse of time; and I therefore caution you against this abuse to which the defense is exposed. The evidence of an alibi does not exclude the absolute possibility of presence at the time and

place of the offense, to be of some value. It can be admitted and considered for what it may be worth. If it renders it very improbable that defendant could have been present, it should be considered, in connection with the other evidence in the case, in determining whether or not there is a reasonable doubt of defendant's guilt."

It is insisted that this instruction was vague and misleading, and that parts of it were the equivalent of telling the jury that they must be conclusively convinced that the defendant was not present at the commission of the crime alleged, and that it was incumbent on the defendant to show conclusively that it was impossible for him to have been present at the time and place, before this defense would be of any avail. While we do not think the instruction is amenable to the severe criticism to which it has been subjected, or that any part of it, when taken in its proper connection, will bear the construction thus put upon it, yet we do not think, in view of the fact that the defense rested largely upon the claim of an alibi, and there was much testimony tending to support this claim, the law on this subject was as distinctly put to the jury as the defendant had a right to demand. The rule on this subject as laid down in *Davis v. State*, 5 Baxt. 617, *Wiley v. State*, Id. 662, and *Jefferson v. State*, 3 Tenn. Cas. 330, and approved in many other cases, is that, "where the proof fairly raises the defense of an alibi, the jury should be instructed that if this proof, in connection with the other proof in the case, raises a reasonable doubt as to whether the accused was at the place of the homicide, or at a different place, the defendant should be acquitted." As has been said, "This is a sound rule, and ought to be given to the jury in direct and unequivocal language."

Error is also assigned upon the action of the trial judge in declining to entertain a motion for a new trial, upon the ground it came too late, and at a time when the jurisdiction of the trial judge over the case had been exhausted. It seems from the record the jury returned a verdict of guilty on the morning of the 25th of July, 1903, and at 11 o'clock of that morning the defendant moved the court for a new trial upon the ground of misconduct of the jury in separating, and of the officer in charge thereof in permitting the separation, and asked the court to grant counsel for the defendant time, before the adjournment of the court, in which to prepare affidavits laying ground for this motion. This the court refused, giving as a reason for this refusal that judgment had been entered, and sentence passed, and an appeal granted to this court. There can be no doubt the trial judge was in error in supposing his jurisdiction over the case was exhausted by the grant of an appeal. The whole matter was still in the breast of the court, and the proper practice would have been for him to have set aside the order granting the appeal, and

to have given time to the counsel to present their affidavit showing, if they could, the separation of the jury had during their consideration of the case. There being no appearance of bad faith upon the part of counsel in making this motion, and it being stated that knowledge of the fact of separation had just come to them, it was a proper case for the court to have exercised its right to set aside the grant of appeal, and to give an opportunity to the defendant below to submit affidavits. Failing to do this, and placing it upon the ground that he had no right to exercise his jurisdiction, the learned trial judge committed an error. On this point we put our holding—not upon the ground that he abused his discretion, but, rather, that, having this discretion, he failed to exercise it upon the erroneous idea that he had none.

We do not consider other assignments that are made, as for these already indicated there must be a reversal and remand.

CHISHOLM & MOORE MFG. CO. v. UNITED STATES CANOPY CO.

(Supreme Court of Tennessee. Dec. 5, 1903.)

SALES — MANUFACTURED ARTICLE — DEFECTS — ACTION FOR PRICE — COUNTERCLAIM — DEFECTIVE GOODS — LOSS OF PROFITS.

1. Defendant contracted with plaintiff for the manufacture and delivery of patented brackets to be used by defendant in the manufacture of mosquito canopy frames. Plaintiff had knowledge that such brackets could not be obtained by defendant elsewhere, and that, if they were not furnished in time for defendant to use them during the mosquito season, defendant would be subjected to loss. The brackets were improperly manufactured, and, on delivery, defendant purchased a machine to remedy the defects; but, this not being satisfactory, defendant refused to receive further defective brackets, and, in an action for the price of brackets furnished, counterclaimed for damages sustained, and proved a loss of profits amounting to 50 per cent. on orders taken for canopies from solvent parties amounting to \$2,225, which it was unable to fill. *Held*, that the profits so lost were not objectionable as uncertain and indefinite, but were properly allowed as damages for plaintiff's breach of contract.

Wilkes, J., dissenting.

Appeal from Chancery Court, Knox County; Joseph W. Sneed, Chancellor.

Action by the Chisholm & Moore Manufacturing Company against the United States Canopy Company. From a judgment in favor of defendant on a counterclaim, complainant appeals. Affirmed.

John W. Green, for appellant. Charles T. Cates, Jr., for appellee.

NEIL, J. The original bill in this case was filed for the purpose of collecting the purchase money for some castings alleged to have been sold by the complainant to the defendant. Thereupon the defendant filed a cross-bill to recover damages for breach of the contract under which the castings were purchased. The Court of Chancery Appeals,

after deducting a certain amount, not now in controversy, for castings accepted and used by the cross-complainant, found that there was a balance due to the latter under its claim of damages, and rendered a decree therefor. From this decree the original complainant has appealed and assigned errors.

The complainant is a corporation organized under the laws of Ohio, with its office in Cleveland; and the defendant is a corporation organized under the laws of Tennessee, with its office in Knoxville. Complainant is engaged in the manufacture of castings of various kinds; the defendant, in the manufacture and sale of canopies and canopy frames for mosquito nettings. Defendant ordered from complainant a large amount of malleable iron castings for mosquito canopy frames. These castings came in sets of two for each canopy, and each set consists of two pieces, which should work or fit into each other—one called the "right," and one the "left." One piece has a journal or pin which should fit into a hole or socket in the other piece. The castings which the complainant shipped to the defendant were defective, in that the journal or pin of the one piece was too large for the hole or socket of the other piece. Defendant bought a machine for that purpose, and bored out the holes in a number of the pieces, and used them, but finally refused to take any more of the castings, because of their defective condition.

The defendant company was organized for, and was engaged in, the manufacture and sale of mosquito canopy frames, and it had bought and contracted for materials for this purpose, including the netting, frames, wires, and brackets. It was using in this manufacture a peculiar device—an invention of one of its officers—as to which a patent had been applied for, being the bracket which is the subject-matter of this litigation, and it was using no other bracket except this. Under these conditions, the defendant applied to the complainant for the purpose of procuring the latter to manufacture for it these brackets. The evidence and the correspondence between the parties shows that it was known to the complainant for what purpose this bracket was to be used, and the fact that a patent had been applied for was known, and that it was a peculiar device, owned and claimed alone by defendant, and used by it in the sale of its mosquito canopy frames. It was further necessarily known how this device was to work, and how the bracket was to be used. The correspondence further discloses that it was made known to the complainant that it was urgent and important that these brackets should be manufactured and on hand by the 20th of April, if possible, or as soon thereafter as practicable; it being known for what purpose they were to be used. And from the character of the trade carried on by defendant, it was necessarily known that it was of the utmost im-

portance that these goods should be gotten out and ready for sale on or before the opening of the mosquito season. The complainant undertook to manufacture these goods in the quantities ordered, with an implied warranty or agreement that the goods or brackets so manufactured should be fit for the purposes intended. It was further known to the complainant that the process of manufacturing these brackets took some time; the complainant's officer, Mr. Moore, testifying that it took some 30 days to complete the manufacture of a quantity of them. A considerable time was consumed in the process of annealing them. The parties therefore had in contemplation the further fact that, if the complainant did not manufacture and deliver these goods according to contract, the defendant could not, after this failure, buy brackets of this peculiar make in the open market, and further that the defendant could not make an additional arrangement or contract with other parties, who might comply with the contract, and save the business for that year. These facts and conditions were necessarily before the parties, and in their contemplation, when the contract was made and when it was breached. With these conditions existing, the complainant violated the contract in the manner above stated. That is, a large part of the goods actually delivered and received turned out to be of such character that they could not be used without being treated in the manner above mentioned; and, in so treating them and cutting down the journals, many of them were broken. For these and other reasons, a large part—at least more than one-half—of the amount actually received by the defendant proved to be practically worthless for the purpose for which they were manufactured and sold.

The Court of Chancery Appeals further finds that defendant had soliciting agents and salesmen in the field, and had sold or taken orders for a considerable number of the mosquito canopy frames above referred to. Their orders so taken and received by them from good and solvent parties amounted to from \$2,200 to \$2,500.

It is further found that the profits the company would have received from this amount of sales, which they had to cancel because of complainant's default, would have been about 50 per cent. of the gross amount, or from \$1,100 to \$1,250.

Speaking further of these damages, the Court of Chancery Appeals say:

"We think there can be no escape from the conclusion that these damages were actually suffered by the defendant. They are not only capable of satisfactory proof, but they have been proven, and we think they were within the reasonable contemplation of the parties when the contract was made. The complainant knew the defendant was dealing in these mosquito canopy frames; that defendant was using this bracket as

a necessary part in the manufacture of the frames. They necessarily knew that defendant was taking orders. They necessarily knew that they could not comply with these orders unless they could use these brackets. They necessarily knew that the brackets could not be bought in the open market. They necessarily knew that, if the complainant did not comply with this contract, the defendant would lose the business of that season. They necessarily knew that it would lose whatever profit it would have made upon the orders that it should take and be unable to fill, if the complainant did not comply with its contract. The officers of complainant did not know what amount of orders had been or would be taken, but they necessarily must have known, and reasonably had in contemplation, that they would suffer loss of whatever the profits amounted to upon such orders as might be taken, if they were unable to fill the orders by reason of complainant's default. * * * They necessarily had in contemplation the character of loss that would follow a breach."

The error assigned is, in substance, that it was improper for the Court of Chancery Appeals to allow the expected profits as damages, for the reason that this amounted to an allowance of speculative damages.

It is true, in general, that the measure of damages for breach of an executory contract of sale of personalty is the difference between the contract price and the market value of the goods at the time and place of delivery. *Cole v. Zucarello*, 104 Tenn. 64, 56 S. W. 850. It is also true that, in general, profits cannot be allowed as damages, for the reason that they are usually uncertain; depending, as they do, upon the dangers and hazards of business. But it cannot be said that there are no exceptions to the rule.

The reasons underlying the general rule, and also a succinct statement of the grounds of the exceptions recognized to the rule, may be found in the following excerpt from *Howard v. Stillwell & B. Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, which we adopt as a sound statement of the law, viz.:

"The grounds upon which the general rule of excluding profits in estimating damages rests are (1) that in the greater number of cases such expected profits are too dependent upon numerous uncertain and dangerous contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote, and not, as a matter of course, the direct and immediate result of a nonfulfillment of the contract; (3) and because most frequently an engagement to pay such loss of profits in case of default in the performance is not a part of the contract itself, nor can it be implied from its nature and terms. 1 Sedg. Damages (7th Ed.) 108; *The Lively*, 1 Gall. 315, 325 [Fed. Cas. No. 8,403] per Mr. Justice Story; *The Anna Maria*, 2 Wheat. 327 [4 L. Ed. 252]; *The Amiable Nancy*, 3 Wheat. 546 [4 L. Ed.

456]; *La Amistad de Rues*, 5 Wheat. 385 [5 L. Ed. 118]; *Smith v. Condry*, 1 How. 28 [11 L. Ed. 35]; *Parish v. United States*, 8 Wall. 500, 507 [19 L. Ed. 472]; *Bulkley v. United States*, 19 Wall. 37 [22 L. Ed. 62]. But it is equally well settled that the profits which would have been realized, had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, and where, from the expressed or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into. *U. S. v. Behan*, 110 U. S. 338, 345-347 [4 Sup. Ct. 81, 28 L. Ed. 168]; *W. U. Tel. Co. v. Hall*, 124 U. S. 444, 454, 456 [8 Sup. Ct. 577, 31 L. Ed. 479]; *Phila., W. & B. R. Co. v. Howard*, 13 How. 307 [14 L. Ed. 157]."

Other illustrative authorities are as follows:

In section 144 (8th Ed.) Sedg. on Damages, the case of *Hadley v. Baxendale*, 9 Ex. 341, is discussed and considered at length, and in a note to this section it is said:

"So entirely is the later law founded on this case, that the great body of cases since decided, involving the measure of damages for breach of contract, resolve themselves into a continuous commentary upon it.

"Plaintiffs were the owners of a steam mill. The shaft was broken, and they gave it to the defendant, a carrier, to take to the engineer to serve as a model for a new one. On making the contract, the defendant's clerk was informed that the mill was stopped, and that the shaft must be sent immediately. He delayed its delivery, the shaft was kept back in consequence, and, in an action for breach of contract, they claimed as specific damages the loss of profits while the mill was kept idle. It was held that, if the carrier had been made aware that a loss of profits would result from delay on his part, he would have been answerable, but, as it did not appear that he knew that the want of the shaft was the only thing which was keeping the mill idle, he could not be made responsible to such extent. The court said: 'We think the proper rule in such cases as the present is this: Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (that is, according to the usual course of things) from such a breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as a probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plain-

tiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such breach of contract. For, had the special circumstances been known, the parties might have specially provided for a breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.'"

In section 146, Sedgwick states: "The rule in *Hadley v. Baxendale* would seem to mean that plaintiff may recover such damages as normally result from the breach of contract, or he may show certain special facts to have been known to the defendant at the time of the contract, which would give notice to him that a breach of the contract would result in an otherwise unexpected loss, and in such case the plaintiff might recover his special loss."

In the case of *Hobbs v. London & S. W. Ry. Co.*, L. R. 10, Q. B. 111, Blackburn, J., citing the rule in *Hadley v. Baxendale*, said:

"We think the proper rule in such a case as the present is this: Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably considered either arising naturally (that is, according to the natural course of things) from such breach of contract itself (that is one alternative), or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

Again, in section 174, the same author says:

"The allowance of profits, when not excluded as unnatural or remote, is wholly a question of the certainty of proof. Whenever there is an interference with or withholding of property, or breach of contract, or commission of a tort, the gains prevented, if proven, may be recovered. As a general rule, the expected profits of a business cannot be proved, and therefore cannot be recovered. They might have been made, and they might not. * * * Instead of profits, there might have been losses. Hence in such cases the measure of damages is not the expected profits, but the average value

of the use of the property, land, or business; and, to ascertain this, evidence of actual past profits must be admissible. This bears a close analogy to the ordinary rule with regard to money. Expected profits from the use of money can never be recovered. The measure of damages is the average value of the use, or, in other words, the interest. Going a step further, we shall find that, whenever expected profits become capable of certain proof, then they can be recovered."

In section 176 the same author says:

"Profits are recoverable if proximate, natural, and certain. The plaintiff may then, in all proper cases, show a gain prevented, as a ground of compensation."

And again: "In the leading case on the subject, *Selden, J.*, in *Griffin v. Colver*, 16 N. Y. 489 [69 Am. Dec. 718], said:

"It is not a primary rule, but it is a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown by clear and satisfactory evidence to have been actually sustained. Profits that would certainly have been realized but for defendant's default are recoverable. Those which are speculative and contingent are not."

And again, further on, quoting from the same opinion, the author says:

"The broad, general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as loss sustained. And this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract (that is, must be such as might naturally be expected to follow its violation), and they must be certain both in their nature and the cause from which they proceed."

In section 177, *Sedgwick* says:

"The general rule is, then, that a complainant may recover compensation for any gain which he can make it appear with reasonable certainty the defendant's wrongful act prevented him from acquiring, subject, of course, to the general principles as to remoteness, compensation, etc., already stated. His compensation will be measured by the most liberal scale which he can show to be a proper one. Damages for the interruption of the business of a manufacturer, for instance, may be measured either by the rental value of the property kept unproductive or by the profits of the manufacture, if the plaintiff can show that they would have been greater than the rental value. The questions that arise in the cases are therefore questions of sufficiency of proof, and it is to be expected that the courts will not in all cases agree in their interpretation of the facts. But the decisions show, under the circumstances, a surprising degree of harmony."

The rule in *Hadley v. Baxendale* has been approved in this state in *McDonald v. Unaka Timber Co.*, 88 Tenn. 38, 43, 44, 12 S. W. 420;

Reese v. Miles, 99 Tenn. 398, 401, 41 S. W. 1065; *Railroad v. Cabinet Co.*, 104 Tenn. 568, 574, 575, 58 S. W. 303, 50 L. R. A. 729; and in *Machine Co. v. Compress Co.*, 105 Tenn. 187, 203, et seq., 58 S. W. 270.

There are several cases in this state which hold that profits cannot be allowed as damages, on the ground that they are speculative and uncertain. *Hendrick v. Stewart*, 1 Overt. 476; *Pettee v. Tenn. Mfg. Co.*, 1 Sneed, 380; *Whitson v. Gray*, 3 Head, 442; *Hurley v. Buchi*, 10 Lea, 346; *McWhirter v. Douglas*, 1 Cold. 602, 603; *Machine Co. v. Compress Co.*, 105 Tenn. 212, 58 S. W. 270.

In the last-mentioned case it appeared that a cotton compress had been injured by defective machinery furnished. The measure of damages was fixed at the rental value of the property during the ensuing cotton season. The court held that the machinery was furnished with a view that it was to be used in that season. It was said that the expected profits to be gained by the running of the mill could not be allowed as damages.

In *Railroad v. Cabinet Co.*, supra, it appeared that certain pews had been manufactured by the cabinet company for a church in Virginia, and they were to be delivered by a certain date, under a penalty for each day's delay thereafter. The railway company received the goods, having knowledge of the penalty contract referred to. The court held, applying the principles of *Hadley v. Baxendale*, that the cabinet company should recover of the railroad company the penalty which it had incurred to its vendee. The court said: "The contract and breach by the defendant now before the court was undoubtedly a special one. The pews in question were manufactured after a peculiar design for a particular church, under a particular contract, of which the defendant was particularly informed at the time it accepted them for carriage. The contract and carriage being special, the penalty for its nondelivery was likewise special, and the plaintiff was entitled to recover all damages resulting from the breach, whatever the amount may have been."

In the same case it is said: "If the property is sold at an advantageous price before shipment on condition that it be delivered within a certain time, and the carrier, with knowledge of that fact, undertakes the transportation, and, through negligence, fails to make the delivery in time, and the conditional purchaser fails to receive the property on account of the delay, the liability of the carrier is measured by the difference between the market value of the property when it arrived at the place of destination and the price at which it was conditionally sold before shipment." *Deming v. Grand Trunk Railway Co.*, 48 N. H. 455, 2 Am. Rep. 267; *Hutchinson on Carriers*, § 772.

In the same case the following is quoted with approval from 3 Wood's Railway Law, 1607: "If the intended use and application

of the goods to be carried was expressly brought to the notice of the company's servants at the time they received them, or could be reasonably inferred from the circumstances known to them, so that the special use, or application might be fairly considered to be within the contemplation of both parties to the contract, the consignor is entitled to recover the damages naturally resulting from his so being unable to use or apply the goods, since both parties may be said to have made this the basis of the contract."

In *Reese v. Miles*, 99 Tenn. 398, 41 S. W. 1065, it appeared that eggs were sold as fresh eggs, with a knowledge that they were to be resold on the Washington market. They were resold, in fact, upon the Boston market, which was at the time the same as the Washington market. The eggs not being fresh, they were sold at very much below the market price in Boston. The measure of damages was held to be the difference between the sum so realized and the market price at Boston. In this case the following from Benjamin on Sales is quoted with approval: "The vendee who takes a warranty with notice that he buys to sell again in another market may include in his damages both the losses actually sustained by the breach, and also the profits he would have made upon the resale, had the article been what it was warranted to be."

We have referred supra to the cases of *Hendrick v. Stewart*, 1 Overt. 476; *Porter v. Woods*, 3 Humph. 56, 39 Am. Dec. 153; *Pettee v. Tenn. Mfg. Co.*, 1 Sneed, 381; *Whitson v. Gray*, 3 Head, 442; *McWhirter v. Douglas*, 1 Cold. 602, 603; *Hurley v. Buchi*, 10 Lea, 346; and *Machine Co. v. Compress Co.*, 105 Tenn. 212, 58 S. W. 270—as holding that profits cannot be allowed as damages, on the ground that they are speculative and uncertain.

But it is to be observed that in none of those cases did the court have before it directly the exact question presented for consideration in the present case.

In the cases referred to, the general principle that profits cannot be allowed as damages, because too uncertain and speculative, was enunciated in respect of the following facts, viz.:

In *Hendrick v. Stewart*, wherein it appeared that a steamboat had been lost by a sudden rise of the river while in charge of the defendant for the purpose of making repairs, which repairs had been negligently delayed by the defendant, damages were claimed for the loss of the voyage which was to be made upon the completion of the repairs. The court said: "Evidence of the probable advantage that might have been derived from the voyage cannot be received. * * * The plaintiff is not entitled to damages for any fancied or probable advantage he might have derived from his contract. The defendants contracted to repair the boat. The plaintiff

is entitled to damages to the amount of those repairs, and no more."

In *Porter v. Woods* it appeared that the defendant was sued for the value of certain castings to be used in the manufacture of plows, which castings had proven defective. He sought to recoup "for delay in business, for injury to his reputation, for speculative profits." The court held that damages of this character could not be allowed.

In *Pettee v. Tenn. Mfg. Co.*, it appeared that the plaintiff had delivered to the defendant machinery for a cotton mill, but that the delivery had been delayed beyond the time fixed in the contract. The plaintiff sued for the value of the machinery, and the defendant sought to recoup damages for the delay, by reason of injury alleged to have been inflicted upon his business by the delay. Speaking to this point the court said: "There was proof tending to show that, if the machinery had been delivered agreeably to the special contract, the mill would have commenced operations in the spring of 1848, and that the profits of the mill might probably have been to a large amount, and that the capital stock was called in from the stockholders, upon the faith of the compliance with the contract by the plaintiff, much sooner than it otherwise would have been, and that large sums were lost in the interest on the capital invested." Speaking to this testimony, the court said: "When we look to the cases and elementary writers, we find the general rule laid down that the damage to be recovered must always be the natural and proximate consequence of the act complained of. 2 Greenl. Ev. 210. Damages for breaches of contract are only those which are incidental to, or directly caused by, the breach, and may be reasonably supposed to have entered into the contemplation of the parties, and not speculative profits or accidental or consequential losses. 2 Kent, Comm. 480, note. Although this is a general rule, in its application to particular cases there is the most serious and distressing difficulty, and the legal and natural consequence, or the natural and proximate consequence, cannot easily be discovered. It must be left for the application to causes as they may arise by sound and discriminating minds. There are, however, some cases which show that an allowance of damages upon the basis of a calculation of profits would be inadmissible. Such profits are too speculative and uncertain to make them the measure of damages. In the case of *Masterson v. The Mayor of Brooklyn*, 7 Hill, 73 [42 Am. Dec. 35]. Chief Justice Nelson says: 'It is a very easy matter to figure out large profits upon paper, but it will be found that these, in a great majority of cases, become seriously reduced when subjected to the contingencies and hazards incidental to actual performance.' There is a great difference between the actual test of experience and speculative estimates of

profits. Judge Story, in the case of *The Schooner Lively*, 1 Gall. 314 [Fed. Cas. No. 8,403], says: 'An allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. It would be a calculation upon conjectures, and not upon facts.' * * * If speculative profits or loss of interest upon capital are to be taken into view in the assessment of damages, they should be expressly stipulated for in the contract itself. The rule would otherwise be too vague and indefinite, and would have no reference to the particular thing which is the object of the contract, and unlimited discretion would be left to the jury."

In *Whitson v. Gray* it appeared there was a misrepresentation of $4\frac{1}{2}$ years as to the age of a slave woman, the subject of the contract, and it was sought to prove as an element of damages "that the woman in four and a half years might have given birth to several children." The court held that this was too remote.

In *McWhirter v. Douglas* there was a contract whereby Douglas agreed to pay McWhirter for the three years next ensuing November 27, 1852, the difference between "what the business of H. & B. Douglas promises" for the three years stated and the sum which might be realized by McWhirter during this time under an offer made to him by Cossitt, Howard & Hill, "which," said the contract, "we now presume to be from one dollar to three thousand dollars." The contract provided that the sum so to be paid should be paid to him "so soon as the correct amount can be arrived at." Under the offer which Cossitt, Howard & Hill had made to McWhirter, the latter was to be taken into partnership after six months' probation, if at the end of that time they should be mutually pleased, and was to receive 20 per cent. of the profits. McWhirter remained with Douglas & Co. for the three years they had agreed upon. After this, assuming that he had not realized from the business of this firm as much as he would have made if he had accepted the proposal made to him by Cossitt, Howard & Hill, McWhirter brought suit against Douglas upon the paper of November 27, 1852. On the trial, Cossitt proved that the offer was made to McWhirter in good faith. The witness objected to stating what the profits had been of his firm during the three years in question, and the objection was sustained by the trial judge. Thereupon he was asked this question: "How much ought your business to have made?" This was objected to by Douglas, but the court permitted the witness to answer; and he said his house, or, rather, a house with the capital of his, ought to have made \$35,000 or \$40,000 a year, and that his house met with no reverses in the years 1852, 1853, 1854, and 1855. And this answer was allowed to go to

the jury as evidence of the measure of plaintiff's damages, the defendant excepting to the evidence. There was also evidence tending to show that the business of Douglas & Co. would probably realize during the three years in question \$20,000 per year for the junior partners, of which sum, if realized, McWhirter would be entitled to one-third. The testimony did not make the amount of the profit of the respective firms more definite than this. The court, in substance, charged the jury that, if they found the contract was made and carried into effect, the plaintiff was entitled to recover from the defendants the difference between what he received from the firm of H. & B. Douglas & Co. (which the testimony showed was in fact only \$15,776.04) and what he would have received from the firm of Cossitt, Howard & Hill, and that they should ascertain this from the proof, looking to the actual net profits of such houses. The court, among other things, said: "The legal effect of the contract being that the defendant was to make the situation of the plaintiff in this Douglas house as profitable as it would have been in the house of Cossitt, Hill & Co." The jury returned a verdict of \$4,262.84 in favor of McWhirter, and Douglas & Co. moved for a new trial; and this being overruled, and judgment rendered against them, they appealed. The court, speaking through Wright, J., said: "We do not agree with the circuit judge in his construction of this contract. * * * Douglas might have said to McWhirter: 'When the business of the two firms is over, and the actual profits of each known, if what you get from my business is not equal to twenty per cent. of the profits of the other house, I will make it so.' But the language of this writing is very different, and, in our opinion, conveys no such idea. What, then, was meant? Douglas said to McWhirter: 'You have before you two offers—one in my house, and one in the Memphis house. The business of my house bids fair, judging from the past, and this additional capital to go on, to make so much; and that of the Memphis house, judging by what Cossitt says, to make so much. You think the offer of the Memphis house is the better one of the two. So do I. We have compared the two offers, and computed their values, and we now suppose the offer of the Memphis house to be more valuable, by from one to three thousand dollars. If you will give up the Memphis offer and become a partner in my house, I will pay you the difference in the value of the two offers, so soon as the actual sum can be arrived at. We have now in our minds some data or rule by which this is to be reached, and to which, as soon as we can, we will resort to settle it.' This we take to be the legal effect of the writing. They did not intend to wait or look to the actual result of the business of these two firms, nor are we permitted to do so. * * * But as a mode of arriving at the exact dam-

ages or sum due, the contract contemplates that the other data or proof, besides that furnished by the instrument itself, were to be resorted to; but what that was to be is not shown in the writing or elsewhere in the record. This being so, if we attempt to enlarge the damages beyond the sum already stated [nominal damages, or, in the alternative, the mean sum between one dollar and three thousand dollars] as reasonably to be inferred from the writing itself, we are at once in the field of speculation and conjecture. * * * In the case in *Sneed* [*Pettee v. Tenn. Mfg. Co.*] the court say: 'If speculative profits or losses of interest upon capital are to be taken into view in the assessment of damages, they should be expressly stipulated for in the contract itself. The rule would otherwise be too vague and indefinite, and would have no reference to the particular thing which is the object of the contract, and unlimited discretion would be left to the jury.' The same general doctrine is to be found in *Masterson v. Mayor*, etc., of Brooklyn, 7 Hill, 61 [42 Am. Dec. 38]. And if the assessment of remote or speculative damages is to be claimed to be taken out of the general rule by reason of an express stipulation to this effect, we understand from the authorities that all uncertainty, both as to the object of the contract and the amount of damages, must be removed by the contract itself. Otherwise the stipulation, however vague, will but serve to destroy the rule. They cannot be considered unless capable of computation with reasonable certainty and precision. Remote and contingent damages, depending on the result of successive schemes or investments, are never allowed for the violation of any contract. Such a rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. * * * Another reason why speculative estimates of profits will not be allowed is that it is not proper to admit witnesses to testify their opinion as to the amount of damages which the plaintiff has sustained in their loss or deprivation. They can only testify as to facts (*Sedg. on Dam.* 589, 591), and to permit a witness to testify as to what a mercantile house ought to have made upon a given capital, in order to reach anticipated profits, is even more objectionable. Here *McWhirter*, in the offer of *Cossitt & Hill*, was to share only in the profits. He was to take none of the capital. It was uncertain whether they would all agree, upon the six-months probation, to form the partnership; and then it was dissolvable by death, or by the action of either of the parties in thirty days' time, and the good fortune of the house in its successive schemes of investment, sale, and reinvestment were all to risk. How, then, could the value of the offer to *McWhirter*, unless fixed by him and *Douglas*, be anything but conjectural?"

In *Hurley v. Buchi* it appeared that plaintiff, a market gardener, applied to defendant to buy Early Rose potatoes, and bought of them 10 barrels which were reported as the Early Rose. The defendants were informed that the purchaser wished this kind to plant for the early market. It was agreed that the Early Rose would mature about the middle of June, and that the kind actually delivered, although planted in due time and well cultivated, did not mature until in August; that the Early Rose, when they matured, were worth \$3.50 to \$4 per barrel, and the other at their maturity were worth \$1 per barrel. Upon the foregoing facts, the circuit court allowed the plaintiff for six barrels, as the probable product of each barrel (that is to say, for 60 barrels of Early Rose at \$3.50 per barrel), and deducted therefrom the 60 barrels of late potatoes actually raised, at the price of \$1 per barrel, and gave a judgment in favor of the plaintiff for \$150. "In arriving at this conclusion," said the court, speaking through *Deaderick, C. J.*, "his honor assumes that, if the Early Rose had been delivered, they would have been planted, cultivated, and have matured at a given time, to wit, the middle of June, and were then worth \$3.50 per barrel, whereas the variety actually planted yielded six barrels for each barrel planted, and were worth when they matured, in August, but \$1 per barrel." The court held that the damages so reached were merely speculative, and could not be allowed.

In *Machine Co. v. Compress Co.* there was no effort to prove any certain profits. Indeed, from the facts presented in this case, it is manifest that the profits suggested could have been nothing more than speculative, since, if allowed, they could have been based only upon an estimate of how much custom or patronage the compress company would have secured if it had been able to run the season through.

From this review of our cases, it is clear that the court did not in either of them have before it a state of facts in any wise resembling the facts shown in the present case, but, on the contrary, facts from which there could be no other conclusion than that the damages sought were purely speculative and contingent.

We do not in any wise impair the force of the general rule that profits fall within the designation of speculative damages, and cannot be allowed; but we think there is a clear distinction where the testimony shows that the damages, although consisting of profits, are really certain and clear. In the present case it appears that orders had been taken from solvent people for goods amounting to at least \$2,200, and that the profit upon these sales was 50 per cent. Here is no element whatever of speculation or uncertainty. To deny compensation under these circumstances would be to apply the

general rule to a case to which it was never intended to be applied, and work a practical injustice.

We think the facts stated show that the contract was made with a knowledge on the part of the complainant that the articles which they were to furnish were to be used in the manufacture of mosquito canopy nets, and that these articles could not be supplied by any one else, and that the canopy nets could not be made unless the articles were supplied, and that these canopy nets were to be manufactured for sale on the market. We are of the opinion, therefore, that the damages which were incurred were fairly within the contemplation of the parties.

In *State of Tennessee v. Ward & Briggs*, 9 Helsk. 132, 133, and other cases (*Foster v. Water Co.*, 3 Lea, 46; *Winters v. Fleece*, 4 Lea, 551; *Smith v. O'Donnell*, 8 Lea, 479; *Insurance Co. v. Heidel*, Id. 495; *Insurance Co. v. Mathews*, Id., 504), it is stated, in substance, that "the contract itself must give the measure of damages, and, if it fail to do so, the damages can only be nominal." This is merely a brief statement of the rule in *Hadley v. Baxendale*—that "where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach should be either such as may fairly and reasonably be considered as arising naturally (i. e., according to the usual course of things) from such a breach of contract itself, or such as may reasonably be supposed to have been within the contemplation of both parties at the time they made the contract as the probable result of the breach of it." The contract thus gives the measure of damages upon the first branch of the rule by the mere statement of its terms, its subject-matter, and the obligations of the parties. As to the second branch, it gives the measure when, in the course of the dealing between the parties in the making of the contract, there are brought to the attention of the person who assumes the obligation of its performance, or he knows, certain facts or circumstances from which it may reasonably be inferred that special damages will probably ensue upon failure of performance. "It is a rule of interpretation," says Sutherland, "that the intention of the parties is to be ascertained from the whole contract, and considered in connection with the surrounding circumstances known to both parties. If it appear by these surrounding circumstances that the contract was entered into, and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure a special gain or to avoid an anticipated loss, the liability of the other for a violation of the contract will be determined, and the amount of damages fixed with reference to the effect of the breach in hin-

dering or destroying that object. The proof of such circumstances makes it manifest that such damages were within the contemplation of the parties. Looking alone at the contract, * * * silent as to such circumstances, * * * such damages sometimes appear to arise very remotely and collaterally to the undertaking violated. But when the contract is considered in connection with the extrinsic facts, there is established a natural and proximate relation of cause and effect between the breach of the contract and the injury to be compensated." Sutherland on Damages, p. 29.

This phase of the matter is illustrated in *Machine Co. v. Compress Co.* The special damages there allowed were based upon the fact that the parties had in contemplation that the repairs which were to be made upon the compress were for the purpose of enabling it to operate during the ensuing cotton season. The fact that this purpose was within the contemplation of the parties was shown by the testimony of Mr. Cutrer, president of the compress company, who testified as follows:

"Mr. Leach thoroughly understood, and we discussed together, the necessity for having this contract done in time to press cotton for the season of 1897, and that, if his company took the contract, they were to take it and complete the work in time for the crop of 1897."

And the following testimony of Mr. W. S. Campbell:

"What information, if any, did you impart to the Livermore Foundry & Machine Company of the necessity of having the work contracted for completed in time, and as to the uses to which the press, when repaired, was to be put?"

"Well, I, of course, impressed the fact upon him that we wanted it completed in time to press cotton that would begin to come in to us; and, in fact, they fully understood the nature of the contract, and the necessity for having it in shape by the time the season was open for compressing."

It is insisted by the complainant that these damages should not be allowed because the castings were not themselves to be resold, but were only to enter into the manufacture of another article of commerce, which was to be the subject of sale. We do not think this makes any practical difference. It is clear, under the facts stated, that the failure to furnish the castings was the proximate cause of the injury suffered by the defendant; that this injury was within the contemplation of the parties, and hence must be held to be a matter for which the complainant should account.

It results, there was no error in the decree of the Court of Chancery Appeals, and it must be affirmed.

WILKES, J., dissents.

McCAMPBELL v. FOUNTAIN HEAD R. CO. et al.

(Supreme Court of Tennessee. Dec. 3, 1903.)

CORPORATIONS—SUBSCRIPTION TO STOCK OF OTHER COMPANY — ACCOMMODATION INDORSEMENTS—ULTRA VIRES ACTS—ACQUISITION OF STOCKHOLDERS—EFFECT—RIGHTS OF TRANSFERREES.

1. A subscription by a railroad company to the stock of a land company is ultra vires, and its character is not altered by the fact that it was made in the names of trustees.

2. The indorsement of a negotiable paper by one corporation for the accommodation of another is ultra vires.

3. The owners of part of the stock of a railroad corporation, who were also directors, authorized the corporation to subscribe for all the stock of a land company, and also to indorse notes for the land company, representing an indebtedness to remaining stockholders in the railroad company. They afterwards became insolvent, and their stock was taken by creditors. *Held*, that the creditors were not under obligation to seek redress through a meeting of the railroad company's shareholders, or by application to its officers, before maintaining suit in equity.

4. Stockholders by whose authorization ultra vires acts are done cannot afterwards avoid the same in equity.

5. Assignees of corporate stockholders cannot avoid, as ultra vires, acts of the corporation authorized by their assignors, and consummated previous to the assignment, or whose consummation is necessary to protect the rights of other persons.

6. Assignees of corporate stock may avoid ultra vires accommodation indorsements by the company, through its officers, for liabilities of the payor corporation arising since the assignment, and after repudiation of the officers' acts by the assignees, though such indorsements are made pursuant to authority once conferred by the assignors.

Appeal from Chancery Court, Knox County; Joseph W. Sneed, Chancellor.

Suit by Mary J. McCampbell against the Fountain Head Railroad Company and others. Decree for defendants, and complainant appeals. Modified.

Sansom, Welcker & Parker and Green & Shields, for appellant. Webb, McClung & Baker, for appellees.

BEARD, C. J. The bill in this case was filed by complainant, as a stockholder of the Fountain Head Railroad Company, for the use of herself and all of its other stockholders, against that company, the Knoxville & Fountain City Land Company, and the individual directors of both of these companies (they being the same persons), to set aside a subscription by the railroad company for \$100,000 of the stock of the Knoxville & Fountain City Land Company, and to recover the funds paid by the railroad company to the land company for this stock; also to set aside the indorsement of the railroad company upon something over \$300,000 of the notes of the land company, which are

payable to or held by George Borgfeldt & Co., a corporation, the shareholders in which constitute the directors of these two companies; and to wind up the Fountain Head Railroad Company, pay its debts, and distribute its assets, on the ground that it had become a business failure because of the alleged fraudulent and illegal diversion of its funds from the legitimate purpose for which it was organized, by the present board of directors, who hold, as is averred, a majority of its stock, and are fraudulently mismanaging its affairs, to their own personal advantage, and to the destruction of the value of complainant's stock.

The pleadings in the case are very voluminous, and it would require very much time to state them with any degree of detail; but, as the finding of facts by the Court of Chancery Appeals sufficiently presents the issues that were raised by them, we will content ourselves with summarizing it.

From this finding it appears the Fountain Head Railroad Company was chartered under the laws of this state in 1887 for the purpose of constructing and operating a short line from Knoxville to Fountain Head, in Knox county, a distance of some five or six miles. The charter is in the form prescribed by the statute of Tennessee, and, among other powers, grants to the stockholders and directors that of fixing the capital stock of the company and increasing it at their pleasure.

At first the company was capitalized at \$50,000, and stock to this amount was subscribed and paid for by different individuals. Mr. Curtis Cullen, of the firm of Cullen & Newman, of Knoxville, was interested in the enterprise from the beginning; and his firm at a very early date became the owners of 285 shares of the stock of the company, the par value of which was \$28,500. In the year 1890, after the road was put in operation. Mr. Cullen conceived the idea that it could be made very much more profitable to the stockholders if the road itself, or its owners and operators, should buy up the lands lying along its line and near its terminus, at Fountain Head, with a view to a speculative advance in their value. Not having sufficient capital himself, and his firm also lacking it, Mr. Cullen went East in the year 1891, and interested in the scheme the defendant Brady, a citizen of the city of New York. Through him he was introduced to the firm of Borgfeldt & Co., a rich concern engaged in business in New York City, with wealthy connections in Germany. This firm and their associates, together with Brady, after consideration, determined to go into the scheme with Cullen & Newman. Originally it was agreed these parties should put into the investment \$100,000, and Cullen & Newman a like amount, and, to this end, that the capital stock of the railroad company should be increased to \$100,000; it being understood the

¶ 2 See Corporations, vol. 12, Cent. Dig. § 1821.

after parties were to make good their subscription to the increased capital stock with the stock already owned by them in the railroad company, and certain lands of which they represented themselves to be the owners, the aggregate value of the two being estimated at \$100,000. It was also agreed, in order to consummate this scheme, that all the original stock of the railroad company should be bought up and controlled by this syndicate.

To make sure that this plan was one which promised success, Brady, in his own interest and that of his New York associates, came to Knoxville, and there, overlooking the field, became satisfied the venture was a safe one. The matter, however, was submitted to a member of the Knoxville bar, who advised him that the railroad company itself could not buy and hold real estate for the purpose of speculation, and that it would be necessary to procure a charter for a land company, and, upon this being done, that the same might be accomplished by a subscription of stock in it made by the former company direct, or indirectly by trustees in its interest. Upon this suggestion a charter was obtained, and the defendant the Knoxville & Fountain City Land Company was organized.

In May, 1891, a meeting of the shareholders of the railroad company was held, at which the by-laws of the company were amended so as to increase the capital stock to \$200,000. For this amendment the entire stock of the company present (being 455 shares) voted, and the directors were instructed to offer for subscription 1,500 shares of stock, of the par value of \$100 each, with the view of making good this increase. At the same meeting a resolution was offered and adopted directing the board of directors of the railroad company, as soon as the 1,500 shares of additional stock had been subscribed, "to subscribe for and on behalf of the Fountain Head R. R. Co. to the capital stock of the Knoxville & Fountain City Land Co. the sum of \$100,000.00, the subscription to be made and the certificates of stock taken either in the name of this company, or in the name of trustees for the use of this company, as it may be advised."

On the same day, and at that or a subsequent meeting, books were opened for subscription for these additional shares of capital stock, resulting in a subscription by Cullen & Newman for 700 shares of the new stock, of the par value of \$70,000; and by George Borgfeldt and his associates for 800 shares, of the par value of \$80,000. This being done, a motion was then made and adopted directing the president of the company to subscribe to the capital stock of the land company the amount already indicated, and that this subscription be made in the name of trustees for the railroad company; the names of these trustees being set out in the motion, and spread upon the minutes.

The subscription thus authorized was at once made.

Cullen & Newman paid for their 700 shares of this new stock as follows; that is to say, they were the owners of 168 acres of land, of which they made a conveyance to the land company. They at the same time gave a check for \$70,000 to the railroad company. This check was taken by Mr. Cullen, the president of the company, in full payment of the subscription of the stock of Cullen & Newman; and it was then indorsed by Cullen as president, and turned over to the land company in payment of the railroad company's subscription of \$70,000 to the stock of that company, and it was then treated as transferred or was actually transferred by that company to Cullen & Newman in payment of the tract of land above referred to. This check did not represent money. The drawers had no money in bank to meet it, and there was no purpose on their part that it should be presented and paid. Its use was adopted as a simple method to consummate the transaction. Cullen, the president of the railroad company, as has been seen, took the check in discharge of the subscription of Cullen & Newman to the stock of that company. He then delivered it to the land company in part payment of the subscription of stock made in the name of the trustees for the benefit of the railroad company; and then it was turned over to Cullen & Newman by this latter company, and discharged the obligation of the land company to Cullen & Newman upon the conveyance of the land. This method of canceling indebtedness by an interchange of credits was understood by all of the parties, and was contemplated as a part of the scheme.

At the time of this transaction, Cullen & Newman had already bought up and controlled, for themselves and George Borgfeldt and associates, all of the original stock of the railroad company, or afterwards acquired it, though it appears that in these meetings only \$45,500 out of the \$50,000 of this stock were present and voted.

The certificates of stock issued by the land company in the name of the trustees appointed on behalf of the railroad company have still been held by them for the benefit of that company.

We have already seen how \$70,000 of this subscription to the land company stock was paid. The balance of the subscription (that is, \$30,000) was paid in cash; this being a part of the \$80,000 paid by Borgfeldt and his associates to discharge their liability for the \$80,000 of the new stock which they took of the capital stock of railroad company.

All this was done under the management of Mr. Curtis Cullen, to whom control was largely delegated by Borgfeldt and his associates; they having, as is evident, entire confidence in his integrity and business ability.

At the time this was done it was understood by Borgfeldt and his associates that

Cullen & Newman were the owners of 450 acres of land, which was to be turned over to them by the land company. It turned out, however, that they only owned and conveyed to that company, as has been before stated, 168 acres. It was also understood by these gentlemen that Cullen & Newman were to put in these lands at actual cost. It subsequently turned out, however, that they were turned over to the land company at double the amount they cost them. This produced a disagreement between Cullen & Newman and Borgfeldt and his associates, the result of which was that Cullen & Newman were required to disgorge their \$25,000 or \$30,000 of the \$70,000 of new stock that had been issued to them. This fact, however, has no material bearing on this litigation, and need not be further followed.

As has already been stated, Borgfeldt and his associates paid into the treasury of the railroad company \$80,000 for their stock, and of this amount \$30,000 was used in paying on the subscription of stock by that company to the land company. The remainder of this cash payment was used by the railroad company in purchasing new engines and paying outstanding liabilities of the railroad company, and in other ways, needless to mention.

As has been already seen, there was \$4,500 of the original stock of the railroad company, which seems not to have been represented at the meetings of the shareholders held in May, 1891, when these various transactions were resolved upon; but the Court of Chancery Appeals finds that all the stock was then owned and controlled by Cullen & Newman and by Borgfeldt and his associates, or was soon after acquired by them, and that all of this stock assented to those transactions as made; that afterwards all of the original certificates of the \$50,000 of stock were surrendered, and new certificates issued and accepted in their places. That court further finds that "when the subscription, after the increase of the capital stock to \$200,000, was made by the railroad company to the stock of the land company, it was assented to by the holders of all the stock of the railroad company, and that this latter company had subscribed for and taken all the stock of the land company, so that the entire transaction was, as a matter of fact, understood by all the stockholders of the railroad company, and was agreed to or afterwards ratified by all the stockholders of the railroad company, when this subscription was made, so that the whole transaction was one of unanimous consent by all the stockholders of the railroad company, both old and new."

The result of these transactions, instead of being profitable, as was anticipated by the parties engaged in them, proved to be disastrous. The land taken from Cullen & Newman, or afterwards purchased through them, cost the land company \$235,000. The operations of the railroad company were evidently not profitable. The land boom which existed

at the time the land company was formed soon collapsed. The indebtedness of both companies seems rapidly to have increased. Both alike in their financial stress looked to, and were relieved by advances made by, George Borgfeldt and his associates, until at the time of the filing of the present bill the railroad company was indebted to these parties, as is alleged, in something like \$40,000, and the indebtedness of the land company to them amounted to something over \$300,000. This latter indebtedness grew out of the fact that these parties were compelled to furnish the money to pay the purchase price of the new lands bought by the land company, and to remove incumbrances on these lands, as well as on those turned over to the company by Cullen & Newman, and to pay for improvements of the railroad properties.

From the time of the organization of the land company, the two companies have had the same boards of directors, and they have been regarded by the stockholders and directors of each as being in a large measure one. So close has been the relationship of these companies, that beginning as early as February, 1892, the Knoxville & Fountain City Land Company was authorized by its shareholders to issue demand notes to raise money to meet its liabilities, and the Fountain Head Railroad Company was authorized by its shareholders to indorse these notes; and it has turned out that at the filing of this bill the railroad company, in addition to its own legitimate debts, was also liable as indorser upon all the paper issued by the land company to Borgfeldt and his associates for money advanced by them for the benefit of that company, amounting to the large sum set out above.

In the year of 1896 the firm of Cullen & Newman failed, and about this time they transferred the stock held by them in the railroad company to the complainant and other intervening petitioners, to be held by them as collateral to secure their debts. While thus pledged, none of it was transferred on the books of the company until a short time before the filing of the bill in this case, in the year 1900, and some of it was only transferred after the bill was filed. All this time, while these transactions were going on, this stock stood in the names of Cullen & Newman, and was voted by them as their own in the various meetings that were held, authorizing or approving these various transactions. Shortly before the bringing of the present suit, some of these parties, under the power given them in their pledges, sold the stock and bought it in, and others pursued this method after its institution. Upon these facts, there can be no doubt that in subscribing for stock in the land company the railroad company exceeded its charter powers, and was guilty of an ultra vires act, and this is not altered by the facts that this subscription was made in the names

of trustees for the company. And we think there is as little doubt that, with proper parties before the court, this subscription of stock would be canceled, and the land company would be compelled to pay back whatever amount of money it received from the officers of the railroad company in discharge of this unauthorized and illegal subscription. And it is also true it is well settled as a rule of law, in the absence of express or necessarily implied power given in the charter, that one corporation cannot indorse paper for the accommodation of another, so that, at the instance of parties not disqualified to act, a court of equity would in this case relieve the railroad company from liability on the indorsements of the paper issued by the land company, now held by George Borgfeldt and his associates. The question is, are the complainants in an attitude to ask for such relief?

In addition to the above rules of law in regard to the charter powers of corporations, which are so well settled that they scarcely need a citation of authority, there is another principle which is equally clear, and that is that courts of equity are prompt to redress the injuries of minority stockholders against the wrongdoing of majorities; and, in view of the relations which exist between them and the corporation and its officers, the general rule is they are bound to seek their remedy through the corporation at a meeting of its shareholders, or by application to those in charge of its affairs. If relief cannot be obtained by either of these methods, then they themselves can come into equity seeking it. The only exception to the rule requiring the minority stockholders to proceed thus before they institute proceedings in behalf of themselves and their stockholders is when it appears that to seek such relief through those regular channels would be an idle ceremony. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Detroit v. Deane*, 106 U. S. 537, 1 Sup. Ct. 560, 27 L. Ed. 300.

It may be conceded, in view of this exception to the general rule, upon the averments of the present bill, as well as the case made out by the testimony, that redress, if obtainable at all by the complainant and the interveners, could only be secured by a bill such as the present one. So it may be said that, if the complainant and these interveners are entitled to a status in court, they have made good their right to it.

Treating this case as if Cullen & Newman had filed the present bill, or that these complaining parties occupy no higher ground than would Cullen & Newman, in view of the facts found by the Court of Chancery Appeals, are they entitled to the relief sought at the hands of the chancellor? From the facts already stated, we have here a case where the parties complaining, by their active co-operation with all the other stockholders of the railroad company, brought about the ultra vires complication from

which they now seek to be relieved. Will their complaint be listened to? In Green's *Brice's Ultra Vires*, p. 783, mere acquiescence in unauthorized and illegal transactions will be, it is said, sufficient to repel complaining stockholders. That author uses these words: "If an act be ultra vires, a corporation may raise the objection, whether against a corporation or against a creditor or other contracting party attempting to enforce such act, or his alleged claims or rights resulting therefrom. But if an incorporator desire protection against the party who has thus dealt with the corporation, he must have been prompt and energetic in repudiating the transaction, as he can be bound by acquiescence. So, if he do not quickly object, and give his objection vitality, the creditor will be justified in answering that he consents."

Mr. Cook, in his work on Corporations (volume 2, § 780), says: "After a stockholder has knowledge of an ultra vires, fraudulent, or negligent act of the directors, he must institute his suit, it at all, within a reasonable time thereafter. As to what will constitute a reasonable time, depends on the circumstances of the case. If it is evident that the stockholder is waiting to see whether the unauthorized act will be profitable to the corporation, the court will refuse to grant him any relief. So, also, if a stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed or money expended or alterations to be made before he brings suit, he is guilty of laches, and his remedy is barred. In like manner, where the stockholder, with full knowledge, has accepted the benefit of the act, he cannot complain thereafter; and, in general, where it is clear that the stockholder had a full knowledge of all the essential facts of an act which he might bring a suit to remedy, but which for an unreasonable length of time he fails to object to by a bill in equity, he will be held guilty of laches, and his right to institute his suit is barred."

Mr. Clark, in his condensed, but valuable, work on Corporations (Hornbook Series), on this subject says: "Stockholders may be precluded by acquiescence, laches, or estoppel from bringing suit to redress injuries to the corporation by the directors or other officers, or by the majority of the stockholders, or by a third person, for such suits are subject to the familiar principle of equity jurisprudence that acquiescence in a course of conduct by one interested in it, especially when the rights of others are effected thereby, will induce the court to refuse him relief. * * * Thus it was held * * * that a stockholder could not bring suit for improper investments of corporate funds made three years before, if he knew them at the time and did not object; and it has often been held that a stockholder is estopped to object to corporate acts done with his consent." To this text the author cites *Dunphy v. Association*, 146 Mass. 495, 16 N. E. 426;

1 *Cumming, Cas. Priv. Corp.* 769; *Dimpfel v. Ry. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121; *Allen v. Wilson (C. C.)* 28 Fed. 677; *Boyce v. Coal Co.*, 37 W. Va. 73, 16 S. E. 501; *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337; *Peabody v. Flint*, 6 Allen, 54; *Gregory v. Patchett*, 33 Beav. 595; *Ashurst's Appeal*, 60 Pa. 290; *Watts' Appeal*, 78 Pa. 370; *Stewart v. Trans. Co.*, 17 Minn. 372 (Gil. 348).

In 2 *Beach on Priv. Corp.* § 887, the rule is announced in these words: "The right to redress corporate acts ceases when the members have consented to the will of the majority." Mr. Morawetz (on Corp., in sections 261, 262, 267, 623-625) lays down the same rule, as does also Judge Thompson in the fourth volume (sections 4569 and 4571), and Mr. Taylor in §§ 275-281, of their several works on Corporations.

In *Alexander v. Searcy*, 81 Ga. 545, 8 S. E. 630, 12 Am. St. Rep. 337—a suit instituted by minority stockholders complaining of ultra vires acts—it was held that where notice of purchasers of stock of another corporation was had by the directors and stockholders, and the purchasing corporation regularly voted the stock, and had expended large sums of money for the benefit of the corporation under resolution of its stockholders, after from 7 to 15 years from the date of the purchase a court of equity would not listen, among other things, to the complaint of the minority stockholders that, being a corporation, it had no power under its charter to make such purchase.

In *Taylor v. Ry.*, 4 Woods, 575, 13 Fed. 152, the court says: "A stockholder of a corporation will not be allowed, after an unreasonable time, to disturb or rescind a contract made by his corporation after the same has been fully executed, on the ground that it is ultra vires and in excess of the corporate powers granted by the charter of the corporation." And in *Stewart v. Transportation Co.*, 17 Minn. 372 (Gil. 348), the court says: "If a stockholder assents to acts ultra vires, or, although not originally or expressly assenting, has for an unreasonable time acquiesced, and has permitted them to go unquestioned, so that other parties who have acted upon the faith of them (as, for instance, by making large appropriations of money) would suffer great injury from their repudiation, a court of equity would not be easily induced to grant relief at the instance of such stockholders." In *Peabody v. Flint*, 6 Allen, 54, an acquiescence and delay of 3½ years was held to be a bar to such relief; in *Gregory v. Patchett*, 33 Beav. 595, 6 years were held to be a bar; and in *Ashurst's Appeal*, 60 Pa. 290, 7 years were held to be a bar; and in *Dimpfel v. R. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121, 3 years and 8 months were held to be a bar. As was well said by the court in *Alexander v. Searcy*, supra: "The general rule we deduce from the authorities * * * is that while a minority of the stock-

holders of a corporation may maintain a bill in equity in behalf of themselves and their stockholders for fraud, conspiracy, or acts ultra vires against the corporation, its officers, and others who participated therein, when the minority stockholders have been injured or damaged by said acts, they must act promptly, and not wait an unreasonable length of time. If they postpone their complaint for an unreasonable length of time, they forfeit their right to equitable relief."

In *Ry. Co. v. Ry. Co.*, 3 De Gex, M. & G. 341, it is said: "Where the summary interference of this court is invoked in cases of this nature, it must be invoked promptly. Parties who have lain by and permitted a large expenditure to be made in contravention of the rights for which they contend cannot call upon this court for its summary interference." And in *Smith v. Clay*, 3 Brown, Ch. 639, it was announced that "nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing."

In the *Alexander v. Searcy* case, above quoted from, the same argument is made as in the case at bar; that is, that no amount of acquiescence on the part of the stockholders will make an act legal which is illegal; in other words, that no amount of acquiescence on the part of the stockholders would give power to the Fountain Head Railroad Company to purchase and own stock in the land company, or to indorse its paper, in the absence of a law authorizing it. To this argument that court replied, as we think properly: "We concede that, but, in our opinion, it does not follow that, because a railroad company has no power to purchase or own stock in another railroad company, a stockholder who has acquiesced therein for 15 years should have a right to object. It may be true, and doubtless is, that no assent or acquiescence of the stockholders can validate such an act; but it is a different question whether, after a long acquiescence, the stockholders may take advantage of the invalidity of such acts. The act of purchasing and owning and voting stock in any railroad company by another railroad company may be ultra vires so far as the public are concerned, but we do not think that a stockholder who has acquiesced for fifteen years, and who has received money from the corporation by reason of the illegal act, should be allowed to make that question. His acquiescence does not render valid the illegal act of the corporation, but will prevent him from taking advantage of its invalidity. The public or the state is not so bound. The state, through its proper officers, may at any time commence proceedings to prevent it, or declare it ultra vires or illegal." If it be true that mere acquiescence or laches will preclude a stockholder from making such question, then what show of right has a holder of stock, who has from time to time given his

consent in open meeting to the doing of the acts of which he now complains?

Nor do the transferees of stock, such as are the complainant and the interveners in this suit, stand in any other or different position from Cullen & Newman. Mr. Morawetz, at section 267, vol. 1, of his work on Corporations, says: "A purchaser of shares acquires no greater rights than the prior holder. If a violation of the corporate rights is acquiesced in by all the other holders of stock, the action becomes extinguished thereby, and no other holders, present or future, would be entitled to complain." And again, in section 265, the same author says: "A shareholder who has acquired his shares after an unauthorized transaction had taken place certainly cannot place his complaint on the ground that he has suffered a wrong, or that his equitable rights have been infringed. Under these circumstances, a plaintiff's cause of action, if he have any, is derived by purchase and transfer from the holder of the share." And in section 264 it is said: "If it appears in the progress of a suit that the complainant is personally disqualified from suing, the suit cannot proceed, although the other shareholders are entitled to relief. As, on the one hand, the plaintiff who has the right to complain of an act done to a numerous society, of which he is a member, is entitled to sue on behalf of himself and of others similarly interested, although no other may wish to sue. So, although there be a hundred who wish to institute a suit, and are entitled to sue, still, if they sue by a plaintiff who has personally precluded himself from suing, that suit cannot proceed."

These texts of the author are supported by authorities of the greatest weight. Among them are to be found *Bert v. British*, etc., Ass'n, 4 De Gex & J. 158; *Belmont v. Erie Ry. Co.*, 52 Barb. 683; *Hubbell v. Warren*, 8 Allen, 173; *Central R. v. Collins*, 40 Ga. 616; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

"It is true," says Mr. Morawetz in section 263, "a shareholder who has acquiesced in an unauthorized act is not bound to submit to all future acts of a similar character, nor is a shareholder who has acquiesced in the making of an unauthorized and illegal contract necessarily precluded from applying to the courts to redress its performance; * * * but the courts are entitled to exercise a wide discretion in cases of this description. They should certainly not allow a shareholder to change his mind, and apply for an injunction to redress the performance of a contract to which he had previously consented, in any case in which this would be unfair to other persons." Citing *Rooks v. S. W. Ry. Co.*, 1 Sm. & C. 142; *Graham v. Burkenhead Ry. Co.*, 2 McN. & G. 146; *Leo v. U. P. Ry. Co.* [C. C.] 19 Fed. 283.

While, under authority of the rule stated in this last quotation, we think that the parties complaining in this suit would be enti-

tled to relief as against similar acts to those passed which they seek to set aside, done after a reasonable protest against their repetition, yet neither under it nor any other authority to which we have referred in the course of this opinion, nor under any to which our attention has been called in the course of argument, can they ask to be relieved from liability incurred or acts done before the filing of their bill, either with their sanction, or that of the transferrors of the stock which they now hold. But it is insisted that, whatever may be the state of the law elsewhere, our own cases are contrary to this ruling. We think, however, an examination of them does not support this insistence, and that no one of them announces a principle that is in conflict with the rule of fairness and right which precludes a party from attacking successfully a corporate act, however unauthorized it may be, to which he has given his consent, or in which there has been an acquiescence for the length of time disclosed in this record.

In *Marble Co. v. Harvey*, 92 Tenn. 116, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71, there was an effort by a corporation to enforce an ultra vires contract as against the other party to this contract; and it was held, and properly, that such a suit could not be maintained. In the case of *Grant v. Lookout Mountain Co.*, 93 Tenn. 691, 28 S. W. 90, 27 L. R. A. 98, it was simply held that a corporation is liable for reasonable attorney's fees incurred in the successful prosecution of a just and necessary suit by a minority of its stockholders against itself, its officers or directors, for the benefit of the company, to enjoin the fraudulent disposition of its properties, or to recover properties already fraudulently transferred, and that the attorneys successfully prosecuting the suit were entitled to a lien upon the property recovered therein. In such a suit the judicial machinery of the court is set in motion by the dissenting shareholders for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder plaintiff. That case, however, is to be distinguished from this, in that the minority shareholders thus suing had never disqualified themselves, either by consent actually given, or long acquiescence in the acts of fraud of which they made successful complaint. In *R. R. v. Sneed*, 99 Tenn. 1, 41 S. W. 364, 47 S. W. 89, an effort was made to hold the defendant on a subscription to an ultra vires and unlawful increase of the capital stock of a railroad company; and it was ruled that although the defendant had been a director in the company by virtue of this stock, and paid up a large portion of his subscription, yet the contract would not be enforced against him or his representatives. As will be seen, this was an effort to enforce performance by the corporation itself of a contract which it had no right to make. The case of *State v. Mitchell*, 104 Tenn. 836,

58 S. W. 365, we think, has no bearing on the question we have been discussing.

So it is we are constrained to hold, upon the whole case, the complainant and the interveners, occupying the position they do, are not entitled to the decree which they seek by their bill. They cannot follow the funds of the railroad company into the real estate acquired by the land company; nor are they entitled to a decree against the managing owners of the railroad company for investing its capital in the stock of the land company, nor to a decree relieving the railroad company from its liability upon indorsements of the paper of the land company held by Borgfeldt and his associates at the time of the institution of this suit. The Court of Chancery Appeals held that they were entitled to have these two companies disassociated, and the relations between them discovered; and, to this end, that court decreed that the stock held by the railroad company in the land company should be sold, and, its proceeds paid into the treasury of the former company. This relief was not contemplated by the bill, and is in the face of the logic of this opinion, yet, as no complaint was made of this part of the decree by either party, we are disposed to affirm it, and direct its execution, if complainant desires it. We think, however, that, under the authority of the rule announced in section 263 of Morawetz on Corporations, set out in full in a former part of this opinion, that complainant and the interveners are entitled to be relieved from liability incurred by the railroad company in the indorsement of the paper of the land company made since the institution of this suit, where that paper embraced new debts incurred by the latter company with Borgfeldt and his associates, but that, so far as these indorsements cover liabilities which were incurred before the filing of the bill, they are entitled to no such relief.

The case will be remanded, if appellants so desire, with a view of effectuating a sale of the stock before referred to, under the orders of the chancellor, and also for the purpose of stating an account between the railroad company and Borgfeldt and his associates, with a view of ascertaining the liability of the company to them for advances made for its benefit, and also with a view of eliminating from the indorsed paper all sums advanced by Borgfeldt and associates to the land company since the filing of the present bill, embraced in any indorsed paper now held by them, and of any usury that may be found in the various claims of Borgfeldt and associates. We agree with the Court of Chancery Appeals that no case is made out which would authorize a court of equity to take the management of the railroad company out of the hands of the majority stockholders, or to wind it up as an insolvent corporation.

With the modifications indicated above, the decree of that court is affirmed.

RICKETTS v. STATE.

(Supreme Court of Tennessee. Nov. 23, 1903.)
CONTEMPT OF COURT—SUBORNATION OF PERJURY—MERGER OF OFFENSES.

1. Where defendant in a prosecution for tippling, by persuasion and threats of personal violence before the trial induced a witness for the state to falsely testify that a sale of liquor made by defendant to him, and then being inquired into, occurred more than 12 months before the indictment, so as to make the offense appear to be barred by limitations, when in fact the sale was made within that time, it constitutes contempt of court, as presenting a case of unlawful abuse of and interference with the process and proceedings of the court, within Shannon's Code, § 5918, subsec. 4.

2. The offense of contempt of court committed by one accused of crime by inducing a witness for the state to falsely testify in his favor is not merged in the greater offense of subornation of perjury, so as to prevent his being punished therefor, a conviction or acquittal of one being no bar in a prosecution for the other.

Error to Criminal Court, Hamilton County; S. D. McReynolds, Judge.

Augustus Ricketts was convicted of contempt of court, and he brings error. Affirmed.

W. H. Cummings and Robert T. Cameron, for plaintiff in error. The Attorney General, for the State.

SHIELDS, J. Plaintiff in error, upon petition of the district attorney charging him with contempt of court, was attached, tried, and convicted, and adjudged to pay a fine of \$50 and undergo confinement in the county jail for a term of 10 days, from which judgment he has prosecuted an appeal in the nature of a writ of error to this court, and assigns error.

The conduct of plaintiff in error alleged in the petition as constituting the contempt of which he was found guilty consists of his action in procuring a witness for the state in a prosecution against him in said court for tippling to falsely testify that a sale of liquor made by plaintiff in error to the witness, and then being inquired into, occurred more than 12 months before the indictment was preferred, so as to make the same appear to be barred by the statute of limitation applicable to such offense, when in fact the sale was made within that time.

The witness was induced to give this false testimony by persuasion and threats of personal violence upon the part of the plaintiff in error before the trial.

The first contention of plaintiff in error is that the facts stated do not constitute contempt of court within the statutes upon this subject.

It is unsound. A case of unlawful abuse of and interference with the process and proceedings of the court within section 5918, subsec. 4, of the Code (Shannon's Ed.), is clearly presented.

¶ 1. See Contempt, vol. 10, Cent. Dig. § 22.

Anything done for the purpose of preventing a witness duly subpoenaed from attending court, or, when in attendance, from testifying to the truth and the whole truth, constitutes a contempt under the statute of the most serious and hurtful character, which should always be vigilantly inquired into and severely punished.

It is difficult to conceive of a more willful and corrupt interference with the process and proceedings of a court of justice than is here presented. Contemnor not only interfered with and prevented the witness then under subpoena from testifying the truth, but practically in the presence of the court caused him to commit the crime of perjury, thus in the most effective way obstructing its proceedings and the administration of justice. Inducing a witness to absent himself from court, as was done in *McCarthy v. State*, 80 Tenn. 543, 15 S. W. 736, is a mild offense compared to that here disclosed.

Again, it is said that the smaller offense of contempt is merged in the greater one of subornation of perjury, and that it cannot be punished. This position is also untenable. The offenses are entirely distinct and independent. They are created upon different principles, for different purposes, are tried and punished differently, and a conviction or acquittal of one is no bar in a prosecution for the other.

This seems to be well settled by the authorities. 7 Am. & Eng. Ency. of Law (2d Ed.) 66 4 Pl. & Pr. 794; U. S. v. Debs (O. C.) 64 Fed. 724; *Yates v. Lansing*, 9 Johns. 417, 6 Am. Dec. 290.

The judgment is affirmed, and the case remanded that it may be executed.

LIVENGOOD v. JOPLIN-GALENA CONSOLIDATED LEAD & ZINC CO.

(Supreme Court of Missouri. Jan. 15, 1904.)

MASTER AND SERVANT—PERSONAL INJURIES—MINES—EXPLOSIVES—INFORMATION OF DANGER—EXAMINATION OF PREMISES—DELEGATION OF DUTY—FELLOW SERVANTS.

1. The operator of a steam drill used in a mine to drill holes into the earth in which to insert explosives is a fellow servant of his helper.

2. Where a steam drill was used in a mine to drill holes into the earth in which to insert explosives, the master was not negligent in not making an examination, after an explosion, in order to ascertain whether the shots in all the holes had been exploded before renewing the use of the drill, but he might cause such examination to be made by the operator of the drill and his helper.

3. Where a newly employed helper of the operator of a steam drill used in a mine in blasting had had some experience, and it was apparent to him that the mine was being worked in this manner, and his first work was to assist the operator in "levelling off" for the purpose of renewing the drilling, the master was not liable for failing to inform him that shots had been exploded at that place the preceding week.

Valliant, J., dissenting.

In Banc. Appeal from Circuit Court, Jasper County; Jos. D. Perkins, Judge.

Action by Walter Livengood against the Joplin-Galena Consolidated Lead & Zinc Company. Judgment for plaintiff, and defendant appeals. Reversed.

McReynolds & Halliburton, for appellant. Thomas & Hackney, for respondent.

MARSHALL, J. The following opinion heretofore rendered in Division No. 1 is hereby adopted as the opinion of the court in banc:

This is an action for \$30,000 damages for personal injuries received by the plaintiff by an explosion in defendant's mine, near Cartersville, on May 21, 1900. The plaintiff recovered a judgment for \$10,000, and the defendant appealed.

The negligence charged in the petition is that the defendant failed to furnish the plaintiff a reasonably safe place to work, and to take necessary precautions to render plaintiff's service reasonably safe, and to inform the plaintiff of any and all hidden danger, and that, disregarding its duty in this regard, it "negligently directed the plaintiff and his co-workmen engaged in operating said steam drill to drill three holes in the face of a drift in defendant's said mine, in the face of which drill holes had been previously made by other servants and employes of the defendant, and charged and loaded with dynamite and other explosive substances, for the purpose of breaking and loosening the ground in said drift, and which said shots so loaded had been previously, by other servants of defendant, attempted to be shot off and exploded, but that in fact one of said shots so previously charged in said drift had not been fired, and had failed to explode, of which fact the plaintiff was ignorant at the time he went to work in said drift making said drill holes as aforesaid; and that defendant had failed and neglected to inform plaintiff that one of said shots so previously made had not been exploded, and remained in the face of said drift; that it was the duty of the defendant, after attempting to fire said previous shots, to inspect said drift, to ascertain whether or not all of said shots so previously loaded had been shot off and discharged, and to advise plaintiff and his co-workmen of the fact, before putting them to operate said steam drill in the face of said drift; but that the defendant, wholly disregarding its said duty to plaintiff, negligently failed to inspect the face of said drift, to ascertain whether or not all of the said shots so previously loaded in the face of said drift had been discharged; that the defendant, by the exercise of ordinary care and diligence in the inspection of said drift, after attempting to fire off said previously loaded shots, could have ascertained that one of said shots had not been exploded, which said inspection and examination the defendant negligently failed to make,

or, if he did make it, negligently and carelessly failed to notify the plaintiff that one of said shots so previously loaded had not exploded, and of the danger which plaintiff ran in attempting to operate said steam drill and to drive the three drill holes aforesaid in the face of said drift; that by reason of said negligence of the said defendant, and plaintiff believing that the said place where plaintiff was sent to work by the defendant was reasonably safe for him to operate said steam drill therein, and believing that the defendant had discharged its duty to the plaintiff, and had made all necessary examinations of said drift after the previous attempted shots, while operating said drill and drilling one of said drill holes in the face of said drift, as directed by the defendant, and while exercising ordinary care, plaintiff drove a drill hole on or near to the said drill hole where the previous shot had not been discharged as aforesaid, and that by means of the said drilling by plaintiff, after the said drill hole had been driven to a depth of some two feet, the said drill came in contact with the giant powder contained in the previous charge, by means of which the said previous charge in said drill hole was exploded and the said shot fired; and that by the explosion of said shot, plaintiff was greatly injured and wounded," etc. The answer is a general denial, a plea of contributory negligence, and of assumption of risk.

To maintain the issues on his behalf, the plaintiff was called as a witness in his own behalf, and testified that he was 19 years old; that on Monday morning, May 21, 1900, he applied to one Dixon, the ground boss of the defendant's mine, the "Gray Goose," for employment; that Dixon asked him if he had ever worked the machine or was a machineman, and he told him he had worked with a machine a little bit, and Dixon told him to go in the mine and help Wilkie, who was running a steam or compressed air drill; that he went down into the mine and found Wilkie, and they "cleaned out" and set up the machine, and drilled two holes, and were drilling a third when an explosion occurred by reason of the drill coming in contact with an unexploded shot (or charge of dynamite) in a drill; that the plaintiff was most seriously and distressingly injured, and crippled and disabled for life, lost his eyesight, and his right hand and left arm were disabled, his left leg was injured, a rib was broken, and he had about a hundred small slivers of rock driven into his body. On cross-examination, he said he had been working around mines for about four or five years, and had before worked a little—not a great deal—with drills; that he told Dixon he had worked a little bit with drills; that Dixon told him he wanted a helper or backer for the machineman; that he had been around Carterville about four days, and prior to that had worked around Joplin; that he had no prior acquaintance with this mine; that when he

went down into the mine it showed that it was being worked, but he could not tell how long before; that when he got down in the mine he helped Wilkie to "level off" and clean up the machine. The defendant asked him if he had not heard of a great many explosions caused by drilling into unexploded shots. The plaintiff objected to the question, the court sustained the objection, and refused to allow the defendant to show that the plaintiff had so heard before he went to work in this mine. The plaintiff then called a doctor, who testified to the character of the plaintiff's injuries, and then the plaintiff rested. The defendant demurred to the evidence. The court overruled the demurrer, and the defendant saved an exception.

To sustain the issues on its part, the defendant called John Dixon, the foreman of the mine, who testified that he had been engaged in mining for about 24 years, and had had 17 years' experience in drilling; that this mine had been in constant operation for about three months before the accident; that when the plaintiff applied to him for work he asked him if he was acquainted with machine work, and he said he was not a professional machineman, but he had helped a little in New Mexico; that he employed him as a helper to Wilkie; that it is the duty of the drillman, after shots have been fired, to examine and find out whether or not all the shots have been exploded before drilling any more holes; that he is furnished with a "spoon" and hose, with air in it, to clear the "face," so he can see clearly whether there is any powder or an unexploded shot in a drill hole; that when shots have been fired it is the duty of the machineman to make such examination the first thing the next morning before doing any other work, and if he finds that any shots have not exploded to report that fact to the foreman, and to go to work somewhere else in the same or, if necessary, another drift; that it is not the duty of the foreman to make such examinations; that it is the duty of the helper to assist the machineman in his work; that he did not tell the plaintiff that shots had been fired on Saturday night; that he did not know that any of the shots had not exploded. The defendant also called six other expert, practical, and experienced miners, foremen, etc., who testified that it is the duty of the machineman to examine and see whether any shot has not been exploded before doing any more drilling, and that it is the duty of the helper to assist the machineman in making such an examination, and that it is not the duty of the foreman to make such examination, nor is it customary for him to do so. At the close of the whole case, the defendant again demurred to the evidence; the court overruled the demurrer, and the defendant excepted.

The court submitted the case to the jury upon the plaintiff's instructions, which declared the law to be that after the explosion on Saturday night it was the duty of the de-

fendant to ascertain whether or not all the shots had exploded, before sending the plaintiff into the drift as helper to the drillman, and if the company did not do so, or did not inform the plaintiff that shots had previously been put in, and caution him to examine and ascertain whether they had all exploded, the defendant was guilty of negligence, and the verdict should be for the plaintiff. The court refused to instruct the jury, as asked by the defendant, that if they found that Wilkie and the plaintiff were fellow servants, and if it was Wilkie's duty to examine and see whether all the shots had been exploded before proceeding to drill further, and if the explosion was caused by Wilkie's negligence, the plaintiff could not recover. Also refused to instruct the jury that the plaintiff, by entering the service, assumed the ordinary risks incident to running the drill, among which was the risk of drilling into unexploded shots and causing an explosion. Also refused to instruct that Wilkie and the plaintiff were fellow servants, and that the plaintiff could not recover if the accident was caused by Wilkie's failure to discharge his duty and examine and ascertain whether all the shots were exploded before proceeding with the work of drilling.

1. There is no room for doubt that the plaintiff and the drillman, Wilkie, were fellow servants. In fact, the petition so treats them, for it speaks of "the plaintiff and his co-workmen" (there was only one, and that was Wilkie) "engaged in operating said steam drill." If they were fellow servants, and if the injuries were caused by the negligence of Wilkie, the plaintiff is not entitled to recover. This is axiomatic in the law, and is not controverted by the plaintiff. The plaintiff's theory, which was adopted by the circuit court, however, is that it was the master's duty to furnish the plaintiff a reasonably safe place to work, and that this duty is personal, and that the defendant in this case, instead of discharging this duty in person by examining and ascertaining whether or not all the shots had been exploded on Saturday night, unlawfully employed Wilkie to discharge this part of its personal duty, and hence the defendant is liable without regard to whether Wilkie was a fellow servant or not, and without regard to whether he was negligent or not. The first postulate is correct. It is the duty of the master to furnish the servant with a reasonably safe place to work, but this is subject to the qualification that regard must be had to the character of the work the master is engaged in, and which the servant is employed to do; for some work, like mining and the use of dynamite, is necessarily dangerous, depending somewhat, but not entirely, upon the care that is taken by the servants, as well as by the master, in the doing of the work and in the handling of the dangerous explosives. *Grattis v. Railroad*, 153 Mo. 380, 55 S. W. 108; *Minnier v. Railroad*, 167 Mo. 99, 66 S. W.

1072. But the plaintiff is not correct in his application of this principle of law to the facts in this case. The defendant did furnish the plaintiff a reasonably safe place in which to work, and did furnish reasonably safe tools and appliances with which to do the work, regard being had to the character of the work to be done. The business was necessarily attended with some risk and danger, but it could be done in a comparatively safe manner, or it could be done in a negligent manner. The injury resulted in this case, not from a failure of the master to discharge his personal duty to furnish the servant with a reasonably safe place and reasonably safe tools and appliances with which to do the work, but from the manner in which the work was done. The petition charges that it was the duty of the master to examine, after each shot, to see whether all the shots had exploded, and the plaintiff's instructions proceed on the same theory, and counsel for plaintiff in their brief contend that the defendant, instead of discharging this duty in person, hired Wilkie to do it, and that this was beyond the power of the defendant, and hence the defendant was negligent and is liable. The petition also charges that the previous shots on Saturday had been fired by "other servants" of the defendant, but this is not shown to be the fact; on the contrary, those shots were fired by Wilkie. There is no conflict in the testimony that it was a part of the duty of the drillman, Wilkie, to examine and ascertain after every shot whether all the shots had exploded, and it was a part of the duty of the helper, the plaintiff, to assist the drillman in this work, and if it was discovered that any shot had not exploded, it was the duty of the drillman and his helper to go to work somewhere else in the same or, if necessary, in another drift. The testimony is uncontradicted that this is the usual and customary way of doing such business, and that the duty of inspecting for unexploded shots is usually cast upon the drillman and his helper, and not upon the foreman or master. Unless, therefore, it be the law that such duty of inspection is a personal duty of the master, which he cannot delegate to or cast upon any one else, the defendant cannot be adjudged guilty of negligence in this case. The duties of a drillman and his helper are necessarily more or less dangerous, but they are simple, and require no great amount of skill or training. Any man of ordinary intelligence can perform them. They consist of drilling holes in the rock, putting sticks of dynamite in them, setting off the shots, removing the dirt after the explosion, and then going through the same operation again. It is not a scientific matter to ascertain whether any of the charges in any of the holes remain unexploded after the shots have been fired. Even the slightest examination will disclose that fact to even the most unscientific investigator. There is no reason in law why the ascertainment of

this simple fact cannot be as well and as safely performed by the servant as the drilling of the hole and the charging of it with dynamite can be performed by the servant. In fact, the latter requires more care and skill than the former. And there is no claim in this case that the master was negligent in the selection of the drillman, nor that Wilkie was an unsuitable or improper person to be employed in such work. That he was negligent in this case is apparent, but he also paid the penalty himself by losing his eyesight. It cannot, therefore, be said, as a matter of law, that the master was negligent in not performing the duty of inspection personally, nor that he was not entitled to have the duty performed by the servant. It was a natural and almost inseparable part of the very work the servant was employed to do. In the very nature of the business, it would be practically impossible for the master, who was largely engaged in mining, to visit every drift after every shot to see if every charge had been exploded. The fundamental idea upon which the case was predicated and submitted to the jury was therefore erroneous.

The contention of the plaintiff that the master was negligent in not informing the plaintiff that there had been shots fired on Saturday, and in not warning the plaintiff to examine and look out for unexploded charges, is also untenable. The plaintiff applied for work; represented that he had been engaged in mining for four or five years, and, while not a professional drillman, yet had had a little experience running a drill; he saw, when he went down into the mine, that it was a going concern, and was being worked; he saw that shots had been fired; he found Wilkie "cleaning up" or "leveling off," and fixing the drill for further work, and he set about assisting him in so doing as a part of his duty; and he had, therefore, the physical evidences of the fact that this mine was being operated like such mines usually are. The master did not know that any shot had not been exploded, and therefore was not negligent in not giving the plaintiff warning of a fact which was known to him and was unknown to the plaintiff, and in which respect this case differs essentially from the case of *Chambers v. Chester*, 172 Mo. 461, 72 S. W. 904. This case is also wholly unlike *Fisher v. Central Lead Co.*, 156 Mo. 479, 56 S. W. 1107, and *Hamman v. Central Coal & Coke Co.*, 156 Mo. 232, 56 S. W. 1091, where the master failed to furnish the servant a safe place in which to work, in that he failed to provide suitable props for the roof of the mine, or to make provision to protect the servant against rocks falling from the roof of the mine, while the servant was at work in a drift, and where it was no part of the duty of the servant to make such provision against such injuries. Here it was the duty of the drillman and of the plaintiff to examine and see whether any charge remained unexploded. They failed to do so, but pro-

ceeded with the work, and the injury ensued. The drillman was negligent, and the plaintiff was negligent. The injury was caused by a risk incident to and ordinarily connected with the doing of the work the plaintiff engaged upon. The negligent manner in which the plaintiff and his fellow servant, Wilkie, did the work, caused the injury. The work of the master was dangerous, but it was not illegal. The master had a right to conduct it in his own way so long as that way was not illegal, and so long as it was not negligently done on his part. The servant assumed the risk of doing the work in that way when he entered the master's employment. He also assumed the risk of being injured if his fellow servants were negligent, and they, in turn, assumed the risk of being injured if he was negligent. For such injuries there can be no recovery.

The injuries to the plaintiff are the most distressing and serious of any that have ever been present in any case that has been called to the attention of this court, and the record has been scrutinized with the hope that some legal ground could be found which would warrant an affirmance of the judgment; but, while the sympathies of this court are with the plaintiff, the law is so plainly against him that the court is reluctantly forced to reverse the judgment of the trial court.

ROBINSON, C. J., and BURGESS, GANTT, and BRACE, JJ., concur. FOX, J., not sitting.

VALLIANT, J. (dissenting). The opinion of the court in this case is based on the assumption that Wilkie, whom the defendant's testimony tends to show was entrusted with the performance of the master's duty in respect of examining for unexploded shots, was the fellow servant of the plaintiff. In my judgment that is an erroneous assumption, and for that reason I dissent from the opinion based on it. The master owes the duty to his servant to furnish him reasonably safe implements with which to work, and a reasonably safe field of operation. This duty the master cannot shirk by casting it on a servant. It is not necessary that the duty be performed by the master in person; he may cast it on a servant to perform; but when he does so he is not rid of it; the act of the servant in performing or neglecting to perform that duty is the act of the master, and he is as liable for the act as if he performed it in person. The ordinary employment of a servant is to do the work of his master in respect of the business in which he is engaged. In this case it was to get out the ore for market. That is what the plaintiff was employed to do, and, according to his testimony, it was the only thing he was employed to do. That is also, according to the testimony of both plaintiff and defendant, what Wilkie was employed to do. But in addition to that work, accord-

ing to defendant's testimony, Wilkie was also charged with the duty of looking out for the unexploded shots. If Wilkie had that duty, then he was employed in a dual capacity. In one he was a servant doing the ordinary work for which the business was being conducted; in the other he was in the master's shoes, looking after the safety of his servants. In the one capacity he might be the fellow servant of the other servants doing the ordinary work of the mine, but in the other capacity not so. If he was guilty of negligence in the one capacity, it might, in a given case, be adjudged the negligence of a fellow servant, whilst his negligence in the other capacity would be the negligence of the master. The master can no more avoid his duty by selecting one to perform it who is also engaged in the ordinary work, and who in that respect is a fellow servant of others engaged in the same work, than he can by selecting a man to do that duty and nothing else. The master may intrust the performance of his duty to look after the safety of his servants to one or many, and, if to many, then they, in the performance of that duty, might become as to one another fellow servants. But because men are fellow servants when working in one capacity does not make them fellow servants with reference to their work in another capacity.

In considering this subject, we should keep in mind that this duty the master owes to his servant is never ended, and he cannot by any form of his contract make his servants assume the risk of his negligence. The only risk the servant assumes, and the only risk he can lawfully be made to assume, is the risk incident to the business, unmixed with the master's negligence. In this case, according to the plaintiff's testimony, the only work he was employed to perform was that of helping Wilkie run the drilling machine to get out the ore; he was employed to do the work of a common laborer in that capacity; he was not in any sense the master's alter ego. The story he told the superintendent when he applied for employment showed that he was a boy of very little experience, certainly not enough to be intrusted to look after the safety of himself and others working with him in the dangerous occupation. In his employment there was nothing said to him to indicate that he was to be the master's vice principal. Unless he was the master's vice principal in this respect, and unless Wilkie was also the master's vice principal in the same respect, they were not fellow servants.

There was testimony on the part of defendant which was at least intended to show that this boy was employed to look after these unexploded shots, and to assist in the performance of the duty which the master in that respect owed to him and the other servants; but that was contrary to the plaintiff's testimony, and it raised a question for the jury. This court has no right to pass on

that question of fact; it was passed on by the jury, and that should be the end of it.

In my opinion the judgment should be affirmed.

TROWER BROS. CO. v. HAMILTON.

(Supreme Court of Missouri. Jan. 15, 1904.)

CHATTEL MORTGAGE—SUFFICIENCY OF DESCRIPTION—LOCATION OF PROPERTY—USURY—WHAT LAW GOVERNS.

1. A prospective purchaser of cattle then on the owner's farm, in H. county, applied to a commission company for a loan, to secure which he gave a chattel mortgage, dated on that day, and describing the cattle sufficiently, except that they were said to be on the purchaser's farm, "section 6, town 44," etc., in J. county. The land described was in P. county, into which the purchaser's farm extended. The mortgage, with the purchaser's note, was left with the commission company, while the purchaser and the owner transported the cattle to the purchaser's farm, in J. county. They then returned to the commission company and received the money. The mortgage was then recorded in J. county. *Held*, that the description was sufficient to make the record notice to a purchaser.

2. Where a resident of Missouri goes to the office of a corporation in Kansas, and there executes his note, payable in Kansas, together with a mortgage on cattle then in Missouri, which he contemplates purchasing, which mortgage is afterwards recorded in Missouri, both note and mortgage are Kansas contracts, and are governed by Gen. St. Kan. 1901, § 3592, providing merely that usurious payments of interest shall be applied on the principal, and not by Rev. St. Mo. 1899, § 8710, making illegal liens on personalty securing usurious loans.

In Banc. Appeal from Circuit Court, Nodaway County; Gallatin Craig, Judge.

Replevin by the Trower Bros. Company against Alexander Hamilton. Judgment for defendant, and plaintiff appeals. Reversed.

Lathrop, Morrow, Fox & Moore, for appellant. W. C. Ellison, for respondent.

BURGESS, J. The following opinion, heretofore rendered in Division No. 2, is hereby adopted as the opinion of court in banc:

This is an action of replevin for the possession of 67 head of cattle. Plaintiff obtained possession of the cattle under the order of delivery, sold them, and had the proceeds arising from their sale at the time of the trial. The judgment of the lower court was against the plaintiff and its sureties on the replevin bond given in the case for the value of the property, and damages amounting to \$1,400.80, from which plaintiff appeals.

The petition is in the usual form. The answer is first a general denial, and then proceeds as follows: "This defendant, further answering, says that all the cattle and stock taken from him and his possession under and by virtue of the writ of replevin issued in said cause were purchased by defendant on the 7th day of February, 1900, at Kansas City, in said state, of the Chicago Live Stock

Commission Company, who was then and there in possession and the apparent owners of said stock and cattle; that defendant then and there purchased said cattle and stock in good faith and for value, to wit, two thousand dollars then and there paid by defendant to said commission company, and without having any notice of any kind whatever of plaintiff's alleged claim or demand on said stock or cattle, and defendant had and retained the possession of said stock and cattle, as the true and legal owner thereof, from the time of his purchase aforesaid until taken under the writ of replevin aforesaid. This defendant further states that he is the owner of said cattle and stock, and demands judgment for the return thereof to him. Further answering, this defendant says that the alleged chattel mortgage and note mentioned in the petition were and are usurious, in that they exact and embrace interest more than at the rate of eight or ten per cent. per annum, contrary to and in violation of the laws of the state of Missouri and of Kansas then and at the time in force. Further answering, this defendant says and admits that plaintiff is, and at the date of the execution of said chattel mortgage, and for more than a year prior thereto, was, a corporation for gain and pecuniary profits organized and incorporated under and by virtue of the laws of the state of Kansas; that said plaintiff has never maintained or kept a public office in the state of Missouri, or any other office; that the plaintiff at any of the dates or times referred to in the petition did not file in the office of the Secretary of State for the state of Missouri a copy of its charter or articles of incorporation, or a copy of its certificate of incorporation, duly certified by any officer or person, and did not at any time, through any of its officers or agents, forward to said Secretary any sworn or other statement relating to its stocks or business, and did not at any time pay any incorporation tax or other tax to the state of Missouri, and said plaintiff at no time aforesaid received from any officer of the state of Missouri a certificate, as provided in section 1025 of the Revised Statutes of Missouri of 1899, that during all the times aforesaid the plaintiff, not being a railway corporation, was and is doing a regular business in the state of Missouri, and in its business aforesaid took the mortgage and notes secured thereby mentioned in the petition, and in violation of law. Wherefore defendant says said mortgage and surety are void, and the property described in said mortgage is not subject to the provisions thereof as against this defendant."

Plaintiff replied as follows: "Comes now the said plaintiff, and, for reply to the amended answer of the said defendant herein filed, says: It admits that the cattle in controversy herein were purchased by said defendant from the Chicago Live Stock Commission Company at Kansas City on the 7th day of February, 1900, and that said defendant had

the possession of said cattle at the time of the commencement of this action. Plaintiff admits that it is a corporation created under the laws of the state of Kansas, as alleged in defendant's answer. Further replying herein, said plaintiff says that it denies that it has not filed in the office of the Secretary of State of the state of Missouri a copy of its charter or articles of incorporation, but alleges the fact to be that on the 13th day of October, 1900, upon application therefor, it obtained from the Secretary of State of the state of Missouri a certificate of authority or license to do business in the state of Missouri, and paid to the Treasurer of said state of Missouri the tax or fees required by the statute to be paid by foreign corporations for a permit to do business in said state, and has in all respects complied with the requirements of the statute. Further replying herein, said plaintiff says that the contract under which the plaintiff claims the property in controversy herein was made, executed, and delivered at the office of said plaintiff in the state of Kansas, and as a part of the business transacted by said plaintiff at its said office in said state of Kansas, and when so made and delivered was, and still is, good, valid, and binding contract as against the said R. H. Muir therein mentioned as obligor and mortgagor, and all persons claiming by, through, or under him, and secured to said plaintiff a valid and subsisting lien upon the property mentioned in plaintiff's petition herein filed, until the full payment and satisfaction of the indebtedness evidenced by said notes and secured by said mortgage; that, as relates to said contract, and the rights of said plaintiff herein, section 1025 of the Revised Statutes of Missouri of 1899, referred to in the amended answer of the defendant herein filed, is unconstitutional and void, the same being in conflict with the provisions of section 10 of article 1 and section 2 of article 4 of the Constitution of the United States, and of section 1 of article 14 of the amendments to the Constitution of the United States. Further replying herein, said plaintiff says that it denies each and every allegation and averment in said defendant's answer contained not herein specially admitted to be true."

Briefly stated, the salient facts are about as follows: Plaintiff is a corporation organized under the laws of the state of Kansas, and doing business as a commission merchant in the Stockyards Exchange Building in Kansas City, Kan. The plaintiff makes a practice of loaning money upon cattle of its customers, with the understanding that the cattle, when marketed, shall be sold by the plaintiff company, and the usual commission charged therefor, with the proviso that if the borrower does not ship his cattle to plaintiff company for sale, but sells them through some other commission merchant, he shall pay to the plaintiff a commission of 50 cents per head, the same as

though the plaintiff company had actually sold them for the borrower. At the time of the transaction involved in this case, R. H. Muir resided on his farm in Johnson county, Mo. His farm was near the county line, and a portion of it extended into Pettis county, Mo. About the middle of September, 1899, Muir bought 101 head of cattle from F. S. Kerr. At the time of the purchase the cattle were in two pastures near the town of Lingo, in Henry county. When this sale was made, both Muir and Kerr came to the office of the plaintiff, in Kansas City, Kansas, and arranged the purchase of the cattle, and Muir arranged for a loan of money from plaintiff with which to pay the purchase price to Kerr. Muir made his personal note, dated at Kansas City, Kan., September 16, 1899, in the sum of \$2,510.85, payable to the order of the plaintiff at its office in the Live Stock Exchange in Kansas City, Kan., with interest at the rate of 8 per cent. from maturity. As security he executed a mortgage on the same date to secure the note; the mortgage, according to its terms, covering the following property: "3,000 bushels of corn, 60 hogs, and 108 head of Southwest Missouri native cattle, one to three years old and upwards, average weight about 700 pounds and worth \$3,000 now. For further and better description, said cattle are marked and branded as follows, viz.: The above 108 head of cattle consist of forty-two (42) Southwest Missouri native heifers, two years old; fifty-eight (58) Southwest Missouri native steers (40, 2 and 3 years old, 18 yearlings); 1 bull; seven (7) Missouri natives (6 yearling heifers, $\frac{1}{2}$ year old steer); forty (40) head now branded O on hip, balance to be branded same by October 1st, 1899, except the seven (7) head of Missouri natives. May have a few other brands, but none described. All dehorned except 4 or 5. Also 3,000 bushels of corn included in said mortgage, which is to be fed to the above cattle, and above cattle to be full fed. Also sixty (60) head of hogs, average weight about 150 pounds. The same being now located on farm owned by R. H. Muir, 4 miles north of Rodella, section 6, town. 44, range 33 Johnson county, Missouri, and being all the property of the above description, owned or controlled by the mortgagor now on said premises, and this mortgage is intended to cover and include all of said property of the above description, and any addition and increase thereto, located on the above described premises and range, if any, thereabouts. The marks and brands used above to describe said property are the only marks and brands and carry the title, although said property may have other marks and brands. * * * Said property to remain and be kept on the premises above described until the full payment of the indebtedness hereinafter described, unless sooner marketed or removed by and with the written consent of the mortgagee, or its assigns." While the mortgage

and note were dated September 16, 1899, and at that time delivered to or lodged with the plaintiff at its office in Kansas City, Kan., the money was not advanced by the plaintiff until two or three days afterwards. As soon as the loan was arranged for, and the note and mortgage given, Kerr and Muir went to the pasture where the cattle were located, near Lingo, and drove them to Muir's farm, in Johnson county, Mo., and branded them as by the mortgage provided. As soon as this was done they went to Kansas City, and plaintiff then paid the money over to Muir; and Muir, in turn, paid it to Kerr. At that time all the cattle branded as provided in the mortgage were on Muir's farm in Johnson county, Mo. The mortgage was duly recorded in the office of the recorder of deeds for Johnson county, Mo., on September 18, 1899. For the first 30 days after the cattle were branded they were pastured on that part of Muir's farm which extended into Pettis county, but at the expiration of that time, or about October 15th or 20th, the cattle were returned to that portion of the farm in Johnson county, and there remained until shipped away by Muir, as hereafter stated. When the cattle were placed on that portion of the Muir farm in Johnson county, all the terms of the mortgage were complied with. There were the number, brand, and character of cattle as described in the mortgage, and they constituted all of the cattle owned by Muir, and upon his farm. The conditions as to location of the cattle remained the same until some time in November, when Muir, without authority of the mortgagee, shipped some 30 head of the mortgaged cattle to St. Louis, and sold them through a commission house there to some parties residing in Carroll county, Ill., to which point the cattle were taken. The balance of the herd continued to remain on the Muir farm, in Johnson county, until February 7th, on which date Muir, without authority of the mortgagee, and without its knowledge, shipped 69 head of the mortgaged cattle to Kansas City, where they were sold by the Cowgill Commission Company; and the defendant, Hamilton, became the purchaser, giving his notes for the purchase money, and taking the cattle to his farm, in Nodaway county, Mo., where they remained until replevied in this action. Early in March, 1900, the plaintiff became advised that Muir had shipped out the mortgaged cattle, and immediately began an investigation. It traced the 30 head to Carroll county, Ill., brought replevin suit, obtained the cattle, sold them, and was successful in the replevin suit when it was tried on its merits. The plaintiff also traced the 69 head of cattle involved in this case to the possession of the defendant, and brought this replevin suit, and obtained possession of 67 of the cattle.

Over the objection of defendant, the court, sitting as a jury, declared the law to be as follows:

"(1) A mortgagee of personal property, where the mortgage is duly executed and acknowledged, and recorded in the office of the recorder of deeds of the county in which the mortgagor resides, upon maturity and non-payment of the indebtedness secured by such mortgage, becomes invested with the title and the right to the possession of the mortgaged property, and may maintain an action for the recovery of such property against a purchaser from said mortgagor, or against one in possession of said property, for the purpose of subjecting it to the payment of the indebtedness secured by said mortgage, and remaining unpaid.

"(2) A mortgage recorded in the county where the mortgagor resides imparts full notice to every one who was or might become interested in the mortgaged property, and the removal of the mortgaged property to another county will not destroy or impair the lien of such mortgage. A purchaser of such property takes the same with notice of, and subject to, the mortgage."

The following instructions asked by plaintiff were refused, and it duly excepted, to wit:

"(3) The court, sitting as a jury, finds from the evidence in this case that R. H. Muir executed and delivered to the Trower Bros. Company, at the office of said company, in the state of Kansas, the note for \$2,510.85, of date September 16, 1899, introduced in evidence; that, to secure the payment of said note, the said R. H. Muir at the same time and place executed and delivered to said the Trower Bros. Company the chattel mortgage introduced in evidence, upon 108 head of cattle and other property in said mortgage described; that said mortgage was on or about the 18th day of September, 1899, recorded in the office of the recorder of deeds of Johnson county, Missouri; that at the time of the execution and recording of said mortgage the said R. H. Muir resided in said Johnson county, Missouri; that the indebtedness secured by said mortgage has not been paid, but remains unpaid, in whole or in part; that afterwards, and before said note became due, the said R. H. Muir, without the knowledge or consent of said the Trower Bros. Company, shipped a portion of the cattle mentioned and described in said mortgage to the Cowgill Commission Company at the stockyards at Kansas City, and the same were there sold, and were then or afterwards purchased by the defendant herein; that the cattle so sold by the said R. H. Muir and purchased by the defendant are the same cattle taken from the possession of the defendant under the writ of replevin herein, and in controversy in this action; and that, prior to the commencement of this action, demand was made by or on behalf of said plaintiff upon the defendant for the possession of the cattle in controversy herein, and possession thereof was refused. And upon the foregoing facts, the court declares the law to be that

the defendant obtained no title to said cattle as against the rights of the plaintiff, and the plaintiff is entitled to a judgment herein for the possession of said cattle; and the fact that the defendant may have, in good faith, paid full value for said cattle, does not impair the right of the plaintiff to recover herein.

"(4) In determining whether any amount remains due and unpaid upon the note secured by the chattel mortgage from R. H. Muir to the plaintiff, introduced in evidence, the plaintiff, before applying any payments which may have been received by it upon said note, is entitled to have deducted from the amount of such payments all reasonable costs and expenses incurred by said plaintiff in ascertaining where the cattle mentioned and described in said mortgage were after the same were removed from the farm of the said R. H. Muir, in Johnson county, Missouri, and in obtaining possession thereof, together with all reasonable expenditures necessarily incurred by said plaintiff in and about the litigation made necessary for the recovery of said cattle by reason of the sale of said cattle by the said R. H. Muir, and their removal from said farm."

Thereupon the court modified said declaration as follows:

"In determining whether any amount remains due and unpaid upon the note secured by the chattel mortgage from R. H. Muir to the plaintiff introduced in evidence, the plaintiff, before applying any payments which may have been received by it upon said note, is entitled to have deducted from the amount of such payments all reasonable costs and expenses incurred by said plaintiff in ascertaining where the cattle mentioned and described in said mortgage were after the same were removed from the farm of the said R. H. Muir, in Johnson county, Missouri, and in obtaining possession thereof, together with all reasonable expenditures necessarily incurred by said plaintiff in and about the litigation made necessary for the recovery of said cattle by reason of the sale of said cattle by the said R. H. Muir, and their removal from said farm, provided the court finds that plaintiff is entitled to recover in this action."

The above declaration No. 4, as modified, was given by the court. To the giving of said declaration as modified, the plaintiff then and there excepted.

"(5) The court, sitting as a jury, finds that the contract under which the plaintiff claims the property in controversy herein was made, executed, and delivered at its office in the state of Kansas, and as a part of the business transacted by said plaintiff at its said office in the said state of Kansas, and, when so made and delivered, was, and still is, a good, valid, and binding contract, as against the said R. H. Muir, therein named as obligor and mortgagor, and all persons claiming by, through, or under him, and secured to said plaintiff a valid and subsisting lien upon the property mentioned and described in the

mortgage mentioned in plaintiff's petition until the full payment and satisfaction of the indebtedness evidenced by the note secured by said mortgage; and upon such facts the court declares the law to be that, as relates to said contract and the rights of said plaintiff herein, section 1025 of the Revised Statutes of Missouri of 1899, referred to in the amended answer of the said defendant, herein filed, is unconstitutional and void; the same being in conflict with the provisions of section 10, art. 1, and section 2, art. 4, of the Constitution of the United States, and of section 1 of article 14 of the amendments to the Constitution of the United States."

The above declaration, No. 5, was refused by the court, and the plaintiff then and there excepted.

Over the objection and exception of plaintiff, the court declared the law in behalf of defendant as follows:

"(1) The court declares the law to be that, under all the facts and circumstances in this case, the finding should be in favor of the defendant.

"(2) The court, sitting as a jury, finds the facts to be that at the time of the execution and delivery of the chattel mortgage in evidence, and at the time the said mortgage was filed for record, the cattle in controversy were first in Henry county, and from thence were moved to Pettis county, and were not located in Johnson county until after the recording of said mortgage. The court further finds the facts to be that defendant on or about the — day of February, 1900, purchased the said cattle in controversy at Kansas City, Missouri, and moved the same to Nodaway county, where he had them in his possession at the time they were taken under the replevin writ in this cause; that defendant was a purchaser of said cattle for value, in good faith, and without any notice whatever of said mortgage, or the record thereof, except such notice as the law implies from its having been recorded.

"(3) Applying the law to these facts, the court declares the law to be that the description of the cattle in controversy in said mortgage was not sufficient to give the defendant constructive notice of the existence of such mortgage.

"(4) The court finds the facts to be that the consideration of the note in evidence, secured by the chattel mortgage in evidence, was not to exceed \$2,387.12, and that there was no further or other consideration for said note. The court further finds the fact to be that the face of said note is \$2,510.85; that, under the statute laws of Kansas, where said note was made, the highest contract rate of interest on notes of the character of this one was and is ten per cent. per annum; and that all interest exacted or received or contracted for in excess of that rate is usurious.

"(5) On the facts above, the court declares the law to be that by the note in evidence

and mortgage the plaintiff in this case exacted usurious interest; that said chattel mortgage securing said note was and is a contract required to be recorded in this state, before becoming of any validity against this defendant, and, in so far as it affects the issues in this case, is governed by the laws of this state with regard to the recording of chattel mortgages, and with regard to liens affected by usury, as specified in section 3710 of the Revised Statutes of 1899. The court therefore declares the law to be that, as to this defendant, said chattel mortgage was and is void and of no effect."

The court, of its own motion, declared the law as follows:

"(8) The court, sitting as a jury, finds the facts to be that the plaintiff at the date of the execution of the note and mortgage in evidence, and for some time prior thereto, was, and now is, a corporation organized under the laws of, and located in, the state of Kansas; that said corporation during all of said time was, in the state of Missouri, transacting a general business in its corporate capacity, and in its line, which sometimes included the sale of cattle and the taking of notes and mortgages for purchase money; that said corporation did not in any manner comply with any of the provisions of sections 1024, 1025, c. 12, art. 1, of the Revised Statutes of 1899, until after the commencement of this suit.

"(9) The court, sitting as a jury, finds the facts to be that the cattle replevied in this case were turned over to plaintiff under the writ, and have been by plaintiff sold and disposed of, and that plaintiff has not the possession of said cattle; that the value of the cattle replevied, at the time thereof, in their then condition and location, was \$1,335.80, and their present value, taken in their condition and location, as at the time they were taken, is the aforesaid sum; that at the time said cattle were replevied the defendant was the owner and entitled to the possession thereof, and, as such owner, is now entitled to the same; and for taking and detaining the cattle under the writ the court, sitting as a jury, assesses the damages at sixty-five dollars."

To the above declarations of law, numbered 8 and 9, plaintiff then and there excepted.

The first question with which we are confronted is with respect to the description of the cattle in the mortgage, which the trial court held not to be sufficient. It is said for defendant: That, "vague and indefinite as the description is, it should be treated as sufficient, if it were not for the last sentence in the description of the property, which reads as follows: 'The same being now located on farm owned by R. H. Muir, 4 miles north of Rodelia, section 8, town. 44, range 23, Johnson county, Missouri.' That, so far as this clause is concerned, the mortgagor may have owned other property of like description on other premises." The point is,

as we understand it, that at the time of the execution of the mortgage the cattle included therein were not upon the farm of the mortgagor, Muir, in Johnson county, but were taken there about the 17th or 18th of September, 1899, branded as specified in the mortgage to the Trowers Bros. Company, and, as defendant contends, turned upon pasture in Pettis county. But they were not in Pettis county at that time, nor until after they were delivered or received by Muir upon his farm, and branded by him "to plaintiff." The mortgage was recorded in the recorder's office of Johnson county on September 18, 1899. Thereafter defendant purchased the cattle in open market in Kansas City, Mo., for a valuable consideration, and without any notice of plaintiff's claim of right thereto, other than that, if any, which was imparted by the record of the mortgage.

It is claimed that the record was not constructive notice, because of the insufficient description of the cattle, in that they were not at the time of the execution of the mortgage upon Muir's farm, in Johnson county, which is described as being in section 8, township 44, range 23, when in fact that section is all in the county of Pettis. *Mackey v. Jenkins*, 62 Mo. App. 618; *Furniture Co. v. Davis*, 76 Mo. App. 512, and *Jones Bros. v. Long*, 90 Mo. App. 8, are relied upon as sustaining that contention; but we think there is a very material difference between those cases and the one in hand, in this: In those cases the location of the property was necessary to its identity, its description otherwise being too general, and when the mortgages were signed the transactions were completed; but it was not so in the case at bar. In this case the mortgage and note were dated September 16, 1899, and at that time delivered to or lodged with the plaintiff at its office in Kansas City, Kan., and the money was not advanced by the plaintiff until two or three days afterwards. As soon as the loan was arranged for, and the note and mortgage given, Kerr and Muir went to the pasture where the cattle were located, near Lingo, and drove them to Muir's farm, in Johnson county, Mo., and branded them as by the mortgage provided. As soon as this was done they went to Kansas City, and plaintiff then paid the money over to Muir; and Muir, in turn, paid it to Kerr. At that time all the cattle branded as provided in the mortgage were on Muir's farm, in Johnson county. The mortgage was duly recorded in the office of recorder of deeds for Johnson county on September 18, 1899. When the cattle were placed upon that portion of the Muir farm in Johnson county, all the terms of the mortgage were complied with. There were the number, brand, and character of cattle as described in the mortgage, and they constituted all of the cattle owned by Muir, and upon his farm. It was a continuous transaction from the time of procuring the loan, the purchase of the cat-

tle by Muir from Kerr, their transportation to Muir's farm, and branding by him to Trower Bros. Company, the payment of the money by the company to Muir, and the recording of the mortgage; and, even if it had been necessary (which we do not concede, as they were otherwise sufficiently described) to the validity of the mortgage that the cattle should be on the mortgagor's farm, in Johnson county, as recited in it, they were in legal contemplation on said farm; and, when once there and branded to plaintiff, there can be no question but that from that time, at least, they were covered by the mortgage, and their removal from the farm thereafter did not have the effect of vitiating it. In *Iowa State National Bank v. Taylor*, 98 Iowa, 631, 67 N. W. 677, the mortgage described more cattle than the mortgagor owned, and stated that they were on a certain farm, when in fact they had not yet been placed there. The court says: "The fact that the mortgage purported to include more cattle than were there on the farm did not affect its validity with respect to those which were actually placed there. Nor do we think its validity was affected by the error in describing the place where the cattle were kept. Donaldson had contracted for them, and they were in fact placed on the Yeoman farm, where they were required to be kept until July, within a week after the mortgage was executed; and they were on the Beck farm, where they were required to be kept after the 1st of July, when the plaintiff claims to have taken possession of them. No prejudice to it could have resulted from the error." In *Bank v. Ragsdale*, 158 Mo. 668, 59 S. W. 987, 81 Am. St. Rep. 332, the description in the mortgage in controversy was as follows: "120 head of feeding cattle now on feed in Audrain county, Missouri." The court held the description sufficient, saying: "The evidence tends to show that the cattle in suit belonged to Crockett Ragsdale, and were at the date of the mortgage on feed in Audrain county. Until he produces some evidence to show that he had another lot of cattle filling that description, and that it was the lot covered by the mortgage, and should have been taken under the writ, instead of this lot, the description will be held to refer to this lot. He cannot be heard to say that the description is so vague as to be meaningless as long as the evidence shows a lot of cattle to which it may apply. Nor can any one holding possession under his title make a similar objection." It follows that, as defendant thereafter purchased the cattle, he did so with notice of the mortgage.

By declaration of law No. 4 given in behalf of defendant, the court finds that the amount of cash received by Muir was \$2,387.12, while the note secured by the mortgage was for \$2,510.85, and from that fact arrives at the conclusion that the note was usurious. This was upon the theory, which is evidently correct, that the note was a

Kansas contract, as it declares that under the statute laws of that state the highest contract rate of interest upon notes is 10 per cent. per annum, and all interest charged upon such instruments in excess of that amount is usurious. The questions, then, are: By the laws of which state are we to be governed in passing upon the validity of the note and mortgage—Kansas or Missouri? And are we governed by the laws of Kansas in regard to both note and mortgage? That the mortgage is incident to the note, and would pass by its assignment and delivery, and only as incident to it, is clear; and, while they were both executed in Kansas, the mortgage, being upon property located in Missouri, was required by law to be recorded in the recorder's office of the county where the mortgagor resided, in order to be notice to purchasers of it. *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343, was a contract for the loan of money, entered into in Rhode Island, secured by a mortgage upon lands in Kentucky; and it was held that the contract was governed by the laws of the former state, and not by laws of the state where the security was taken. The court said: "With regard to the locality of the contract, we have no doubt that it must be governed by the law of Rhode Island. The proof is positive that it was entered into there, and there is nothing that can raise a question but the circumstance of its making a part of the contract that it should be secured by conveyances of Kentucky land. But the point is established that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan upon the part of the borrower is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrowed, unless another place of payment be expressly designated by the contract. * * * Two preliminary questions arose, the first of which was whether the *lex loci* of the contract was Rhode Island or Kentucky. By the usury laws of the latter, the contract and all the securities given for it are void, both for principal and interest. Under the laws of the former, although it is prohibited to take more than 6 per cent. interest, and a penalty imposed for the offense, the act does not render the contract void—certainly not for the principal sum. * * * It is not easy to discover how the taint of Rhode Island usury can infuse itself into the veins of a Kentucky contract." In *Arnold v. Potter*, 22 Iowa, 194, it is held that when interest expressed is usurious, both by the law of the place where the contract was made and where it is to be executed, the law of the place where the contract was made will gov-

ern as to the consequences of the usury. In *Bowman v. Miller*, 25 Grat. 831, 18 Am. Rep. 686, a resident of Virginia took a promissory note, made by himself, and indorsed by other residents of Virginia, blank as to date and place of payment, to Maryland, where he inserted a date and place of payment in Maryland, and negotiated it at a rate of interest usurious under the laws of both states. By the laws of Maryland, usury only avoided a contract as to the excess of interest agreed. By those of Virginia, it invalidates it. Suit on the note was brought in Virginia, and it was held that it was a Maryland contract, and, not being void there, could be enforced in Virginia. The court said: "What, then, is the Maryland law upon the subject of usurious contracts? Under its operation, as found in this case, a contract or evidence of debt, though tainted with usury, is not null and void; but it is a valid contract, upon which an action may be maintained for recovery of the principal and interest actually due on said contract or evidence of debt, and it is only void to the extent of the usurious interest. It is clear, therefore, that the notes of the defendant, executed in Maryland, and payable there, were valid securities." In *Vermont Loan & Trust Co. v. Dygert* (C. C.) 89 Fed. 123, it is held: "Notes dated in Washington, and by their terms payable there, are governed by the law of that state as to usury, although the contract was made in Idaho, and the notes are secured by mortgage on property there, in the absence of evidence of a design to evade the usury laws of the latter state." In *Kuhn v. Morrison* (C. C.) 75 Fed. 81, it is held: "The statutes of Tennessee, under which the lien of a mortgage is lost when the debt it secures is affected with usury, do not affect a mortgage executed in Tennessee, but covering land in Georgia, and securing a note made in Georgia, and payable there, and bearing a rate of interest which, though usurious in Tennessee, is legal in Georgia. A note was signed and dated in Georgia. A mortgage given to secure it was executed in Tennessee, and both note and mortgage were delivered and the money was paid in the latter state. Held, that the mortgage was a Tennessee contract, and subject to the laws of that state in respect to usury in the debt secured." In *Central National Bank v. Cooper*, 85 Mo. App. 383, in an action involving the application of section 3710, Rev. St. 1899, to a note and mortgage made in Kansas, it is held: "The place of performance of a contract, in the absence of an attempt to evade the laws, follows the law governing the terms of the contract; and so a note payable in Kansas is a Kansas contract, although executed in Missouri, and is not usurious, although it bear 10% interest; that rate being unlawful in Missouri and valid in Kansas. The situs of a debt is not lost in the situs of the security, and a mortgage made in Missouri on property located in Mis-

souri to secure payment of a Kansas note is not usurious, and does not come under the ban of the statute." The law of Kansas, where the note and mortgage were executed, did not vitiate them because of the note containing usurious interest, but merely imposes a penalty for the exaction of usury, which, however, does not in any way impair the integrity or legal force of the obligation. The statute of that state provides that "all payments of money or property by way of usurious interest, or of inducement to contract for more than ten per cent. per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal and ten per cent. interest per annum, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid. * * *" Section 3592, Gen. St. Kan. 1901. The note and mortgage being valid under the laws of the state where executed, there is no obstacle in the way to their enforcement under the laws of this state, unless it be because of plaintiff's failure to comply with sections 1025, 1026, Rev. St. 1899, before bringing suit, as section 3710, Rev. St. 1899, has no application to such mortgages. But if it has, its effect is to invalidate a mortgage given as security to a Kansas contract, and is as to such contract invalid, under the fourteenth amendment of the federal Constitution. *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Bedford v. Loan Association*, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834.

For these intimations, the judgment should be reversed, and the cause remanded. It is so ordered. All concur.

JEROWITZ v. KANSAS CITY.

(Court of Appeals at Kansas City, Mo. Jan. 4, 1904.)

DEFECTIVE STREETS—DUTY OF MUNICIPALITY—INSTRUCTIONS.

1. In an action for injury from a defective street it is error to instruct that it is the city's duty to "keep its streets in a proper state of repair, free from obstructions, and reasonably safe for travel," instead of "in a proper state of repair, free from obstructions, so that they will be reasonably safe," etc.

2. Where other instructions clearly lay down the rule that a city is only required to keep its streets in a state of repair which is reasonably safe for travel, error in instructing that it should keep them in a proper state of repair and reasonably safe is harmless.

Appeal from Circuit Court, Jackson County; Willard D. Hall, Special Judge.

Action by H. D. Jerowitz against Kansas City. Judgment for plaintiff, and defendant appeals. Affirmed.

R. J. Ingraham, for appellant. I. J. Ringolsky, for respondent.

ELLISON, J. This action is for damages which plaintiff suffered by reason of an in-

jury to his horse which he was driving along one of the streets of the defendant city. Plaintiff charges the injury to have been occasioned by defendant permitting an excavation in such street to remain improperly filled so as to leave a sudden depression, into which the horse stepped. The judgment in the trial court was for the plaintiff.

The only point made for reversal which was mentioned in the motion for new trial relates to the third instruction for plaintiff, wherein it was declared "that it was the duty of Kansas City to keep its streets in a proper state of repair, free from obstructions, and reasonably safe for travel." The objection to this instruction is that it imposes a greater burden of duty upon the city than can be legally required. It will be noticed that it requires that the street shall be kept in "proper state of repair," as well as "free from obstructions," and also "reasonably safe for travel." That is to say, the city is required to do those three things as independent and separate duties, neither having reference to the other. According to that instruction, the city is not only to keep the street in "proper" repair, but it must keep it free from all obstructions, and it must also keep it reasonably safe for travel. The instruction should have been so written that the "proper state of repair" and the freedom "from obstructions" would have referred to and been qualified by the "reasonably safe for travel." It then would have read that it was the duty of the city to keep its streets in a proper state of repair, free from obstructions, so that they would be reasonably safe for travel. That is all the law requires. *Blake v. St. Louis*, 40 Mo. 569; *Smith v. St. Joseph*, 45 Mo. 449; *Welsh v. St. Louis*, 73 Mo. 71; *Vogelgesang v. St. Louis*, 139 Mo. 127, 40 S. W. 653; *Koesman v. St. Louis*, 153 Mo. 299, 54 S. W. 513. It is true that the judgment was affirmed in the case of *Russell v. Columbia*, 74 Mo. 490, 41 Am. Rep. 325, in which an instruction was given stating that it was the duty of the city to keep its streets "in a proper state of repair, free from obstructions, and safe for travel." But the point here was not made on that instruction, and it is clear that it does not state the law as it was announced by the Supreme Court both before and since. It will be noticed that it requires that the street must be kept "safe," and not reasonably safe; the latter being the universally recognized duty. In stating the duty of the city in that case the court cites cases which have been theretofore decided, viz., *Blake v. St. Louis* and *Welsh v. St. Louis*, supra, where the duty is correctly stated to be to keep its streets "in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel." And such is the duty as defined in the latest cases from the Supreme Court, cited above. And so it has been held reversible error for an instruction to omit the word "reasonably" as a qualification to the streets being safe. *Smith v. Brunswick*.

61 Mo. App. 578; Wallis v. Westport, 82 Mo. App. 522. Yet it has been held in *Burdoin v. Trenton*, 116 Mo. 358, 22 S. W. 728, that giving an instruction with fault similar to this one is not reversible error in cases where other instructions clearly laid down the rule that the city was only required to keep its streets in a state of repair reasonably safe for travel. In this case that was done not only in other instructions, but in other parts of the one we are discussing. On authority of that case we must therefore affirm the judgment. All concur.

STEPHENS v. CASSITY.

(Court of Appeals at Kansas City, Mo. Jan. 4, 1904.)

PROBATE COURTS—LEGAL SERVICES TO EXECUTORS—UNALLOWED CLAIM—JURISDICTION—STATUTES.

1. Legal services rendered an executor are expenses of administration, and cannot be recovered in an action against the executor until allowed as a claim against the estate.

2. Probate courts have no jurisdiction of an action against an executor for legal services rendered him before an allowance of a claim against the estate therefor, under Rev. St. 1899, § 223, granting such courts jurisdiction only to adjudicate matters on settlements made with executors and administrators.

3. Rev. St. 1899, § 191, providing that any person having a demand against an estate may establish the same by the judgment or decree of some court of record in the ordinary course of proceeding, is intended to give circuit courts jurisdiction to establish demands against the estate of deceased persons, and can in no sense be construed as conferring jurisdiction on circuit courts to adjust the claims of the executors or administrator for his services and expenses against the estate in his hands.

Appeal from Circuit Court, Linn County.

Action by E. R. Stephens against Armstrong Cassity, executor of the will of Presley Pound deceased. From an order sustaining demurrer to plaintiff's complaint, he appeals. Affirmed.

E. R. Stephens, for appellant. O. F. Libby and Harry K. West, for respondent.

BROADDUS, J. The plaintiff began his suit in the circuit court against the defendant, as executor under the will of one Presley Pound, deceased, for compensation for services as an attorney and counselor at law rendered said executor in his management as such of said estate. A petition was filed setting out the facts, to which a demurrer was interposed, which the court sustained on the ground that it had no jurisdiction of the case. The plaintiff appealed, and contends here that the court below committed error in sustaining said demurrer, citing certain decisions of the Supreme Court of Missouri to uphold his contention, to wit, *Gamble v. Gibson*, 59 Mo. 555, and *State ex rel. v. Tittmann*, 103 Mo. 553, 15 S. W. 936. The first, on the

question, only holds that an administrator or executor may avail himself of the aid of legal counsel, for the value of whose services he may charge and credit against the estate in his hands. The second decides that taxes accruing on a personal estate in the hands of the administrator after the death of the deceased are demands against his estate within the meaning of the law, and may be established as such either before the probate or circuit court. Neither case has any application to the question under consideration here. The plaintiff's demand is not, strictly speaking, a claim against the decedent's estate, but one against the executor thereof. Legal services rendered an administrator or executor are but expenses of the administration, and should be allowed as such only, and until they are so allowed they do not become demands against the estate of the decedent. And the probate courts only have jurisdiction to adjudicate such matters on settlements made with administrators and executors. Section 223, Rev. St. 1899. Section 191, Id., is intended to give to circuit courts jurisdiction to establish demands against the estate of deceased persons, and can in no sense be construed as conferring jurisdiction to adjust the claims of the executor or administrator for his services and expenses against the estate in his hands. The sole jurisdiction in that matter is in the probate court. The cause is affirmed.

HAIR v. EDWARDS et al.

(Court of Appeals at Kansas City, Mo. Jan. 4, 1904.)

NOTE—FINDING AMONG DECEDENT'S EFFECTS—PRESUMPTION OF OWNERSHIP—SUFFICIENCY OF EVIDENCE.

1. Evidence in an action by an executrix on a note held insufficient to show that decedent was the owner of the note, found among his effects.

2. The mere fact that a note not payable to bearer, and not indorsed, is found among the effects of a decedent who was not the payee, raises no presumption that he was the owner.

Appeal from Circuit Court, Linn County; Jno. P. Butler, Judge.

Action by Isabelle Hair, as executrix of the last will and testament of R. M. Hair, deceased, against R. J. Edwards and others. Judgment for defendants, and plaintiff appeals. Affirmed.

West & Bresnahan, for appellant. A. L. Pratt and Burns & Burns, for respondents.

BROADDUS, J. This suit was begun in a justice's court, where it was tried and appealed to the circuit court, where it was again tried; and, the judgment being against the plaintiff, she appealed to this court.

The action is founded upon a negotiable promissory note executed by defendants, and

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1634.

¶ 2. See *Bills and Notes*, vol. 7, Cent. Dig. §§ 1673, 1826.

made payable to one J. M. Johnson, dated March 15, 1901, and payable in 30 days after date. There is no indorsement of the note, and no written transfer of any kind to R. M. Hair, the plaintiff's testator, who died in November of said year. It was shown at the trial that the note in question was delivered by the executrix to T. M. Bresnehen, her attorney, for collection, but there is no direct evidence that Hair died with it in his possession. However, it may be reasonably inferred from all the testimony that such was the fact. N. E. Wannamaker testified as follows: "I was one of the appraisers and clerk of the appraiser at the time the inventory of the estate of Richard Hair was taken. After that time I think I was representing the plaintiff, as executrix of her husband's estate, with reference to the collection of this note, and all of the notes. I interviewed the defendant Edwards with reference to the note in controversy some time along in February. I was in Mr. Brinkley's office, and Mr. Edwards was there. I told him (Mr. Edwards) that Mrs. Hair had asked me to ask him when he would pay that note, and he said that he was pushed now, and that it would not be convenient for him to pay it now, but long about the 1st of June he said he would begin paying the note—about \$40 per month until it was paid. In about a month or two afterwards I met Mr. Edwards, and he said: 'I made payments on that note. I hold receipts for payment on that note.' He walked with me up to Mrs. Hair's house. Mrs. Hair and Mr. Hays were there. He showed them this receipt. He said he got the receipt from R. M. Hair. He also said: 'I hold two other receipts, which I have not with me.' He said Mr. Hair had brought a man, and introduced him as J. M. Johnson, and those receipts were obtained from that man, and he wanted credits for those receipts. He did not make any objection to paying the balance; simply claimed to have some receipts." Wannamaker further testified that he did not have the note at the time of said conversations, and the same was not exhibited to defendants. Edwards also told David Hays about three months prior to the death of Hair that he still owed him about \$173 or \$175 on the note. At the conclusion of plaintiff's testimony, the jury, at the direction of the court, returned a verdict for the defendants.

The declaration of one of the defendants to witness Hays before the death of Hair that he owed Hair the note, and to witness Wannamaker that he would pay the note, less certain credits which he claimed, were scarcely evidence of ownership. They were more in the nature of admissions of the debt. Such declarations would not be evidence in a controversy between plaintiff and Johnson, the payee of the note, as to the question of ownership. And the statement of defendant that Hair, in his lifetime, brought a man, and introduced him as J. M. Johnson, who gave his receipts for payments made, is as

consistent with Johnson's ownership of the note as with that of Hair's. It would be a reasonable inference from such facts that Hair was only acting as Johnson's agent for collection. It seems, therefore, that the case must either stand or fall upon the theory of plaintiff that, Hair having died in the possession of the note, the law raises the presumption or the inference that he was the owner. The general rule, it is true, is that possession of personal property implies ownership, but this rule does not apply to negotiable promissory notes not payable to bearer or holder. Plaintiff relies much on the case of *Cummings' Estate*, 153 Pa. 397, 25 Atl. 1123. But there the deceased had been in possession of certain canal-loan bonds for more than 30 years, and for 21 years after they had been registered in the name of claimant's husband, who during all said time had made no claim whatever to their ownership. These bonds, we presume, were payable to bearer, as bonds of like character usually are, and in that respect differed from the note in suit. The court held that under the facts the presumption was that the deceased was the owner. But the decision of the case was not based upon the mere fact that the bonds were in the possession of deceased at the time of his death. Other cases cited by plaintiff have no application, save that of *Tapley v. Herman*, 95 Mo. App. 537, 69 S. W. 482, wherein, in speaking of the note in controversy, the court says: "The paper itself was produced in evidence by plaintiff as the executor of Hosea Tapley. From that fact it may be fairly inferred that the document belonged to Hosea at the time of his death." The note was made payable to "Whose Tapley," instead of Hosea Tapley, and the evidence went to show that Hosea Tapley was the person intended; and the decision of the court that it was competent to so show is good law, but the dictum that mere possession of a promissory note by an executor is a fact from which ownership may be inferred is not supported by any of the text-writers, or by the decisions of any of the courts, so far as we have been able to examine. The general rule is that the possession of a note not payable to bearer, nor indorsed in blank by a third person, is not prima facie evidence of ownership. *Dorn v. Parsons*, 56 Mo. 601. And "the possession of an unindorsed note does not relieve the holder from the presumption that the note still belongs to the payee." *Rice v. McFardland*, 41 Mo. App. 488; *Richardson v. Drug Co.*, 92 Mo. App. 515, 69 S. W. 308; *Tiedeman on Com. Pap.* § 303, p. 524; *Daniel on Neg. Inst.* (3d Ed.) §§ 574, 664a, 741. It is not denied that this is the general rule, but the rule is different where such paper is found in the effects of a deceased person, for the reason that, as he can no longer speak, the maker ought to be required to show the truth of the matter. This theory leaves out of consideration the statute, which also closes the mouth

of the maker, thus prohibiting him from doing that which plaintiff insists he should do.

For the reasons given, the cause is affirmed. All concur.

**ST. LOUIS POLICE RELIEF ASS'N v.
STRODE et al.**

(Court of Appeals at St. Louis, Mo. Dec. 15,
1903.)

**FRATERNAL INSURANCE — BENEFICIARIES —
RIGHTS—DESIGNATION — CHANGE — COMPLI-
ANCE WITH REGULATIONS—WAIVER.**

1. A beneficiary has no vested interest in a benefit certificate until the death of the person insured, nor have his heirs at law, to whom the certificate is payable in case of a failure to designate a beneficiary, and insured is at liberty, until his death, to change the beneficiary at will.

2. While the regulations of a fraternal insurance association respecting a change of beneficiary should be followed, there are well established exceptions to literal compliance—as where the society waives a strict observance of its own rules, where it is beyond the power of insured to comply literally with such regulations, or where insured has done all in his power to change the beneficiary, but death intervenes before the full consummation of the change.

3. Where a former member of a police relief association resumed his membership on rejoining the force, the designation of his wife as beneficiary, made during his earlier membership, continuing of record with the association, the most that was necessary to continue the designation of the wife as payee was a formal or informal ratification of such designation by the member, acceptable to the association.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Interpleader by the St. Louis Police Relief Association against Garrard Strode, public administrator, as administrator pendente lite of the estate of Margaret Tierney, deceased, and William Tierney, administrator of the estate of Mary Tierney, deceased, and others. From the judgment rendered, Garrard Strode, administrator, appeals. Reversed.

T. L. Anderson, for appellant. R. M. Nichols, for respondent.

Statement.

REYBURN, J. The plaintiff, a beneficial society incorporated under the laws of the state of Missouri, and especially an act of the General Assembly entitled "An act authorizing the formation of a police relief association in any city having over one hundred thousand inhabitants," approved March 12, 1881 (Laws Mo. 1881, p. 87), paid into court the amount of mortuary fund accruing upon decease of Michael Tierney by virtue of his membership in the plaintiff association, and obtained an order of interpleader by defendants, the rival claimants to said fund, who interpose their respective rights thereto in pleadings following:

"Now, at this day, come defendants Wm.

Tierney and Ellen Tierney, Wm. Tierney, administrator of the estate of Mary Tierney, deceased, of the city of St. Louis, Missouri, Mary E. Rust, of Manchester, New Hampshire, Mark Tierney and Patrick Tierney, of county Galway, Ireland, and for answer to the petition of interpleader filed herein say that they admit that the plaintiff, St. Louis Police Relief Association, is a corporation, and as such a beneficiary society, incorporated under the laws of the state of Missouri, and especially under an act of the General Assembly of the state of Missouri entitled 'An act authorizing the formation of a police relief association in any city having over one hundred thousand inhabitants,' approved March 12, 1881, and other acts amendatory thereto, as averred in said petition. These defendants further admit that the plaintiff's charter, constitution, and by-laws contain the rules governing its relation to its members, and that no certificate of membership, or beneficiary certificate, or policy is issued by it; that section 1 of article 2 of its charter states the object of its formation to be for the purpose of creating a fund for the purpose of affording relief to such members of the association as may become sick, disabled, incapacitated by long years of service; and, second, for the purpose of aiding the families of police officers who may die while members in good standing of said association, as averred in said petition. These defendants further admit that by section 4 of article 7 of plaintiff's constitution provision is made for death benefits as follows: 'Sec. 4.—Death Whenever any member of the police force, who is a member of this association, shall die, the sum of two thousand dollars shall be paid, within thirty days after his demise, to such person or persons as he may have designated in the books of the association. If he shall have failed to designate, it shall be paid to his heirs at law, in accordance with the law of descent and distribution. If he shall have failed to designate and has no heirs at law, it shall then revert to the association'—as averred in said petition. These defendants further admit, as averred in said petition, that section 2 of article 1 of the plaintiff's constitution provides that membership in the plaintiff's said association shall terminate whenever an individual member shall cease to be a member of the police force of the city of St. Louis. These defendants further admit, as averred in said petition, that one Michael Tierney was appointed a member of the police force of the city of St. Louis on the 21st day of August, 1899, and that he was on the 25th day of April, 1900, duly elected a member of the St. Louis Police Relief Association, plaintiff herein, and that he died on the 19th day of May, 1901, while a member in good standing of the said Police Relief Association, and while a member of the police force; and that at the time of the death of the said Michael Tierney he left surviving, as heirs at law,

¶ 2. See Insurance, vol. 28, Cent. Dig. §§ 1951, 1954.

under the statute of descent and distribution of the state of Missouri, no child or children, but his father, Mark Tierney, and a brother, Patrick Tierney, of county Galway, Ireland; his mother, Mary Tierney, of the same place, who has since deceased, and upon whose estate William Tierney, of the city of St. Louis, has qualified as administrator, and who is a defendant herein. That the said Michael Tierney also left, him surviving, a sister, Mary E. Rust, of the city of Manchester, in the state of New Hampshire, and William Tierney and Ellen Tierney, brother and sister, of the city of St. Louis, Missouri, defendants herein. These defendants further admit that they have made demand upon the said St. Louis Police Relief Association for the benefit accorded to the said Michael Tierney as a member thereof, for the sum of two thousand dollars, and that they claim to own the same, and are entitled to receive the same under and by virtue of the constitution and by-laws of the said association. And these defendants further admit that the said Michael Tierney left, him surviving, his wife, Margaret Tierney, and that she departed this life on or about, to wit, the 8th day of November, 1901, and that thereafter, on, to wit, the 12th day of November, 1901, a certain instrument purporting to be the last will and testament of the said Margaret Tierney was probated in the probate court of the city of St. Louis, Missouri, and that on said date the defendant William Hannon was duly appointed administrator of the estate of the said decedent, Margaret Tierney, and duly qualified as administrator cum testamento annexo; that thereafter, to wit, on the 21st day of December, 1901, a suit contesting the said will was filed in the circuit court of the city of St. Louis, and letters of administration granted to said William Hannon were by the said probate court revoked, and the defendant Garrard Strode was appointed administrator pendente lite of the estate of the said Margaret Tierney, deceased, and that the said defendant Garrard Strode is now in charge of the said estate of Margaret Tierney, deceased, as such administrator. And these defendants, further answering, say that they deny each and every other allegation in said petition contained not herein specially admitted, or any knowledge or information thereof. And, further answering, these defendants say that the said Michael Tierney did not, in accordance with section 5 of article 1 of the constitution of the said plaintiff association, designate a person or persons on the books of said association as beneficiary or beneficiaries of said relief fund between the hours of 9 and 11 a. m. on the third day after the said Michael Tierney had become admitted to the membership of said association, as provided in said section 5 of article 1 of said constitution of said association; that by said section 5 of article 1 of said constitution it is provided that when an applicant is admitted to membership he

shall call at the office of the association between the hours of 9 and 11 a. m. on the third day after he has been admitted to membership, and designate on the 'Death Benefit Record' the disposition of his death benefit fund. And, further answering, these interpleaders say that in default of him (the said member) so designating a person or persons upon the said 'Death Benefit Record,' as aforesaid, the said death benefit fund will be paid to his heirs at law, in accordance with the law of descent and distribution. Further answering, these interpleaders say that never at any time after August 21, 1899, when the said Michael Tierney again became a member of said police force of the city of St. Louis and a member of said St. Louis Police Relief Association, did he designate his wife, Margaret Tierney, as beneficiary of said relief fund, and never intended to exercise the power of appointing said relief fund for the use of the said Margaret Tierney, but intended always that the same should be carried by the provisions of the contract, as detailed in section 4 of article 7 of the constitution, wherein it is provided that, if the member of said association failed to designate in the manner and form as provided by said section 5 of article 1 of the constitution, the funds shall pass to and vest in the heirs at law under the statute of descent and distribution of the state of Missouri. Further answering, these interpleaders say that they are the heirs at law under the statute of descent and distribution of the state of Missouri, and that by virtue of said contract or provisions of said section 5 of article 1 and section 4 of article 7 of the constitution and by-laws they are entitled to the said fund, and claim the same. Wherefore defendants pray the honorable court for an order directing the clerk of this court, or custodian of said fund, to turn over the same to the said defendants, and to that end and purpose that these defendants may have judgment therefor; and these defendants further pray for such other orders, judgments, and decrees in the premises as may be just and proper, and for this they will ever pray.

"Now at this day come defendants Garrard Strode, administrator pendente lite of the estate of Margaret Tierney, deceased, and William Hannon, administrator cum testamento annexo of the estate of Margaret Tierney, deceased, of the city of St. Louis, Missouri, and for answer to the petition of interpleader, and to the answer of William Tierney, Ellen Tierney, Mary E. Rust, et al., filed herein, say that they admit that the plaintiff, St. Louis Police Relief Association, is a corporation, and as such a beneficiary society incorporated under the laws of the state of Missouri, and especially under an act of the General Assembly of the state of Missouri entitled 'An act authorizing the formation of a police relief association in any city having over one hundred thousand inhabitants,' ap-

proved March 28, 1881, and other acts amendatory thereto, as averred in said petition. These defendants further admit that the plaintiff's charter, constitution, and by-laws contain the rules governing its relation to its members, and that no certificate of membership or beneficiary certificate or policy is issued by it. These defendants further admit that by section 4 of article 7 of plaintiff's constitution provision is made for death benefits as follows: 'Sec. 4.—Whenever any member of the police force who is a member of this association shall die, the sum of two thousand dollars shall be paid within thirty days after his demise to such person or persons as he may have designated in the books of the association. If he shall have failed to designate, it shall be paid to his heirs at law in accordance with the law of descent and distribution.' Defendants Garrard Strode, administrator pendente lite of the estate of Margaret Tierney, deceased, and William Hannon, administrator cum testamento annexo of the estate of Margaret Tierney, deceased, further admit, as averred in said petition, that Michael Tierney died on the 19th day of May, 1901, while a member in good standing of said Police Relief Association, and while a member of the police force, and that at the time of the death of said Michael Tierney he left surviving him, as heirs at law under the statute of descent and distribution of the state of Missouri, no child or children. And these defendants further admit that the said Michael Tierney left, him surviving, his wife, Margaret Tierney, and that she departed this life on or about the 8th day of November, 1901, and that thereafter, to wit, on the 12th day of November, 1901, a certain instrument purporting to be the last will and testament of said Margaret Tierney was probated in the probate court of the city of St. Louis, and that on said date the defendant William Hannon was duly appointed administrator of the estate of said decedent, Margaret Tierney, and duly qualified as administrator cum testamento annexo; that thereafter, to wit, on the 21st day of December, 1901, a suit contesting the said will was filed in the circuit court of the city of St. Louis, and letters of administration granted to said William Hannon were by the said probate court revoked, and the defendant Garrard Strode was duly appointed administrator pendente lite in the estate of said Margaret Tierney, deceased, and that said Garrard Strode is now in charge of the estate of said Margaret Tierney as such administrator. These defendants, Garrard Strode, administrator pendente lite of the estate of Margaret Tierney, deceased, and William Hannon, administrator cum testamento annexo of said estate, further answering, state that article 2 of section 1 of the charter of the St. Louis Police Relief Association thus states the objects of its organization: 'Section 1.—Objects. The objects for which the association is formed are to create a fund

for (1) the purpose of affording relief to such members of the association as may become (a) sick, (b) disabled, (c) incapacitated by long years of service; (2) aiding the families of police officers who may die while members in good standing of the association.' And these defendants, further answering, state that Michael Tierney was appointed a member of the police force of the city of St. Louis on the 23d day of April, 1889, and was duly elected a member of the St. Louis Police Relief Association on the 4th day of August, 1890; and they further state that said Michael Tierney, on the 19th day of August, 1892, duly designated his said wife, Margaret Tierney, as his beneficiary upon the books of the St. Louis Police Relief Association, in accordance with the constitution and by-laws of said association. And these defendants state that subsequent to the time of the re-election of the said Michael Tierney to membership in the said St. Louis Police Relief Association on the 25th day of April, 1900, on various occasions, the exact dates being to these defendants unknown, the said Michael Tierney ratified the said above designation of his wife, Margaret Tierney, as his beneficiary of the said death benefit fund, and adopted the said designation of August 19, 1892, as his designation of beneficiary under his renewed membership in said association. And these defendants state that the said Michael Tierney did legally and lawfully designate the said Margaret Tierney, his wife, as his lawful beneficiary of the said death benefit fund of said association; and upon his decease as aforesaid the said Margaret Tierney was entitled, as said beneficiary, to the whole of said fund of \$2,000, as provided in section 4 of article 7 of the constitution of said association, and that defendant Garrard Strode, administrator pendente lite of the estate of said Margaret Tierney, is now entitled as such to said fund, and to the fund now deposited with the clerk of this court. And these defendants state to the court that defendants William Tierney, Ellen Tierney, and Mary E. Rust, Mark Tierney, Patrick Tierney, and William Tierney, administrator of the estate of Mary Tierney, have no right, title, or interest in the said death benefit fund and in the fund deposited in this court, and that their alleged claim is a void and empty pretense. And, further answering, these defendants state that they have no knowledge or information as to the legal heirs of the said Michael Tierney under the statute of descent and distribution of the state of Missouri. And, further answering, these defendants say that they deny each and every allegation in said petition contained, and in the answer of William Tierney, Ellen Tierney, Mary E. Rust, William Tierney, administrator of the estate of Mary Tierney, deceased, Mark Tierney, and Patrick Tierney, not herein specifically admitted. These defendants state that they have repeatedly demanded of the plaintiff asso-

clation the said sum of \$2,000, which is due the estate of said Margaret Tierney, but said association has refused, and still refuses, to pay the same to them or either of them. Wherefore these defendants pray this honorable court for an order directing the clerk of this court, or the custodian of the said fund, to turn over the same to Garrard Strode, administrator pendente lite of the estate of Margaret Tierney, deceased, and to that end and purpose that defendant Garrard Strode, administrator pendente lite, may have judgment therefor, and these defendants further pray for such other orders, judgments, and decrees in the premises as may be just and proper."

The cause was submitted to the jury upon testimony oral and documentary, accompanied by an agreed statement of facts substantially the following:

(1) That Garrard Strode, public administrator, city of St. Louis, as such is in charge as administrator pendente lite of the estate of Margaret Tierney, deceased, and William Hannon is administrator cum testamento annexo of estate of Margaret Tierney, deceased, and William Tierney is administrator of estate of Mary Tierney deceased.

(2) That plaintiff, the St. Louis Police Relief Association, is a corporation organized under the provisions of article 10 of chapter 21 of Revised Statutes of Missouri of 1879, and of an act of the General Assembly of the state of Missouri entitled "An act authorizing the formation of a police relief association," etc., approved March 12, 1881 (Laws 1881, p. 87). That a true copy of the constitution and by-laws of said association is herewith appended, and marked "Exhibit A," and made a part hereof. That by section 1 of the constitution and by-laws of said St. Louis Police Relief Association it is provided that: "The following persons shall be eligible to membership in this association: All persons who were, on the twenty-eighth day of February, 1900, members in good standing of this association, the chief of police, assistant chief of police, chief of detectives, assistant chief of detectives, inspectors, secretary to the chief, superintendent of the Bertillon System, superintendent of stables and electrical servers, captains, lieutenants and sergeants of police, detectives, patrolmen and probationary policemen of the police force of the city of St. Louis." That among the provisions in the constitution and by-laws are the following:

"Sec. 2. Termination of. Individual membership herein shall terminate whenever (one) the individual shall cease to be a member of the police force of the city of St. Louis; (two) the individual shall refuse for three calendar months to pay an assessment, except as provided by article II."

"Sec. 5. Designation of Beneficiary. When an applicant is admitted to membership, he shall call at the office of the association between the hours of nine and eleven a. m.,

on the third day after he has been admitted to membership, and designate on the death benefit record the disposition of his death benefit. Provided, that a member may change his beneficiary by notifying the secretary in writing of his desire to do so, and designating the change desired."

"Section 4 of article 1. Death. Whenever any member of the police force, who is a member of this association, shall die, the sum of two thousand dollars shall be paid within thirty days after his demise to such person or persons as he may have designated on the books of the association. If he shall have failed to designate, it will be paid to his heirs at law, in accordance with the law of descent and distribution. If he shall have failed to designate, and has no heirs at law, it shall then revert to the association."

(3) That one Michael Tierney became a member of the police force of the city of St. Louis on April 23, 1889, and on August 4, 1890, said Michael Tierney was admitted as a member of the said St. Louis Police Relief Association, and thereafter, to wit, August 19, 1892, duly designated his wife, Margaret Tierney, on the death benefit record of said association as the person to whom the death benefit provided by the said association should be made payable upon the death of Michael Tierney, said designation taking place by the said Michael Tierney writing the name of Margaret Tierney in a book entitled "Death Benefit Record," in a column which was headed by the word "Beneficiaries," and June 30, 1897, the said Michael Tierney resigned from the police force of the city of St. Louis.

(4) That said Michael Tierney, August 21, 1899, again became a member of the police force of the city of St. Louis, and thereafter, to wit, August 25, 1900, said Michael Tierney became a member of the St. Louis Police Relief Association, and that he did not sign the death benefit record in accordance with section 5, above quoted, after his readmission to the St. Louis Police Relief Association. That the St. Louis Police Relief Association had no certificate of membership or beneficiary certificates, and upon an officer of the said police force becoming a member of the association he would write in a book kept for that purpose, designated as "Death Benefit Record," at the head of which appears the word "Beneficiaries," the name or names of the person or persons to whom he intended the beneficial fund payable at his death.

(5) That Michael Tierney departed this life May 19, 1901, leaving, him surviving, as his heirs at law, the following named persons: Wm. Tierney, Ellen Tierney, his brother and sister, of St. Louis, Mo.; Mark Tierney, his father, and Patrick Tierney, his brother, of county Galway, Ireland, and his mother, Mary Tierney, since deceased, and upon whose estate William Tierney, of the

city of St. Louis, has duly qualified as administrator; and Mary E. Rust, a sister, of Manchester, state of New Hampshire. That said Michael Tierney left no children or descendants him surviving, but left a widow, Margaret Tierney, who departed this life about the 8th day of November, 1901, and of whose estate said Garrard Strode, public administrator of the city of St. Louis, is in charge as administrator pendente lite, and of which said Wm. Hannon, administrator cum testamento annexo of the estate of Margaret Tierney, was in charge, but whose authority has been suspended by reason of the contest of her said will.

(6) That at the time of the death of the said Michael Tierney, May 19, 1901, he was a member in good standing of said St. Louis Police Relief Association, and was also a member of the police force of the city of St. Louis.

The court ordered payment of the fund to William and Ellen Tierney. William Tierney, administrator of Mary Tierney, and Mary E. Rust and Mark and Patrick Tierney, and defendants Strode, administrator p. l. of Margaret Tierney, and Hannon, administrator c. t. a. of Margaret Tierney, have appealed.

Opinion.

The agreed statement and testimony offered established that Michael Tierney died on the 19th of May, 1901, bequeathing to his wife, Margaret, in effect, all his estate, except \$20, devised to his parents. Subsequently, November 8th, his widow died, devising her estate to her brother and sister. When Tierney first became a member of the relief association, he constituted his wife the beneficiary to whom the benefits should be paid upon his decease by writing her name in the record book entitled "Death Benefit Record" under the column "Beneficiaries," and no other formal designation was ever made by him. When he again became a member of the association in April, 1900, the name of his wife continued as his designated beneficiary under the original appointment. The testimony introduced tended to establish by the custodian of the "Beneficiary Record" that section 5, prescribing that an applicant for membership should call at the office on the third day after admission, and designate the disposition desired of the death benefit, was not rigidly insisted upon nor inflexibly enforced, but a member was permitted to make such designation at any subsequent date. The secretary of plaintiff testified that during Tierney's illness his fellow officers Dooley and Stone had called upon him to take the book of the association to Tierney's house in order that he might designate his wife as beneficiary, and deponent did not take the book, because he did not consider it necessary, as Tierney had already designated his wife upon the books of the association. Stone, one of these officers, stated that Tierney had requested that the

secretary bring the book to him, but the testimony of this witness, tending to prove that Tierney wished to renominate his wife as beneficiary, and the reasons assigned by the secretary for his declination, were excluded by the court. The law is well settled that in cases of this description the beneficiary has no vested interest in the benefit certificate until the death of the member of the organization and termination of the life insured. The respondents had no more than mere expectancies in the mortuary benefits until the decease of Tierney; until which occurrence he was at liberty to change the beneficiary at will. *Supreme, etc., v. Neidlet*, 81 Mo. App. 598; *Supreme, etc., v. Cappella* (C. C.) 41 Fed. 1. In the language of this court: "The interest of a beneficiary in the certificate upon the life of a member of a fraternal beneficial association is a mere expectancy before the death of the member, after which event it becomes vested. It is a corollary of these propositions that anterior to the death of a member the association, for whose benefit alone the rules governing changes of beneficiaries are made, may waive compliance with any such rules on the part of their members, and thus validate attempts to change beneficiaries which would be ineffectual under the strict rules of the order." *Grand Lodge v. Reneau*, 75 Mo. App. 402. As a general rule, the regulations of the association respecting a change of beneficiary should be followed, but well-established exceptions to literal compliance exist—as where the society waives a strict observance of its own rules; where it is beyond the power of the insured to comply literally with such regulations; and, finally, where the insured has done all on his part and in his power to change the beneficiary, but death intervenes before the full consummation of the change. *Supreme Council, etc., v. Cappella*, supra; *National, etc., Ass'n v. Kirgin*, 28 Mo. App. 80. In this case the deceased, when he became eligible by rejoining the police force, resumed his membership in plaintiff organization, and the designation of his wife as beneficiary, made during his earlier membership, continued of record with plaintiff, and at most its ratification by Tierney in some manner, formal or informal, acceptable to the association, was all that was required to preserve and continue the designation of his wife as payee. Appellants were entitled to introduce evidence that Tierney intended his wife to be beneficiary, and endeavored, in conformity to the regulations and requirements of plaintiff, to have her designated, and also to establish, if such be the facts, that the plaintiff treated the former designation as continuous and effective under the later membership, or waived further formal nomination of his wife as beneficiary.

For the error committed in excluding evidence tendered going to show such facts, the judgment is reversed, and cause remanded.

BLAND, P. J., and GOODE, J., concur.

ILLINOIS CENT. R. CO. v. BEAUCHAMP.

(Court of Appeals of Kentucky. Jan. 14, 1904.)

NEW TRIAL—SURPRISE—SETTING ASIDE JUDGMENT—PERSONAL INJURY—INSTRUCTIONS—ELEMENTS OF DAMAGE—SUFFICIENCY OF PLEADINGS.

1. Where an amended answer is filed the day before trial, and judgment is given for defendant non obstante veredicto, because of plaintiff's failure to reply thereto, the court has power to vacate such judgment and grant a new trial on plaintiff's showing of surprise and ignorance of the filing of such answer.

2. Where, in a personal injury case, plaintiff alleges the occurrence of the accident, and adds, "Thereby throwing plaintiff from his wagon, and greatly injuring plaintiff, * * * causing the plaintiff much * * * loss of time, and causing him to expend considerable money for medical attention, and permanently injuring plaintiff to his damage," etc., and defendant traverses the petition without moving to make it more definite, an instruction allowing a recovery for loss of time and medical attention is proper.

Appeal from Circuit Court, Larue County.

"Not to be officially reported."

Action by Frank Beauchamp against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. B. Handley and Pirtle, Trabue & Cox, for appellant. Noggle & Graham, for appellee.

NUNN, J. This action was instituted by appellee against the appellant to recover damages for personal injuries. The facts appear about as follows: Appellee had hauled a load of lumber to appellant's depot, and loaded his wagon with goods to be carried to Green county for one Lewis Despains, who aided him in loading the goods. The wagonway from the place where the goods were placed on the wagon passed along by the side of the railroad track for about 50 yards and passed over the track. Appellant's agent had an engine with two cars attached standing about half way between the depot and the point where this wagonway crossed the track. Appellee drove his team of mules along this passway by the engine, and at the moment he with his team was crossing the railroad track the person in charge of the engine, who was an agent at the depot (the engineer had gone to his dinner), sounded the whistle of the engine, which frightened the team. They started to run, and about the time appellee got them under control the whistle was sounded again, when the team became unmanageable and ran away. Despains jumped from the wagon. Appellee, the driver, either jumped or was thrown out, and by some means his foot was caught in the wheel, and received severe and painful injuries, by reason of which he was confined to his bed for two months, and was compelled to use crutches in getting about for four months or more. The evidence tended to show that his injuries were permanent. The question as to whether or not the whistle was sounded negligently or necessarily was submitted to the jury. At the first term of the court, after the petition was filed, the ap-

pellant filed its answer, which contained a denial of the allegations of the petition; no affirmative matter. The case, by agreement, was continued, and set for a day in the next succeeding term. On that day, or the day before, appellant filed an amended answer in the usual and proper form, charging contributory negligence on the part of appellee. The trial of the case was entered into, and resulted in a verdict for appellee in the sum of \$750. Appellant, however, at the conclusion of appellee's evidence, and also at the conclusion of all the evidence, moved the court to give to the jury a peremptory instruction to find for appellant, which the court in each instance overruled. After the verdict was returned, the appellant moved the court to render judgment for it notwithstanding the verdict, for the reason that no reply was filed to its amended answer charging contributory negligence. The court sustained this motion, dismissed appellant's petition, and rendered judgment against him for the costs of the action. Appellee entered motion and filed reasons for setting aside this judgment, alleging and proving surprise and a want of knowledge or information of the filing of this amended answer until after the verdict of the jury. Counter affidavits were filed. The court sustained this motion and set aside the judgment, and of this the appellant complains. At the next term of the court another trial was had, and resulted in a verdict in favor of appellee for \$845. Of this appellant complains, and contends that the court erred in not giving a peremptory instruction, for the reason that on the former trial the judgment was in its favor, and the court's action in setting it aside was void, and for the further reason that the court erred in one of its instructions.

We cannot understand why the lower court had not the power and authority to set aside the judgment in favor of appellant. An application for a new trial on the ground of surprise is peculiarly addressed to the discretion of the trial court, and that discretion will not be disturbed unless palpably abused, especially when the new trial has been granted, as the court is more inclined to sustain a judgment granting than one refusing a new trial. See *Voght Machine Co. v. Penn. Iron Works Co.* (Ky.) 66 S. W. 734, *L. & N. R. Co. v. Coniff* (Ky.) 27 S. W. 865, and *E. H. Taylor, Jr. v. Louisville Public Warehouse Company* (Ky.) 72 S. W. 20.

The appellant complains of this language used by the court in its first instruction: "Including any loss of time on account thereof, and expenses incurred in obtaining medical attention," etc., for the reason, as its counsel claim, that "it is a well-settled rule, and one repeatedly adhered to by this court, that special damages must be specially pleaded," and refers to two cases to support its contention—*L. & N. R. Co. v. Mason* (Ky.) 72 S. W. 27. The principle contended for by appellant is correct, but it does not apply to this case. Appellee, by his petition, did not seek to recover

special items of damage. In his petition he used this language: "Thereby throwing the plaintiff from his wagon, and greatly injuring the plaintiff, by bruising, spraining, and maiming the plaintiff's foot and leg and arm and hand, causing the plaintiff much pain and suffering and loss of time, and causing him to expend considerable money for medical attention, and permanently injuring the plaintiff, to his damage in the sum of \$1,500." This was notice to the appellant that he expected to prove loss of time and medical expense to enhance the amount of recovery. If the appellant desired, it could have moved the court to have appellee make his petition more specific, and name the amount that he expected to recover for loss of time and medical expense; but instead it traversed these allegations, and made an issue. In the case of *L. & N. R. R. Co. v. Reynolds* (Ky.) 71 S. W. 516, the petition alleged that the plaintiff was badly bruised and injured in his person, and his ability to walk with ease and comfort greatly and permanently decreased, and was for a long time incapable of attending to his business, whereby he was damaged in the sum of \$10,000. Appellee was permitted to prove, over the objections of appellant, that at the time he was injured it was the busy season for his work, he being a specialist of diseases of the eye, ear, nose, and throat, and that his income would average \$100 per day. The proof showed that he was not able to sit up for 17 or 18 days after his injury, and at the end of three months was not able to ride on a street car. The court, in its instruction, allowed the jury to find, among other things, such an amount as would fairly and reasonably compensate appellee for the value of the time lost. This court said: "Where special damages are not such as the defendant would naturally anticipate from the injury, they must be pleaded with sufficient particularity as fairly to apprise him of the charge he is to meet. In 2 Greenleaf on Evidence, § 254, after a statement of the rule as to general damages, it is said: 'But when the damages, though natural consequences of the act complained of, are not the necessary result of it, they are termed "special damages," which the law does not imply; and, therefore, in order to prevent a surprise upon the defendant, they must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of this at the trial. * * *' The petition in this case was not sufficient to admit the evidence in question under the above rule. The fact that this was the best season of the year for the plaintiff in the practice of his specialty, and that the time he lost was so valuable, was not to be inferred from his injury, or the bare allegation that he lost time, and, to justify a recovery of items so unusual, the fact should have been specially pleaded." To the same effect is *L. & N. R. R. Co. v. Mason*, supra.

Perceiving no error prejudicial to appellant, the judgment of the lower court is affirmed.

MARTIN et al. v. BARNHILL et al.

(Court of Appeals of Kentucky. Jan. 12, 1904.)

WILL—CONSTRUCTION—EVIDENCE.

1. Where a testator bequeaths all his property to his wife, to dispose of as her own, "as long as she shall live, and after her death to be equally divided among my children," she takes not merely a life estate, but may dispose of such part as her own as may be necessary to provide for her comfortable support and maintenance.

2. Evidence held to show that a contract whereby a widow's son received certain notes and the use of her real estate during her life in consideration of caring for her was a suitable and proper arrangement for her support, authorized by her husband's will.

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by J. V. Martin and others against R. M. Barnhill and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Sweeney, Ellis & Sweeney, for appellants. Miller & Todd, for appellees.

NUNN, J. This is the second appeal in this case. The former appeal was decided on March 29, 1900. The opinion is reported in 56 S. W. 160. On the former appeal every question made herein was determined, except as to whether or not the contract made by the appellee R. M. Barnhill with his mother, Siberia A. B. Barnhill, "is a suitable and proper arrangement" for her to make for her own support. With every other question eliminated, the case was remanded by this court to the Daviess circuit court for a trial of that one question. The depositions of the parties and their witnesses were taken, and upon a trial in the lower court the chancellor found this contract to be a suitable and proper arrangement for the widow to make for her own support, and dismissed the petitions. From this judgment this appeal is prosecuted.

We will only state such facts as will be necessary to elucidate the question at issue. Joseph Barnhill died in the year 1894, and left a will, and this litigation grew out of the construction of the first provision of this will, which is as follows: "I will and bequeath to my beloved wife, Siberia A. B. Barnhill, after my burial expenses and just debts are paid, all of my property, consisting of lands, stocks, moneys, bonds, notes, &c., household and kitchen furniture, to have and to hold, and to dispose of as her own property, as long as she shall live, and after her death to be equally divided among my children or their legal representatives." This provision of the will was construed by this court in the case referred to. In that case the court said: "We think it was the intention of testator to provide for the comfortable support and maintenance of his wife as long as she should live, and that, if necessary to enable her to attain this object, she was authorized to treat the property bequeathed as her own, and to dispose of it as her necessities might require; and if at her death any part of it remained

undisposed of, it should then be equally divided among testator's children, or their legal representatives. He did not intend that she should sell this property, or give it away, but that she should not be hampered in its appropriation to her own necessities." After the death of Joseph Barnhill, the appellee his widow was left alone. She induced appellee R. M. Barnhill to leave his home and reside with her on a small farm containing about 75 acres. In August, 1896, they entered into a written contract, in which it was recited, in substance, that in consideration of the services by her son, R. M. Barnhill, in supporting and caring for her since her husband's death, and in further consideration that he would support and care for her so long as she lived, she gave him the use of her real estate for her life, and three notes, amounting to about \$360 each, with a credit on one of them for about \$50. Her other children and their husbands instituted a suit against them, alleging that this contract was procured from her by her son, R. M. Barnhill, through the exercise of undue influence over her, and with a design to appropriate to his own use the entire estate devised by their father, in which they might ultimately be interested as remaindermen; that it was, in effect, not a provision for her own comfort and support, but for his. The appellees traversed the allegations of the petitions. It will be observed that this is not an instance where a party to a contract is seeking to avoid it. On the contrary, both the parties to the contract are insisting that it was understandingly entered into, and that it is a fair and reasonable one. We quote with approval a part of the opinion of the lower court: "According to the construction given the will [by this court] the widow had the unrestricted right not only to possess and control the property devised to her, but to use it, and, if necessary to her comfortable maintenance, to consume any part or the whole of the personal property; and that seems to be conceded. But the difference between the plaintiffs and defendants arises out of the meaning and scope that is to be given to the word 'necessary.' From the standpoint assumed by the plaintiffs [appellants here], as evinced in their pleadings and evidence, the amount necessary for the support of defendant [appellee here] should be determined by the lowest price for which a qualified person might undertake to clothe, board, and lodge her. In other words, the idea which seems to be entertained by the plaintiffs is that her 'keep' might be let out to the lowest bidder, or that the amount she may be allowed out of the devised estate embracing the income or rental value of the land for her support should be measured by that standard. This court is of a different opinion." It was not intended that she should be hampered in the appropriation of this property to her own bare and exact necessities. The proof in this case shows that all the parties to this action are honest, well-meaning people, but their

personal interests, unfortunately, cause them to place different constructions upon this provision of the will. It is sufficient to say that the proof also shows that appellee R. M. Barnhill did not use any undue influence in obtaining this contract from his mother; that his mother was about 70 years of age when he went to live with her, and that it was reasonable and natural that Mrs. Barnhill should have preferred to make her home at the place where she had lived for more than 50 years, and to have her son to live with her; and that he was an honorable and upright man is shown by this evidence. The old lady is still alive. The rental value of the farm is worth about \$125 a year, and, if her son continues the care and support of his mother for any considerable length of time (that is, if his mother continues to live much longer), it will be a losing contract on his part, if he should consider it in the light of profit. Considering all the facts and circumstances, we are of the opinion that this was not an improvident contract upon her part, and should be permitted to stand.

For these reasons the judgment of the lower court is affirmed.

CALVERT v. BROSIUS.

(Court of Appeals of Kentucky. Jan. 13, 1904.)
MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. A servant in a sawmill, while waiting to speak to his superintendent, sat down on the edger saw table; the mill not being then in operation. The mill started, and the servant, thinking himself in danger, and attempting to get out of the way of the machinery, sustained injuries from the edger saw. *Held*, that the servant was guilty of gross negligence.

Appeal from Circuit Court, McLean County.

"Not to be officially reported."

Action by Len Calvert against Aaron Brosius. From a judgment for defendant, plaintiff appeals. Affirmed.

L. P. Tanner, for appellant. Wm. B. Nee and G. W. Hickman, for appellee.

BURNAM, C. J. Appellant sought in this action to recover damages for the loss of two fingers and a portion of one of his hands, which were cut off by a strip saw in appellee's sawmill, which he alleges was due to the negligence of appellee's agents and servants in charge of and operating the mill. The answer was a traverse, and a plea of contributory negligence. The trial in the court below resulted in a verdict for the defendant, rendered in obedience to a peremptory instruction given to the jury by the trial court.

The testimony introduced by plaintiff is to the effect that for several months he had been employed by the defendant to stack lumber in his lumber yard adjacent to his sawmill; that he finished this work on Saturday, the 16th of August, 1902, and that on

that day he communicated to appellee that there would be nothing for him to do in the yard until some lumber was sawed; that appellee directed him to report to Mr. Lorey, his superintendent in charge of the mill, on the following Monday morning, and that he would direct him what to do; that, pursuant to such direction, on Monday morning he went to the mill shed, and found that the mill was not running; that Mr. Lorey, the superintendent, and several employes of the mill, were busy at work on the carriage-way of the mill, and that, not desiring to interrupt him whilst he was so employed, he took his seat on the edger table, in which was located the edger saw; that suddenly and without warning the mill started; that his attention was directed to the cut-off saw, which was making an unusual noise, and began to wobble as though it would fly off of the bar on which it was placed; that about this time Mr. Lorey called out, "Look out," and, believing that he was in danger, and under the impulse of the moment, in attempting to get out of the way of the cut-off saw his right hand came in contact with the edger saw on the table on which he was sitting, and a portion of his hand and two fingers were cut off, from which he suffered greatly. There is no testimony or claim that appellant was directed by the defendant or any of his agents to take his seat upon the edger table, or that any duty which he owed the defendant required that he should do so; and it also appears that he was unduly alarmed, as the cut-off saw did not, in fact, escape the axle on which it revolved. Even if it be conceded that appellant was in the employ of appellee at the time of the accident, we do not feel that he has shown any right to recover. A servant cannot recover of a master for any injury to which his own negligence contributed, and it was certainly negligence of the grossest kind for him to go into a sawmill, which he knew would soon be in operation, and take his seat upon the edger saw table. He was not discharging any duty which he owed the defendant. The accident seems to be entirely attributable to his own carelessness and fright, and we think the trial court properly directed the jury to find a verdict for the defendant.

Judgment affirmed.

BISHOP v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. Jan. 12, 1904.)

CARRIERS—DUTY AT STATION—PERSON ASSISTING INVALIDS—TIME TO ALIGHT—QUESTION FOR JURY—KNOWLEDGE OF CONDUCTOR—SPEED OF TRAIN—MANNER OF ALIGHTING.

1. Where the evidence was conflicting, the speed of the train from which plaintiff alighted was for the jury.

2. Whether or not a person alighting from a moving train was negligent in the manner in which he alighted was for the jury.

3. Where a bystander at a railroad station was directed by a conductor to assist another in

putting an invalid on the train, he had a right to rely on the assurance of the conductor that plenty of time would be allowed for the performance of that duty, and to believe that he would, at least, be notified in time to alight from the train in safety; and it became the conductor's duty, if he knew or had reason to believe that such bystander had gone on the train for the purpose stated, to delay the train a reasonable time to permit him to get off.

4. Where a conductor knew that a person had entered a train to assist an invalid, it was his duty to use ordinary care to ascertain whether he got off before the train started.

5. In an action against a railroad for injuries to one alighting from a train which he had boarded in assisting an invalid, evidence examined, and held to raise a question for the jury as to whether the conductor knew or had reasonable means of knowing for what purpose plaintiff boarded the train, and whether he got off before it started.

Appeal from Circuit Court, Union County.
"Not to be officially reported."

Action by W. J. Bishop against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Geo. S. Wilson, for appellant. D. H. Hughes and Pirtle & Trabue, for appellee.

SETTLE, J. The appellant sued the appellee railroad company in the Union circuit court for personal injuries received at Sturgis, this state; in attempting to get off one of its passenger trains while in motion. The action is based upon the alleged negligence of the servants of appellee in charge of the train in starting it without notice to appellant, or opportunity to him to get off, though they knew that he had just gotten upon the train to assist an invalid woman into a car, and intended to get off the train at once. The appellee, by its answer, denied the negligence complained of, and averred contributory negligence on the part of appellant, but for which he would not have been injured. After the introduction of the evidence of both the parties, the jury, upon a peremptory instruction from the court to that effect, found for the appellee. Whereupon judgment was rendered by the court dismissing the petition, and allowing appellee its costs. Of the judgment thus rendered, and the refusal of the lower court to grant him a new trial, the appellant now complains.

The facts as shown by the bill of evidence are as follows: On July 1, 1902, one Hearn, himself in feeble health, had his wife at Sturgis for the purpose of taking her on the first train to a sanitarium in Evansville for medical treatment. She was an invalid, and, being unable to walk, had to be carried in a chair. The train was a few minutes late, but, upon its reaching Sturgis, Hearn met the conductor as he stepped from the train on the platform, and informed him of his purpose to take his wife on that train to Evansville, and that, as she was an invalid, she would have to be carried on the train in a chair. The conductor thereupon promptly replied: "All right. I will give you plenty

of time." This entire conversation occurred in the presence and hearing of appellant, who, with a Dr. Martin, physician in attendance upon the invalid, at once picked up the chair in which she was seated, and carried her therein upon the front steps or platform of the ladies' coach. Martin, Hearn, and perhaps others, testified that they heard the conductor say that he would give plenty of time to get the invalid on the train. After placing her in the chair upon the platform of the car, appellant left the chair, and stepped back some feet on the depot platform, not intending to enter the car. About that time the conductor, as appellant testified, gave an order to him and Dr. Martin to go upon the rear steps of the next coach, and lift the chair over the brakes to the platform of the ladies' coach. The conductor then left, and went forward to the baggage car; and appellant and Dr. Martin, again taking up the chair and invalid, proceeded with her into the ladies' coach; appellant backing as they went, followed by the chair; Dr. Martin advancing, and holding onto the other side of the chair. According to the testimony of appellant and Martin, they made all the haste possible in getting into the car with the invalid, but, before they got far enough into the car to permit the door to close without striking the rockers of the chair, the train started. Putting down the chair as quickly as possible, the appellant and Martin started for the door; but Martin, being next to the door, succeeded in getting off the train without difficulty. But not so with appellant. He had some difficulty in getting around the chair and rockers, which were in his way; and by the time he got out, and on the steps of the car, the train was going faster, having moved along the platform about 75 feet or more. At this juncture, choosing what he regarded a suitable place at the end of the platform, appellant stepped or jumped from the steps of the car, and fell, thereby sustaining the injuries complained of. There is considerable conflict in the evidence. The conductor, for instance, testified that he gave no order to appellant to assist Dr. Martin to take the invalid into the car from the platform of another car where she was first placed after the arrival of the train, but admits that he did give such an order generally to those standing around. If he did so give the order, it applied as much to appellant as any other person then present, and he had the right to give the needed assistance to carry it out. Again, there is some conflict in the evidence as to the speed of the train at the time appellant got off, and also as to the manner of his getting off. The witnesses put the speed of the train at from three to five miles an hour when he got off. We incline to the opinion, from all the evidence, that the speed was not less than three, and not as much as five, miles an hour. But in any event, that was a question for the jury to settle, and should have been

submitted to them under proper instructions. In *L. & N. R. Co. v. Eakins' Adm'r*, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872, this court said (quoting from *L. & N. R. Co. v. Crunk*, 119 Ind. 549, 21 N. E. 33, 12 Am. St. Rep. 443), "Whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury trying the case, taking into consideration all the circumstances in connection with the alighting." In 2 *Wood on Railroads*, p. 1298, it is said: "As a rule, it may be said that where a passenger, by wrongful act of the company, is compelled to choose between leaving the train while it is moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably." In volume 2, p. 762, *A. & E. Enc. Law*, it is said: "When a passenger, not having been set down or taken up at the station, to or from which the railway has contracted to carry him, is injured in the attempt to board or leave a moving train, the railway is liable, if the person injured in getting on or off the train did not incur a danger obviously apparent to the mind of a reasonable man." Appellant and others testified that he stepped or jumped off toward the engine; others, that he jumped in the opposite direction; one witness, that he jumped like a frog. Whether or not he was negligent in the manner of getting off the train was likewise a matter for the determination of the jury.

It appears that neither the conductor nor any brakeman connected with the train offered any assistance in getting the invalid on the train. Appellant, having been directed by the conductor to assist Dr. Martin in doing it, and having heard the conductor's assurance that he would allow plenty of time for the performance of the duty, had the right to rely upon that assurance, and to believe that he would be protected, at least to the extent of receiving such notice of the time of the starting of the train as would enable him to get off in safety; and, under such circumstances, it was the duty of the conductor, if he knew or had any reason to believe appellant had gone upon the train for the purpose stated, to delay the train a reasonable time to permit him to get off. Did the conductor comply with his promise to give appellant and Dr. Martin time to get the invalid into the car? It would seem not, for they in fact barely got her in the door, but could not place her in a seat before the train started. Did the conductor know that appellant had not gotten off the train when it started? If he got on the train to assist the invalid into the car by the conductor's direction or request, as appellant and others testified, it would be but fair to presume that the conductor had knowledge of when he got on the train; and, if so, it was his duty to use ordinary care to ascertain whether he had

gotten off before the train started. The conductor testified that appellant was a newspaper man, in possession of a pass, and that he frequently rode on his train, and on the occasion in question he did not know but what he expected to go somewhere on the train. It was in proof that appellant was often at the Sturgis depot to meet trains in gathering news for his paper, and on this occasion, though he did not say to the conductor that he was not going on the train, the latter saw that he was standing on the depot platform, some steps from the train, after helping the invalid to the platform of the coach. His position and manner did not indicate any intention of getting on the train, and he did not go toward the train again until directed by the conductor to assist the invalid in the coach. From the facts and circumstances admitted in evidence, the jury should have been allowed to determine whether the conductor knew or had reasonable means of knowing for what purpose appellant went on the train, and whether he had gotten off before it started.

The case of *Berry v. L. & N. R. Co.*, 60 S. W. 700, is relied on by appellee to justify the action of the lower court in granting the peremptory instruction, because in that case it was decided by this court that a recovery was unauthorized. The facts of that case were wholly unlike those of the case at bar. It was unnecessary for Berry to enter the car containing his departing family. They were receiving from the porter all needed assistance, and it did not appear that the conductor knew of his entering the car, or of his purpose in so doing. But in this case the appellant had no intention of entering the car, and would not have done so but for the request of the conductor to assist a helpless woman therein, and the latter's assurance that he would allow ample time to get her into the car and seated. The court, in the *Berry Case*, *supra*, quotes approvingly from the *Crunk Case* as follows: "If the company sells a ticket to an invalid who is unable to assist himself, the carrier takes upon itself the obligation of allowing him assistance in placing him on the train and seating him in the car, and the compensation paid for the ticket includes such right; and the company will owe the same obligation to his assistants, while necessarily entering and leaving the car, which it owes to him." The principle here announced applies with peculiar force to the facts of the case at bar, and seems to leave no room to doubt that it was error for the lower court to take the case from the jury. In the *Crunk Case* great emphasis is given the fact that none of the company's officers or trainmen assisted or offered to assist in putting the sick man on the train, and the same is true in this case.

There can be no question but that the injuries received by the appellant in getting off the train were serious and painful. In our opinion, the evidence was such as to en-

title him to have his case go to the jury, and it was therefore error for the trial court to grant the peremptory instruction. Wherefore the judgment is reversed, and cause remanded, with directions to grant the appellant a new trial, and for further proceedings consistent with the opinion herein.

DAVIS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 14, 1904.)

HOMICIDE—EVIDENCE—ADMISSIBILITY—RES GESTÆ—INSTRUCTIONS—PREJUDICIAL ERROR—APPEAL—DISTURBANCE OF VERDICT—CONTINUANCE—ABSENT WITNESSES—ADMISSION OF TESTIMONY.

1. In a prosecution for homicide, where defendant, who was a town marshal, claimed that he undertook to arrest deceased on the sole ground that he used obscene and vulgar language on the streets, and was drunk in his presence, there was no error in refusing to allow in evidence an ordinance of the town making it unlawful for persons to be on the street after 10 o'clock p. m.

2. In a prosecution for homicide, where it was admitted that defendant was a town marshal at the time of the killing, and several witnesses testified, without contradiction, that he was a town marshal, although the court might properly have instructed that he was such, there was no prejudicial error in a charge reading, "If the jury believe that defendant was marshal," etc.

3. In a prosecution for homicide, statements made by defendant, corresponding with those made by him on the witness stand, within five minutes after the homicide, but after defendant had called three persons, gone after a physician, returned to the scene of the homicide, and then, in pursuance of the advice of a person left, and gone to the sheriff's office, where he made the statements, were not admissible as a part of the *res gestæ*.

4. The Court of Appeals has no power, under the Code, to disturb a verdict of guilty, if there is any evidence to support it.

5. The provisions of the Criminal Code authorizing the commonwealth, on an application by defendant for a continuance on the ground of absent witnesses, to force trial by agreeing that the witnesses present would testify as stated in the affidavits—such statements being read to the jury—are not in violation of the constitutional rights of defendant to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

Appeal from Circuit Court, Carter County.

"Not to be officially reported."

George Davis was convicted of voluntary manslaughter, and appeals. Affirmed.

Geo. W. Armstrong and G. W. E. Wolford, for appellant. C. J. Pratt, Atty. Gen., and M. R. Todd, for the Commonwealth.

NUNN, J. Appellant was indicted by the grand jury of Carter county on the 10th of June, 1902, charging him with the willful murder of Owen Leedy. He was tried in June, 1903, convicted of voluntary manslaughter, and sentenced to the penitentiary for the term of five years. From this judgment, appellant has appealed.

The appellant in the lower court filed reasons for a new trial, and assigned 18 or 20 grounds therefor. This court is prohibited

† 3. See Criminal Law, vol. 14, Cent. Dig. §§ 816, 817.

by section 281 of the Criminal Code from reversing for most of the reasons named. In fact, the attorneys representing appellant urge but four or five reasons why this court should reverse this case. They are as follows: (1) The lower court erred to his prejudice in refusing to grant him a continuance. (2) That the verdict of the jury was against the evidence. (3) That the court erred in refusing to allow appellant, by himself and witness Rose, to prove that when appellant surrendered himself to the officer, about five minutes after the killing, he narrated the same facts with reference to the killing as related by him on the witness stand. (4) That the court refused to allow him to have read to the jury an ordinance of the town of Grayson making it unlawful for any persons to be out on the streets of the town after 10 o'clock p. m. without a reasonable excuse. (5) That the court failed in its instructions to give the whole law of the case to the jury.

The substance of the facts of the killing, as shown by the record, are as follows: Appellant and the deceased, Owen Leedy, resided in the town of Grayson, Ky. Appellant was the marshal of the town, and had previously arrested the deceased for some small offense. On the night of the killing, which occurred about 11 o'clock, the deceased, Leedy, Alva Gee, and Millis Melvin were sitting on a plank or bench in front of Black's store, talking and laughing, as claimed by the commonwealth, and cursing and using obscene language, as claimed by appellant, when appellant arose from the bench situated against the end of the storehouse, and walked over to Owen Leedy, and grabbed hold of him, and pulled him off of the plank, to his knees, and said to him: "Come. Go with me." Commonwealth witnesses say that Leedy said to him at that moment, "Don't search me here," or, "You can't search me"—one or the other. Appellant states that Leedy said, "You can't search me." Leedy instantly arose to his feet and jerked loose from appellant, and backed down the sidewalk in front of Mr. Mocabee's home. Appellant was with him, and witnesses for the prosecution say they heard Leedy say to appellant, "Take that pistol out of my face, George," and then appellant fired three shots in quick succession, and that they then heard Leedy say to appellant, "Oh, George, you have shot me," or "Don't shoot me." Appellant states that Leedy had the pistol drawn on him, and that it was he (appellant) that said to Leedy, "Take that pistol out of my face," and that he then fired three shots and killed Leedy to save his own life. Appellant then called Gee and Melvin back, who had started away, and then called Mr. Mocabee, who suggested to appellant to go for a physician. He left the deceased, and went after the doctor, and returned to the scene of the killing. Mr. Mocabee had procured a light. The night was dark. Deceased was lying on his back, with his right hand over his body,

and a small pistol lying by his side. The commonwealth attempted to show that Leedy had no pistol, and that appellant placed the pistol by the side of the deceased after the shots were fired. The preponderance of the evidence favored appellant on this point. When appellant returned, Mr. Mocabee advised him to leave, to prevent further trouble, as word had been sent to Leedy's family, who were expected to arrive in a short time. Appellant left, and went to the office of the sheriff, and surrendered himself to Deputy Sheriff Rose.

Appellant claimed that he undertook to arrest Leedy because he used obscene and vulgar language on the streets, and was drunk in his presence. The court told the jury that, if this was true, it was not only the right, but the duty, of appellant to make the arrest. But appellant did not claim that he was undertaking to enforce the ordinance against persons being on the streets after 10 o'clock p. m. without a reasonable excuse, or that he attempted to arrest Leedy for this offense. Consequently the court did not err in refusing to allow this ordinance to be read to the jury as evidence.

Appellant claims that the court erred in giving instruction No. 4, in the use of these words: "If the jury believe from the evidence that the defendant, George Davis, was marshal of the town of Grayson. * * *" He contends that the commonwealth in the course of the trial admitted that he was such marshal, and therefore there was no proof on this subject. On the facts as developed on the trial, it would have been proper for the court to have assumed that he was marshal; but the instruction, as presented, could not have prejudiced appellant, as it was admitted that he was marshal at the time of the killing, and, in addition, appellant and several witnesses testified without contradiction that he was the marshal of the town at that time. Taking the instruction as a whole, it was more favorable to appellant than he was entitled to. There was no error of the court in giving instructions to the jury prejudicial to appellant. On the contrary, they were favorable to him.

It is urged by counsel that the court erred in refusing to permit appellant to prove by himself and his witness Rose that he made to Rose the same statement of the facts of the killing as was given by him on the witness stand, and that these statements were made by appellant within five minutes after the tragedy. It seems to us very clear that this was not admissible, and formed no part of the *res gestæ*. The test of the admissibility of such testimony is that the act, declaration, or exclamation must be so intimately interwoven with the principal fact or event which it characterizes as to be regarded as a part of the transaction itself. Appellant had, after the killing, called Gee and Melvin and Mr. Mocabee; then went after the physician, and returned to the scene of

the homicide; then, in pursuance of the advice of Mocabee, left, and went to the sheriff's office, about one block distant. The court was right in rejecting the proposed testimony.

As to the second proposition presented by counsel for appellant, it is sufficient to say that it has often been decided by this court that it has no power, under the Code, to disturb a verdict of guilty if there is any evidence to support such a verdict. See the cases *Vowells v. Com.*, 83 Ky. 193; *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387, and *Johnson v. Com.* (Ky.) 15 S. W. 662.

On the calling of this case for trial in the lower court, appellant filed his affidavit for a continuance on account of the absence of several witnesses; naming them, and embracing in his affidavit what he expected to prove by each of them. The commonwealth agreed that the witnesses, if present, would testify as stated therein, and said statements were read to the jury as evidence. Appellant's complaint is that he was entitled to have his witnesses present; that, in their absence, and by merely reading to the jury their statements, he did not receive the full force, effect, and benefit of their evidence. This question has repeatedly been before this court, and the provisions of the Criminal Code authorizing such procedure have been decided as not in violation of the Constitution. See *Adkins v. Commonwealth*, 33 S. W. 948. The record shows that appellant was not confined in jail, but was out on bond, from the date the indictment was presented in court until trial. He certainly failed to avail himself of the right to obtain from the court compulsory process to compel the presence of his witnesses at the trial.

Perceiving no error of law prejudicial to the substantial rights of appellant, the judgment of the lower court is affirmed.

LOUISVILLE & N. R. CO. v. VANARS-DELL'S ADM'R.

(Court of Appeals of Kentucky. Jan. 14, 1904.)
RAILROADS—CHILD ON TRACK—FAILURE TO CHECK TRAIN—MISTAKE OF JUDGMENT.

1. A railroad company is liable for its engineer's mistake of judgment in supposing that a child would get off a bridge, which led him to omit efforts to check the train in time to avoid killing it.

Appeal from Circuit Court, Boyle County.
"Not to be officially reported."

Action by Mary Vanarsdell's administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. R. McDowell, J. W. Alcorn, and B. D. Warfield, for appellant. Rawlings & Voris and Robt. Harding, for appellee.

O'REAR, J. This is the second appeal of this case. The opinion upon the first appeal, which states the facts as they appeared sub-

stantially on the last trial so far as the proof for appellee is concerned, may be found in 65 S. W. 858. The jury found a verdict of \$2,500 for appellee. There is no material error to be found in the instructions of the court. The evidence objected to was considered upon the former appeal, and the objections to it there disposed of. The criticism urged against the same evidence upon this appeal goes more, in our opinion, to affect the weight than the competency of the evidence. After all, it was a matter for the jury. Perhaps the weight of the evidence is for appellant, and the physical facts, taken in connection with appellant's evidence, barring one exception, are strongly persuasive that the verdict is not sustained by the proof in the case. The exception is that under all of the evidence it is clearly shown that by the proper application of the means at hand by the servants in charge of appellant's train, after they had discovered the peril of the child upon the bridge, the train could have been stopped anyhow within 1,200 or 1,800 feet. As a matter of fact the train was not stopped at all until it had run more than twice that distance. This is not explained satisfactorily, and doubtless convinced the jury that the application of the brakes and other means to control the train was not made until the locomotive was so close to the bridge upon which the child was killed that they were then unavailing. This does not find that the engineer in charge purposely ran over the child. He may have at the time thought that she would be able to get off of the bridge as the other children did, and therefore did not take every precaution that the subsequent developments have shown was necessary to save the child's life. This was a mistake of judgment, doubtless an honest mistake. But it is a mistake of that character for which the court is of opinion that the master is liable to the person injured. Under the circumstances shown we do not feel warranted in saying that the verdict of the jury is palpably against the weight of the evidence.

Judgment affirmed, with damages.

BANK OF COMMERCE'S RECEIVERS v. WINDMULLER et al.

(Court of Appeals of Kentucky. Jan. 7, 1904.)
FOREIGN ASSIGNMENTS—PREFERENCE—PROPERTY IN OTHER STATES—STATUTES—ENFORCEMENT—APPEAL—DECISIONS—LAW OF THE CASE.

1. Where, on a prior appeal, it was held that a foreign transfer of property including property in Kentucky, by a debtor to his creditor, operating as a preference, would not be construed as an assignment for the benefit of the debtor's creditors generally under a Kentucky statute in so far as it applied to property located in Kentucky, but that, in the absence of a contrary showing, it would be presumed that the common law authorizing such preferences prevailed in the state where the assignment was made, and on remand of the case to the trial court the only resident creditor dismissed his suit, and there was no amendment by the foreign creditors tending to show that the com-

¶ 1. See *Railroads*, vol. 41, Cent. Dig. §§ 1281, 1282.

mon law did not prevail in the state where the transfer was made, it was error for the court on retrial to hold that such transfer was void as a fraudulent preference.

Appeal from Circuit Court, Carter County.
 "Not to be officially reported."

Action by Louis Windmuller and others against the receivers of the Bank of Commerce of Buffalo to have certain transfers of property declared to operate as an assignment for the benefit of creditors. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Norris Morey and W. B. Wilhoit, for appellant. Theobald & Theobald, D. K. Weis, and R. D. Davis, for appellees.

BARKER, J. This action is here on appeal for the second time. The material facts upon which the litigation is based are set forth in the opinion on the first appeal (50 S. W. 548), to which reference is now made for the purpose of obviating the necessity of a restatement. So far as the appellees are concerned, there has been no change made in the record since its return, after reversal, to the circuit court. Their rights, therefore, are circumscribed by the opinion heretofore delivered. Appellees and the judge of the circuit court seem to have labored under the belief that, if the conveyance from Andrew Brown to the Bank of Commerce of Buffalo, N. Y., could be held to be a fraudulent preference under the statute of 1856 (1 Acts 1855-56, p. 107, c. 704), they, although New York creditors of Brown, could participate in the assignment which would follow the judgment, and that all that was necessary in order to reach this desired end was to find a Kentucky creditor of Brown, at whose suit such a judgment might be had under the statute. This is a mistaken view as to the effect of the former opinion. After holding that the transaction between Brown and the Bank of Commerce was a fraudulent preference under the statute of 1856, it is said: "But it does not follow that the appellees are entitled to the relief they sought. It must first be ascertained whether they have debts against Brown; and, second, whether the transaction in New York operates as an assignment for their benefit. Waiving, for the purposes of this opinion, the question of the sufficiency on demurrer to the petitions, and assuming that there is no contest over the claim of any appellee but Gregory, the question arises whether the Kentucky act of 1856 affects the New York transaction, so as to make it operate as an assignment for the benefit of the New York creditors. All the appellees but Gregory are nonresidents of this state. The transaction must be assumed to be valid according to the laws of New York, for preferences were lawful at common law, and the common law is presumed to prevail in states where the contrary does not appear. It follows, that the transfers will be treated by this court as valid, so far as the

citizens of other states are concerned. All the appellees except Gregory being confessedly citizens of other states, it follows, therefore, that in the present state of the record the statute cannot be held to operate in their favor. The validity of the claim of Gregory is in dispute, and the judgment makes no mention of his claim. As to his claim, therefore, there is nothing for us to act upon. The judgment is reversed, with directions for further proceedings consistent herewith, allowing appellees to amend, if desired, both as to the New York law and as to demand and protest upon the bills of exchange sued on." Upon the return of the case to the court below, Gregory, who was the only Kentucky creditor of Brown, dismissed his action, whereupon the case having been again submitted, the circuit judge again decided in favor of appellees that the conveyance from Brown to the Bank of Commerce was a fraudulent preference under the act of 1856, and operated as a general assignment of his property for the benefit of all his creditors. So far as this record shows, the creditors, at the time the judgment below was rendered, and the debtors, were citizens of New York. The opinion on the first appeal holds that, if the common-law rule prevails in New York, then the assignment of Brown to the Bank of Commerce is valid as to appellees, and they could not participate in the Kentucky estate of Brown, even if the conveyance was set aside as a fraudulent preference at the suit of a Kentucky creditor. Certainly, this court would not decide that appellees have a valid and subsisting claim which they could not enforce, and that their right to have their claims paid by a sale of the Kentucky property depends upon the adventitious contingency of being able to find a Kentucky creditor at whose suit the conveyance might be set aside. From such a conclusion it would follow that there might be a valid legal claim without a legal remedy. What the court meant to decide and did decide is that where, as in this case, all of the parties reside in a state where a preference among creditors is valid, those creditors who have not been included in the preference cannot come to Kentucky and set in force the act of 1856 as against their debtor, and, as they cannot do this for themselves, a Kentucky creditor cannot do it for them. Had Gregory not dismissed his case, any judgment rendered in his favor would only have redounded to his interest, and not to the interest of appellees. They were not, therefore, prejudiced by the dismissal of his action. As appellees failed to amend their pleadings, or to take any proof to show that in the state of New York a debtor cannot lawfully prefer one creditor over another, it must be conclusively presumed that the common-law rule prevails therein; and, such being the fact, appellees' petition should have been dismissed.

Wherefore the judgment is reversed for proceedings consistent herewith.

LIPP'S GUARDIAN v. ALLPHIN.

(Court of Appeals of Kentucky. Jan. 12, 1904.)

PARTITION SALE—INADEQUATE PRICE—RIGHTS OF INFANT HEIR.

1. In partition between heirs a judgment directing a sale did not adjudge that an infant heir's interest therein should remain a lien on the land, as required by Civ. Code, § 493. The sale was made for an inadequate price, and, though there was nothing to show that persons desiring to purchase were prevented from attending the sale, it was undisputed that the day of the sale was severe, and that snow covered the land while it was advertised, so that it could not be examined. *Held* that, though inadequacy of price alone was not sufficient ground for setting aside a sale fairly made, the circumstances of the sale, in connection with the error in the judgment, warranted such relief to prevent a great sacrifice of the infant's property.

Appeal from Circuit Court, Boone County.
"Not to be officially reported."

Action by Susie N. and J. S. Adams against Cordelia M. Whitson and others for the sale of land jointly owned by the parties. From order overruling objections to order of sale to B. B. Allphin, Ethel E. Lipp, by her guardian, S. Gaines, appeals. Reversed.

S. Gaines, for appellant. S. H. Tolin and John S. Gapnt, for appellee.

NUNN, J. This action was brought in the court below by Susie N. Adams and her husband, J. S. Adams, against Cordelia M. Whitson and her husband, Charles Whitson, Ethel E. Lipp, and S. Gaines, as her guardian, for the purpose of procuring an order of sale, under subsection 2 of section 490 of the Civil Code, for 56 acres of land, which plaintiffs alleged was in possession of and owned jointly by Susie N. Adams, Cordelia M. Whitson, and Ethel E. Lipp by inheritance from their deceased father, George W. Lipp; and also alleged and proved that the same could not be divided between the three joint and equal owners without materially impairing its value. The court directed the sale thereof, and the master commissioner, pursuant to the order of court, made a sale of the land on March 2, 1903, at which sale the appellee, Allphin, became the purchaser thereof, at the price of \$1,725. The commissioner reported to the court this sale at the April term, 1903. The appellant, Ethel E. Lipp, by her guardian, filed exceptions to this report of sale, in substance as follows: "First. Because the land lays on a county dirt road, and during the time it was advertised for sale the road was so bad that it was almost impassable, and contemplated purchasers were thereby prevented from seeing and examining the land with a view of purchasing. Second. Because during the time the land was advertised a very deep snow covered the land, and it could not be seen and examined by people who desired to purchase it. Third. Because the day of sale was bad, and few people attended the sale. Fourth. Because this defendant is an infant under fourteen

years of age, and this land is all the estate of any kind that she has; and because the price for which it sold is grossly inadequate." It appears from the uncontradicted proof that this is a well improved and valuable tract of land, worth \$3,000 or more, and it is evident that the price it brought at the commissioner's sale was inadequate; but it has been held by a long line of decisions by this court, nothing else appearing in connection with the sale detrimental to the interest of the party excepting, that mere inadequacy of price is not sufficient to authorize the setting aside a sale fairly made. It is agreed that there was snow upon the ground, which covered this land during all the time it was advertised for sale, and that the day of sale was a severe, cold day; but it is not shown, except by inference, that any person or persons were prevented from attending the sale by the inclemency of the weather, or that any person attempted to examine the land with a view of purchasing it, and was prevented by its being covered with snow; but it appears from the record that one Henry Bishop, as principal, and W. M. Lancaster, as his surety, executed a bond in due form obligating themselves that, in the event this sale to Allphin is set aside, that they would start the bid at the next sale at the price of \$2,225, and a like bond was given by J. S. Gaines, principal, with T. J. Booth as his surety, offering to start the bid at the next sale, should one occur, at the price of \$2,200; but no special reasons were offered why they were not present at the sale. As stated, this action was brought for a sale of this land by virtue of subsection 2 of section 490 of the Civil Code. Subsection 1 of section 497 is as follows: "In the action mentioned in sub-section 2, of section 490, the share of an infant, or a person of unsound mind, shall not be paid by the purchaser; but shall remain a lien on the land bearing interest, until the infant becomes of age, or the person of unsound mind becomes of sound mind, or until the guardian of the infant, or the committee of the person of unsound mind, execute bond as is required by section 493." The lower court, in its judgment directing the sale of this land, erred in not adjudging that this infant appellant's interest therein should remain a lien on the land, bearing interest until she became of age, or until her guardian executed a bond as required by section 493 of the Code. This error possibly was prejudicial to the interest of appellant and the other parties in interest. Persons contemplating the purchase of this land would naturally look to the judgment for the terms of sale, and upon examination of the judgment in this case they would have found that the whole purchase price was payable to the commissioner, divided into three payments of 6, 12, and 18 months; when, if they had found, as the Code requires, that one-third of the purchase price, with interest at 6 per cent., should remain a

¶ 1. See Partition, vol. 33, Cent. Dig. § 367.

lien upon the land until this appellant arrived at the age of 21 years, or until her guardian executed the bond as required by the Code, if such had been the case, persons with limited means and desiring to purchase a home, might have been induced to pay a greater price, believing that they could get a much longer time to pay a third of the purchase money than this judgment gave them. When a court of equity exercises its statutory power by ordering a sale of infants' land, it must require the proceedings to conform strictly to the statute. We understand the public interest in having purchasers at judicial sales "secure" in their purchases, and that this is one of the paramount reasons in not sanctioning the setting aside of such sales for mere inadequacy of price alone, or for frivolous and immaterial causes; but we know from this record that for some reason there has been a great sacrifice of this infant's property, it being unable to protect itself. In view of this great inadequacy of price, coupled with the inclemency of the weather on the day of sale and the snow upon the ground during the whole time that it was advertised, which possibly prevented persons from examining the land and attending the sale, and the error of the lower court in not asserting in its judgment a lien on the land for the infant's interest, we feel impelled, in justice to this infant, to reverse the action of the lower court.

For these reasons the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

IRVINE v. GIBSON.

(Court of Appeals of Kentucky. Jan. 14, 1904.)

SLANDER—INSANITY AS DEFENSE—INSTRUCTIONS—DEATH OF DEFENDANT—DISPOSITION OF CASE ON REVERSAL—REMITTITUR—IMPOSITION OF TERMS.

1. Total mental derangement, or an insane delusion on the subject to which slanderous words relate, is a complete defense to an action therefor.

2. In an action for slander, in accusing plaintiff of being the mother of an illegitimate child, the evidence showed that defendant, a married woman, whose husband was exemplary in his conduct towards other women, became diseased, with the result that her mind gave way, and she became possessed of delusions, one of which was that her husband was unfaithful. When told that her suspicions were groundless, she would cry out with rage. She believed her husband was the father of a child by a young woman harbored by plaintiff, and any woman she met with a child became to her frenzied imagination the object of her husband's love. This condition was testified to by numerous witnesses, including experts and acquaintances. *Held*, that the court should have instructed that if the jury believed defendant, at the time of speaking the defamatory words, was insane, or under a delusion as to her husband's relations with other women, incapacitating her from understanding their meaning, they should find for her.

3. Where a judgment for slander is erroneous, after reversing it the Court of Appeals has no jurisdiction to order a remittitur of an excessive portion of the recovery, because by reversal the judgment is rendered void.

4. Where, after trial and judgment for plaintiff in an action of slander, defendant appeals and then dies, and the Court of Appeals finds it necessary to reverse the judgment for error in instructions, it cannot, to avoid an abatement of the action, impose terms on appellant (defendant's personal representative) by which the judgment may stand as security for any future recovery.

Appeal from Circuit Court, Madison County.
"To be officially reported."

Action by Florida Gibson against Bettie H. Irvine. Judgment for plaintiff, and defendant appealed. Defendant having died pending the appeal, I. Shelby Irvine, as her administrator, was substituted as appellant. Reversed.

J. W. Caperton, W. B. Smith, R. W. Miller, Smith & Bush, and J. H. Hazelrigg, for appellant. J. A. Sullivan and J. Tevis Cobb, for appellee.

SETTLE, J. The appellee, Florida Gibson, a young woman of excellent character, residing in Madison county, instituted in the circuit court of that county an action for slander against the appellant, Bettie H. Irvine, and her husband, I. Shelby Irvine, laying her damages at \$30,000. These are the slanderous words set forth in the petition, viz.: "Florida Gibson left here this summer, and had a baby, and I know it is so." It is averred in the petition that the slanderous words were falsely and maliciously spoken and published by Bettie H. Irvine of and concerning the appellee, and though it appears from the bill of evidence, made a part of the record, that other harsh and false charges derogatory to the character of the appellee were made by Mrs. Irvine, the words complained of were shown to have been spoken but one time, and in the hearing of but one person. I. Shelby Irvine entered a motion to require the appellee to elect which of the defendants she would prosecute her action against, which motion was sustained by the lower court. Appellee elected to prosecute her action against Bettie H. Irvine, which caused its dismissal as to I. Shelby Irvine. Thereafter I. Shelby Irvine, as the husband of Bettie H. Irvine, and assuming to act as her next friend, filed an answer to the petition, in which it was averred that she was a person of unsound mind and unable to defend the action for herself, and that if the slanderous words were spoken by her it was when she was of unsound mind and unable to understand what she said, or the meaning of the words used. On motion of appellee this answer was by the court stricken from the file, and the court then appointed two able and experienced members of the Madison county bar guardians ad litem to defend for Bettie H. Irvine. The guardians ad litem by answer set up for their ward the defense that the words complained of were not spoken by her, or, if they were spoken, that she was at the time of the speaking laboring under a pronounced and well-defined monomania or delusional insanity upon the subject of her hus-

band's relations with women, which incapacitated her from knowing what she said of the appellee, or the meaning or effect of the words complained of. In addition, the answer contains the following testimonial to the appellee's character: "They further state that the plaintiff is a woman of most excellent character, esteemed by her friends, and respected by the community as a woman of pure life and chaste character." The answer of the guardians ad litem, except as to the testimonial to appellee's character, was controverted by the reply filed by the appellee, and upon the issues thus formed the case went to trial, which resulted in a verdict and judgment for the appellee for \$30,000 in damages. The guardians ad litem entered motion and grounds for a new trial, which was refused by the trial court, and the case is now before us for review upon the appeal of Bettie H. Irvine, by the guardians ad litem. And Bettie H. Irvine having died since the taking of the appeal, the same has been revived in the name of I. Shelby Irvine, administrator of her estate, he having been appointed as such administrator by the Madison county court.

The grounds relied on for a new trial are 18 in number, but as, in our view of the case, the fourth ground authorized the granting of a new trial asked, it will not be necessary to consider the others. This ground complains of the failure of the lower court to instruct the jury that insanity or monomania was a complete defense to the action. In other words, it is contended by the appellants that the lower court should have either peremptorily directed the jury to find for the appellant, Bettie H. Irvine, or instructed them that if they believed from the evidence that at the time of the speaking of the slanderous words, if she did speak them, she was of unsound mind, that is, laboring under such monomania or delusional insanity upon the subject of her husband's relations with women as to incapacitate her from knowing what she said in using the slanderous words of appellee complained of, or the meaning or effect of such words, they should find for the defendant.

Mr. Justice Cooley, in his admirable work on Torts, discusses at great length the responsibility of lunatics for torts. He seems to be of the opinion that though they cannot, because of the absence of a criminal intent, be punished for acts that would be criminal if committed by a sane person, nevertheless in certain cases they or their estates may be held civilly liable for torts committed by them, but that they nor their estates are responsible in actions for slander or libel. An illustration of this point may be found on page 99 of the volume *supra*, where it is said: "The case of an injury suffered at the hands of a lunatic furnishes us with an apt illustration. Let it be supposed that one of this unfortunate class meets a traveler on the highway, and by force or by terror of his threats takes from him his horse and vehicle, and abuses or destroys them. In a sane person this may be highway

robbery; but the lunatic is incapable of a criminal intent, and therefore commits no crime. Neither is the case one in which a contract to pay for the property or for the injury can be implied, for the law can imply no contract relations where the capacity to enter into them is withheld. But a plain wrong has been done, because the traveler has been deprived of his property, and, if the person at whose hands the wrong has been suffered is possessed of an estate from which compensation can be made, no reason appears why this estate should not be burdened to make it. In other words, it seems but just that the consequences of the unfortunate occurrence should fall upon the estate of the person committing the injury, rather than upon that of the person who has suffered it. * * * One eminent law writer has doubted if there ought to be any responsibility in such a case. In the case of a *compos mentis*, he says, although the intent be not decisive, still the act punished is that of a party competent to foresee and guard against the consequences of his conduct, and inevitable accident has always been held an excuse. In the case of a lunatic, it may be urged both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accident." In discussing whether a person of unsound mind is responsible for slanderous or libelous words, Mr. Cooley further says: "* * * It has been seen that in some cases malice is a necessary ingredient of the tort. How can a non *compos* be responsible in such cases; such, for instance, as a malicious prosecution or libel? Legal malice certainly cannot be imputed to one who in law is incompetent to harbor an intent. It would seem a monstrous absurdity, for instance, if one were held entitled to maintain an action for defamation of character for the thoughtless babbling of an insane person, or for any wild communication he might send through the mail or post upon the wall. There can be no tort in these cases, because the wrong lies in the intent, and an intent is an impossibility. The rules which preclude criminal responsibility are strictly applicable here, because there is an absence of the same necessary element. And if, in the case of defamatory publications, it may be said that, after all, the requirement of malice as an element in the wrong is only nominal, still there can be no tort because presumptively the utterances, or rather publications, which proceed from a diseased brain, cannot injure." Cooley on Torts, p. 103.

"In reason, an insane person cannot have the malice essential in slander and libel. And this doctrine may be deemed to be sufficiently, though not very firmly, established." Bishop, *Noncontract Law*, § 508.

"Inasmuch as malice, actual or implied, is an element of slander, a person is not liable in damages therefor, if, at the time of speaking the defamatory words, he was totally deranged, or was the victim of insane delu-

sion on the subject to which the words related." 16 Am. & Eng. Ency. Law (2d Ed.) 622.

"Insanity is a complete defense to an action for slander or libel." Townsend on Slander (3d Ed.) § 248; Bryant v. Jackson, 6 Humph. (Tenn.) 199; Horner v. Marshall, 5 Munf. (Va.) 466; McDougald v. Coward, 95 N. C. 368.

This court is asked for the first time to say whether or not insanity is a good defense in an action of slander. In view of the authorities supra, we are of the opinion that the question should be answered in the affirmative. Insanity, however viewed anciently, is in modern times deemed a visitation from God, a disease or malconstruction of the mind. If God does not hold accountable for their misdeeds those whom he suffers to be thus afflicted, shall his creatures, intrusted with the enforcement of human laws, refuse to excuse their ostensible evil-doing? Surely not. But while such is our view of the law, we would say that, in order to defeat a recovery in a case like the one at bar upon the ground of insanity, it should satisfactorily appear from the evidence that at the time of speaking the defamatory words the person uttering them was either totally deranged, or laboring under an insane delusion on the subject to which the words related. In considering the evidence introduced as to the condition of mind of the unfortunate woman against whom the recovery was had in this case, we have been profoundly impressed by its weight and force. Without undertaking to discuss it in detail, or to mention the names of witnesses, we find that it manifests the facts that Mrs. Irvine was the fortunate possessor of practically unlimited wealth, a happy home, and devoted husband. It seemed to be the constant aim of the husband to minister to her happiness. Both time and money were lavishly expended by him in the effort to restore her health and surround her with all that makes life desirable. She was apparently as devoted to her husband as he was to her. During all their married life he gave her no cause to doubt his affection for or loyalty to her, and in his relations with respect to other women his conduct was exemplary in the extreme. But with the passing years disease, such as sometimes afflicts her sex, came upon her, insidiously at first, but later with such force as to undermine her constitution, wreck her health, and practically destroy her mind. For 15 years before her death she was thus afflicted. Repeated operations were performed upon her by the best and most experienced physicians and surgeons, and she was taken by her husband to sanitariums and health resorts in the effort to restore her health, but without avail. According to the evidence, soon after the disease fastened upon her body, her mind began to give way, and about four years before her death became so impaired that she was possessed of delusions and imaginings, which

for the remainder of her life controlled her actions, dominated her will, and wrecked her mind. From an affectionate and trusting wife she, without cause, became jealous and suspicious of her husband, and her mind dominated by the delusion that he was unfaithful to her. When laboring under these delusions she was incapable of being reasoned with, or of knowing or understanding what she said or did. When told that her suspicions against her husband were groundless, and her charges of infidelity on his part untrue, she would grow excited, and cry out with rage. She was especially under the delusion that her husband had become the father of a child by a young woman who lived with the appellee, and she, without cause, accused the latter of harboring the mother and child. Any woman that she met, particularly with a child, became to her disordered mind and frenzied imagination the object of her husband's love. This condition of Mrs. Irvine's mind was established by the testimony of divers witnesses, several of them the most distinguished physicians and specialists on diseases of the mind in the country; others being business men, friends, and neighbors of herself and her husband, who knew her well, and had every opportunity to become acquainted with her condition of mind. These witnesses all agree that her mind was disordered, and her reason dethroned, on the subject of her husband's relations with other women. The physicians say that her disease of mind was known as monomania, and that it was incurable. There were witnesses introduced by the appellee who testified to the effect that Mrs. Irvine was of sound mind, but all of these witnesses were non-experts, and only two, certainly not more than three of them, had such association with or knowledge of Mrs. Irvine as gave them opportunity to testify understandingly in regard to her mind. What they stated amounted in the main to mere expressions of opinion, with little to base the opinion upon. It was said by this court in *Brown v. Commonwealth*, 14 Bush, 398, in discussing nonexpert evidence on the question of insanity: "Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained." Again: "The court must be satisfied that the witness has had an opportunity, by association and observation, to form an opinion as to the sanity of the person in reference to whom he is to speak." Tested by this rule, we incline to the opinion that the testimony of all but three of appellee's witnesses as to the condition of Mrs. Irvine's mind was of little, if any, value, and much of it incompetent.

If correct in our view of the law of this case, it follows that the instructions of the lower court to the jury were altogether erroneous. In addition to the customary and general instruction setting forth the grounds which, if sustained by the evidence, would

authorize the jury to find for the plaintiff, the court should have instructed them as to the measure of damages; and, finally, that if they believed from the evidence that at the time of the speaking of the defamatory words by the defendant she was insane, or laboring under delusional insanity upon the subject of her husband's relations with women which incapacitated her from knowing or understanding the meaning of the defamatory words, they should find for the defendant.

It is proposed of record by the appellee that this court, in the event it should find the amount of the verdict and judgment excessive, may, instead of reversing the judgment, reduce the amount thereof to such a sum as it may deem proper. We are of opinion that we are not authorized to enter the remittitur. If the judgment is erroneous, we can only reverse it, and our jurisdiction over the case ceases with its reversal. The remittitur cannot be entered after the reversal, for the further reason that there will be nothing upon which it can operate, because by the reversal the judgment is rendered void. And, by such a course of action as is here proposed, the parties in other cases, following the precedent thus set, by like means would avoid the consequences of erroneous proceedings, to the prejudice of those against whom they were committed.

It is also insisted for appellee that if the court should find it necessary to reverse the judgment of the lower court it should put the appellant upon terms by requiring him to enter his assent of record that the present judgment shall stand as security for whatever damages may be found for appellee upon a second trial, and Turner's Adm'r v. Booker, 2 Dana, 334, is relied on in support of this contention. We are unable to grant this request, because without power to do so; nor do we regard Turner's Adm'r v. Booker, supra, as authority in point. The judgment in that case went against Turner in the lower court by default. He moved for a new trial, for cause set out in his affidavit. The motion was laid over to the succeeding term, before which time Turner died. The judgment was all the while suspended by the motion for a new trial. The motion for a new trial was finally overruled by the lower court, and upon appeal to this court it was held that the affidavits presented by Turner in the lower court were sufficient to authorize a new trial; consequently the case was reversed; but, as a naked reversal would operate to abate the action altogether, upon its return to the lower court on account of Turner's death, it was deemed just to put the administrator of his estate upon terms, as was done, because it was not the fault of Booker, but that of Turner, that he did not make defense before judgment and obtain a trial of the case upon its merits. The court therefore refused to allow his fault to be made the possible instrument of a great injustice. The case at bar is wholly different. Here there was a

trial; the appellant administrator, his deceased wife, and her guardians ad litem are without fault, but grave errors were committed by the lower court to appellant's prejudice, resulting in a verdict for damages with one exception unprecedented in this state as to amount. In that case the motion for a new trial only suspended execution against Turner. Here the rights of the surety on the supersedeas bond have intervened, and will be affected. This court can only declare the law, though the effect of its so doing in this case will be to abate the appellee's action upon its return to the lower court because of the death of the appellant, Mrs. Irvine.

For the reasons indicated the judgment is reversed, and cause remanded, with directions to the lower court to set aside the verdict and judgment and dismiss the petition.

PARKER'S ADM'R v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Court of Appeals of Kentucky. Jan. 13, 1904.)

DEATH—EVIDENCE—ADMISSIONS OF A CORPORATION'S FOREMAN—TESTIMONY OF FOREMAN.

1. Evidence of statements by the foreman of a corporation several days after an accident, admitting that he had failed to instruct a servant how to prepare dynamite, is inadmissible in an action against the corporation for the servant's death.

2. Evidence of a foreman of a corporation is admissible in an action against it for the death of a servant who was working under him at the time of the accident.

Appeal from Circuit Court, Bullitt County. "Not to be officially reported."

Action by David Parker's administrator against the Cumberland Telephone & Telegraph Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Chas. Carroll, for appellant. Farleigh, Straus & Farleigh, for appellee.

BARKER, J. Appellant's decedent, David Parker, was in the employment of appellee, the Cumberland Telephone & Telegraph Company, performing services in Green county, Ky., at the time he received the injuries from which he died. The petition substantially states that while in the employ of appellee David Parker was ordered by the foreman who was over him in authority to thaw some sticks of dynamite for the purpose of being used for blasting; that the decedent was ignorant of the nature of dynamite, or of the proper manner of preparing it for use; that without knowing of the danger, and without having been instructed thereof by appellee or its employé having charge and control of him, he, in obedience to the order of his superior, placed some 17 sticks of dynamite in a stove containing fire, which was situated in a box car owned by appellee, and then closed the door of the stove, whereupon the dynamite exploded, completely wrecking

¶ 1. See Evidence, vol. 20, Cent. Dig. § 912.

both the stove and the car, and inflicting upon him such injuries that he, after suffering great agony, died. It is further charged that the foreman who gave Parker the aforementioned order to prepare the dynamite for blasting well knew that he was ignorant of the nature of dynamite, or of the manner of safely preparing it for use, and, with this knowledge of the decedent's ignorance the foreman, with gross negligence, failed to instruct him as to the proper mode of preparing or the danger in handling it. The answer controverts the material allegations of the petition and pleads contributory negligence of the decedent. A trial resulted in a verdict and judgment for the defendant. Upon appeal appellant relies upon but two grounds for reversal:

First. That the trial court erred in refusing to permit appellant (plaintiff below) to prove, by a witness, as original testimony, the statements of appellee's foreman, made several days after the accident, containing an admission of his failure to instruct the decedent as to the proper mode of preparing the dynamite. This ruling of the court was entirely proper. Except where they are a part of the *res gestæ*, such statements of the agent, made after the injury complained of, are inadmissible as against the principal. *Embry v. L. & N. R. R. Co.* (Ky.) 36 S. W. 1123; *C. & O. Ry. Co. v. Smith*, 101 Ky. 111, 39 S. W. 832; *L. & N. R. R. Co. v. Webb*, 99 Ky. 332, 35 S. W. 1117; *McLeod, Rec'r, v. Ginther*, 80 Ky. 399.

Second. That the trial court erred in permitting appellee's agent to testify against the decedent as to instructions given him about the use of dynamite. In the case of *Cobb's Adm'r v. Wolf*, 98 Ky. 418, 29 S. W. 308, this court said: "It is competent for an agent who acts for a party in a transaction with one afterwards dying to testify for his principal concerning any verbal statement of, or any transaction with, or any act done by, the decedent. There is no reason why there should be such a rule as would preclude him from doing so. The agent has no pecuniary interest in the result of the litigation. He incurs no financial loss nor gains any material benefit by the result. The purpose of the law was to protect the estate of dead men by not allowing the one who is to profit by the litigation to testify concerning any verbal statements of or any act done by the decedent, nor as to any transaction with him. The wisdom of this provision is evident. Were it otherwise, the estates of dead men would become a prey to the rapacity of perjurers. The agent being free from the motive of profit which his principal possesses has not been declared incompetent as a witness as to the acts, etc., of a decedent." The fact that appellee is a corporation does not change the rule above announced, or take its agent out of the reasoning of the opinion.

For the reason indicated, the judgment is affirmed.

HALL v. BLANTON et al.

(Court of Appeals of Kentucky. Jan. 13, 1904.)

PUBLIC LAND—PRIORITY OF PATENTS—ADVERSE POSSESSION.

1. The priority of conflicting land patents issued by the state on the same day is determined by the dates of the surveys on which they are based.

2. Where two patents lap, actual possession by the junior patentee of a part of the land included in his patent, but not in the lap, he claiming title to a boundary including the lap, is not actual, adverse possession, so that limitations run in his favor, though he allowed his hogs and cattle on it, and occasionally cut timber there.

3. Evidence held to show that, where two patents lapped, there was no actual, adverse holding of any portion of the lap by the junior patentee.

4. Where two patents lap, actual possession of part of the lap by the senior patentee is such possession that limitations run as to the whole of it against the junior patentee, who also claims by previous adverse possession.

5. Evidence held to show that the senior patentee of a tract held actual adverse possession of the whole of it for the statutory period.

Appeal from Circuit Court, Harlan County. "Not to be officially reported."

Action by W. S. Blanton and another against Wm. K. Hall. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Wm. Low and W. F. Hall, for appellant. J. S. Forester, Jas. Howard, J. A. Scott, and W. C. Marshall, for appellees.

BARKER, J. This action involves the title to a boundary of land in Harlan county, Ky. On the 2d day of July, 1844, the commonwealth of Kentucky issued to Louis Farmer a patent for a boundary of 1,000 acres of land in Harlan county, and on the same day it issued to John Ledford and Robert Napier a patent for 1,000 acres of land in the same county. The patents lap each other on the waters of what is now called "Bobs Creek," and the interference thus made contains the land in controversy; and, being issued on the same day, their priority is decided by the date of the survey, which is shown to be in favor of the Farmer patent, by a few days in time. Appellant deduces his claim from the Louis Farmer patent; appellee, from the Ledford and Napier patent. Prior to the issuance of either of the patents before named, James Farmer had obtained a patent for 50 acres of land on Bobs creek, which he had sold to Robert Napier, who lived thereon at the time the 1,000-acre patent was issued to him and Ledford. After obtaining their patent, John Ledford and Robert Napier, who were brothers-in-law, made a verbal division of the land called for by its terms, so that Robert Napier's moiety would lie next to his home place. After thus settling the boundary between himself and John Ledford, appellee claims that Robert Napier remained in possession of the land, claiming to a well-defined boundary, which included the land in controversy,

from 1844 until his death, in 1883, when, by the terms of his will, it was devised to his wife for life, and then to his nine children, one of whom, Minta, intermarried with appellee Blanton. After the death of his father-in-law, appellee purchased all of the outstanding interests in the land in question, except that belonging to his wife, and, by virtue of this acquisition, claims title to it. In 1882 appellant, W. K. Hall, as the remote grantee of Louis Farmer, and claiming to be its owner, took possession of the land in controversy, and has remained in possession thereof from then continuously up to the institution of this action. Both of the parties litigant claim the land by record title, as above shown, and also claim possessory title by the adverse holding by themselves and their grantors for the full statutory period of 15 years. Upon the trial of the case, the chancellor held that the deed to appellant was champertous, within the terms of the statute, because at the time it was made the land was in the actual, adverse possession of Robert Napier, and that the appellee had a good possessory title, and adjudged him the owner of the whole disputed boundary. To review this judgment, this appeal is prosecuted.

The learned chancellor properly held that the Louis Farmer patent was the elder, and took priority over the Ledford and Napier patent; but we cannot agree to the conclusion reach by him that the deed from J. K. Farley to W. K. Hall was champertous and void for the reason that the land in controversy was then in the actual possession of Robert Napier, or that Robert Napier had the actual possession of the lap in the patents from 1844 until 1883, or that since that time his heirs and the appellee have had possession of it. Where two patents lap, the holder of the junior title cannot, by taking actual possession of a part of the land included in his patent—not in the lap—acquire title to the interference by claiming to a defined boundary which would include the interference. *Greer v. Bowling* (Ky.) 55 S. W. 1081; *Wait v. Gover* (Ky.) 12 S. W. 1068; *Trimble v. Smith*, 4 Bibb, 257; *Jones v. McCauley's Heirs*, 2 Duv. 14. In order to acquire title by possession, as against the elder grant, he must take actual, physical possession of all the land within the interference, which he proposes to acquire, and hold it, adversely, actually, and continuously, for the full statutory period. This principle is thus announced by Judge Robertson in the case of *Jones v. McCauley's Heirs*, 2 Duv. 14: "There can be no constructive possession of the same land by conflicting claimants. In the absence of any actual possession, if there be any constructive possession, it must necessarily be in the holder of the best title, unless he had renounced it. And his constructive possession can never be ousted by any constructive possession claimed under the inferior title. Nothing short of a renun-

ciation or actual disseisin can evict him. Nor will the statute of limitations run in favor of a mere constructive possession by the claimant under a junior patent. Such ideal possession cannot be either wrongful or hurtful to the holder of the elder grant, and, per se, could not give him any cause of action. Nor would a mere trespass, in cutting or removing wood or timber, authorize an action of ejectment. Such wrongs do not, in law, give actual possession of the land, nor amount to an eviction. The law of limitation, being reasonable and founded on principle, does not allow the statute to run when there is no cause of action; and, therefore, to bar an ejectment by time, the adverse possession must have been not only actual, but so continued for twenty years as to have furnished a cause of action every day during the whole period, and, consequently, as conclusively and consistently adjudged, claim of title, however notorious, and occasional use under that claim, without actual possession, continued without intermission or interruption for twenty years, will not bar an adverse right of entry." Measured by the standard thus announced, the evidence in this case wholly fails to show that Robert Napier ever had the actual, continuous, and adverse possession of the lap in question for the full period of 20 years. This was wild, uninclosed—mountain land—and until very recently of small value. The fact that Robert Napier "masted" his hogs thereon, or allowed his cattle to range on it, or had a sugar camp, or occasionally cut timber therefrom, and other like desultory trespasses, did not constitute an adverse possession, within the meaning of the law. The deed from Farley and wife to W. K. Hall was not champertous. As Robert Napier's claim, and the occasional trespasses before mentioned, did not constitute an adverse holding, the deed cannot be held champertous on that ground. But it is urged that the evidence shows that one of the sons of Robert Napier had the actual possession of the interference in controversy at the time the deed was made. The evidence does show that Nathan Napier, one of the sons of Robert, was occupying a small log house which had been built upon an inclosed boundary containing an acre or two of the property involved in this litigation. The rule is that, where the holder of the junior patent takes actual possession of a part of the interference, there having been an entry under the elder, his possession, in law, is limited to his actual inclosure. *Millar v. Humphries*, 2 A. K. Marsh. 446; *Crockett v. Lashbrook*, 5 T. B. Mon. 530, 17 Am. Dec. 98; *Shrieve v. Summers*, 1 Dana, 239.

The adverse possession, then, of Robert Napier, at the time the deed of Farley and wife to appellant was executed and delivered, must be limited to the small inclosure which his son was actually occupying. The evidence shows, however, that there was no

actual, adverse holding of any part of the interference on the part of Robert Napier. His son Nathan, who occupied the cottage in question, and his wife, Rhoda Napier, both testified (and in this they are not contradicted by any evidence whatever) that, when W. K. Hall evinced an intention to take possession of the interference, under claim of title, they moved out of the cottage, under the orders of Robert Napier himself, who told them to let Hall have the land. We conclude, then, that at the time appellant acquired title to the land in controversy no part of it was in the adverse possession of Robert Napier, or any one for him.

The evidence conclusively shows that after his entry, in 1882, W. K. Hall held the land in question adversely to all the world, and continuously, up to the date of the filing of this action—a period of more than 15 years. As to whether or not he had the whole of the interference inclosed is immaterial, as, he having entered upon it under the elder patent, by construction of law his possession is that of the whole; the rule being the reverse of that where the entry is made under the junior patent. In the case of *McGowan v. Crooks*, 5 Dana, 65, the rule is thus declared: "One of the well-established principles on the subject is that where the junior patentee has made an adverse entry within the interference, and holds possession of it, if the elder patentee enter upon it within twenty years for the purpose of taking possession, such entry stops the running of the statute of limitations against him, and may vest him with the entire possession. *Hord v. Bodley*, 5 Litt. 88. Such an entry certainly gains the possession of the uninclosed land, and, though it should not be continued, would operate to save the right of the elder patentee for twenty years from the time of its removal or cessation." To the same effect is *Shrieve v. Summers*, 1 Dana, 239. But we think the evidence shows that, for the period of time elapsing from 1882 to the institution of this action, the possession on the part of Hall was actual as to the whole tract of land.

The record in this case is voluminous, and the testimony of many witnesses was taken on the question of the adverse possession of Robert Napier. A great many of the witnesses introduced by appellee testified, in general terms, that Robert Napier claimed to a well-defined boundary, which included the land in controversy; but we think the great weight of the testimony, and in fact all which is directed to the particular issue, as to whether or not he claimed title to this land, shows that he did not so claim. Nathan Napier, his son, and Rhoda Napier, his daughter-in-law, both testified that he did not claim it, but, on the contrary, ordered Nathan to move off of the small part he occupied, and give Hall possession. William

Clem, Sr., one of appellant's vendors, testifies that Robert Napier did not claim the land in controversy, but offered to buy it from him. N. H. Howard, in his evidence, shows that he did not claim it, but desired Howard to aid him in purchasing it from Clem. Rans Hall, a son of appellant, testifies that Robert Napier told him that he did not claim any part above Clem's line (the land in controversy); that the title to that was "as good as wheat in the mill." We are of opinion that the claim of appellee grew out of a misapprehension as to the real condition of the record establishing the priority between the Farmer and the Ledford-Napier patents. It seems that after the death of Robert Napier his heirs instituted an action in ejectment in the Harlan circuit court against appellant to recover possession of the land involved here. This action, although pending for 14 years, appears never to have been prosecuted to a trial. The reason for this is shown in the testimony of J. M. Napier, one of the sons of Robert, who says: "By looking at the survey books, the patent under which we claim on Bobs creek, or the survey, showed to be older than the one under which W. K. Hall claimed, and myself and the heirs of Robert Napier brought suit against W. K. Hall to recover this land. We sent to Frankfort and got certified copies of the original survey and plat to each one of the surveys. The one under which W. K. Hall claimed was the oldest, and we quit the suit, and never prosecuted it any further. I sold out my interest to W. S. Blanton in the land owned by Robert Napier at his death. W. F. Hall, James D. Black, and John Dishman was our attorneys. They advised us we could not recover the land, and we quit the suit. * * * I sold him [Blanton] all my interest in the Robert Napier land. W. S. Blanton said he was going to law for the W. K. Hall land. I told him, if he could gain it, it was all right with me." E. V. Napier, another son of Robert, in answer to a question as to whether or not there was any marked line around his father's home farm, including the land of W. K. Hall, said: "No, sir; none that I ever knew of." Again he was asked: "State if your father ever had any sort of possession of any part of what is known as the W. K. Hall tract of land after W. K. Hall moved there, and you will further state whether or not any of his heirs ever had any possession of any part hereof after his death?" He answered: "No, sir; I think not. Neither did any of his heirs ever have any possession after his death, that I ever knew of."

We conclude that the record shows that W. K. Hall, at the time of the institution of this action, had a good title to all the land in question, and was in possession of it. Wherefore the judgment is reversed for proceedings consistent with this opinion.

SMALLHOUSE v. AMERICAN NAT. BANK.

(Court of Appeals of Kentucky. Jan. 15, 1904.)

BILLS AND NOTES—DELAY IN SUIT—ESTOPPEL OF ASSIGNOR.

1. Where the assignor of a note repeatedly assured the holders that he would see the makers, and either have it paid or secured, thereby causing the holders to postpone suit on the note, he could not rely on their delay to prosecute, to escape liability.

Appeal from Circuit Court, Warren County.
"Not to be officially reported."

Action by the American National Bank against C. G. Smallhouse. Judgment for plaintiff, and defendant appeals. Affirmed.

C. P. Mottley and W. B. Gaines, for appellant. Wright & McElroy, for appellee.

BARKER, J. This action was instituted by the American National Bank against C. G. Smallhouse, seeking to hold him liable, as assignor, upon a promissory note for \$5,500, payable to the appellee. The defense was failure on the part of the bank to prosecute the makers of the note to insolvency within a reasonable time. This is the second time this case has been here on appeal. Upon the original trial in the court below, after all the appellee's (plaintiff's) evidence was in, the court, deeming that the evidence did not show reasonable diligence, gave a peremptory instruction to the jury to find for the defendant (appellee) on first appeal. The bank brought the record up to this court on appeal, where it was reversed, in an opinion to be found in 67 S. W. 260. The opinion on the first appeal elaborately sets forth all the facts, making it unnecessary to repeat them here. Upon return of the case a retrial was had, which resulted in a verdict for the appellee for the full amount sued for, from which appellant is prosecuting this appeal.

To overcome the plea of negligence in prosecuting the makers of the note to insolvency within a reasonable time, the bank pleaded that it was induced to bring suit by the request of the assignor, and, in support of this plea, introduced several letters from it to him on the subject of the note, and his replies thereto. Nearly all of the material evidence upon this issue was contained in this correspondence. As to its weight, it was said in the original opinion: "It is apparent that the repeated promises and assurances made by the appellee, Smallhouse, to the appellant, that he would see the makers of the note, and either have it paid or secured, were calculated, whether so intended or not, to throw appellants off their guard, and to induce them to delay the institution of a suit against the makers. This was especially true in view of the close and intimate business relations which had existed between the parties for such a long period of time, and, thus having, both by words and acts, induced the appellee to postpone resorting to the courts, he cannot rely

upon their delay as an act of negligence to escape liability." The same correspondence which was introduced upon the original trial in the court below was introduced in the second trial, and the only additional evidence heard was the testimony of C. G. Smallhouse himself, which, when examined and analyzed, does not seriously militate against that of the appellee. The correspondence was the same, and speaks for itself. These letters show that the indulgence granted was at the request of Smallhouse, and, as their genuineness was not denied by him, it seems to us that he is concluded by the effect given them in the opinion on the first appeal, and that, if a motion had been made therefor, appellee would have been entitled to a peremptory instruction at the close of all the evidence in the case; but, waiving this, the court properly overruled the motion of appellant for a peremptory instruction, and gave the jury the whole law of the case in the instructions.

Perceiving no error in the record, the judgment is affirmed.

FRANKLIN v. TRACY.

(Court of Appeals of Kentucky. Jan. 18, 1904.)

LANDLORD AND TENANT—DEFECTIVE PREMISES—INJURY TO PROPERTY—LIABILITY OF LANDLORD.

1. A landlord is not liable to a tenant for injury to his property from a collapse of the building owing to inherent defects in the construction of the building at the time it was rented, of which the landlord did not have notice, but which he might have known by the exercise of reasonable diligence, and which the tenant did not know, and could not have discovered by ordinary diligence.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

Action by Fannie Franklin against Mattie L. Tracy. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry J. Tilford and P. C. Beckley, for appellant. Huston Quinn, for appellee.

BARKER, J. The appellant, Fannie Franklin, instituted this action in the Jefferson circuit court to recover damages for injury to her property caused by the collapse of a house belonging to appellee, which she had rented, and which contained the injured property at the time of the collapse. The petition states that the appellant rented the house—being No. 633 Center street, in Louisville, Ky.—on the 20th day of July, 1900, from the Columbia Finance & Trust Company, which was the agent for that purpose of its owners, Mattie L. Tracy and Susie B. Tracy; that the renting was from month to month, until the contract lease between herself and appellee should be terminated; that she re-

¶ 1. See *Landlord and Tenant*, vol. 32, Cent. Dig. § 648.

mained in possession of the premises, under lease, until the 24th day of February, 1903, when the house, by reason of its unsafe, dangerous, and defective condition, suddenly and without warning collapsed and fell, breaking and destroying all the property of appellant therein, which was reasonably worth the sum of \$200; that the house was in the unsafe, dangerous, and defective condition which caused it to fall, at the beginning of the lease, and remained so until the day on which it fell; that this condition of the house was well known to the owners, and each of them, or could have been known to them by the exercise of ordinary care at the time the lease was made, and on the 1st day of February, 1903, but was not known to appellant, and could not have been known to her by the exercise of ordinary care at the time the lease was made, or on the 1st day of February, 1903; that, by reason of the collapse of the house in question, she was damaged in the sum of \$250. To this petition a general demurrer was interposed by the appellee, which was sustained by the court. Whereupon, appellant declining to plead further, her petition was dismissed, from which judgment this appeal is prayed.

The demurrer admits, as true, all of the well-pleaded allegations of the petition, and presents for adjudication the question as to whether or not a landlord is liable for injuries to his tenant caused by inherent defects in the construction of the tenement at the time of its rental, of which he did not have actual notice, but which, by the exercise of reasonable diligence and care, he could have known, and which the tenant did not know, and could not have discovered by ordinary diligence. In the case of *Battres v. Heiss*, 2 Ky. Law Rep. 308, it was said by this court: "It is as much the duty of the tenant as the landlord to take notice of the dangerous condition of premises, and, unless actual knowledge is brought home to the landlord, no recovery can be had on account of injuries received by reason of defects in the premises, even though an ordinance as to repairs of such places has not been complied with." The case of *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499, was an action for damages resulting to a little child by reason of the defective privy floor, through which she fell into the vault below. The petition in the case alleged that, at the time the landlord rented the premises to the plaintiff's father, he knew the timbers upholding the floor were defective, rotten, and dangerous, but suppressed his knowledge of its condition from her father, and "neither she nor her father could discover the dangerous condition of the privy floor, by reason of the character of its construction, and that she fell through the floor, and was precipitated into the vault below, and greatly damaged, physically and mentally, by the fall." A general demurrer to the petition having been sustained, this court, in reversing the judgment, thus states

the rule: "This case is not like the cases cited, where the premises were defective or dangerous, but unknown to the lessor, who is not bound to repair, and in such cases not responsible for injuries to third persons. They lack the ingredients of knowledge, and the culpable neglect in disclosing it, about tenements or premises whose dangerous character could not be known by ordinary care, and whose use necessarily placed the occupant in peril." Taylor, in his work on *Landlord & Tenant* (6th Ed.) § 381, says: "There is no implied warranty, on the letting of a house or land, that it shall be reasonably fit for habitation or cultivation, or for any other purpose for which it was let. And where a person hired a house and garden for a term of years, to be used for a dwelling house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease, the principle was laid down, after an elaborate review of all the cases where a contrary doctrine seemed to have prevailed, that there is no implied contract, on a demise of real estate, that it shall be fit for the purposes for which it was let. Consequently an abandonment of the premises under these circumstances forms no defense to an action for rent. And in all cases of this kind where a tenant has been allowed to withdraw from the tenancy and refuse the payment of rent, there will be found to have been a fraudulent misrepresentation or concealment as to the state of the premises which were the subject of the letting, or else the premises were proved to be uninhabitable by some wrongful act or default of the landlord himself." *Shearman & Redfield*, in their work on *Negligence* (5th Ed.) § 709, say: "On the owner's entire surrender of control over premises to a lessee, he is, in the absence of any warranty of their condition, or fraudulent concealment of known defects or agreement to repair, on his part, free from liability to the lessee, and to those whom the latter invites upon the premises, for defects which could have been discovered by the lessee, on reasonable inspection, at the time of hiring. In other words, if the lessee had the same opportunities as the owner to discover a defect at the time of leasing, the rule of *caveat emptor* applies, and he takes the premises as he finds them. There is therefore no implied warranty on the part of a lessor that the demised premises are safe or reasonably fit for occupation. Where, however, there is some latent defect, e. g., an original structural weakness, or decay, or the presence of an infectious disease, or other injurious thing, rendering the occupation of the premises dangerous, which were known to the lessor, and were not known to the lessee, nor discoverable by him on a reasonable inspection, then it was the duty of the lessor to disclose the defect; and, if an injury results therefrom, he is liable as for negligence." In note 3 to

the section cited, the rule is stated as follows: "A landlord who lets a house in a dangerous condition is not liable to his tenant's customers or guests for accidents happening during the term, for, fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is on his contract, if any." In support of which doctrine, the learned authors have collated a large number of cases. In 18 American & English Encyclopædia of Law (2d Ed.) subject, "Landlord and Tenant," p. 215, it is said: "At the common law, it is a well-settled rule that, in the absence of any agreement between the parties, the landlord was under no obligations to his tenant to keep the demised premises in repair. The rule of caveat emptor applies in regard to leases, and the landlord is not even under an implied obligation to remedy defects in the demised premises existing at the time of the demise. It follows, therefore, that, in the absence of any agreement on the part of the landlord to repair, a tenant cannot recover from the landlord the cost of the repairs made by him; nor can the tenant recover from the landlord for injuries to his person or property, or the property or person of his family, caused by the defective condition of the demised premises." In support of which text, the authors of this work have, in a note, collated a vast number of adjudicated cases. One of the most instructive cases to which our attention has been called is that of *Doyle v. The Union Pacific Ry. Co.*, 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223, wherein the court, in a learned opinion, discusses the question of the responsibility of a lessor to his tenant for defects or dangers existing in the tenement at the time of the demise, and arrives at a conclusion in harmony with the rule enunciated by the authorities cited.

The cases of *Hines v. Wilcox*, decided by the Tennessee Supreme Court, and contained in 33 S. W. 914, 34 L. R. A. 824, 832, 54 Am. St. Rep. 823, and *Wilcox v. Hines*, decided by the same court (46 S. W. 297, 41 L. R. A. 278, 66 Am. St. Rep. 770), as authority for the doctrine contrary to that herein announced, have been pressed with great earnestness upon our attention. With the highest respect for the ability and learning evinced in the utterance of the Supreme Court of Tennessee in the cases cited, we cannot concur in the conclusion therein reached—that the landlord is liable to his tenant for damages accruing to him by reason of defects existing in the tenement at the time of the demise, of which the landlord had no actual knowledge, but which he could have known by the exercise of reasonable diligence. In a note to the first of the cited cases, the annotator thus speaks of the rule announced in the opinion of the court: "*Hines v. Wilcox* is a new departure in the law of landlord and tenant. It places a duty upon the landlord which has not been the rule to place there, and, to a large extent, relieves the tenant

from a duty which has always rested upon him. It makes a general rule of an exception which has only been applied in a peculiar class of cases, which does not include so obvious a defect as existed in *Hines v. Wilcox*. No active care and diligence to discover defects have generally been placed on the landlord." And then follows a review of the cases bearing upon this question, which demonstrates that the principle announced by the Tennessee court is out of harmony with the overwhelming weight of authority on the subject.

"Negligence," as used in law, may be defined as the failure to discharge a legal duty, whereby injury occurs. There can be no negligence where there is no duty imposed. The law, as we have seen, imposes no duty of inspection on the landlord, but casts that duty on the tenant, who has equal facility with the owner to examine the premises. In other words, it applies to the contract of leasing the doctrine of caveat emptor. In this particular case the tenant shows in her petition that she had been in the possession of the premises for 31 months before the accident, and it is difficult to understand how the landlord, who, at best, could only have seen the premises occasionally, could have discovered a defect which the tenant, who was in it constantly, could not discover in nearly 3 years.

The judgment is affirmed.

GENTRY et al. v. GENTRY.

(Court of Appeals of Kentucky. Jan. 15, 1904.)
WILLS—CONSTRUCTION—LIFE ESTATE—REMAINDERMAN—COMPENSATION FOR IMPROVEMENTS.

1. Testator, by the first clause of his will, bequeathed to his son a certain portion of "my farm on which I now reside," describing it, and by a second clause to another son a part of the same farm, also describing it. By a further clause he bequeathed to his wife "full and undivided control of my farm on which I now reside so long as she lives or remains my widow." One of the sons had occupied the part of the farm devised to him under an agreement of testator to give it to him if he would build thereon and live there, but had not received a deed therefor. *Held*, that the words "my farm on which I now reside," as used in the bequests, devised to his wife a life estate in the entire tract used as a farm by the husband, and that the son took his share thereof subject to the life estate.

2. Where a son received under his father's will, subject to the life estate of his mother, land on which he was living pursuant to an agreement with the testator to give the same to him, but for which he had never received a deed, he could not claim the remainder under the will, and also claim compensation for his improvements against the will; such claim for compensation being a waiver of any rights under the will.

Appeal from Circuit Court, Ohio County.

"Not to be officially reported."

Action by Cassander Gentry against Lily Gentry and others for possession of real estate. From a judgment for plaintiff, defendants appeal. Reversed.

J. E. Fogle, for appellants. Glenn & Wing, for appellee.

HOBSON, J. David Gentry owned a tract of 185 acres of land, on which he resided, in Ohio county. Some years ago his son Darius married, and went to the state of Illinois to reside; but the father, desiring him to return to Kentucky, proposed that if he would accept it, and build on it, and live there, the father would give him a certain portion of the farm. The son accepted the arrangement, and the father put him in possession of the land. The son built a residence, out-houses, fencing, etc., enhancing the value of the land, and occupied it up to the death of the father, claiming it as his own under the gift, the father saying that he would make the son a deed to the property; but this he failed to do, and died leaving a will by which he devised to the son the property referred to, subject to a charge of \$50, and a provision for his widow. The son saved up the \$50, and was ready to pay it when it came due, but died a few years after his father, leaving a widow and two little children in possession of the land given to him. The widow of the father has filed this suit against the widow of the son and his two infant children for the possession of the land, on the ground that, under the will of the husband, she is entitled to hold the land for her life. The court having adjudged in her favor, the defendants appeal.

Neither the mother nor son renounced the provisions of the will. Its material provisions are as follows:

"I, David Gentry, of the County of Ohio, State of Kentucky, being of sound mind and memory and understanding, do make my last will and testament in manner and form following:

"(1) I give and bequeath to my son, Darius Gentry, that part of my farm on which I now reside and bounded as follows [here follows boundary of land in dispute] to have and to hold to him and his heirs forever.

"(2) I give and bequeath to my son, S. B. Gentry, a part of my farm on which I reside bounded as follows [here follows boundary] to have and to hold to him and his heirs forever.

"(3) I also give and bequeath to my son, S. B. Gentry [here follows description of other property].

"(4) I give and bequeath to my daughter, Claudia Baker, the remainder of my farm on which I now reside [here follows description] to have and to hold to her and her heirs forever.

"(5) I give and bequeath to my granddaughter, Ethel Willson, \$150.00, said sum to be paid her by my sons, Darius Gentry, S. B. Gentry and my daughter Claudia Baker, or their heirs equally, viz. \$50.00 each, when my granddaughter is married or reaches her majority; said sum is secured to her by retaining a lien on all my land bequeathed until said sum is paid.

"(6) I give and bequeath to my wife, Cassander Gentry, full and undivided control of

my farm on which I now reside so long as she lives or remains my widow.

"(7) I also give and bequeath to my wife all of the household goods, farming implements, stock of all description and crop now on hand on my farm or so much thereof as remains after paying all of my indebtedness.

"(8) I appoint my wife, Cassander, sole executrix of this my last will and testament."

It is insisted for appellants that in the sixth clause of the will the testator referred only to the land that was then in his possession, and not to the land upon which his son had settled, and which he then held. But it will be observed that in the first clause of the will, in which the land claimed by the son is devised to him, it is referred to as "that part of my farm on which I now reside." The same words, in substance, are used in the second clause of the will in the devise to S. B. Gentry, and in the fourth clause in the devise to Claudia Baker. The same words are again used in the sixth clause, by which his wife is given "full and undivided control of my farm on which I now reside so long as she lives or remains my widow." It cannot be presumed that the testator used the words "my farm on which I now reside" in the sixth clause of his will in a different sense from that in which the same words are used in the first, second, and fourth clauses. In those clauses they evidently refer to the entire tract of 185 acres, for the whole of it is devised thereby, and the same meaning must be given to the sixth clause where the identical words are again employed. There is no latent ambiguity as to what the testator meant by the words "my farm on which I now reside," for, taking the will as a whole, it unmistakably shows what property was intended; and parol evidence is incompetent to vary the will, or to show that the testator did not intend what the will plainly declares. When the testator gave his wife full and undivided control of the farm as long as she lived or remained his widow, he necessarily devised to her a life estate, for the words "full and undivided control" necessarily mean that she is to have the entire use of the land, free from the claims of any one, during her life or widowhood. By the will the son gets the land subject to the life estate of his mother. He cannot claim the remainder under the will, and also claim compensation for his improvements against the will. If compensation is claimed for improvements, the right to take anything under the will is renounced, and the property devised in this clause of the will will pass as undevise estate to the heirs at law of the testator, subject to the statute requiring heirs to be equalized in the division of the undevise estate, considering what each has heretofore received under the will or otherwise. If compensation is allowed for the improvements, it must be on the principles applicable to parol vendees of land making

improvements. We do not see that the son in his lifetime did any overt act or followed any course of conduct that could have misled anybody. He remained in possession of his land, claiming and improving it as his own, the widow acquiescing in his claim. The case is here on demurrer, and on the face of the answer there is not enough to show that the son waived his rights, or elected to take under the will. He not having waived his rights, his widow and children succeeded to them, and may make the same plea that he could have made. Their answer is substantially good as to the enhancement of the land by his improvements. The plaintiff may have it made more specific if she desires. On the return of the case, the personal representative of Darius Gentry should be made a party defendant, so that any money that may be allowed may be paid to him, and he can litigate the amount due on account of the betterments placed on the land by his intestate. The court on final hearing will protect the interests of the infants, as far as it may be done under the evidence, by such judgment as seems proper.

Judgment reversed and cause remanded for further proceedings on the question of the enhancement of the land by the improvements of the intestate, not inconsistent with this opinion.

LOUISVILLE & N. R. CO. v. BARRALL, Justice of the Peace.

(Court of Appeals of Kentucky. Jan. 13, 1904.)

EQUITY—INJUNCTION—PROSECUTION OF CRIME.

1. An injunction will not issue on allegations charging defendant, a justice of the peace, with conspiring to unlawfully issue warrants of arrest against plaintiff's employes for an alleged trespass.

Appeal from Circuit Court, Bullitt County. "Not to be officially reported."

Bill by the Louisville & Nashville Railroad Company against S. F. Barrall, justice of the peace, and another, to enjoin prosecution of plaintiff's employes. From a decree sustaining a demurrer of defendant Barrall, and as to him dismissing the bill, plaintiff appeals. Affirmed.

Farleigh, Straus & Farleigh, for appellant. Chas. Carroll, for appellee.

BARKER, J. Appellant, the Louisville & Nashville Railroad Company, operates a truck railway line through Bullitt county, Ky., on a right of way said to be 66 feet wide. S. C. Sanders, claiming to own a part of this right of way, upon which stood a toolhouse used by appellant, obtained from appellee, who is a justice of the peace of Bullitt county, the issuance of warrants of arrest for several of the employes of appellant, charging them with trespassing and injuring his property, under section 1256 of

the Kentucky Statutes of 1899. Upon the issuance of these warrants appellant instituted this action in the Bullitt circuit court for the purpose of obtaining an injunction against S. C. Sanders and S. F. Barrall, the justice of the peace in question, charging them with the fraudulent and collusive conspiracy to unlawfully and illegally issue warrants of arrest against its employes, and in this way to drive appellant and its employes out of the possession of its property. General demurrers to this petition were filed, both by appellee and S. C. Sanders. That of Sanders was overruled; that of appellee was sustained; whereupon, appellant declining to plead further, as against appellee its petition was dismissed, from which judgment it has appealed.

No rule of equity jurisdiction is better settled than that an injunction will not lie to restrain the prosecution of crime. The allegation that the justice of the peace had entered into a fraudulent conspiracy with the prosecuting witness to issue warrants of arrest in order to deprive appellant of its property does not alter the rule. It is only well-pleaded allegations of fact that are admitted to be true by the demurrer. Every burglar taken with the stolen property upon his person could and would make just such an allegation against the court and prosecuting witness if it availed to restrain the process of the law against him. Appellant's employes were charged with crime in a court having jurisdiction of the subject-matter, and which, by its process, had acquired jurisdiction of their persons, and injunction will not lie against the court to restrain this prosecution. High, in his work on Injunctions (section 272), thus states the rule: "It is a well-settled principle of equity jurisprudence that an injunction will never be granted for the purpose of restraining proceedings of a criminal or quasi criminal nature in a court having jurisdiction over such matters." Spelling, in his work on Injunctions and other Extraordinary Remedies (section 24), says: "Equity has no jurisdiction to interpose for the prevention of crime, or to enforce moral obligations, nor to interfere for the prevention of illegal acts merely because they are illegal. Nor have courts of equity jurisdiction to prevent by injunction the institution of bona fide prosecutions for criminal offenses, whether the same be for violations of state statutes or municipal ordinances." The case of *Shinkle v. The City of Covington*, 83 Ky. 420, does not militate against the principle announced in the case at bar. There a citizen who had taken possession of property claimed to be one of the public streets of the city of Covington was proceeded against by ordinance warrants sued out in the mayor's court, which had jurisdiction of the subject-matter. Fifteen warrants were issued against the alleged trespasser, and in each case a fine was entered so small in amount that it could not be appealed from.

¶ 1. See Injunction, vol. 27, Cent. Dig. § 173.

To remedy this evil the defendant in the ordinance warrants instituted an action to enjoin the city of Covington from further prosecution in the mayor's court under the ordinance, and to test his title to the property in question. It was held that the actions of the city in thus constantly suing out warrants under the ordinance, and the imposition of fines too small to be appealed, inflicted an injury upon the plaintiff for which he had no adequate remedy at law, and upon this ground the injunction was sustained. That is not the case here. Appellant's employees have not been tried, and no fine whatever has been imposed upon them. No facts are alleged or shown tending to establish irreparable injury to appellant, or that a multiplicity of suits will be instituted against it. In the case cited by appellant it is said: "The aid of a court of equity cannot be invoked so as to interfere with proceedings of subordinate tribunals, unless to prevent irreparable injury or a multiplicity of suits. *Ewing v. City of St. Louis*, 5 Wall. 413, 18 L. Ed. 657; *Mayor of Brooklyn v. Meserole*, 26 Wend. 132." The injunction issued and sustained in the case cited was only against the city, not against the judge of the court in which the warrants were pending.

The judgment is affirmed.

**VANCEBURG & S. L. TURNPIKE ROAD
CO. v. MAYSVILLE & B. S. R. CO. et al.
SAME v. BRUCE et al.**

(Court of Appeals of Kentucky. Jan. 13, 1904.)

TURNPIKE TAX—ASSESSMENT—LAW OF THE CASE—EFFECT OF INVALIDITY—TAXATION IN TWO DISTRICTS—COMPANY'S SURRENDER OF FRANCHISE—UNAUTHORIZED INDEBTEDNESS—DEFENSES TO TAX—DIFFERENT ASSESSMENTS—ELECTION—RAILROAD PROPERTY—TAXATION SAME AS OTHER REALTY.

1. Where on a former appeal the Court of Appeals has determined that the method of assessing a turnpike aid tax, provided in Acts 1889-90, vol. 2, p. 1385, c. 1034, is unconstitutional, the question cannot be considered on the present appeal.

2. A turnpike tax assessment, void because made by an unauthorized person, does not prevent a reassessment by the county assessor; the case standing merely as an omission by that officer of an assessment he should have made.

3. The fact that a county assessor, in assessing turnpike aid taxes, after a void assessment thereof, does not again call on the taxpayers to list their property, does not invalidate the assessments; they having been called on each year when the regular county assessment was made for a list of their property.

4. Ky. St. 1903, § 4736, providing that, where property is situated in more than one turnpike taxing district, it shall be liable only in the district whose turnpike affords it the greater benefit, as determined by the fiscal court or county commissioners, does not prevent the collection of a turnpike tax levied by the company's charter on all property in the district, where the taxpayer has not applied to the fiscal court or board of county commissioners, and secured an adjudication exonerating his property.

5. Ky. St. 1903, § 4748b, subsec. 8, provides that, when a turnpike is sold to the county, the company's charter and franchise are at once at an end. Section 4306 gives the fiscal court gen-

eral charge and supervision of the public roads in the county. *Held*, that the lease of a turnpike built partly on a county road to the county until the turnpike company should have sufficient funds to complete and maintain it did not terminate the company's charter and franchise.

6. The charter of a turnpike company provided that it should not issue any written obligations of indebtedness, or contract for the construction of any part of the road, until the aid tax, stock subscriptions, etc., should be sufficient to meet such contract of construction, etc. *Held*, that the fact that the directors had borrowed money individually, which was used in constructing the road, before the company's resources met the charter requirement, was not a defense to a taxpayer when sued, before the road's completion, for the aid tax levied by the Legislature for the building of the road.

7. In a suit to collect a turnpike aid tax on railroad property, the turnpike company set up an assessment for each year, both by the county commissioners, as authorized by its charter (Acts 1888-90, vol. 2, p. 1385, c. 1034), and by the Railroad Commission, as authorized by Acts 1891-93, p. 308, and made applicable (section 7) to all assessments of railroads, and prayed the judgment of the court as to which was valid. *Held*, that the assessment by the railroad commission being under the later statute, and therefore valid, and the allegation as to the assessment by the county commissioners being merely surplage, it was error to require the company to elect on which it would rely.

8. Under Acts 1891-93, p. 308, art. 4, § 7, providing that the same rate of taxation levied on other realty in any year shall also be levied on railroad property, a turnpike aid tax cannot be collected from a railroad for years in which no assessment thereof on individual property was made.

Appeal from Circuit Court, Lewis County.
"To be officially reported."

Actions by the Vanceburg & Stouts Lane Turnpike Road Company against the Maysville & Big Sandy Railroad Company, and by John L. Bruce and others against the turnpike company. From judgment for the railroad company in the first action, and for Bruce and others in the second, the turnpike company appeals. Reversed.

A. E. Cole & Son, W. C. Halbert, and E. L. Worthington, for appellant. W. H. Wadsworth and Wadsworth & Cochran, for appellees.

HOBSON, J. The opinion heretofore rendered in the first of these cases (see *Vanceburg, etc., Turnpike Co. v. Maysville, etc., R. Co.*, 63 S. W. 749) was withdrawn, and a reargument ordered. On the reargument the second case was, by consent of parties, heard with the first case, in order that the court might get more fully before it all the facts in the controversy; and we will now dispose of the two cases together.

The turnpike company was incorporated by an act of the Legislature approved April 24, 1890. See Acts 1889-90, vol. 2, p. 1385, c. 1034. By its charter appellant was authorized to construct and operate a turnpike commencing at the west end of the bridge across Salt Lick creek, thence down the Ohio river bottom, the best and most practicable route to Stouts Lane; following, so far as convenient, the existing county road. In or-

der to enable the company to build the turnpike as speedily as possible, and equalize the burden thereof, there was levied by the act on all species of property, including that of railways situate within the bounds of a certain taxing district, subject to taxation for state purposes, the sum of 50 cents upon each \$100 worth of taxable property each year, commencing with the year 1891, and continuing until the road was built and paid for. It was also provided that the company might appoint an assessor to assess the property of individuals subject to taxation; his assessment to be returned to the May or June term of the Lewis county court in each year, and to be subject to correction thereby. The taxes were then to be listed with the sheriff of Lewis county for collection. As to railroad property, the Lewis county court was required, at its January or February term in each year, to appoint two commissioners to ascertain and report the number of miles and the value of the property within 30 days from this report, and such other evidence as might be introduced by any party in interest; and the judge of the county court was required to make an assessment of the property, and certify it to the railroad company. The taxes levied were required to be listed with the sheriff for collection on or before the 15th of July of each year. They were due from that date, and the sheriff might then proceed to collect and distrain therefor. Persons paying taxes became stockholders in the company to the amount of taxes paid, and certificates should be delivered to them therefor whenever they paid an amount equal to \$25 until the road was completed and paid for. The company organized as provided in the charter on June 18, 1891, and proceeded then and for each year thereafter to have the property assessed within the taxing district as provided by the charter; the order of the county court for that year as to the appointment of commissioners to assess the railroad property being made at the June term. The taxes were placed in the hands of the sheriff for collection, and the company proceeded with the construction of its pike. T. J. Bruce and other individual taxpayers residing in the taxing district then filed a suit enjoining the collection of the taxes on the ground, among other things, that the statute was unconstitutional. The circuit court perpetuated the injunction, and on appeal to this court the judgment was affirmed. The court said: "It seems to us that so much of the act in question as attempts to provide for the assessment of the property in the taxing district is unconstitutional and void, and that the appointment and assessment made by the appointees of the company are both invalid. But the Legislature had power to levy the tax, and to that extent the act in question is valid; and by virtue of the general law the assessor of the county should assess the property in the taxing district, and return

the same as other tax lists are returned, and that the taxpayer should have the same right to obtain corrections in or modifications of the list as is allowed by the general law respecting the assessment of property for general taxation." *Bruce v. Vanceburg, etc., Turnpike Co.*, 35 S. W. 112. After this opinion was rendered the turnpike company procured from the county court an order directing the county assessor to assess the property as indicated in the opinion, and to return his assessment to the county clerk, to be submitted to the county board of equalization. Under this order, assessments were made for the years 1895, 1896, 1897, 1898, and 1899 by the county assessor. His assessments were submitted to the county board of equalization, and were by it approved. No assessment appears to have been made of the property of the individual taxpayers for any year previous to 1895, except those made by the appointees of the turnpike company as provided in its charter, which was in this respect held unconstitutional in the case above referred to. The second of the above actions was brought by Bruce and others on July 5, 1897, to restrain the sheriff from levying on or selling their property under the assessment made under the charter before the property had been assessed by the county assessor as indicated in the opinion of this court above quoted. The subsequent assessment by the county assessor was set up in the action, and the case, as finally presented, involved the right of the turnpike company to collect the taxes at all. The court perpetuated the injunction in that case, and also dismissed the petition in the first action above named, in which the turnpike company undertook to collect from the railroad company its taxes. From these judgments the turnpike company appeals.

The opinion heretofore rendered on the former appeal is conclusive upon the parties, and the validity of the charter provision as to the assessment of the property by the appointees of the company cannot now be reconsidered. The assessment of the property of the individual taxpayers by the appointees of the company has been determined to be void. Being void, it conferred no right upon the sheriff to collect taxes thereunder, and was no bar to an assessment of the property by the county assessor, for, as it was void, the property had not, in law, been assessed at all, and, not having been assessed, the case stood simply as an omission by the county assessor to make an assessment which he ought to have made. The fact that the assessor, in making this list, did not again call on the taxpayers, does not invalidate the assessment. They were called on for the list of their property in each year when the county assessment was made, and they had ample opportunity to appear before the county board of supervisors and have any errors corrected.

It is insisted for appellees that they can-

not be taxed, by reason of section 4736, Ky. St. 1903, because their property lies in two districts. By that section it is provided that whenever in any county there is in force a system of taxation for turnpike purposes under which part of such taxes are general, and part thereof levied in turnpike road districts, then, when the same property is situated in more than one of such districts, the property shall be liable for only one district tax, which shall be that levied in the district in which is the turnpike from which the property or its owner derives the greater benefit, and this shall be determined by the fiscal court or board of county commissioners, and its judgment shall be final. It is not averred that any such decision has been made by the fiscal court. By the charter of appellant, the tax is levied by the Legislature on all the property in the taxing district; and, if any taxpayer seeks exoneration from it, he must apply to the fiscal court or county commissioners and obtain its judgment exempting him. Until this is done, the sheriff may go on and collect the tax, as *prima facie*, under the act, all property within the taxing district is subject thereto.

The turnpike company, when the collection of the taxes was suspended, finding itself unable to complete its road, adopted on March 18, 1897, the following: "It was moved and adopted by a unanimous vote of all the directors of the company that the portion of the road now completed and graded be leased to Lewis county as and for a county road until such time as the company is in a financial condition to finish the road and properly take care of and maintain the same under its charter; the company reserving the right under its charter to resume possession for the purpose of finishing the road at any time it is financially able to do so, and also all its rights under its charter." Under this resolution a lease was made, stating that during the litigation in regard to the collection of taxes for the construction of the road, and as the company was unable, from lack of funds, to finish the road or keep it in repair, or to build a sufficient length of road to erect a gate and collect toll, the company, in consideration of the premises, leased its road, so far as built, to the county, until it was in a condition financially to resume control; the county agreeing to surrender possession to the company when it was able and desired to retake possession and resume the work of construction under its charter. It is insisted for appellant that the company thus surrendered its franchises. The legal effect of the contract thus made is entirely different from that provided for by the free turnpike act (Ky. St. 1903, § 4748b, subsec. 8), which provides that, when a pike shall be sold to the county, the charter, franchises, and privileges of the company shall be at once dissolved and terminated. The road in this case was not sold to the county. The county court simply took charge of it tempo-

rarily under its general power of providing for the county highways, the pikes having been in part built upon the line of the county road. See Ky. St. 1903, § 4306.

After the turnpike company was organized, and had laid out its pike, and constructed one mile of it, it became apparent to the directors that it was necessary to get enough of the road constructed as soon as possible to erect a tollgate and collect toll, so as to keep it in repair. The officers of the company to this end borrowed money in their own name and individually, which they used in grading the road and in getting ready for the completion of the first section necessary for a tollgate. The charter of the company contains the following: "Provided, that the company shall not be permitted to issue any bonds or other written obligations of indebtedness, nor to make any contract or contracts for constructing the road or any portion thereof until the taxes collected, with the stock subscriptions and the aid given by the county as hereinafter shown and provided for, shall be sufficient to meet and pay for said contract or contracts of construction of the road so let, et cetera." The words "aid given by the county as hereinafter shown and provided for" refer to a following section of the charter, by which the Lewis county court was authorized to subscribe the sum of \$1,000 per mile to the capital stock of the turnpike road company for each mile of the road constructed and ready for travel by the public until the entire road was finished and completed, whenever the resources of the company were sufficient, with the aid of the subscription, to enable the company to construct its road 1 mile or more. The length of the road was about 6½ miles. At the time the officers borrowed the money referred to, the stock subscriptions of the company amounted to \$1,050, and little taxes had been collected. It is insisted for appellees that the borrowing of this money was forbidden by the charter, and that the taxes sued for are aimed to be collected to pay off the debts thus incurred, and not for the purpose of completing the road. We fail to see that there is any force in this position. If the directors of the company created a debt they had no power to create, this is no reason why they should not go on and complete the road and pay for it as required by law. It is no defense for the taxpayer to say, when called on for the payment of taxes which were levied by the act of the Legislature until the road was constructed and paid for, that the board of directors had created a debt they ought not to have created. It is not alleged that the road has been constructed and paid for, and it is therefore unnecessary now to consider whether the company made a contract for the construction of its road, or any part thereof, when the taxes collected, with the stock subscriptions and the aid given by the county court, as therein provided, were insufficient to meet such con-

tract, or what would be the rights of the parties if the turnpike company, on receiving the benefit of the contract, and having the money to pay, should voluntarily pay for the benefit received. These questions are not presented by the record, and are not passed on. We only decide that the borrowing of the money by the directors individually, and the spending of it in the construction of the pike, is no defense to the taxpayer, when sued for the taxes levied for the building of the pike. When he pays his taxes, he will then be a stockholder in the company; and, if the money of the company is misappropriated, he may then complain. The proof fails to show that the company is not in good faith attempting to carry out its charter, and to collect the taxes for the purpose of constructing and paying for the road as therein provided.

In the suit to collect the railroad tax, the turnpike company set up the assessment of the property for each year both by commissioners, as provided in its charter, and by the Railroad Commission, as provided by the Kentucky Statutes; alleging that it was not advised as to which was the proper method of assessment, and praying the court to determine and enter judgment accordingly. On motion of the defendants, the court required the plaintiff to elect which assessment it would rely upon. The plaintiff excepted, and, under protest, elected to rely on the assessment made under the charter. On final hearing, the court gave judgment in favor of the defendants. The act of November 11, 1892, was a general law regulating taxation. By article 4 it regulated the assessment and payment of taxes by railroads, not only for state and county purposes, but for the purposes of each tax district of any kind. Section 7, Acts 1891-93, p. 308. This act superseded all local or special acts regulating the assessment of railroad property, and repealed to this extent the provisions of appellant's charter providing for a different mode of assessment of railroad property. The plaintiff's petition, in so far as it sets out the assessment made by the commissioners of the county court, stated matter that was surplusage. There was no inconsistency between the allegations of the petition. The court was simply asked to determine which was the legal assessment, and this he should have done. The plaintiff stated but one cause of action, and there was no more reason for requiring an election than there would have been if the plaintiff had set up in a suit for real estate two deeds executed by the defendant, alleging that the defendant claimed that one or the other was void, and he did not know which was valid; the same property being embraced in each. The assessments referred to were precisely the same for some of the years, and substantially the same for all. But by section 7, art. 4, p. 308, of the act of 1892, it was provided that the same rate of taxation which was

levied on other real estate in any year should also be levied on railroad property. So far as appears from the record, there has been no assessment, in law, of the property of individuals in the taxing district referred to for any year previous to 1895. This being so, no tax can be collected from the railroad company for any year previous to 1895.

The judgment in each case appealed from is therefore reversed, and the cause is remanded for further proceedings consistent herewith.

QUINTANCE v. FARMERS' MUT. AID ASS'N.

(Court of Appeals of Kentucky. Jan. 12, 1904.)
INSURANCE ASSOCIATION—OFFICERS—POWER TO FIX COMPENSATION.

1. A charter of a farmers' insurance association provided that it should have the right to assess and collect annually not exceeding one-fifth of 1 per cent. on the amount insured by each member, to pay contingent expenses, and was otherwise silent on the subject of salaries, and did not authorize the board of directors to fix the same. In addition to this, a by-law was in force providing that the officers should not collect an assessment for any purpose other than to pay losses, without the consent of the company. *Held* that, in the absence of charter power, and in opposition to the by-law, the officers had no power or authority to fix their compensation by resolution or otherwise.

Appeal from Circuit Court, Fleming County.

"Not to be officially reported."

Action by William Quintance against the Farmers' Mutual Aid Association. From a judgment for defendant, plaintiff appeals. Affirmed.

W. G. Dearing and G. A. Cassidy, for appellant. J. P. McCortney, for appellee.

NUNN, J. This action was instituted by appellant against the appellee in February, 1898, by which he sought to recover \$502.50, balance of salary due him as its president for the years 1892 to 1896. Appellee traversed the claim. In substance, the facts, as they appear of record, are as follows: In the year 1875 appellant, with four others, named, obtained a charter authorizing them to organize and operate a fire insurance company in the county of Fleming. The business of the company was, by the charter, confined to property situated in Fleming county. By the charter appellant was made the president of the company for the first year, and the other persons named were to be its directors. All persons who insured their property in this company became members thereof. The company or association was authorized to make and publish by-laws, ordinances, etc. The members of the association, upon notice by the president, had annual meetings for the election of officers and the transaction of its business. It appears from the charter that powers of assessment and the creation of liabilities were reserved to the members of the association. The charter is silent on the subject of salaries,

nor does it authorize the board of directors to fix same. The appellant became president in 1875, and was continued in office until 1896, when another was elected in his place. From the year 1875 to the 3d of September, 1892, the only compensation the president received was \$2, received from each person who was induced by him to become a member of the association, and a part of such a fee received from persons who were induced by other solicitors to become members thereof. The testimony of appellant shows that for several years prior to 1892 he had endeavored to induce the members of the association, at their annual meetings, to allow him additional compensation. On the 3d day of September, 1892, the appellant, with four directors or solicitors of the company, met in an office in Flemingsburg, and appellant prepared and all signed the following paper:

"Sept. 3d, 1892.

"At a meeting of the board of officers of the Farmers' Home Insurance Company held in Flemingsburg on the above date. By and in compliance with our charter, page 5, article 5, the following resolutions were offered and passed:

"Article 13. That the solicitors shall have the right to charge all persons on becoming members of this company \$2.00, and the same for each subsequent certificate they issue.

"Article 14. The secretary shall have the right to charge the company five per cent. on all calls or collections for his services.

"Article 15. The president shall have the right to charge the company one-twentieth of one per cent. per annum on the aggregate amount of insurance for his services.

"Article 16. Property in adjoining counties may be insured in this company.

"Article 17. This company will not make any calls for less than one-fifth of one per cent. in the future."

These articles were never recorded on the books of the company, and it does not appear that any member of the association other than those interested had any knowledge of same. The appellant, in his testimony, gives the reason why these resolutions were passed by him and the solicitors. In answer to a question in which he was asked if in soliciting members he did not represent to them that there was to be nothing taken from the company to pay salaries, etc., his answer was: "No, sir; I never. I was trying to get them to vote me something at the annual meetings, which they failed to do, and then I took advantage of the charter. Q. Does not your own statement say that you made no assessments except to meet losses? A. No, this was a twofold affair. There was a certificate and instruction to solicit. . . . Q. Did you consider it an emergency to pass a resolution giving you a salary? A. Well, you can call it what you please. I was entitled to it, but every effort I made at a meeting to get anything through, some fellow would amend my motion in such a way as to change the whole thing, and I

never could do anything. Q. Is that the reason you never made it when all of them were present? A. I could not get it through. Q. And you had it passed by the board of solicitors? A. I had it passed according to the charter."

The article of the charter upon which appellant relies to sustain the action of himself and board of solicitors or directors in fixing his salary provides that the association shall not have the power to assess or collect any money from any member of the association unless there has been a loss; but the association shall have the right to assess and collect annually not exceeding one-fifth of 1 per cent upon the amount insured by each and every member to pay contingent expenses. It does not appear from this section of the charter that the president and board of directors or solicitors have the power to fix their compensation, and, in addition to this, it appears that the association had prior to September 3, 1892, passed a by-law which was then in force which provided that the officers of the company should not collect an assessment for any purpose other than to pay losses, without the consent of the company. We are of the opinion that the officials of this association, in the absence of power given by the charter and in opposition to this by-law, had no power or authority to fix by resolution or otherwise their compensation. Thompson on Corporations, vol. 1, 956, and vol. 3, 4016; American & Eng. Ency. of Law, vol. 17, 166. It appears that from the year 1875 to 1892 appellant recognized the fact that the association only had the right to pass by-laws and fix the compensation of its officials, and when, from time to time, at the annual meetings, he had been prevented from getting what he considered just compensation, he then concluded that article 5 of the charter gave the right to the officials to fix their own salaries. We think appellant is in error as to his last construction of article 5 of the charter. Therefore the judgment of the lower court is affirmed.

SCOTT'S ADM'R et al. v. SCOTT.

(Court of Appeals of Kentucky. Jan. 8, 1904.)

LIFE INSURANCE—ADVERSE CLAIMS TO PROCEEDS—PRESUMPTION OF DIVORCE—BURDEN OF PROOF—INSURABLE INTEREST—WAGERING POLICIES.

1. In an action to determine the right to life insurance it was conclusively shown that deceased had separated from his first wife more than 15 years before his death; that he left the state avowedly to live in another state long enough to get a divorce; that following his return after a long absence he married a second wife, and after her death a third, in whose favor the policy was drawn; that he lived with them for more than 30 years, publicly recognizing each in turn; that the first wife, who continued to reside in the same place during that time, lived near enough to meet the second before her death, and to see the third often, and was never known to deny that he had been divorced from her, or to make complaint of his marriage to either; and, in addition to that, she permitted two of her daughters to live some time with their father and his third wife.

Held, that the presumption of the legality of the last marriage created by this showing shifted to the first wife and others claiming with her the burden of establishing its illegality.

2. The presumption of the legality of the last marriage created by this showing was not overthrown by the mere denial of the first wife, wholly unsupported, that the deceased was not divorced from her.

3. The beneficiary of a life insurance policy, which was obtained by decedent voluntarily for her benefit, had in good faith married him in the belief that he had been divorced from his first wife, and lived with him many years without ever being informed that there was even a doubt of the legality of her marriage until after his death, though his first wife and her daughters had every opportunity to advise her of it long before his death. Besides this, she and her children were absolutely dependent on decedent for support. *Held* that, independent of the validity of her marriage, she had an insurable interest in his life, and that the contract could not be regarded as within the rule against wagering policies.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by the Mutual Life Insurance Company of Kentucky against Nancy J. Scott and others interpleaded to determine their rights to the proceeds of a policy of insurance. From a judgment in favor of defendant Nancy J. Scott, defendant William A. Earl, administrator of John M. Scott, deceased, and another defendant, appeal. Affirmed.

A. A. Hagan, for appellants. Wm. Krieger and Burwell K. Marshall, for appellee.

SETTLE, J. John M. Scott died intestate on the 14th day of May, 1902, in Louisville, Ky., his place of residence. Afterwards, on August 22, 1902, the appellant William A. Earl was by an order of the Jefferson county court appointed administrator of the estate of the decedent. Before his death the Mutual Life Insurance Company of Kentucky issued to the decedent a policy of insurance, No. 24,024, on his life, for \$1,000, in consideration of \$49.40, then paid, and a like sum to be paid by the insured on or before the 6th day of January in each year during the continuance of the policy; the amount of the insurance being payable upon the death of the insured to his "wife, Nancy J. Scott," after receipt by the company of the necessary proofs thereof. It appears from the record that John M. Scott was married three times. The first marriage was with Florilda Waldron, in Louisville, on October 12, 1869. Five children were born of this marriage, three of whom are living, and of full age. Scott and his first wife lived together for about 18 years. Then they separated, and continued to live apart until his death. The second marriage of Scott occurred in Cartersville, Ga., with Capernia Willis, formerly of Barren county, Ky. She died about 15 months later, leaving one child, who was reared by, and yet lives with, the third wife. The third marriage was with Nancy J. Willis, who is

yet living. This marriage occurred in Barren county, Ky., in July, 1890. The third wife was a sister of the second, and she continued to live with the decedent as his wife until his death. One child was born of the last marriage. He is still living, and is about 11 years of age. The third wife, known as Nancy J. Scott, is the beneficiary named in the policy, and was found to be in possession of the policy after the death of the insured. Proofs of the death of the insured were furnished the insurance company by the appellee, Nancy J. Scott, but as she, Florilda Scott, the first wife, and W. A. Earl, administrator of the estate of John M. Scott, the deceased, were all claimants of the amount due under the policy, this action was instituted by the company to obtain of the chancellor advice and direction as to the disposition to be made of the proceeds of the policy, and to this end all three of the claimants were made defendants, and called upon to assert their respective claims, which was done by proper pleadings on the part of each of them. In the meantime, by permission of the court and agreement of the parties, the amount of the policy was paid into court by the insurance company, and an order entered discharging it from further liability. The judgment rendered by the chancellor gave the proceeds of the policy to the appellee, Nancy J. Scott, and from that judgment the appellants, Earl, administrator, and Florilda Scott, have appealed.

It is insisted for the administrator that the marriage of his decedent with the appellee, Nancy J. Scott, was invalid, and that by reason thereof she had no insurable interest in his life, for which reason the insurance money should be received by him as assets belonging to the decedent's estate. The appellant Florilda Scott also relied upon the alleged invalidity of the decedent's marriage with the appellee, Nancy J. Scott, and insists that she (appellant) was never divorced from the decedent, and that she was therefore his only lawful wife at the time of his death, which entitles her to the insurance due under the policy. Upon the other hand, the appellee, Nancy J. Scott, contends that the copy of the marriage license and the certificate of the minister showing the solemnization of the rites of matrimony between her and the decedent, presented by the record, furnish sufficient proof of the validity of that marriage, added to which is the further fact that she and the decedent continuously lived together as husband and wife from the date of their marriage to the time of his death. We are of opinion that the facts appearing in the record create the legal presumption that the decedent was divorced from the first wife, the appellant Florilda Scott, as they conclusively show that he separated from her more than fifteen years before his death, and never lived with her again, and, further, that he left this state avowedly to live in another state long enough to get a divorce. Also that

after the separation and following his return to this state after a long absence he married the second wife, and, after her death, the third, with each of whom he lived in Louisville, his place of residence, for more than 30 years, holding out to the world each in turn as his wife; all with the knowledge, and in the daily presence, so to speak, of the first wife, Florilda Scott, who was also a resident of Louisville during that time, and lived near enough to the second and third wives to meet the second before her death, and to see the third often and at any time, yet she was never known to deny that he had been divorced from her, or to make complaint of his marriage to either of them. In addition to what has been mentioned, the appellant Florilda permitted two of her daughters— young ladies—to live some time with their father and his third wife, to which it is not likely that she would have consented, if the latter were living in adultery. We think the strong presumption thus created as to the legality of the last marriage of the decedent shifted to appellants the burden of establishing the fact of its illegality, and, in our opinion, this presumption was not overthrown by the mere denial of the first wife, wholly unsupported, that the deceased was not divorced from her.

It is the law in this state that, "when a marriage is shown in fact, the law raises a strong presumption, especially after the lapse of many years, in favor of its legality, and the burden is with the party objecting to its validity to prove that it is not valid. This presumption is not conclusive, but is sufficient to shift the burden of proof." *Howton v. Gilpin* (Ky.) 69 S. W. 767; *Bishop's Marriage and Divorce* (Last Ed.) §§ 956-1145. "It will be presumed that the disability of a prior marriage has been removed by a divorce before one of the parties had contracted a second marriage." *Enc. Law*, vol. 19 (2d Ed.) 1208. In *Tompkins v. Commonwealth*, 77 S. W. 712, this court, in discussing the doctrine under consideration, said: "Appellant objected to the admission of parol evidence of the divorce on the ground that there was necessarily a record of the judgment of divorce, and, that being the best evidence, must be produced. This is the general rule, and in a proceeding involving directly the legitimacy of the second marriage it would doubtless be applied. But here the main inquiry is not whether the witness had or had not been divorced. That question arose collaterally. The law rises a presumption based upon existing conditions; that is, it will be presumed, nothing to the contrary appearing, that a second marriage of a person has been preceded by a lawful dissolution of the first one. This is partly because of the law's favorite presumption of innocence, by which it is always an act or state of being to be lawful rather than criminal. There is another policy of the law no less favored than the one

first mentioned, which supports the presumption of the legal dissolution of the first marriage which is the concern of the law for the legitimacy of the offspring of men and women, for the integrity of the family, its honor, and a policy that favors the capacity of inheritance. The various rules of law which fix the time for presuming a record at 20, 30, or 40 years after it must have been made are in reason only partially applicable to divorce records. They depend simply on lapse of time and the losses which a series of years may bring. But the law's favorite presumption of innocence, and its still more favorite pressing, even of mere possibilities, into the support of marriage, are severally forces greater than the other. So in legal principle there should be no specific waiting for years to pass by before a divorce may be presumed. A judicious and judicial discretion, varying with the circumstances, will better give form to this presumption than any iron rule which it would be possible for a text-writer to suggest in advance."

In view of the state of the record, we think the chancellor might well have bottomed his judgment upon the doctrine announced by the foregoing authorities. But, independent of the legal presumption as to the validity of the last marriage of John M. Scott, we are not disposed to dissent from the conclusion of the chancellor that the appellee, Nancy J. Scott, had, under the facts manifested by the record, an insurable interest in his life. As said in *Bayse v. Adams*, 81 Ky. 375: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of wager policies. It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. * * * In all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured; otherwise the contract is a mere wager by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy." In *Joyce on Insurance*, § 1055, it is said: "Although it is held that by the term 'wife' is meant a lawful wife, yet a woman has an insurable interest in the life of a man with whom she has for years been living as his wife, notwithstanding there has been no marriage ceremony, where he has openly and notoriously recognized her as his wife, and although she is named in the

policy by another name than that of his wife; and substantially the same rule has been made in Georgia, and there is nothing against public policy in effecting such an insurance." In *Eq. Life Ass'n v. Paterson*, 41 Ga. 338, 5 Am. Rep. 535, the wife, Catherine A. Paterson, had a husband (Talbird) living, from whom she had not been divorced at the time of her marriage to Paterson. One of the defenses to suit upon a policy upon Paterson's life in favor of his alleged wife, Catherine, was that she had no insurable interest in his life by reason of her first marriage not having been annulled at the time of her marriage to Paterson. The court held: "But, though such a marriage is void, and may be so treated in any court where the facts are made apparent, we do not see that it follows that a policy of insurance effected by the husband on his own life in the wife's name and for her benefit is void. We do not think such a policy comes within the reason of the law prohibiting gaming policies, nor that it is open to the other objection that it offers inducement to crime. In this case, though the marriage was illegal, yet in fact the woman had an interest, and a deep interest, in the life of the husband. He treated her as his wife, he supported her as such, * * * and she was dependent upon him for support as such. It was the husband who in fact effected this policy. It was his own method of extending to this woman his assistance and protection after he should himself be dead. Here is no gaming, since the very person whose life is insured is the actor in the transaction. So, too, as to the temptation to crime offered to the beneficiary of the policy, it would seem, when the person whose life is insured is himself the actor in the matter, the amount of temptation held out to others to take his life may, as a general rule, at least, be left to his discretion." In commenting upon a similar state of case, it was said by the Court of Appeals of New York in *Story v. Williamsburg Masonic Mut. Benefit Ass'n*, 95 N. Y. 474: "Nor did the appropriation for the fund for her benefit contravene the policy or objects of the association. The plaintiff for 16 years lived with Story, believing herself to be his lawful wife. They had children depending upon them for support. It was a case where it was the duty of Story to provide for them, and the provision he made was his insurance, which was in entire accord with the object of the defendant organization." The well-considered opinion of the chancellor truly says "the beneficiary, Nancy J. Scott, her child and stepchild (the son of her husband by second marriage), were absolutely dependent upon the decedent for support." It is apparent from the record that she in good faith married the decedent in the belief that he had been divorced from the first wife. Indeed, it further appears that she was never informed that there was even a

doubt of the legality of her own marriage until after the death of her husband, although the first wife, Florilda, and her daughters, had every opportunity to have advised her of it long before his death, if it were true. The decedent seemed to have voluntarily secured the insurance for her benefit. Under the facts in this case, she could have no reason for desiring his death. Upon the contrary, her every interest would have been advanced by his continuing to live. The contract cannot, therefore, be regarded as within the rule against wagering policies; and as, in our opinion, it would be inequitable and unjust to deprive her of the amount in controversy, the judgment is affirmed.

D. DAVIS & SON v. ALLEN.

(Court of Appeals of Kentucky. Jan. 14, 1904.)

SALES—INSPECTION—QUALITY OF ARTICLE—CONFORMITY TO SAMPLE—CONSTRUCTION OF CONTRACT.

1. Where a contract recited that plaintiff had sold defendant certain wool, which was to contain no burry wool, and not to exceed a certain number of pounds of black and fleece-grown wool, the wool to be subject to defendant's inspection and approval, and to be delivered at a specified time, or sooner if the defendant desired it, and prior to the contract defendant had examined some of the wool, defendant had a right, after inspection, to refuse to accept any burry, black, or fleece-grown wool in excess of the amount stipulated, as well as any wool not similar to the sample, or which was not merchantable, but he could not refuse to accept because not satisfied with its quality in any other respect.

Appeal from Circuit Court, Jefferson County, Common Pleas Division, No. 8.

"Not to be officially reported."

Action by J. A. Allen against D. Davis & Son. From a judgment for plaintiff, defendant appeals. Affirmed.

O'Neal & O'Neal, for appellant. W. Pratt Dale, for appellee.

BURNAM, C. J. On the 22d of January, 1902, the appellant, D. Davis & Son, and the appellee, J. A. Allen, mutually executed the following contract in duplicate:

"January 22, 1902. Sold to D. Davis & Son my wool, about 11,000 lbs., at 20 cents per pound, F. O. B. cars Bloomfield, Kentucky. This wool is to contain no burry wool, and is to contain not exceeding 275 pounds of black wool, and 100 pounds of fleece grown wool. The wool is to be subject to D. Davis & Son's inspection and approval. Wool is to be delivered to and received by D. Davis & Son within the next thirty days, or sooner if Mr. J. A. Allen is ready to deliver same. This wool is in Mr. Allen's warehouse, and is at his risk until received by D. Davis & Son. [Signed] J. A. Allen.

"Accepted. D. Davis & Son, per Sidney Davis."

This contract was written by Sidney Davis. Previous to its execution he had very thor-

oughly examined five bags of the wool which was stored in the warehouse of Allen. On the 3d day of February, 1902, Allen notified Davis & Son that he was prepared to deliver the wool to them, and on February 6, 1902, Sidney Davis came to Bloomfield for the ostensible purpose of inspecting and receiving the wool. When he arrived at the warehouse he examined five bags of the wool, three of which were the same bags he had examined on the 22d of January, the date of the execution of the contract of sale. None of the bags examined by him contained any black or fleece wool or burry wool. He, however, expressed the opinion that it was trashy, and left without receiving or paying for it. On the 13th of February following, Allen notified Davis & Son, in writing, that he was ready to deliver the wool to them, and would hold it for them for 30 days; that, in the event they failed to receive and pay for it under the contract, he would sell it to the best advantage, and, if any loss was sustained, he would look to them for the difference. In response to this communication, D. Davis & Son notified him that they declined to take the wool. He subsequently sold the wool at 17½ cents per pound, or \$289.88 less than it would have brought at 20 cents per pound. On the 30th of April, 1902, he brought this suit against the appellant for this difference. D. Davis & Son filed a general demurrer to the petition, which was overruled. Thereupon was filed an answer denying liability under the contract, and a jury was impaneled to try the issue. At the conclusion of plaintiff's evidence, the defendant moved the court that the jury be instructed to find for the defendant, which was overruled, and he excepted. At the conclusion of the testimony, the court gave to the jury the following instruction: "Under the contract sued on, the defendant had the right to reject the wool mentioned in said contract for any reasons deemed satisfactory to them, but, before making such rejection, were compelled to examine said wool in good faith. Now, the court instructs the jury that they shall find for the defendant unless they believe from the evidence that the defendant, D. Davis & Son, through its agent, Sidney Davis, did not inspect said wool in good faith, but only fraudulently pretended to inspect the same; in which latter event they shall find for plaintiff." The trial resulted in a verdict and judgment for the plaintiff, and the defendant appealed, and insists that the writing of January 22, 1902, imposed no obligation upon it to receive or pay for the wool mentioned there; that the words, "The wool is to be subject to D. Davis & Son's inspection and approval," left it wholly optional with the firm whether to accept or reject the wool, or, at most, if, upon inspection, it was not satisfied with its quality, that it could refuse to take it, and there was no appeal from its decision.

We cannot concur in this contention. The

contract of January 22, 1902, is in no sense optional or conditional, but an absolute sale by appellee to appellant, of about 11,000 pounds of wool at 20 cents per pound. As appellant had only examined five bags of the wool, the contract provided that before its acceptance it had the right to inspect all of it, and to refuse to accept any burry, black, or fleece-grown wool in excess of the amounts stipulated for in the contract; and a fair construction of the contract would also have included any other wool which was not substantially similar to the sample already examined by it, or which from any cause was not merchantable. But it is conclusively shown by the testimony that the fleece-grown wool and black wool were separated from the rest, and that there were only 91 pounds of fleece-grown wool, and 458 of black wool, and that the rest of the wool was of a uniform grade and quality, and of the same grade as that contained in the five bags examined by appellant before it entered into the contract. The construction given by the trial court to this contract, and the instructions given to the jury, were more favorable to appellant than the contract warranted. But even under that construction, the testimony shows that appellant did not in good faith comply with its contract in the inspection made by it at the time of the visit for the ostensible purpose of receiving the wool.

Appellant has called our attention to a number of decisions, considering contracts in which the vendee was given the unqualified power to refuse or accept the merchandise contracted for, if not satisfied. In the main, they consist of cases where the article sold was to be made to satisfy the personal taste of the buyer, like portraits, busts, articles of wearing apparel, etc. These decisions afford no support to appellant's contention as to the proper construction of this contract. It speaks for itself. The agreement to buy is unconditional.

We therefore conclude that appellant has no legal ground for a reversal, and the judgment is affirmed.

BULLOCK et al. v. GUDGELL.

(Court of Appeals of Kentucky. Jan. 13, 1904.)
TRUSTS — INFANT BENEFICIARIES — SALE OF TRUST PROPERTIES — PAYMENT TO TRUSTEE — JUDICIAL SALE — CAVEAT EMPTOR.

1. On petition by a trustee for an order to sell the trust property, to which the adult cestuis que trustent and the guardian of the minor children answered, admitting the advisability of the sale, the court ordered the sale, and directed the purchaser to make payment to the trustee, which was done, but he failed to account therefor in full. *Held*, that under Civ. Code, § 498, dispensing with necessity of bond on the sale of an infant's real estate, but requiring the money to be paid into court, the court was without jurisdiction to make the order, and the infants were not divested of their interest in the property.

2. The purchase being at a judicial sale, the rule of caveat emptor applied.

Appeal from Circuit Court, Shelby County.

"To be officially reported."

Proceedings by E. P. Bullock, trustee, and others, against Mary E. Gudgell and others, to secure an order for the sale of trust property to said Gudgell. From an order requiring said Gudgell to pay all the purchase money into court, the guardian ad litem and the Shelby County Trust Company appeal. Reversed.

P. J. Beard and E. H. Davis, for appellants.
Willis & Todd, for appellee.

BURNAM, C. J. The will of Mrs. Mary Bullock was duly probated by the Jefferson county court. The first section thereof is as follows:

"I devise three-eighths of my property on the corner of 7th and Main Streets in Louisville, and my land in McCracken county, namely, viz: the land derived from my uncle Isaac Clark, and by gift from my sister Martha, to H. C. Pindell, for and during the life of my son E. Pearce Bullock, in trust, to collect the rents and profits thereof, pay the taxes thereupon, maintain it in good order and repair, keep the buildings thereon to which I am or may become entitled, well insured, and apply the net profits to the support of my son, E. Pearce Bullock, and his children, remainder to be equally divided among descendants of said E. P. Bullock, living at the time of his death, per stirpes, with power to said trustee and the said E. P. Bullock, to dispose of McCracken county land and invest the proceeds in such real estate, or the improvement of such as the said E. P. Bullock may direct."

The surviving husband of testatrix, W. F. Bullock, was appointed trustee under the will in lieu of H. C. Pindell, who declined to qualify, and continued to serve in this capacity until his death, when W. G. Anderson was appointed. Subsequently Anderson resigned, and the Shelby County Trust Company qualified as trustee. Finally, in June, 1901, the Shelby County Trust Company tendered its resignation as trustee, which was accepted, and upon motion of E. P. Bullock, his son, J. Lowry Bullock, was appointed trustee, and duly qualified. Prior to the appointment of J. Lowry Bullock as trustee, the real estate in Louisville had been sold under judgments of the Jefferson circuit court, and a part of the proceeds thereof invested in a farm in Shelby county, which contained in the aggregate 90 acres and 60 poles. The title thereto was taken to the trustee for the use and benefit of E. P. Bullock and his children, as required by the will of Mary Bullock. After the qualification of J. Lowry Bullock as trustee, he collected from the former trustee \$930 in cash, which belonged to the trust estate. And on the 13th of August, 1901, he contracted in writing with the appellee, Mary E. Gudgell, for the sale to her of the Shelby county farm for \$3,000, of

which \$300 was paid in cash, \$1,700 to be paid when the deed was made to her, and the balance, of \$1,000, was to be paid on the 25th of December, 1902, and to bear interest from the date of the deed. On the 24th of August, 1901, J. L. Bullock, as trustee, instituted this suit against his father, E. P. Bullock, and his wife, N. L. Bullock, and all of his children, namely, J. L. Bullock, W. A. Bullock, H. P. Bullock, Lunsford Bullock, E. P. Bullock, Jr., Bessie Harwood, and her husband, T. W. Harwood, and the appellee, Mary E. Gudgell, as defendants. The petition alleged that the defendants Lunsford Bullock, Helen M. Bullock, Thomas B. Bullock, and E. P. Bullock, Jr., were infants; that all of them resided with, or were under the care and control of, their father, the defendant E. Pearce Bullock; that neither of them had any guardian, curator, or committee; and set out at length the contract for the sale of the land with Mrs. Gudgell, and asked the court to confirm it and authorize the execution of a deed to her by the trustee. The petition also set forth certain reasons why it would be beneficial to the "cestui que trust" that the sale should be confirmed. The defendants E. P. Bullock, N. L. Bullock, J. L. Bullock, W. A. Bullock, H. P. Bullock, Bessie Harwood, and T. W. Harwood filed their joint answer to the petition, in which they admit each and every allegation of the petition, and affirmatively aver that the sale of the real estate to Mary Gudgell is at its full value, and will be highly beneficial to the trust estate, and pray the court to grant the prayer of the petition. The guardian ad litem appointed for the infants filed an answer stating that he was unable to make an affirmative defense for his wards. On the 28th of September, 1901, a judgment was entered directing the master commissioner of the Shelby circuit court to sell this tract of land after being properly advertised, and directing that \$2,000 of the purchase money should be paid to J. Lowry Bullock, trustee, on the day of the sale, and the balance 12 months from the date of sale, for which a bond should be made payable to the trustee, bearing interest from date. This judgment was duly executed by the sale of the property, and Mrs. Gudgell became the purchaser at the price agreed on, paying on the day of sale \$1,700 in cash to J. L. Bullock as trustee, and executed bond to him as trustee for the unpaid purchase money. This sale was regularly confirmed, and it was further adjudged that the purchaser of the property should be permitted to pay the balance of the purchase money before its maturity, if she so elected. On the 28th day of March, 1902, Mrs. Gudgell paid to J. L. Bullock \$400 upon her note for the balance of the purchase money. Subsequently, on the 16th of September, 1902, she came into court and asked for a rule against J. L. Bullock requiring him to pay the money into court, and that it be reinvested in other real estate under order of the court; and that

the proceedings thereafter might conform to the requirements of law. In response to this rule, J. L. Bullock asked a settlement of his accounts as trustee by the commissioner, and that he be given until the next term of the court to obey the rule. At the next term he paid into court \$768.50, and, after the allowance of all proper credits, there remained in his hands as unaccounted for a balance of \$2,189.73, which included the \$930 in money collected from the former trustee. J. L. Bullock was thereupon removed, and the Shelby County Trust Company reappointed trustee of the funds, and on its motion a rule was entered against Mrs. Gudgell to pay all of the purchase money into court. She responded, setting out the fact that she had paid \$2,400 to J. L. Bullock, and offered to pay the remaining \$600 in her hands, with interest, if the court should hold that she had acquired a good title. The trial court adjudged her title good, and directed the payment by her into court of the \$600 and interest. To this ruling of the court the trust company and the guardian ad litem both excepted, and have prosecuted an appeal to this court, and insist that the Shelby circuit court had no jurisdiction to direct that the purchase money for the lands sold in this action should be paid to the trustee.

The law is well settled that courts of equity have no jurisdiction to sell the real estate of infants except as authorized by statute, and a strict compliance with the provisions of such statute is uniformly held necessary to divest the title of an infant in land. In *Hicks v. Jackson* (Ky.) 68 S. W. 419, the court said: "The statutory safeguards of infants' real estate cannot be too strictly enforced by the courts. If they are literally adhered to and followed, much of the confusion in titles and loss to infants or purchasers at such sales would be averted." See, also, *Malone v. Conn.*, etc., 95 Ky. 93, 23 S. W. 677; *Isaert v. Davis* (Ky.) 32 S. W. 294; *Dineen v. Hall* (Ky.) 65 S. W. 445, 66 S. W. 392; *Craig v. Wilcox's Executor*, 94 Ky. 484, 22 S. W. 76. In sales under section 498 of the Civil Code the bond required by sections 491 and 493 are dispensed with, but in lieu thereof, as an equally adequate protection of the rights of the infant, the proceeds of the real estate sold are required to be paid into court, and reinvested by the court in other property to be held in the same way. We are therefore of the opinion that the Shelby circuit court had no jurisdiction to order so much of the purchase money of the land sold in this action as belonged to the infant defendants Lunsford Bullock, Helen M. Bullock, Thomas B. Bullock, and E. P. Bullock, Jr., at the death of their father, E. Pearce Bullock, paid to the trustee; and that the payment by her to J. Lowry Bullock did not relieve her from responsibility so far as they are concerned, and that they are not divested of their interest in the land until their part of the purchase money has been

paid into court. Being a purchaser at a judicial sale, she is bound by the rule of caveat emptor. But as to the adult defendants a different rule of law applies. They were parties to the proceedings. The petition filed by J. L. Bullock, asking for a confirmation of the sale made by him to Mrs. Gudgell, set out the terms of the written contract entered into with her, and recited that \$2,000 of the purchase money was to be paid to him, and a note executed to him for the balance. They voluntarily entered their appearance in this action by filing a joint answer, in which they united in the prayer of plaintiff's petition. They made no objection to the judgment authorizing the payment of the purchase money to J. Lowry Bullock; on the contrary, they requested that same might be entered. We are therefore of the opinion that E. Pearce Bullock and all of his adult children are now estopped by their acts and conduct from complaining of the judgment, or the payment thereunder of the purchase money to J. Lowry Bullock. See *Loeb v. Struck* (Ky.) 42 S. W. 401. Upon the return of the case the lower court is directed to have the value of the infant defendants' interest in the land bought by Mrs. Gudgell ascertained and paid into court as directed by the amendment to section 498 of Carroll's Civil Code, and so reinvested as to secure to them the full benefit of the provision made for them by the will of their grandmother, Mrs. Mary Bullock, applying the \$600 paid by her to this fund.

For reasons indicated, the judgment is reversed, and cause remanded for the proceedings indicated.

WRIGHT v. WILLIAMS.

(Court of Appeals of Kentucky. Jan. 12, 1904.)

RIGHT OF WAY—ORAL REPRESENTATION—ESTOPPEL.

1. Evidence held to show that, at the sale of a lot, one who afterwards became the owner of an adjoining lot was present, and represented that the first lot included the right to use a 10-foot alleyway on the adjoining lot, running from the front to an alley at the rear of the lot on sale, and that the purchaser relied on this representation in buying the lot.

2. Where one, by representing that there was a right to the use of an alley over a lot of which he afterwards became the owner, appurtenant to an adjoining lot, thereby induced the purchase of the adjoining lot, he is estopped, as against the purchaser, to deny the existence of the right.

Appeal from Circuit Court, Warren County.

"Not to be officially reported."

Action by J. Tom Williams against Hattie A. Wright to recover possession of an alleyway. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Wright & McElroy, for appellant. Jno. M. Gallaway, for appellee.

O'REAR, J. Appellee's wife owned a large lot of land in the city of Bowling Green. She and appellee sold to one Quinn part of

it, being a lot fronting 50 feet on College street, and extending back the same width 205 feet to a 10-foot alley. Twelve hundred dollars of the purchase price was unpaid. There was then in fact no alley at that point, but the deed called for such one, which amounted to its dedication by the owners, Williams and wife, for the use of the lot sold. Quinn failed, and contracted the lot to one Wilford, who assumed the payment of the \$1,200 balance of purchase money to appellee's assignee and creditor. It is claimed by appellant, who has since bought the lot from Wilford, that, when Quinn was preparing to sell the lot to Wilford, appellee, J. Tom Williams, was present, and represented to Wilford that the lot included the right to use a 10-foot alleyway alongside and running from College street to the alley first mentioned, and which was in the rear of the lot sold. The use of this alley was not only necessary to make the first-named alley of any value whatever to that lot, but was quite desirable as affording a way to the rear of the lot by wagons, etc. Wilford says that appellee showed him the lines of this alley, and told him to set the fence accordingly; that, relying upon that representation of appellee, he bought the lot from Quinn, and paid off the lien owing to appellee's assignee, appellee having assigned the notes to a creditor of his. Wilford did fence the passway, and he and his vendee (appellant) continued to use it for about 10 years, till this suit was brought, without molestation or question. Later Mrs. Williams died, and by will devised to her husband (appellee) all her property. Appellee then brought this suit to recover the 10-foot alleyway, which was not referred to in his deed to Quinn, resulting in a judgment in his favor. The case was tried by the chancellor in equity.

It is conceded that Mrs. Williams, who was the owner of the land over which the alleyway is claimed, did not convey the alley to Quinn, nor did she make any representations to Wilford when he bought from Quinn. Her husband, appellee, as her agent, it is claimed, represented her in that transaction, though whether she would have been estopped to deny Wilford's right to use the passway, we do not determine. In this suit by appellee to recover the passway from appellant, the only defense upon which there was any proof is that appellee having by his representations induced Wilford to buy the lot under the assurance that there went with it, as an appurtenant, the right to use the 10-foot strip adjoining it on the side, as a passway, the former is thereby estopped from asserting the contrary. The proof consisted of the statement of the two witnesses Wilford and appellee, and evidence of the physical conditions brought into being and maintained immediately after and ever since the alleged matter of estoppel. Wilford testifies clearly and unequivocally that appellee made the representations, and staked off the place

for the fencing of the disputed alleyway. Appellee as positively denies having made the representations, and denies that he was even present. The burden of proof is on appellant to maintain her plea of estoppel. We conclude that Wilford must be correct in his recollection of what occurred, for he is corroborated by the contemporaneous act of taking possession of the passway, of which appellee then knew, or saw shortly after, and of having maintained it without question for about 10 years. It is not likely that appellee would have submitted to such an encroachment unless there had been some understanding about it. The attending circumstances, and conduct of the parties since, are sufficient corroboration to tip the balance in appellant's favor. If the owner of land stands by and sees, and without question permits, another to sell it to an innocent stranger, he will not be allowed thereafter to deny that the title passed by the sale. If the owner himself represents that such seller has the title, misleading the purchaser into buying it, the case is even stronger against the owner as an estoppel. Title to land, derived by estoppel, first came to be applied where one not the owner undertook to convey by deed with covenant of seisin or warranty, and afterward acquired the title. In a very learned discussion of the subject by the author of *Herman on Res Adjudicata & Estoppel* (volume 2, c. 60, pp. 377-441) it is asserted that title by estoppel can be derived only from a covenant of warranty, actual or implied, or by some similar assurance or declaration of title in the conveyance of the grantor. The author observes, however (page 431): "Warranty, even in its palmy days, when collateral as well as lineal warranty flourished in all its vigor, never possessed the power of conveyance." The whole matter, as treated by the author, and as seems to be sustained by principle and authority, however it may be made to turn in the reasoning of the judges, comes at last to the homely and familiar doctrine, laying at the very base of every estoppel, that no one should be allowed to deny the truth of that which he has previously asserted to be true, whereby another has acted on it so as to alter his condition. Estoppel in pais, unknown to the common law in the time of Coke—a creation of equity—has come to be applied at law as well as those matters of estoppel by deed or record. It has been held differently in different jurisdictions. In *Illinois* (*Mills v. Graves*, 38 Ill. 455, 89 Am. Dec. 314) it was decided that, as title to land could not be passed by parol agreements, an estoppel by mere oral declarations was equally ineffectual, and repugnant to the statute of frauds and perjuries. In *Bell v. Goodnature*, 50 Minn. 417, 52 N. W. 908, it was held just to the contrary. In this state there is a long line of cases which have applied the doctrine of estoppel in pais to defeat the claim of title by the true owner where he had induced an innocent

stranger to buy the land from one not the owner; and the court has not halted to consider whether, at the time of the representation afterwards invoked as an estoppel, the guilty declarant then had the title, or acquired it subsequently. *Craig v. Baker*, Hardin, 289; *Gerault v. Anderson*, 2 Bibb, 543; *Barclay v. Hendrix*, 8 Dana, 380; *Sale v. Crutchfield*, 8 Bush, 645; *Morris v. Shannon*, 12 Bush, 89; *Brothers v. Porter*, 6 B. Mon. 113; *Davis v. Tingle*, 8 B. Mon. 542; *Carpenter v. Carpenter*, 8 Bush, 288; *Hampton v. France*, 32 S. W. 590, 33 S. W. 826; *Loeb v. Struck*, 42 S. W. 401; *Stith v. Carter*, 60 S. W. 125; *Ritterhouse v. Clark*, 61 S. W. 33; *Wimmer v. Ficklin*, 14 Bush, 193; *Ratliff v. Bellfonte*, etc., Co., 87 Ky. 559, 10 S. W. 365; *McFarland v. Baugh*, 15 S. W. 249; *Greer v. Greer*, 12 S. W. 152; *Wallender v. Wintersmith*, 2 Ky. Law Rep. 232; *Arnold v. Stephens*, 17 S. W. 859; *Klemp v. Liebold*, 3 Ky. Law Rep. 684; *Alexander v. Woodford Spring Lake Fishing Co.*, 90 Ky. 215, 14 S. W. 80; *Ramsey v. C. & M. T. P. Co.*, 1 Ky. Law Rep. 308; *Schwitzer v. Wagner*, 94 Ky. 458, 22 S. W. 883. Following these cases, and under the evidence as we construe it, the circuit court should have denied appellee's claim and dismissed his petition.

Judgment reversed, and cause remanded, with directions to enter judgment in accordance herewith.

CITY OF OWENSBORO v. YORK'S ADM'R. (Court of Appeals of Kentucky. Jan. 13, 1904.)

CONTRIBUTORY NEGLIGENCE—CHILD.

1. Where a boy 12 years old, on a dare, touched a live electric wire, which was negligently left lying in a street, of the danger of which he had been warned, the question was for the jury whether he exercised such care and discretion as might be reasonably expected of a child of his age, situated as he was, though an adult, under the same circumstances, would be chargeable with contributory negligence as a matter of law.

Barker, Paynter, and Settle, JJ., dissenting.

Appeal from Circuit Court, Daviess County.

"To be officially reported."

Action by the administrator of James P. York against the city of Owensboro. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

G. W. Jolly, for appellant. Wilfred Carico and Berkhead & Clements, for appellee.

HOBSON, J. Appellee filed this suit as the administratrix of the estate of James P. York to recover of appellant for his death. The intestate was a boy 12 years old. Some boys playing in the street discovered that a wire connecting with the electric light system was hot. When the curfew rang, the larger boys went home. The intestate was sitting on a fence post. One of the boys dared any one in the crowd to touch the wire,

and said he would give a nickel if some one would touch it. The intestate said that if he could get a board and stand on it he could touch it, and it would not hurt him. Some one got a board, and the little boy got on it. As soon as he touched the wire he was immediately killed. One of the boys who pulled him off from the wire by catching hold of his person was severely shocked. One of the older boys, who was 14 years of age, before he left, told the boys not to touch the wire, or they would get killed. But it is uncertain from his testimony whether the intestate heard this. About this time, also, one of the boys got a piece of wood, and touched the wire with the wood, and it shocked him. It is earnestly insisted for the city that there can be no recovery, although it was negligent in having the hot wire in the street, for the reason that the intestate knew the danger, and voluntarily took the risk, assuming that, if he stood on the board, the electrical current would not hurt him. This would be true of an adult, but the question is whether the same rule should be applied to an infant 12 years old. If the child had been 8 years old, it would not be maintained that his negligence or willfulness in touching the wire would acquit the city of responsibility for having such an instrument of death negligently in the street; and when the child is older it is a question for the jury whether, considering his age, he exercised such care and discretion as might be reasonably expected of a child situated as he was. In *Macon v. The Paducah Street Railway Company* (Ky.) 62 S. W. 496, a boy 12 years old was killed by a live wire in the streets, and there was evidence in that case, as here, that the child was warned of the danger, but, after showing that there was evidence of negligence on the part of the defendant sufficient to take the case to the jury, the court, in disposing of the defense of contributory negligence, said: "It was also the province of the jury to determine whether or not plaintiff had in fact been warned of the danger of taking hold of the wire, and, if so, whether, considering his age and capacity, and all the other circumstances as shown by the evidence at the time that he did take hold of it, he was guilty of such contributory negligence as barred his right to recover in this action." In *Texarkana Gas Company v. Orr* (Ark.) 27 S. W. 66, 43 Am. St. Rep. 30, the wire was lying in the street, and a hog had been shocked by it. A boy, who was passing along the street, took hold of one of the wires lying in the street, which was not charged, and began dragging it across the street. A policeman saw him, and called to him to put it down. He then took the wire in both hands, and began throwing it backwards and forwards, with a view to throwing it down. When he did this, the wire was thrown in contact with a live wire, while he yet held it in his hands, and he was killed. His exact age is not stated in the report.

except that it appeared that he was "of that indiscreet age which is between the irresponsibility of youth and the full responsibility of manhood." It was held that it should be left to the jury to say how far he should be held responsible. These decisions are in accord with the current of authority. In *Washington, etc., R. R. Co. v. Gladmon*, 15 Wall. 401, a child seven years old was injured. The court said: "Of a child three years of age less caution would be required than of one of seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case." In *P. & M. Railroad v. Hoehle*, 75 Ky. 41, a child 12 years old was struck by a train. It was held that she could not recover if she would have escaped injury "by exercising the caution and prudence that one of her age would ordinarily have used under the circumstances." In *Kentucky Central Railroad v. Gastineau's Adm'r*, 83 Ky. 119, a boy between 14 and 15 years old was run over and killed by a car. It was held that the jury should have been instructed to find "whether, from the age of the deceased, he had discretion enough to know his danger, and guard against it, or not." In 1 *Shearman & Redfield on Negligence*, § 73, it is said: "It is now settled by the overwhelming weight of authority that a child is held, so far as he is personally concerned, only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age. No injustice is done to the defendant by this limitation of the defense of contributory negligence, since the rule itself is not established primarily for his benefit, and he can never be made liable if he has not been himself in fault." In 7 *Am. & Eng. Ency. of Law*, p. 408, after a discussion of the rule requiring that allowance must be made for childish instincts, impulses, and want of discretion, it is said: "As the standard of care thus varies with the age, capacity, and experience of the child, it is usually, if not always, where the child is not wholly irresponsible, a question of fact for the jury whether the child exercised the ordinary care and prudence of a child similarly situated; and, if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law erects for determining what is ordinary care in a person of full age and capacity." Electricity is such a deadly instrumentality, as used by an electric light company, and the wire when charged with it has so little appearance of danger, that a child of 12 years would not appreciate the peril of touching the wire. The fact that the child was warned of the danger, or told not to touch the wire, while it is a circumstance to be considered by the jury, is not conclusive on the question of neg-

ligence; for it is the want of discretion in the child, rather than the want of information, which underlies the rule exempting him from the consequences of his act, as shown by the authorities above referred to. Children act upon childish instincts and impulses. That discretion which is expected of an adult cannot be required of them. It is incumbent on those handling dangerous instrumentalities not to leave exposed to the reach of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they could handle or play with. In the case at bar the little boy, from his want of discretion and judgment, thought he could handle the deadly wire if he stood on a board. His ignorance as to the danger of taking hold of the wire while standing on the board, his childish impulse to take hold of it, not to take a dare, and his childish want of discretion were the causes that led to his death. Under such circumstances it was a question for the jury to determine under all the facts whether he exercised such care and discretion as might be reasonably expected of one of his age situated as he was. The petition was sufficient under the rule in this state as to the necessary allegations in an action to recover for death by negligence. *L. & N. R. R. v. Wolfe*, 80 Ky. 82; *Chiles v. Drake*, 2 Metc. 149, 74 Am. Dec. 406.

Judgment affirmed.

PAYNTER and SETTLE, JJ., dissent.

(Jan. 15, 1904.)

BARKER, J. (dissenting). Finding myself unable to concur in the conclusions reached by the majority of the court in this case, I respectfully submit the following reasons therefor:

I have no fault to find with the rule at law that an infant is to be held to no higher standard of responsibility for his acts than is commensurate with his age and experience. There is little or no difference between my Brethren of the majority and myself as to the facts in this case. The divergence of our views begins with the application of those facts, or, rather, the conclusions of law to be deduced therefrom. The infant decedent, James P. York, was one of a number of boys who were playing at the corner of Cherry and Elm streets, in Owensboro, Ky., on the night of his death. It had been discovered by the boys that the wire rope which was used to lower and elevate the electric lamp at the corner in question had become charged with electricity, or, to use the language of the boys themselves, "it was hot." This rope was not dangling in the street, or over the sidewalk, where one might come in contact with it by inadvertence or accident, but was securely locked on the electric light pole, about four feet from the pavement. Just prior to the accident, a man, passing along, had warned the boys not to touch the rope, and that,

if they did, it would kill them. It is not clear that the decedent was there at the time this warning was given; but it is certain that he arrived on the ground within a few minutes thereafter, and heard the boys discussing in boyish fashion the danger of touching the rope, and playfully daring each other to do so—one boy saying that he would give a nickel to any of the other boys who would touch the rope. At this time the decedent was sitting on a fence along the property line next to the street, in easy conversational distance of the boys on the pavement, discussing the danger of touching the wire; and while this discussion was going on he jumped down to the pavement, and said that he was not afraid to touch it, provided he could get a plank to stand upon. There was a house being built in the immediate neighborhood, and from the debris around it a plank was obtained, either by the decedent or one of the boys for him. This plank being placed on the pavement, the decedent stepped upon it, grasped the charged wire, and was instantly killed. Just before he stepped on the plank, one of the boys said to him: "Don't touch it, Jimmy; it will kill you." Another one said: "Oh, he's got rubber in his shoes."

Admitting the negligence of the municipality in permitting the wire rope to become charged with electricity, it seems to me clear that the decedent was guilty of such contributory negligence as entitled the appellant municipality to a peremptory instruction. When all of the facts are admitted, the question of contributory negligence becomes a rule of law to be applied by the court. That the decedent knew the wire was charged with electricity appears from the uncontradicted testimony; that he was especially warned, if he touched it, he would be killed; that he fully appreciated the danger—is clearly demonstrated by the fact that he would not touch it without attempting to insulate himself from the effect of the current by placing a plank on the pavement, upon which he proposed to stand while performing the act which caused his death. Jimmy York knew that the rope was charged with electricity, and he knew that, unless he insulated himself against the current with which it was charged, if he touched it, he would lose his life. There was no contrariety of evidence on this point. The mistake the decedent made was in the defectiveness of the insulation which he selected. It is a well-known fact that a dry plank, free from nails, affords at least fair insulation from electricity, when placed under the feet of one proposing to come in contact with it. It is also known that a damp plank, or one containing nails driven through it, will not afford such immunity from danger. The plank selected in this case for some reason was not a nonconductor of electricity. Hence the death of Jimmy York.

I do not know how appellant could bring home to the decedent the knowledge of the danger of touching the wire more completely

than was done in this case, where all of the evidence—both that for appellant and that for appellee—shows that he was told of the fact that the wire was charged with electricity, and solemnly warned that, if he touched it, he would be killed; nor do I know how his appreciation of that danger could be brought home to him more completely than by showing, as was done in this case by the uncontradicted evidence, that before he would touch the rope he undertook to insulate himself against the effect of the current. His act was one of deliberation—not of inadvertence or accident. It was done with a due appreciation on his part of the danger involved in the act. Now, what is the difference between the responsibility of an adult and a boy 12 years old in a case like this? As to the former, as is well stated in the opinion of the majority of the court, his guilt of contributory negligence, from the admitted facts, would be conclusive. The only difference in the case of the latter arises from the uncertainty as to whether or not he had sufficient understanding to appreciate the known danger. When this fact is clearly established against an infant, there is no difference in the rule of law with regard to responsibility between him and an adult; and in this case the decedent demonstrated beyond doubt that he did both know and appreciate the danger of touching the charged rope in question.

It may be instructive to refer to some of the evidence of the little boys on the subject of the decedent's knowledge of the danger of touching the wire. John Garrett, one of the boys present at the time of the accident, was asked this question: "Q. Did you hear any conversation, about the time just before Jimmy York touched the wire, about the wire in any way, and while Jimmy was there? A. They all knew the wire would shock them if they touched it." Claude Jarboe was asked: "Q. Did you boys know it was dangerous? A. Yes, sir." The uncontradicted testimony of the witnesses present at the time of the accident, and his own action in taking measures to insulate himself from the known danger, conclusively show that Jimmy York knew of the presence of the electricity in the wire, and knew the danger that would accrue to him if he touched it without being properly insulated. That he made a miscalculation as to the serviceableness of the method of insulation adopted was no fault of appellant. He could not legally coquette with death at its expense.

In all of the cases cited in the opinion, holding that the question of the responsibility of youth is a fact for the determination of the jury, the question as to whether or not the youth knew of the existence of the danger, or appreciated it, if known, was in dispute, and, of necessity, this was an issue for the decision of the jury; but where the facts, as in this case, without contradiction show both the knowledge and its appreciation by the youth, then the appellant was entitled to the

ule of law arising from the admitted facts, and therefore to a peremptory instruction, unless it be determined that no amount of uncontradicted testimony is sufficient to convict an infant of contributory negligence.

Much is said, in the opinion, on the subject of the subtle danger attending the use of electricity. This is true. An electric current is not only dangerous, but, being invisible, noiseless, and odorless, it is often impossible to detect its presence until its deadly work is done; and for this reason a higher measure of responsibility rests upon those who use it as a means of commerce than arises from the use of any other known power. But, when actual knowledge of the existence of this danger and a due appreciation thereof is established by all the evidence, the difference between it and any other danger vanishes.

It seems to me that this case records the high-water mark thus far reached by that ever-flooding tide of speculative litigation which threatens to overwhelm the courts of the country—litigation wherein sufferers from the consequences of their own wanton and reckless negligence seek remuneration from those upon whose property they have trespassed, and which enables juries to constitute themselves vicarious almoners for the distribution of charity among petitioners whose misfortunes excite their sympathy.

MEMORANDUM DECISIONS.

CHESAPEAKE & O. Ry. Co. v. GUNTER. (two cases). (Court of Appeals of Kentucky, Dec. 18, 1903.) Appeal from Circuit Court, Franklin County. "Not to be officially reported." Separate actions by Mary Gunter and Sallie Gunter against the Chesapeake & Ohio Railway Company. From judgments for plaintiffs, defendant appeals. Both judgments affirmed. Ira Julian and John T. Shelby, for appellant. Jas. A. Scott and W. C. Marshall, for appellees.

NUNN, J. These actions were instituted by appellees in the Franklin circuit court against appellant to recover damages for injuries received by them by jumping or being thrown from their buggy by reason of their horse becoming frightened at appellant's passenger train at Walcutt's Crossing; it being averred that no signal or warning of the approach of the train was given, and that the crossing at which the accident occurred was exceptionally dangerous, by reason of the railroad making a sharp curve there and passing through a cut just before reaching the pike. The two actions, by agreement of parties, were tried together. The first trial resulted in a verdict and judgment in favor of appellee Mary Gunter for the sum of \$1,000 and for appellee Sallie Gunter for the sum of \$400. On motion of appellant the lower court set aside the verdict in favor of Sallie and granted a new trial, but refused to set aside the verdict in favor of appellee Mary Gunter. The appellant appealed, and this court reversed that judgment. On a second trial, the cases were heard together, and the jury returned a verdict in favor of ap-

pellee Mary Gunter for \$800, and Sallie for \$400. The court refused a new trial, and appellant has appealed from both judgments, and by consent they are heard together. In substance all the facts and circumstances proven on the last trial were presented on the first trial, and this court, in an opinion by Judge Du Relle, recites them in his opinion, which is reported in 108 Ky. 362, 56 S. W. 527. For this reason we deem it unnecessary to again recite them. After a careful consideration of this record and former opinion referred to, we are of opinion that the lower court gave the parties a trial in conformity with the directions of this court. The evidence as to the extent of the injury received by Sallie Gunter is not very satisfactory; but two juries have heard the testimony, and gave her the same amount by each verdict. Perceiving no error prejudicial to the substantial rights of appellant, the judgment in each of these cases is affirmed.

CITY OF LOUISVILLE v. BOARD OF PARK COM'RS et al. (Court of Appeals of Kentucky, Dec. 18, 1903.) Appeal from Circuit Court, Jefferson County, Chancery Division. "Not to be officially reported." Action by the city of Louisville against the Board of Park Commissioners and others. From a judgment for defendants, plaintiff appeals. Affirmed. H. L. Stone, for appellant. Bennett H. Young, Pirtle, Trabue & Cox, Kohn, Baird & Spindle, and Marion W. Ripey, for appellees.

NUNN, J. This is the second appeal of this case. In appellant's petition, among other necessary allegations, it was stated that the board of election commissioners for Jefferson county, composed of Martin, Lucas, and Stout, failed and refused to examine and canvass the returns and count the vote of 13 precincts of the city on the question of issuing bonds for the purpose of purchasing a park and for the construction of sewers in the city of Louisville. The court was asked to require the election commissioners to reconvene and recanvass the vote for and against this bond proposition, and that they include in the canvass the returns furnished and filed with their codefendant W. P. Johnson, the clerk of the Jefferson county court, from the 18 precincts named, and that Johnson, as such clerk, be required to furnish them (the board of election commissioners) the returns of the election from these precincts, including the contents of the ballot boxes returned on that election by the precinct election officers in order that the recanvass might be properly and lawfully made on the question of issuance of the aforesaid bonds. It was also alleged in the petition that the vote cast in the 18 precincts named, when added to the other vote cast at the election, would show that the proposition for the issue of bonds was lost and that this bond issue proposition did not obtain two-thirds of the legal votes cast at that election on that question; in other words, more than one-third of the votes cast on that question voted against the proposition. To this petition a demurrer was filed and sustained, and appellant appealed to this court. This court, in an opinion by Judge Du Relle (see 65 S. W. 860), decided that, as it was admitted by the demurrer to the petition that this board of election commissioners failed and refused to examine, canvass, and count the vote pro and con on the bond issue in the 18 precincts named, mandamus was the proper remedy to compel them to reconvene and perform this duty; and in this connection the court said: "Undoubtedly it was the duty of the county election commissioners to canvass all the returns. It was their duty to canvass the returns from the 18 precincts, in which it is admitted votes were cast for and against this proposition, and the returns from which were not canvassed at all. It may be possible

that the returns in those precincts were in such shape that they could not be counted; but it was none the less the duty of the board to canvass them, and, if found countable, to count and certify them." Upon the return of the case to the lower court, the appellees filed an answer denying that the board of election commissioners failed or refused to canvass the returns from the 18 precincts named, or any precinct, but averred that they fairly, honestly, and carefully examined, canvassed, and counted all the votes cast at that election upon the proposition named, and that the bond proposition carried at that election, and with their answer filed a copy of their certificate, made at the time. On this question proof by depositions was taken, and it is shown that in 5 or 6 of the 18 precincts named no vote was cast, or at least none certified by the precinct election officers as having been cast, at that election on the bond question. It is shown in the proof that on the back of the stub book there appears a certificate of the election officers, pasted over the blank certificates, or rather over the blank that ought to have been used by the officers in making their certificate of the vote, showing several hundred votes cast pro and con on the bond question, and, if these votes were counted, the proposition would be lost by a few votes. The proof clearly shows that one of the certificates was made and pasted in this stub book a year or more after the election. Some of these precincts show a majority for the bonds; one of them more than three votes to one in favor of the proposition. The others showed a majority against the question. The proof also shows that the county court clerk, at the expiration of six months after the election, in performance of his duty as required by statute, destroyed all the returns, legal ballots, questioned ballots, and spoiled ballots—in fact, everything connected therewith, except the stub books and these certificates mentioned. It is also shown by the depositions of Martin and Stout, two of the election commissioners (the other's—Lucas'—deposition was not taken), that they did, in accordance with the statute, examine and canvass all the returns from every precinct in the city of Louisville at that election, including the 18 precincts named, and that they honestly, fairly, and in good faith performed this duty without prejudice or partiality for or against the bond proposition, and that they counted every vote for or against this proposition, as shown by the official returns presented to them; that while they could not remember, at the time of giving their depositions, which was two or three years after the election, the particular reasons why the precincts named were not counted, they knew they had at that time what they considered a valid reason for not counting same. The stenographer of the board, who was present at the canvass and count, corroborates them in these statements. There is no evidence in the record contradicting these statements, except the proven contents of the certificates in the stub books. The lower court upon this evidence dismissed plaintiff's petition. While this court adheres to the legal propositions announced in the former opinion with reference to the control of election commissioners, yet in view of the conflict of the evidence on the question of fact involved herein, and giving some weight to the conclusion of the chancellor who tried this case, we are not prepared to say that, if the present election board was now convened and a recanvass and recount made, the board could find any returns that are "countable," other than those found and counted by the former board. Therefore the judgment of the lower court is affirmed.

WOOD v. McBEE. (Supreme Court of Arkansas. Nov. 28, 1903.) Appeal from Circuit Court, Marion County, in Chancery; Elbridge

G. Mitchell, Judge. Action by Winnefred M. McBee against Joseph Wood. Decree for plaintiff, and defendant appeals. Affirmed. Z. M. Horton, for appellant. S. M. Woods and A. O. Seawell, for appellee.

BUNN, C. J. This was an action, originally in ejectment in the Marion circuit court, but transferred to the chancery docket thereof on the petition of the defendant in his answer and cross-bill. It appears that the defendant, being indebted to one W. C. McBee in a certain sum, executed and delivered to John Gibson, as trustee, his certain deed of trust to secure said indebtedness, evidenced by his promissory note, dated 14th April, 1893, with the usual stipulations and covenants, and conveying for that purpose the lands involved in this controversy. Subsequently, to wit, on the — day of —, 1897, for value, the note and deed of trust was assigned and transferred by the said W. C. McBee to the plaintiff, Winnefred M. McBee, and on the — day of —, 1899, the said trustee, under and by virtue of the power vested in him, advertised and sold said lands, after due appraisalment according to law, to pay said indebtedness, and the plaintiff became the purchaser of said lands, she bidding two-thirds of their appraised value, and received her certificate as such, and afterwards, to wit, in January, 1899, the defendant being still in possession of the lands, brought this her suit for the recovery of the same, making exhibits to her complaint the order appointing appraisers, the certificate of appraisalment of said lands, the report of sale, her said certificate of sale, etc. On the 15th day of August, 1900, the defendant filed his answer and cross-bill, denying in his answer that plaintiff was owner of said lands and that she was entitled to the possession thereof, denying that he had executed the note and deed of trust as in the complaint set forth, and averring that, if plaintiff ever did become the owner of said note, it was after maturity of the same, and that therefore she held the note subject to the legal and equitable defenses; and in his cross-bill defendant set up his defenses that the trustee's sale was for more than the true indebtedness on said note, that the appraisalment was not properly made, etc., and that he did not owe said W. C. McBee, at the time of the sale, the amount claimed, but that he only owed him the sum of \$192.23, which last amount he then and there offered to pay, and prayed that the cause be transferred to the equity docket, and that an accounting be had between them, and that he be allowed to redeem said land, and prayed for cost and all relief to which he may be entitled. The transfer was made, and this narrowed the question down to one of the true indebtedness of defendant to W. C. McBee, and the proper decree to be made upon such findings. The plaintiff answered the cross-complaint of the defendant, appointed receiver to take charge of the property, and evidence was taken pro and con, mainly on the question of the indebtedness, and upon final hearing the chancellor found and decreed as follows, to wit: "On this day [February 23, 1901] this cause came on for hearing, and the plaintiff asked and obtained leave of the court to amend her answer to defendant's cross-bill, by striking out one paragraph, which was done. Whereupon both parties announced ready for trial, and the court, after hearing the evidence, argument of counsel, and being fully advised in the premises, doth find that the defendant was indebted to W. C. McBee on the 1st April, 1893, in the sum of seven hundred and forty-seven and 5/100 dollars and executed the note sued on for eight hundred and seventy-nine and 18/100, which included, by mistake, one hundred and thirty-two and 15/100 dollars more than he owed W. C. McBee; that said note bears interest at the rate of 10 per cent. per annum; and that there is now due and unpaid on said

note the sum of twelve hundred and nineteen and 60/100 dollars. The court further finds that on the 14th day of April, 1893, the defendant made, executed, and delivered to John Gibson, as trustee, to secure said debt to said W. C. McBee, his deed of trust on the following described lands, to wit: The northeast quarter of southeast quarter, the southeast quarter of northeast quarter, the southwest quarter of northeast quarter, and the northwest quarter of the southeast quarter, of section nineteen (19), township nineteen (19) north, range fifteen (15) west, containing 160 acres; that in the year 1897 the said W. C. McBee for a good and sufficient consideration assigned and transferred said note and deed of trust to the plaintiff; and that she is the sole owner thereof, and the same is a valid and subsisting lien on said lands. The court further finds that on the 10th day of June, 1899, said John Gibson, at the request of the said plaintiff, sold said lands to satisfy said debt, and that said sale is void on account of the fact that the indebtedness was too large. It is therefore considered, ordered, and decreed by the court that the plaintiff have and recover of and from the defendant the sum of twelve hundred and nineteen and 62/100 dollars for her debt, and that the said sale and deed executed to the plaintiff for said lands by said trustee under said sale be canceled, set aside, and held for naught, and that said deed of trust be foreclosed," etc. The court then orders foreclosure sale, appointing the clerk as special commissioner to carry out the order of sale. There is ample evidence to sustain the chancellor's findings, and the decree was proper under the circumstances, and the same is affirmed.

STATE ex rel. SCHOOL DIST. OF PLATTSBURG v. BOWMAN, County Assessor. (Supreme Court of Missouri, Division No. 1, Dec. 23, 1903.) Appeal from Circuit Court, Clinton County; A. D. Burnes, Judge. Mandamus by the state of Missouri, on the relation of the School District of Plattsburg, against Phillip V. Bowman, as assessor of taxes for Clinton county. From a judgment for respondent, relator appeals. Affirmed. W. S. Herndon, for appellant. Sandusky & Sandusky, for respondent.

MARSHALL, J. This is a proceeding by mandamus to compel the defendant, as assessor of taxes for Clinton county, to correct the assessments involved in the case of School District of Plattsburg v. Bowman et al. (just decided) 77 S. W. 880, so that, instead of assessing said personal property to the partnerships that own it, and at the place of business of the partnership, the property shall be assessed against the members of the firm, each for his proportionate interest, at the place where the members severally reside. What was said in the case just decided is decisive of this case. The circuit court denied the peremptory writ, and its judgment is right, and it is affirmed. All concur.

STATE v. REAGAN. (Court of Appeals at St. Louis, Mo. Dec. 1, 1903.) Appeal from St. Louis Court of Criminal Correction; L. A. Steber, Special Judge. Indictment charging M. Reagan with crime quashed, and the state appeals. Affirmed. C. P. Williams, for the State. J. A. Gerenz and Harry A. Walsh, for respondent.

REYBURN, J. This case presents the identical question determined in State v. Gassard et al., 77 S. W. 473, decided by this court. For the reasons therein stated, the judgment sustaining the demurrer to, and quashing, the indictment, is affirmed.

BLAND, P. J., and GOODE, J., concur.

SWEENEY et al. v. WEBB et al. (Supreme Court of Texas. Jan. 14, 1904.) Application for Writ of Error to Court of Civil Appeals of Fifth Supreme Judicial District. Suit by M. J. Sweeney and others against G. P. Webb and others. The Court of Civil Appeals (76 S. W. 760) affirmed a judgment for defendants, and plaintiffs apply for a writ of error. Denied. C. L. Galloway, Don A. Bliss, and Moseley & Eppstein, for applicants.

GAINES, C. J. We think the application for the writ of error in this case should be refused. But, in order to prevent misconception, we deem it proper to say that we have not found it necessary to pass upon the question whether, if the statute in controversy had been unconstitutional, the plaintiffs were entitled to the remedy of injunction. The determination of that question not being requisite to a decision of the case, we give no opinion upon it.

ARTO v. STATE. (Court of Criminal Appeals of Texas. Nov. 25, 1903.) Appeal from Criminal District Court, Harris County; J. K. P. Gillaspie, Judge. John Arto was convicted of theft from the person, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft from the person, and his punishment assessed at confinement in the penitentiary for five years. The record before us is without statement of facts, bill of exceptions, or motion for new trial. The indictment is good, and the charge of the court is applicable to a state of facts provable under the indictment. No error appearing in the record, the judgment is affirmed.

HODGE v. STATE. (Court of Criminal Appeals of Texas. Dec. 9, 1903.) Appeal from Smith County Court; S. A. Lindsey, Judge. Cull Hodge was convicted of aggravated assault, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an aggravated assault, and fined \$100. The only question is the sufficiency of the evidence. The state's case makes out an aggravated assault, while, if the testimony of defendant be true, it clearly disproves the state's case. The jury have passed upon the issue so made, and found appellant guilty. We do not feel authorized to disturb their finding. The judgment is affirmed.

PATTERSON v. STATE. (Court of Criminal Appeals of Texas. Dec. 2, 1903.) Appeal from District Court, McLennan County; Sam R. Scott, Judge. Robert Patterson was convicted of burglary, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for burglary. The record contains neither bill of exceptions nor statement of facts. The only contention by appellant in his motion for new trial is the alleged insufficiency of the evidence. No error appearing in the record, the judgment is affirmed.

SPARKS v. STATE. (Court of Criminal Appeals of Texas. May 27, 1903.) Appeal from Criminal District Court, Harris County; J. K. P. Gillaspie, Judge. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft, and his punishment assessed at confinement in the penitentiary for a term of three years. The record is without bill of exceptions

or statement of facts. The charge of the court is applicable to a state of facts provable under the indictment. The complaints in the motion for new trial cannot be reviewed as presented by this record. No error appearing, the judgment is affirmed.

BROWN et al. v. CITY OF GALVESTON.* (Court of Civil Appeals of Texas. Oct. 30, 1903.) Appeal from District Court, Galveston County; Wm. H. Stewart, Judge. Suit by A. A. Brown and others against the city of Galveston. From a judgment for defendant, plaintiffs appeal. Judgment affirmed. See 75 S. W. 488. James B. & Charles J. Stubbs, for appellants. J. Z. H. Scott, City Atty., for appellee.

GARRETT, C. J. The judgment of the court below in this case will be affirmed, in accordance with the answers of the Supreme Court to questions certified to it. See opinion of Supreme Court, delivered June 26, 1903, 75 S. W. 488. Affirmed.

INTERNATIONAL & G. N. R. CO. v. KILGO.† (Court of Civil Appeals of Texas. Nov. 11, 1903.) Appeal from District Court, McLennan County; Marshall Surratt, Judge. Action by R. S. Kilgo against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed. N. A. Stedman and W. S. Baker, for appellant. J. E. Yantis, for appellee.

*Rehearing denied, and writ of error denied by Supreme Court.

†Rehearing denied December 23, 1903.

STREETMAN, J. This is the second appeal in this case. The nature of the suit is set out in the former opinion. 71 S. W. 556. Upon the last trial appellee recovered judgment for \$500. We have carefully examined the record, and believe that the verdict of the jury, which, under the charge of the court, amounts to a finding of the truth of all the material allegations of the petition, was supported by the evidence. We find no error in the judgment, and it is therefore affirmed. Affirmed.

PIONEER MILL & ELEVATOR CO. v. HOUSTON & T. C. R. CO. et al.* (Court of Civil Appeals of Texas. Nov. 11, 1903.) Appeal from McLennan County Court; G. B. Gerald, Judge. Action between the Pioneer Mill & Elevator Company and the Houston & Texas Central Railroad Company and others. From a judgment for the latter, the former appeals. Affirmed. J. B. Scarborough, for appellant. J. W. Terry and Andrews & Ball, for appellees.

FISHER, C. J. The facts of this case bring it within the doctrine announced in *I. & G. N. R. Co. v. Bergman*, 64 S. W. 999, 3 Tex. Ct. Rep. 168, and *G., C. & S. F. Ry. Co. v. Darby & Cauthen*, 67 S. W. 129, 4 Tex. Ct. Rep. 246, and especially *Hunt Bros. v. M., K. & T. Ry. Co.* (Tex. Civ. App.) 74 S. W. 69. The facts of this case are almost similar to those found by the court in the last case cited, in which a writ of error was refused by the Supreme Court. We find no error in the record, and the judgment is affirmed. Affirmed.

*Rehearing denied December 23, 1903.

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Actions between parties in particular relations.

See "Master and Servant," § 9; "Parent and Child"; "Partnership," § 3.
Co-tenants, see "Partition," § 1.
Devisees, see "Wills," § 4.

Actions by or against particular classes of parties.

See "Brokers," § 2; "Carriers," §§ 2-9; "Counties," § 4; "Druggists"; "Executors and Administrators," § 6; "Husband and Wife," § 2; "Infants," § 3; "Landlord and Tenant," § 3; "Municipal Corporations," § 9; "Partnership," § 2; "Principal and Agent," § 3; "Railroads," §§ 2, 4-6; "Street Railroads," § 6; "Turnpikes and Toll Roads," § 2.

Banks, see "Banks and Banking," § 1.
Ferry companies, see "Ferries," § 1.
Foreign corporations, see "Corporations," § 6.
Heirs, see "Descent and Distribution," § 2.
Stockholders, see "Corporations," § 2.
Surety, see "Principal and Surety," § 3.
Taxpayers, see "Counties," § 3.
Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.
Trustees, see "Trusts," § 4.

Particular causes or grounds of action.

See "Assault and Battery," § 1; "Bills and Notes," § 5; "Death," § 1; "False Imprisonment," § 1; "Forcible Entry and Detainer," § 1; "Fraud," § 2; "Guaranty," § 2; "Insurance," §§ 7, 8; "Libel and Slander," § 1; "Negligence," § 3; "Nuisance," §§ 1, 2; "Taxation," § 6; "Torts"; "Trespass"; "Trove and Conversion," § 1; "Work and Labor."

Bonds of guardian, see "Guardian and Ward," § 4.

Breach of contract, see "Contracts," § 6; "Sales," §§ 7, 8; "Vendor and Purchaser," § 7.

Breach of warranty, see "Sales," § 8.

Compensation of agent, see "Principal and Agent," § 2.

Compensation of broker, see "Brokers," § 2.

Delivery of forged telegram, see "Telegraphs and Telephones," § 2.

Fires caused by operation of railroad, see "Railroads," § 6.

Injuries caused by maintenance of railroad, see "Railroads," § 2.

Injuries to animals caused by operation of railroad, see "Railroads," § 5.

Loss of passenger's baggage, see "Carriers," § 9.

Loss of services of child, see "Parent and Child."

Negligence of lessor, see "Landlord and Tenant," § 3.

Obstruction of easement, see "Easements," § 2.

Personal injuries, see "Carriers," § 5; "Collision"; "Druggists"; "Master and Servant," § 9; "Municipal Corporations," § 9; "Railroads," § 4; "Street Railroads," § 6; "Telegraphs and Telephones," § 1.

Possession of mortgaged property, see "Chattel Mortgages," § 2.

Price of goods, see "Sales," § 7.

Price of land, see "Vendor and Purchaser," § 6.

Recovery of bank deposit, see "Banks and Banking," § 1.

Recovery of land sold by vendor, see "Vendor and Purchaser," § 6.

Recovery of value of turnpike, see "Turnpikes and Toll Roads," § 1.

Rent, see "Landlord and Tenant," § 4.

Services, see "Work and Labor."

Wrongful attachment, see "Attachment," § 3.

Particular forms of action.

See "Account, Action on"; "Ejectment"; "Replevin"; "Trespass," § 1; "Trespass to Try Title"; "Trove and Conversion."

Particular forms of special relief.

See "Divorce"; "Injunction"; "Partition," § 1.

Abatement of nuisance, see "Nuisance," § 1.

Alimony, see "Divorce," § 3.

Cancellation of deed, see "Deeds," § 1.

Enforcement or foreclosure of lien, see "Mechanics' Liens," § 4.

Establishment and enforcement of right of homestead, see "Homestead," § 4.

Establishment and enforcement of trust, see "Trusts," § 4.

Establishment of boundaries, see "Boundaries," § 1.

Establishment of will, see "Wills," § 2.

Foreclosure of mortgage, see "Mortgages," § 3.

Reformation of written instrument, see "Reformation of Instruments."

Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 2.

Setting aside will, see "Wills," § 2.

Particular proceedings in actions.

See "Continuance"; "Costs"; "Damages"; "Depositions"; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Motions"; "Parties"; "Pleading"; "Process"; "Reference"; "Removal of Causes"; "Stipulations"; "Trial"; "Venue."

Default, see "Judgment," § 2.

Notice of action, see "Process," § 2.

Verdict, see "Trial," § 6.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers"; "Sequestration."

Proceedings in exercise of special jurisdictions.

Criminal prosecutions, see "Criminal Law."

Suits in equity, see "Equity."

Suits in justices' courts, see "Justices of the Peace," § 1.

§ 1. Joinder, splitting, consolidation, and severance.

Under Rev. St. Mo. 1889, § 2040, and the statute relative to injunctions, *held*, that one may in the same action seek to abate a nuisance and pray for injunction and for damages.—*Baker v. McDaniel* (Mo. Sup.) 531.

In an action against the makers of a note, *held* not improper to join as defendant a third person falsely representing that the makers had signed the note.—*Commercial Nat. Bank v. First Nat. Bank* (Tex. Civ. App.) 239.

A widow's cause of action to set aside a fraudulent judgment in an action for the negligent killing of her husband is properly joined with her cause of action for the negligent killing.—*De Garcia v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 275.

ACTION ON THE CASE

See "Trespass," § 1.

ADJOINING LANDOWNERS.

See "Boundaries."

The cost of shoring up, underpinning, or taking whatever precautions may be needed to prevent injury to adjacent structures from excavating, when carefully done, falls on the owner of the adjacent structures.—*Carpenter v. Reliance Realty Co.* (Mo. App.) 1004.

Responsibility to prevent injury resulting from the removal of earth contiguous to buildings devolves on the owner of the buildings, on receipt of timely notice of a purpose by the owner of the contiguous lot, or his licensee, to make an excavation.—*Carpenter v. Reliance Realty Co.* (Mo. App.) 1004.

The right to lateral support pertains only to the ground itself in its natural state, not to incumbering buildings or improvements.—*Carpenter v. Reliance Realty Co.* (Mo. App.) 1004.

The owner of an unimproved lot, or his licensee, has the right to excavate for the purpose of erecting a building thereon, by using reasonable care and giving timely notice to the owner of adjacent buildings.—*Carpenter v. Reliance Realty Co.* (Mo. App.) 1004.

ADJUDICATION.

Operation and effect of former adjudication, see "Judgment," §§ 6, 7.

ADMINISTRATION.

Of estate of decedent, see "Executors and Administrators."

Of estate of ward, see "Guardian and Ward," § 1.

Of trust property, see "Trusts," § 3.

ADMIRALTY.

See "Shipping."

ADMISSIONS.

As evidence in civil actions, see "Evidence," § 6.

As evidence in criminal prosecutions, see "Criminal Law," § 8.

In pleading, see "Pleading," § 2.

To prevent continuance, see "Continuance."

ADOPTION.

Under Ky. St. § 2072, creditors of foster parent *held* not entitled to reach property of adopted child, because parents had borne her maintenance.—*Anderson v. Mundo & McGraw* (Ky.) 926.

Adoption of a child in one state, in accordance with the laws thereof, *held* to entitle such child to inherit property left by the adopter in another state.—*McColpin v. McColpin's Estate* (Tex. Civ. App.) 238.

ADVANCEMENTS.

See "Descent and Distribution," § 2.

ADVERSE CLAIM.

To real property, see "Quieting Title."

ADVERSE POSSESSION.

See "Limitation of Actions."

§ 1. Nature and requisites.

Possession by the donee under a parol gift will ripen into a fee-simple title.—*Owsley v. Owsley* (Ky.) 397.

Mere occupancy by donor of tract of land with donee *held* not to preclude latter from recovering title by adverse possession.—*Owsley v. Owsley* (Ky.) 397.

Requisites of acquisition of title by adverse possession are actual entry, with continuous, open, adverse possession, accompanied by claim of title.—*Owsley v. Owsley* (Ky.) 397.

Where two patents lap, actual possession of undisputed portion, while claiming the lap, *held* not such actual, adverse possession that limitations run.—*Hall v. Blanton* (Ky.) 1110.

Evidence *held* to show that, where two patents lapped, there was no actual, adverse hold-

ing of any portion of the lap by the junior patentee.—*Hall v. Blanton* (Ky.) 1110.

Evidence *held* to show that the senior patentee of a tract held actual, adverse possession of the whole of it for the statutory period.—*Hall v. Blanton* (Ky.) 1110.

Possession of land is adverse to the true owner under the 10-year statute of limitations, though under the erroneous belief that it is vacant land.—*Price v. Eardley* (Tex. Civ. App.) 416.

§ 2. Operation and effect.

Where patents lap, actual possession of part of the lap by senior patentee *held* such that limitations run as to the whole of it.—*Hall v. Blanton* (Ky.) 1110.

Under Rev. St. 1895, arts. 3343, 3344, two persons in adverse possession of 160 acres *held* to have acquired title thereto, though only 110 acres was inclosed.—*Price v. Eardley* (Tex. Civ. App.) 416.

§ 3. Pleading, evidence, trial, and review.

In a suit to try title to land, evidence *held* insufficient to establish plaintiff's title as against defendants, who were in possession under color of title.—*Hays v. Earls* (Ky.) 706.

A plea of limitations for 160 acres only of the land sued for, this being claimed on a naked possession, is insufficient; it not describing the land.—*Giddings v. Fischer* (Tex. Sup.) 209.

Refusal to submit question of adverse possession in trespass to try title *held* error, where the evidence tended to show such possession of a portion of the lot in controversy.—*Haigler v. Pope* (Tex. Civ. App.) 1039.

ADVERTISEMENT.

Publication of process, see "Process," § 2.

AFFIDAVITS.

See "Depositions."

In particular proceedings.

See "Continuance."

For publication of process, see "Process," § 2. Verification of information, see "Indictment and Information," § 2.

Verification of pleading, see "Pleading," § 6.

AFFRAY.

Former jeopardy, see "Criminal Law," § 5.

AGENCY.

See "Principal and Agent."

AGGRAVATED ASSAULT.

See "Assault and Battery," § 2.

AGREEMENT.

See "Contracts."

AGRICULTURE.

Irrigation, see "Waters and Water Courses," § 4.

AIDER BY VERDICT.

In civil actions, see "Pleading," § 9.

ALIBI.

Instructions as to, see "Criminal Law," § 18.

ALIMONY.

See "Divorce," § 3.

ALLOWANCE.

Of appeal or writ of error, see "Appeal and Error," § 3.

To surviving wife, husband, or children of decedent, see "Executors and Administrators," § 3.

ALTERATION.

Of geographical or political divisions, see "Counties," § 1; "Schools and School Districts," § 1.

ALTERATION OF INSTRUMENTS.

See "Reformation of Instruments."

An appeal bond *held* sufficient, in the absence of a showing that alterations on its face were made after its execution.—*Parshall v. Clark* (Tex. Civ. App.) 437.

AMENDMENT.

Of by-laws of insurance association, see "Insurance," § 8.

Of statute, see "Statutes," § 4.

Of particular legal proceedings.

See "Indictment and Information," § 5; "Pleading," § 5.

Of record on appeal or writ of error, see "Appeal and Error," §§ 5, 6.

Pleading on appeal from justice's court, see "Justices of the Peace," § 2.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Appeal and Error," § 1; "Courts," § 2.

ANIMALS.

Carriage of live stock, see "Carriers," § 3.

Exemptions of domestic animals, see "Exemptions," § 1.

Injuries from operation of railroads, see "Railroads," § 5.

Necessity of requesting instructions in action for killing of live stock for purpose of review, see "Appeal and Error," § 2.

Evidence *held* insufficient to support a conviction, under Pen. Code 1895, art. 913, for willfully driving cattle from their accustomed range.—*Newport v. State* (Tex. Cr. App.) 224.

ANNULMENT.

Of will, see "Wills," § 2.

ANSWER.

In pleading, see "Pleading," § 2.

APOTHECARIES.

See "Druggists."

APPEAL AND ERROR.

See "Certiorari"; "Exceptions, Bill of"; "New Trial."

Alteration of appeal bond, see "Alteration of Instruments."

Appellate jurisdiction of particular courts, see "Courts," § 3.

Costs, see "Costs," § 3.

Recognizance on appeal in criminal prosecutions, see "Criminal Law."

Review of proceedings of justices of the peace, see "Justices of the Peace," § 2.

Review in particular civil actions.

See "Forcible Entry and Detainer," § 1.

By or against infant, see "Infants," § 3.

Review in special proceedings.

See "Habeas Corpus," § 1.

Accounting by guardian, see "Guardian and Ward," § 3.

Assessment of taxes, see "Taxation," § 5.

Review of criminal prosecutions.

See "Criminal Law," §§ 21-24; "Homicide," § 9.

§ 1. Decisions reviewable.

Where a judgment against a guardian imposed a lien on real estate, the Court of Appeals had jurisdiction of an appeal therefrom, without regard to the amount of the judgment.—*Bybee's Ex'r v. Poynter* (Ky.) 698.

An informal judgment on demurrer *held* not a final judgment, from which an appeal will lie.—*Akins v. Hicks* (Mo. App.) 86.

Where damages recovered for delay of a telegraph company in transmitting a message, together with interest, amounts to over \$100, the cause is appealable to the Court of Civil Appeals.—*Western Union Tel. Co. v. Noland* (Tex. Civ. App.) 1031.

§ 2. Presentation and reservation in lower court of grounds of review.

Objection to sufficiency of petition by salesman to recover commission *held* too late on appeal.—*Albin Co. v. Kuttner* (Ky.) 181.

A party cannot, on appeal, question the ownership of land, as alleged in the petition and not denied in the answer.—*Louisville & N. R. Co. v. Brooks* (Ky.) 693.

Objectionable questions and answers in a deposition, unless excepted to specifically and such exceptions appear in the bill of evidence, will not be considered on appeal.—*Louisville & C. Packet Co. v. Bottorff* (Ky.) 920.

In an action by a foreign corporation, plaintiff *held* not entitled on appeal to question the validity of Rev. St. 1899, §§ 1025, 1026, requiring foreign corporations to obtain a certificate authorizing them to do business, not having raised such point below.—*Fay Fruit Co. v. McKinney* (Mo. App.) 160.

An appellant *held* not entitled to complain that a transcript of the testimony on a former trial was erroneously admitted in evidence, instead of being used merely to refresh the memory of a witness.—*Dice v. Hamilton* (Mo. Sup.) 299.

A party, objecting to the finding of a referee, must except to the overruling of his exceptions, and object in his motion for a new trial, to make the objection available on appeal.—*Arkansas Land Co. v. Ladd* (Mo. App.) 322.

The objection that a verdict is excessive cannot be considered on appeal, unless it is made a ground for a new trial.—*Turney v. Baker* (Mo. App.) 479.

Where no exception is saved to the refusal of a new trial, exceptions saved during the trial cannot be considered on appeal.—*Parsons v. John L. Clark & Co.* (Mo. App.) 582.

Under Rev. St. 1899, § 2867, providing for recovery against railroads for killing live stock,

issue whether the engineer of the locomotive which killed the stock could have discovered it on the track by the exercise of reasonable care in time to have prevented the killing cannot be raised for the first time on appeal.—Redmond v. Missouri, K. & T. Ry. Co. (Mo. App.) 768.

Sufficiency of affidavit to plea cannot be questioned for the first time on appeal.—Dyer v. Winston (Tex. Civ. App.) 227.

Negligence of master in failing to provide sufficient number of men to do the work *held* not available, under pleadings and assignments of error, on appeal by servant from judgment for master in action for injuries.—Hettich v. Hillje (Tex. Civ. App.) 641.

§ 3. Requisites and proceedings for transfer of cause.

An appeal from probate court to circuit court *held* properly dismissed.—Bonner v. Gorman (Ark.) 602.

By express provision of Rev. St. 1899, § 812, failure to perfect appeal in the prescribed time is cause for affirmance, unless good cause to the contrary be shown.—Long v. Hawkins (Mo. Sup.) 77.

An appeal bond *held* conditioned to pay all costs below and on appeal.—Giddings v. Fischer (Tex. Sup.) 209.

An appeal bond executed by joint principals *held* binding as to the principal, who is a party to the action.—Parshall v. Clark (Tex. Civ. App.) 437.

§ 4. Effect of transfer of cause or proceedings therefor.

Successful party's filing record in Supreme Court for affirmance, on unsuccessful party's failure to perfect appeal below, *held* unnecessary.—State v. Thomas (Tenn.) 667.

§ 5. Record and proceedings not in record.

Oral testimony cannot by a nunc pro tunc order be made part of the record after the rendering of the decree, no effort to that end having been previously made.—Tucker v. Hawkins (Ark.) 902.

Certified agreed statement of facts, with findings and judgment, appeal bond, and assignments of error, *held* sufficient, without pleadings, under Rev. St. 1895, art. 1293, to require consideration of appeal.—Scott v. Slaughter (Tex. Sup.) 949.

Fact of introduction of deed, omitted from statement of facts, *held* not presentable to Supreme Court on motion for rehearing, notwithstanding agreement of counsel and certificate of trial judge.—Williamson v. Work (Tex. Civ. App.) 266.

Delay in filing transcript *held* not sufficiently excused to allow the filing, under Sayles' Ann. Civ. St. 1897, art. 1015, more than 90 days after the perfecting of the appeal.—Faux v. Lemaire (Tex. Civ. App.) 439.

§ 5½. — Necessity of bill of exceptions, case, or statement of facts.

Judgment on an agreed statement of facts cannot be reviewed, in the absence of a bill of exceptions.—Stempel Fire Extinguisher Mfg. Co. v. National Fire Ins. Co. (Mo. App.) 334.

Where, on appeal, there is no statement of facts, alleged error in refusing to charge that there was no evidence of partnership was not reviewable.—Avocato v. Dell 'Ara (Tex. Civ. App.) 47.

A judgment recital *held* not to contain all the evidence, so as to dispense with the necessity for a statement of facts, on appeal.—De Garcia v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 275.

Order of a court charging costs against an estate in a proceeding determined adversely to the

administratrix *held* not reversible, in the absence of a statement of facts.—Pierson v. Blanton (Tex. Civ. App.) 433.

§ 6. — Questions presented for review.

On appeal from a judgment for defendant in ejectment, in which none of the title papers are copied in the record, and there is nothing to show plaintiff's title, the verdict for defendant cannot be disturbed.—Bowman v. Moss (Ky.) 184.

Where there is no bill of exceptions, there is nothing to review on appeal, except the sufficiency of the petition, which was demurred to, and the sufficiency of the pleadings to support the judgment.—Berea College v. Powell (Ky.) 381.

An appeal on the record, in the absence of a bill of exceptions, *held* to restrict the court to a review of questions arising on the face of the record.—Strauss v. St. Louis Transit Co. (Mo. App.) 156.

Conclusions of fact are conclusive on appeal, in the absence of a statement of facts.—East v. Houston & T. Cent. R. Co. (Tex. Civ. App.) 646.

§ 7. Assignment of errors.

An assignment of error complaining of two different rulings, not related to each other, cannot be considered.—Galveston, H. & S. A. Ry. Co. v. Fales (Tex. Civ. App.) 234.

An assignment of error raising a question of fact, being without a statement to support it, as required by rule 31 (31 S. W. vii), will not be considered.—International & G. N. R. Co. v. Thompson (Tex. Civ. App.) 439.

A verdict charged to be excessive will be reviewed on appeal, notwithstanding the assignment of error objecting thereto is general and multifarious.—Galveston, H. & S. A. Ry. Co. v. Appel (Tex. Civ. App.) 635.

Defendants cannot assign error to the judgment in favor of codefendants, where they have asserted in their pleadings no right or equity against either of such codefendants.—McCabe & Stein v. Farrell (Tex. Civ. App.) 1049.

§ 8. Briefs.

The failure of appellant to file his brief in the court below within the time required by the statute *held* waived by appellee.—San Antonio & A. P. Ry. Co. v. Turnham (Tex. Civ. App.) 625.

Appeal dismissed for failure to file briefs within the statutory time.—San Antonio & A. P. Ry. Co. v. Brock (Tex. Civ. App.) 953.

Question of sufficiency of evidence *held* reviewable on the briefs, though appellant disregarded rules of court in their preparation.—Masterson v. Heitmann & Co. (Tex. Civ. App.) 983.

§ 9. Dismissal, withdrawal, or abandonment.

One against whom a judgment was rendered cannot prosecute his appeal therefrom, when, after the appeal was granted, a new trial was awarded and the judgment set aside.—Owsley v. Owsley (Ky.) 402.

§ 10. Review.

Decision as to the law on former appeal *held* binding on second appeal.—Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co. (Ky.) 1118; Same v. Bruce, Id.

Judgment will not be reversed for variance, in the absence of a showing, under Rev. St. 1899, § 655, providing that no variance shall be deemed material, unless proved so by affidavit.—Hannon v. St. Louis Transit Co. (Mo. App.) 158.

§ 11. — Scope and extent in general.

Order granting new trial *held* to mean simply that the testimony offered by plaintiff was insufficient to support the verdict, when considered with that offered by defendant.—*Somerville v. Stockton* (Mo. Sup.) 298.

Where there was no objection to evidence, and no instructions asked, the only question that can be reviewed on appeal is the sufficiency of the evidence to support the finding.—*Buck v. Endicott* (Mo. App.) 85.

§ 12. — Parties entitled to allege error.

An appellant *held* not entitled to complain that a transcript of the testimony on a former trial was erroneously received in evidence, because it had not been made a part of the record of former case by bill of exceptions.—*Dice v. Hamilton* (Mo. Sup.) 299.

An appellant cannot complain of instructions, because inconsistent with instructions given in her favor, where the inconsistency is because of erroneous statement in her instructions.—*Fehlhauser v. City of St. Louis* (Mo. Sup.) 843.

Party to a cause, moving for order that stenographer transcribe notes taken on trial, that he might make up a statement of facts, *held* not entitled to complain of court's refusal to grant the motion.—*Allen v. Hazzard* (Tex. Civ. App.) 268.

A party who secures the giving of a charge submitting a certain issue cannot complain that another instruction was given submitting such issue.—*Bitter v. Butchers' & Saloon Men's Ice Mfg. Ass'n* (Tex. Civ. App.) 423.

Where one defendant appeals, without complaining of a judgment for costs, one appellee, plaintiff below, cannot have it reviewed without a cross-appeal.—*Jamison v. New York & T. Land Co.* (Tex. Civ. App.) 969.

Where evidence is excluded, but subsequently its introduction is permitted, the party offering it should introduce it, instead of refusing to do so and relying on appeal on his exception to the exclusion.—*Strohmeier v. Wing* (Tex. Civ. App.) 977.

The court *held* not entitled to review on cross-assignments of error a judgment as to a breach of warranty in an action consolidated with an independent action between the same parties as to a trust agreement; the appeal being solely from the judgment as to the trust agreement.—*Foster v. Ross* (Tex. Civ. App.) 990.

§ 13. — Discretion of lower court.

The court on appeal will not interfere with the discretion of the circuit court in granting or refusing new trials on account of newly discovered parol evidence, unless the discretion is palpably abused.—*Louisville & C. Packet Co. v. Mulligan* (Ky.) 704.

Discretion of court in granting new trial will be overruled on appeal, where there was no evidence to support any other verdict than that rendered.—*Ottomeyer v. Pritchett* (Mo. Sup.) 62.

The granting of a new trial for excessive damages will not be disturbed on appeal, unless it is manifest that the trial court has abused its discretion.—*Friedman v. Pulitzer Pub. Co.* (Mo. App.) 340.

The refusal of a new trial for a disqualification of a juror by failure to pay his poll tax *held* no ground for reversal on appeal.—*Alexander & Kneeland v. Von Koehring* (Tex. Civ. App.) 629.

§ 14. — Questions of fact, verdicts, and findings.

Chancellor's findings will not be disturbed on appeal, unless they appear to be clearly against the evidence.—*Greer v. Fontaine* (Ark.) 56.

A verdict on conflicting evidence will not be set aside.—*Western & Southern Life Ins. Co. v. Brennan* (Ky.) 373.

The Supreme Court will not interfere with the chancellor's findings of fact, upon which credits allowed to a trustee are based.—*Owsley v. Owsley* (Ky.) 394.

Where evidence is conflicting, the finding of the trial court will be sustained.—*Louisville & N. R. Co. v. Brooks* (Ky.) 693.

The Supreme Court cannot disturb the finding of the jury on the question of damages, based on conflicting evidence.—*Louisville & N. R. Co. v. Cumnock* (Ky.) 933.

Where there was nothing to indicate that the verdict of the jury in a personal injury action was not the result of calm judgment, the court on appeal will not disturb it as excessive.—*Parks v. St. Louis & S. Ry. Co.* (Mo. Sup.) 70.

In actions at law the Supreme Court will not weigh the sufficiency of evidence.—*Sanders v. North End Building & Loan Ass'n* (Mo. Sup.) 833.

The findings of the jury on conflicting evidence are conclusive on appeal.—*Interstate Hotel Co. v. Woodward & Burgess Amusement Co.* (Mo. App.) 114.

The finding of a referee will not be disturbed on appeal, when supported by substantial evidence.—*Arkansas Land Co. v. Ladd* (Mo. App.) 322.

A jury's finding, based on conflicting evidence and approved by the trial court, is conclusive with the appellate court.—*Peterson v. Westmann* (Mo. App.) 1015.

Where there is evidence sufficient to support the findings of the court, the court on appeal will not disturb them simply because there is evidence to justify a different conclusion.—*Sanders v. Rawlins* (Tex. Civ. App.) 41.

Finding of trial court that certain improvements placed on real estate were personality *held* not conclusive on appeal.—*Watson v. Markham & Reese* (Tex. Civ. App.) 660.

Verdict in personal injury case, based on some evidence of negligence, *held* not reversible on appeal.—*Boettler v. Tumlinson* (Tex. Civ. App.) 824.

§ 15. — Harmless error in general.

In ejectment, error in discharging the jury, on the ground that the case was one in equity, *held* harmless, under Rev. St. 1899, § 865; judgment having been properly rendered in favor of plaintiff.—*Hall v. Small* (Mo. Sup.) 733.

Defendant in personal injury action *held* not prejudiced by cross-examination of his expert medical witness to effect that attending physicians were more competent to form opinion.—*Robinson v. St. Louis & S. Ry. Co.* (Mo. App.) 493.

To permit the jury to take with them a copy of a telegram alleged to have been delayed in delivery *held* not prejudicial error.—*Western Union Tel. Co. v. Shaw* (Tex. Civ. App.) 433.

On appeal by plaintiff from a judgment for him, on the ground of inadequacy of the verdict, error in rulings on evidence on issues found in his favor is harmless.—*Farley v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 1040.

§ 16. — Harmless error in pleadings.

Omission of verification of pleading cannot be held unprejudicial, in absence of bill of exceptions.—*Berea College v. Powell* (Ky.) 382.

Error in striking out special defenses in trespasses to try title *held* harmless.—*Nowlin v. Hall* (Tex. Civ. App.) 419.

§ 17. — Harmless error in admission of evidence.

The jury having found a will invalid on the ground of unsound mind, alone, improper admission of evidence on undue influence *held* harmless.—*Staggenborg v. Staggenborg* (Ky.) 173.

Admission of certain evidence in an action against a street railway for injuries to a hack *held*, in view of subsequent instructions and the verdict rendered, not prejudicial.—*South Covington & O. St. Ry. Co. v. McHugh* (Ky.) 202.

The evidence of a witness, in an action against a city for injuries sustained by reason of a defective sidewalk, *held* not prejudicial to the city.—*O'Neill v. Kansas City* (Mo. Sup.) 64.

In action on notes, admission of certain evidence that plaintiff had stated to witness that he had loaned money to defendant *held* not prejudicial error.—*Sanders v. North End Building & Loan Ass'n* (Mo. Sup.) 833.

In action on notes, where defense was forgery, admission of an abandoned answer setting up want of consideration *held* not error.—*Sanders v. North End Building & Loan Ass'n* (Mo. Sup.) 833.

In an action against a street railway company for injuries sustained by a passenger, owing to his having been thrown from a car by the conductor, the erroneous admission of a statement of the conductor, made shortly after the occurrence, *held* harmless.—*Gotwald v. St. Louis Transit Co.* (Mo. App.) 125.

Admission of part of a letter from plaintiffs to defendant, not stating any fact, but merely making an argument in their favor, which they or their attorneys might have made at the proper time, *held* harmless.—*Baker v. Pulitzer Pub. Co.* (Mo. App.) 585.

Where, in a case tried to the court, the only definite evidence furnishing basis for the judgment was hearsay, which the court ruled admissible, it could not be presumed that he disregarded it, and based his judgment on the indefinite evidence.—*International & G. N. R. Co. v. Startz* (Tex. Sup.) 1.

Where there is competent evidence to support the judgment in a case tried to the court, the admission of incompetent evidence is not ground for reversal.—*International & G. N. R. Co. v. Startz* (Tex. Sup.) 1.

Admission of evidence, in action against surety, as to consideration for written contract reciting consideration, *held* not ground for reversal.—*Stanley v. Evans* (Tex. Civ. App.) 17.

Erroneous admission of evidence *held* harmless, the judgment showing it was based on other evidence.—*Price v. Oatman* (Tex. Civ. App.) 258.

Evidence as to the distance in which a train properly equipped could be stopped *held* harmless, the cattle with which it collided having been less than that distance from the train when discovered.—*International & G. N. R. Co. v. Thompson* (Tex. Civ. App.) 439.

Admission of improper evidence in a nonjury case *held* ground for reversal.—*Erwin v. Arch-enhold Co.* (Tex. Civ. App.) 823.

Admission, in action on county treasurer's bond, of certain portion of auditor's report, *held* harmless error.—*Harper v. Marion County* (Tex. Civ. App.) 1044.

§ 18. — Harmless error in exclusion of evidence.

The error in excluding from a hypothetical question an element in the case *held* harmless error, in view of the witness' testimony on cross-examination.—*Meeker v. Metropolitan St. Ry. Co.* (Mo. Sup.) 58.

The error, if any, in excluding evidence, is cured by the subsequent admission of such evidence.—*Meeker v. Metropolitan St. Ry. Co.* (Mo. Sup.) 58.

The error in excluding evidence, which is subsequently admitted, is harmless.—*Missouri, K. & T. Ry. Co. v. McCutcheon* (Tex. Civ. App.) 232.

In action against administrator on note of his intestate, the exclusion of certain evidence *held* not prejudicial, even though erroneous.—*Adam v. Sanger* (Tex. Civ. App.) 964.

The sustaining of an objection to an interrogatory in a witness' deposition is harmless, where the witness is subsequently placed on the stand and testifies.—*Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Tex. Civ. App.) 961.

§ 19. — Harmless error in submission of issues or questions to jury.

Where the propounder of a will was entitled to a peremptory instruction on issues raised, the contestant was prejudiced by ruling submitting such issues to the jury.—*Thruston's Adm'r v. Prather* (Ky.) 354.

Where a jury properly found that correspondence constituted a contract for the sale of goods, the submission of such question to the jury was harmless.—*Nelson v. Cal Hirsch & Sons' Iron & Rail Co.* (Mo. App.) 590.

Where all defensive issues are submitted, a defendant in a personal injury case cannot complain of a charge excluding issues as to negligence which are relied on by plaintiff.—*Boettler v. Tumlinson* (Tex. Civ. App.) 824.

§ 20. — Harmless error in instructions to jury.

An instruction in trespass that plaintiff was owner of land *held*, in view of insufficient answer, not error of which defendant could complain.—*J. I. Porter Lumber Co. v. Hill* (Ark.) 905.

To give two correct rules in charging on the measure of damages, in an action for breach of contract to furnish a certain quality of feed to plaintiffs' cattle, resulting in injury thereto, without the two rules being carefully distinguished, *held* reversible error.—*Hartgrove & Clegg v. Southern Cotton Oil Co.* (Ark.) 908.

In an action for injuries owing to plaintiffs' horse having been frightened by defendant's automobile, an instruction as to the circumstances under which plaintiff might recover *held* not prejudicially erroneous.—*Shinkle v. McCullough* (Ky.) 196.

The error, if any, in an instruction on a will contest, because of the use of the word "credible" with reference to the character of the subscribing witnesses, *held* not prejudicial.—*Savage v. Bulger* (Ky.) 717.

Where facts were such that a verdict for defendant should have been directed, a judgment for him is not subject to reversal because of error in instructions.—*Fehlauer v. City of St. Louis* (Mo. Sup.) 843.

In an action for wrongful death, under Gen. St. Kan. 1889, par. 4518, in view of the verdict, and Rev. St. Mo. 1899, § 865, an instruction on the amount of damages that might be recovered *held* not reversible error.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

Any error in an instruction as to the care required of a storekeeper to keep the premises safe *held* harmless, where the facts required to be found that plaintiff may recover show defendants used no care.—*Kean v. Schoening* (Mo. App.) 335.

Instruction in action for damages from a nuisance, submitting grounds of recovery not sup-

ported by evidence, *held* prejudicial error.—*Danker v. Goodwin Mfg. Co.* (Mo. App.) 338.

Where a verdict for defendant specifically stated that it was under a certain subdivision of the charge, error in other subdivisions *held* harmless.—*First Nat. Bank v. San Antonio & A. P. R. Co.* (Tex. Sup.) 410.

Use of "reasonable and prudent person," instead of "reasonably prudent person," in a charge defining negligence, in an action against a carrier for negligent injury to live stock, *held* harmless error.—*St. Louis Southwestern Ry. Co. v. Smith* (Tex. Civ. App.) 28.

In action against street railway for injuries, owing to plaintiff's horse having been frightened, instruction *held* prejudicial error as not authorized by the evidence.—*Romine v. San Antonio Traction Co.* (Tex. Civ. App.) 35.

On issue as to existence of partnership, an instruction on implied partnership *held* not ground for complaint.—*Avocato v. Dell 'Ara* (Tex. Civ. App.) 47.

In an action against a railroad company for personal injuries, giving an erroneous instruction *held* harmless.—*Galveston, H. & S. A. Ry. Co. v. Fales* (Tex. Civ. App.) 234.

Charge, in action against a surety on note, that payment of interest in advance is *prima facie*, and not conclusive, evidence of an agreement to extend the note, *held* harmless error.—*Guerquin v. Boone* (Tex. Civ. App.) 630.

§ 21. — Harmless error in findings by court or referee.

The court on appeal will not disturb a decree for an error in allowing a building association to charge a borrowing member with monthly interest on the loan at the sum of \$8.34, while the correct amount was \$8.33½.—*Kittredge v. Chillicothe Loan & Building Ass'n* (Mo. App.) 147.

Under Rev. St. 1899, § 695, providing that, when requested by a party, "the court shall state in writing the conclusions of fact found separately from the conclusions of law," *held* not to entitle party making such request to predicate reversible error on omitted finding, which the court might have made.—*Redmond v. Missouri, K. & T. Ry. Co.* (Mo. App.) 768.

§ 22. — Harmless error in judgment or order.

The maker of a note sued on *held* not prejudiced by failure of commissioner to allow credit on such note by certain usury, which was exceeded by amount of maker's overdraft due plaintiff bank.—*Lee v. Grant County Deposit Bank* (Ky.) 374.

The rendering of judgment for plaintiff's attorney for half the amount recovered, assigned to him as a contingent fee, was no predicate for reversal at the complaint of defendant.—*Gulf, C. & S. F. Ry. Co. v. Cooper* (Tex. Civ. App.) 263.

§ 23. — Harmless error in proceedings after judgment.

Execution in replevin in favor of defendant *held* not objectionable because requiring the sheriff to take property from plaintiff and deliver it to defendant.—*Koelling v. August Gast Bank Note & Lithographing Co.* (Mo. App.) 474.

Refusal of court to order stenographer to transcribe notes taken on trial, that party might make up statement of facts, *held* not prejudicial.—*Allen v. Hazzard* (Tex. Civ. App.) 268.

§ 24. Determination and disposition of cause.

Where a deed has been construed on appeal, such construction constitutes the law of the case.—*Ashcraft v. Cox* (Ky.) 718.

Where it had been previously held on appeal that a foreign assignment of a debtor's property to his creditor did not operate as a general assignment in Kentucky as to Kentucky property, it was error for the court, on retrial, as against nonresident creditors, to hold that such foreign assignment was void as a fraudulent preference, etc.—*Bank of Commerce's Receivers v. Windmuller* (Ky.) 1103.

After reversing a judgment for damages for slander, the Court of Appeals has no jurisdiction to order a remittitur of the excessive portion of the recovery.—*Irvine v. Gibson* (Ky.) 1106.

Where it is held that defendant owed no legal duty to plaintiff, the case, on reversing judgment for plaintiff, will not be remanded.—*Sykes v. St. Louis & S. F. R. Co.* (Mo. Sup.) 723.

Error in an instruction in an action for personal injury as to recovery for expense of a physician *held* harmless.—*Hannon v. St. Louis Transit Co.* (Mo. App.) 158.

Under Rev. St. 1895, art. 1027, Court of Civil Appeals, on reversal, *held* to have power to enter judgment demanded by evidence, notwithstanding limitation on trial court's power contained in article 1335.—*Heune & Meyer v. Moultrie* (Tex. Sup.) 607.

Where a cause has been tried by a court, and conclusions of fact filed, the judgment can be reformed on appeal, and such judgment rendered as the record shows proper.—*Jackson v. Jernigan* (Tex. Civ. App.) 271.

The findings of fact, which it is the duty of the Court of Civil Appeals to make, cover only conclusions from the evidence, and not the evidence itself.—*Maney v. Eyres* (Tex. Civ. App.) 969.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," §§ 3, 9, 10.

APPLICATION.

For continuance in criminal prosecution, see "Criminal Law," § 11.

For new trial in criminal prosecution, see "Criminal Law," § 20.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.

Of highway officers, see "Highways," § 2.

Of receiver in foreclosure proceedings, see "Mortgages," § 3.

Of receiver of corporation, see "Corporations," § 4.

APPORTIONMENT.

Of costs, see "Costs," § 1.

Of expenses of public improvements, see "Municipal Corporations," § 6.

APPROPRIATION.

Of water rights in general, see "Waters and Water Courses," § 3.

APPROVAL.

Of ordinance, see "Municipal Corporations," § 3.

ARBITRATION AND AWARD.

See "Reference."

ARGUMENT OF COUNSEL.

In civil actions, see "Trial," § 3.
In criminal prosecutions, see "Criminal Law," § 16.

ARREST.

See "Bail."
Homicide while resisting, see "Homicide," §§ 4, 7.
Illegal arrest, see "False Imprisonment."

ARREST OF JUDGMENT.

In criminal prosecutions, see "Criminal Law," § 20.

ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide," § 8.
Assault with intent to rape, see "Rape," § 2.
Former jeopardy, see "Criminal Law," § 5.
Liability of carrier for assault on passenger, see "Carriers," § 5.

§ 1. Civil Liability.

Passenger in a street car *held* entitled to a charge on exemplary damages, in action against carrier for assault.—*Ickenroth v. St. Louis Transit Co.* (Mo. App.) 162.

In action for assault, punitive damages allowed, if assault is malicious or brutal.—*Ickenroth v. St. Louis Transit Co.* (Mo. App.) 162.

Passenger in a street car, injured by conductor, using force sufficient to repel assault, *held* not entitled to damages in action against the carrier for assault.—*Ickenroth v. St. Louis Transit Co.* (Mo. App.) 162.

Passenger in a street car, ejected by the conductor, using only such force as necessary, *held* not entitled to damages in action against the carrier.—*Ickenroth v. St. Louis Transit Co.* (Mo. App.) 162.

Passenger on a street car, expelled by conductor, using more force than necessary, *held* entitled to damages for assault in action against carrier.—*Ickenroth v. St. Louis Transit Co.* (Mo. App.) 162.

Malice *held* to be the intentional doing of a wrong act without just cause or excuse.—*Ickenroth v. St. Louis Transit Co.* (Mo. App.) 162.

§ 2. Criminal responsibility.

Evidence *held* sufficient to support conviction of assault.—*State v. Sayman* (Mo. App.) 337.

On prosecution for aggravated assault with a deadly weapon, defendant *held* entitled to a charge on self-defense.—*McCardell v. State* (Tex. Cr. App.) 446.

In prosecution for assault with a deadly weapon, admission of evidence that railroad hands, of which parties were a part, were in the habit of "hurrahing one another and throwing knives at each other," *held* error.—*McCardell v. State* (Tex. Cr. App.) 446.

Facts *held* to show correction of a child by a parent moderately done, excepted from the statute as to aggravated assault.—*Goode v. State* (Tex. Cr. App.) 799.

ASSESSMENT.

Of damages, see "Damages," § 4.
Of expenses of public improvements, see "Drains," § 1; "Municipal Corporations," § 6.
Of loss on insured, see "Insurance," § 8.
Of tax, see "Taxation," § 5.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 7; "Criminal Law," §§ 21-24.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."
Fraud as to creditors, see "Fraudulent Conveyances."

Transfers of particular species of property, rights, or instruments.

See "Bills and Notes," § 3; "Chattel Mortgages," § 4.

Insurance policy, see "Insurance," § 8.

§ 1. Requisites and validity.

Contract for the sale of cattle *held* not assignable by vendor.—*Houssels v. Jacobs* (Mo. Sup.) 857.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy."

§ 1. Rights and remedies of creditors.

Compensation of assignee for benefit of creditors in joint deed of assignment *held* properly payable out of one estate.—*Dunlap v. Fible & Crabb Distilling Co.* (Ky.) 173.

§ 2. Accounting, settlement, and discharge of assignee.

Services of assignee for benefit of creditors *held* to warrant \$2,400 compensation.—*Dunlap v. Fible & Crabb Distilling Co.* (Ky.) 173.

ASSOCIATIONS.

See "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 8.

ASSUMPSIT, ACTION OF.

See "Work and Labor."

ASSUMPTION.

Of risk by employé, see "Master and Servant," §§ 7, 10.

ATTACHMENT.

See "Execution"; "Garnishment"; "Sequestration."

Exemptions, see "Exemptions"; "Homestead."

§ 1. Quashing, vacating, dissolution, or abandonment.

Where an attachment bond was not in double the amount sued for, the court erred in denying a motion to quash the writ of attachment and in foreclosing the attachment lien on the property involved.—*Zachariae v. Swanson* (Tex. Civ. App.) 627.

§ 2. Claims by third persons.

Mortgagor of chattels *held* to have no general or special property therein, as against attaching creditor of mortgagee, after default in payment of installment notes.—*Connersville Buggy Co. v. Lowry* (Mo. App.) 771.

Mortgagor of chattels *held* not entitled to show, as against attaching creditor of mortgagee, that mortgage note had been transferred to and was owned by another than the defendant mortgagee.—*Connersville Buggy Co. v. Lowry* (Mo. App.) 771.

§ 3. Wrongful attachment.

Owner, remaining in actual possession of property levied on under void process, *held* only entitled to nominal damages under allegation of value of property.—*Low v. NeSmith* (Tex. Civ. App.) 32.

Owner of property levied on under void process, instructed not to use same, *held* entitled to recover value of its use during detention.—*Low v. NeSmith* (Tex. Civ. App.) 32.

ATTENDANCE.

Of witness, see "Witnesses," § 1.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 3.

Arguments and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 16.

Attorneys as public officers, see "District and Prosecuting Attorneys."

Attorney's fees in garnishment proceedings, see "Garnishment," § 2.

Attorney's fees on accounting by guardian, see "Guardian and Ward," § 3.

Attorney's fees on accounting by receiver, see "Receivers."

Attorneys in fact, see "Principal and Agent." Authority to call in special judge in disbarment proceedings, see "Judges," § 1.

Disclosure of privileged communications between, see "Witnesses," § 4.

Harmless error in arguments and conduct of counsel, see "Criminal Law," § 24.

Necessity of exceptions or objections to arguments of counsel for purpose of review, see "Criminal Law," § 22.

§ 1. Compensation and lien of attorney.

Defendants *held* absolved by plaintiff's conduct from further obligation to pay certain costs of a suit brought by them as plaintiff's attorneys to clear title to the latter's land.—*Cahill v. Dickson* (Tex. Civ. App.) 281.

Evidence *held* to show a sufficient consideration to support an agreement whereby plaintiff's attorneys were to conduct on his behalf a suit to recover title to certain land, and to advance costs, etc., therein, in consideration of plaintiff's conveying to them a portion of the land recovered in accordance with a prior agreement.—*Cahill v. Dickson* (Tex. Civ. App.) 281.

An attorney, whose services brought about a judgment in garnishment against a garnishee, has no lien on the fund for an amount due from his clients, under a contract made after clients' right had attached by virtue of the garnishment.—*Raley v. Hancock* (Tex. Civ. App.) 658.

Attorneys whose services secured a judgment *held* to have no lien for their agreed compensation on a fund recovered from a bank in garnishment based on such judgment.—*Raley v. Hancock* (Tex. Civ. App.) 658.

AUTHORITY.

Of agent, see "Principal and Agent," § 2.

AUTOMOBILES.

Use of on highway, see "Highways," § 4.

BAGGAGE.

Of passenger, see "Carriers," § 9.

BAIL.**§ 1. In criminal prosecutions.**

Recognition on appeal from dismissal of appeal by county court from conviction by justice *held* insufficient.—*Buck v. State* (Tex. Cr. App.) 12.

Under Code Cr. Proc. 1895, art. 887, recognition on appeal from a misdemeanor *held* insufficient to support the appeal.—*Cater v. State* (Tex. Cr. App.) 12.

White's Ann. Code Cr. Proc. 1895, art. 295, relating to the requirement of additional bail, does not authorize such a requirement after indictment found.—*Jenkins v. State* (Tex. Cr. App.) 224.

An appeal in a criminal case will be dismissed, where the recognition omits the concluding phrase "in this case," as required by Code Cr. Proc. 1895, art. 887.—*Armstrong v. State* (Tex. Cr. App.) 446.

BAILMENT.

See "Banks and Banking," § 1; "Carriers," § 2; "Pledges."

Embezzlement or larceny by bailee, see "Embezzlement."

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

§ 1. Assignment, administration, and distribution of bankrupt's estate.

Property of a bankrupt, purchased before the institution of proceedings in bankruptcy, is no part of the bankrupt's estate.—*Hall v. Keating Implement & Machine Co.* (Tex. Civ. App.) 1054.

Provision of bankruptcy act invalidating liens invalid against creditors *held* not to avoid unrecorded chattel mortgage.—*Hall v. Keating Implement & Machine Co.* (Tex. Civ. App.) 1054.

§ 2. Rights, remedies, and discharge of bankrupt.

In action against bankrupt to recover claim included in his discharge, evidence *held* to show that he had unconditionally promised to pay the debt.—*Brooks v. Paine* (Ky.) 190.

The fact that one discharged in bankruptcy has conditionally promised to pay a debt included in the discharge cannot prevent a recovery on a clear promise to pay.—*Brooks v. Paine* (Ky.) 190.

A widow *held* entitled to dower in land which her husband conveyed by his sole deed to his assignee in bankruptcy; she receiving nothing in satisfaction of her potential right of dower.—*Cravens v. Shippen* (Ky.) 929.

Notice to an agent, or actual knowledge on his part, of proceedings in bankruptcy, constitutes notice or knowledge of the principal.—*Atkinson v. Elmore* (Mo. App.) 492.

In action on notes against discharged bankrupt, evidence *held* sufficient to show knowledge of proceedings in bankruptcy, so as to bar the notes, under Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428].—*Atkinson v. Elmore* (Mo. App.) 492.

BANKS AND BANKING.

Bank as pledgee of goods on which it had made advancements on bill of lading, see "Pledges."

§ 1. Functions and dealings.

Bank *held* justified in applying to the satisfaction of a personal note funds deposited in the bank to the credit of the depositor "as ad-

ministrator."—*Sparrow v. State Exch. Bank* (Mo. App.) 168.

Payment of check, merely stamped with the name of the depositor, *held* admissible to show negligence of the bank, which paid forged checks, though the money drawn on this check was received by the depositor.—*Kenneth Inv. Co. v. National Bank of the Republic* (Mo. App.) 1002.

A bank depositor is not bound by the examination of its pass book, nor to be treated as though it had made none, where its clerk, to whom it intrusts such duty, had forged checks which had been paid, if ordinary care was used in selecting the clerk.—*Kenneth Inv. Co. v. National Bank of the Republic* (Mo. App.) 1002.

Ten days cannot be arbitrarily fixed as sufficient time under all circumstances for a bank depositor to examine his pass book after it has been balanced and returned to him with canceled vouchers.—*Kenneth Inv. Co. v. National Bank of the Republic* (Mo. App.) 1002.

Evidence considered, and *held* to show that, at the time a bank accepted the deposit of funds by certain factors, the bank's officers knew the factors were insolvent.—*Interstate Nat. Bank v. Claxton* (Tex. Civ. App.) 44.

Evidence considered, and *held* sufficient to put a bank on inquiry, at the time it accepted a deposit of certain factors, whether the fund belonged to the factors or to their principal.—*Interstate Nat. Bank v. Claxton* (Tex. Civ. App.) 44.

Bank accepting deposit of trust fund *held* liable to true owner, where he sustains loss thereof by act of bank.—*Interstate Nat. Bank v. Claxton* (Tex. Civ. App.) 44.

BAR.

Of action by former adjudication, see "Judgment," § 6.

Of action by limitation, see "Limitation of Actions," § 4.

BATTERY.

See "Assault and Battery."

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 8.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 5.

BETTING.

See "Gaming."

BIAS.

Of juror, see "Jury," § 2.

Of witness, see "Witnesses," § 8.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF LADING.

See "Carriers," § 2.

BILLS AND NOTES.

Discharge by discharge in bankruptcy, see "Bankruptcy," § 2.

Harmless error in admission of evidence in action on note, see "Appeal and Error," § 17. Harmless error in judgment in action on note, see "Appeal and Error," § 22.

Indorsement of negotiable instruments by corporations, see "Corporations," § 3.

Liability of surety, see "Principal and Surety," § 2.

Negotiability and transfer of bills of lading, see "Carriers," § 2.

Parol or extrinsic evidence, see "Evidence," § 10.

§ 1. Requisites and validity.

Where the maker of a mortgage note executed it on representations of the payee's agent that she was assuming no personal liability, the payee is not entitled, after foreclosure, to enforce the note against the maker personally.—*Merchants' & Farmers' Bank v. Cleland* (Ky.) 176, 719.

§ 2. Modification, renewal, and rescission.

The makers of a note are released from liability, and with them the indorser, where without their knowledge or consent the holder grants an extension to the person who had assumed payment of it.—*Laumeier v. Hallock* (Mo. App.) 347.

A forbearance to sue on a note, in the absence of an agreement by the payee not to do so, does not amount to an extension of time for payment of the note.—*Guerquin v. Boone* (Tex. Civ. App.) 630.

§ 3. Rights and liabilities on indorsement or transfer.

Where the assignor of a note assured the holders that he would have it paid or secured, thereby causing the holders to postpone suit on the note, he could not rely on their delay to escape liability.—*Smallhouse v. American Nat. Bank* (Ky.) 1118.

Facts *held* not to charge holder of note with knowledge of purpose for which it had been delivered to his transferee.—*Wright Inv. Co. v. Frisco Realty Co.* (Mo. Sup.) 296.

§ 4. Presentment, demand, notice, and protest.

An indorser of a note *held* not to waive demand and protest, by procuring an extension, as agent of the person who had assumed payment.—*Laumeier v. Hallock* (Mo. App.) 347.

§ 5. Actions.

In an action on a mortgage note, evidence *held* to show that the maker executed the note and mortgage under the belief, induced by the payee, that she assumed no personal responsibility.—*Merchants' & Farmers' Bank v. Cleland* (Ky.) 176, 719.

In an action on a note, evidence *held* sufficient to justify a dismissal of the petition on the ground that the note sued on was one which had been paid by the execution of a new note.—*Moore v. Potter* (Ky.) 367.

Evidence considered, and *held* sufficient to sustain finding that the maker of a note was entitled to credits not indorsed.—*Barrickman's Adm'r v. Barrickman* (Ky.) 685.

In action on notes, where the defense was forgery, evidence *held* sufficient to sustain a verdict for plaintiff (Rev. St. 1899, § 4679).—*Sanders v. North End Building & Loan Ass'n* (Mo. Sup.) 833.

In an action on a note, where the answer sets up a counterclaim based on fraud, defendant must prove that plaintiff's representations were false and that he knew it.—*Halliwell Cement Co. v. Stewart* (Mo. App.) 124.

The mere fact that a note, not payable to bearer, and not indorsed, is found among the effects of a decedent, who was not the payee, raises no presumption that he was the owner.—*Hair v. Edwards* (Mo. App.) 1089.

Evidence in a suit on notes *held* sufficient to establish an extension of time.—*Bitter v. Butchers' & Saloon Men's Ice Mfg. Ass'n* (Tex. Civ. App.) 423.

Evidence *held* admissible to show extension of note.—*Bitter v. Butchers' & Saloon Men's Ice Mfg. Ass'n* (Tex. Civ. App.) 423.

BONA FIDE PURCHASERS.

At execution sale, see "Execution," § 1.
Of bill of exchange or promissory note, see "Bills and Notes," § 3.
Of realty, see "Vendor and Purchaser," § 5.

BONDS.

Liquors dealers' bonds, see "Intoxicating Liquors," § 3.
Municipal bonds, see "Municipal Corporations," § 10.
Sureties on bonds, see "Principal and Surety."
Bonds for performance of duties of trust or office.
See "Guardian and Ward," § 4; "Notaries."

Bonds in legal proceedings.

See "Appeal and Error," § 3; "Bail."
Appeal from justice's court, see "Justices of the Peace," § 2.
Appeal in criminal prosecutions, see "Criminal Law," §§ 21-24.

BOUNDARIES.

See "Counties," § 1; "Municipal Corporations," § 1; "Schools and School Districts," § 1.
Stipulations in proceedings to establish, see "Stipulations."

§ 1. Evidence, ascertainment, and establishment.

The conflict between plaintiffs' and defendant's survey *held* so great as to charge plaintiffs with notice thereof.—*Bryant v. Main* (Ky.) 680.

Oral agreement for dividing line, made by father for himself and children, *held*, after a lapse of 34 years, binding on children and their vendees.—*Campbell v. Combs* (Ky.) 923.

In an action to establish a boundary, the burden of establishing the defense of limitations is on the defendant.—*Sloan v. King* (Tex. Civ. App.) 48.

A latent ambiguity in the description in a deed may be corrected in a suit to establish a boundary, without resort to equity.—*Sloan v. King* (Tex. Civ. App.) 48.

BREACH.

Of condition, see "Insurance," § 4.
Of contract, see "Contracts," § 5; "Sales," § 4; "Vendor and Purchaser," § 4.
Of covenant, see "Covenants," § 2.
Of warranty, see "Sales," §§ 6, 8.

BRIBERY.

Charge, in prosecution for attempt to bribe a city officer, under Rev. St. 1899, § 2089, defining the offense, *held* to show claim of state that the jury found as a fact that the offer was made after the ordinance on which the indictment was predicated was approved was without merit.—*State v. Butler* (Mo. Sup.) 560.

Burden, in prosecution for attempt to bribe city officer, under Rev. St. 1899, § 2089, defining the offense, *held* to be on state to show beyond a reasonable doubt that the offer to bribe was made after the ordinance on which the indictment was predicated went into effect.—*State v. Butler* (Mo. Sup.) 560.

Verdict of guilty in prosecution for attempt to bribe a city officer, under Rev. St. 1899, § 2089, defining the offense, *held* not sustained on proof by the state that the offer was made on or before the day preceding that on which the law became effective.—*State v. Butler* (Mo. Sup.) 560.

An indictment for attempt to bribe a city officer *held* not predicable on Rev. St. 1899, § 2089, defining such offense.—*State v. Butler* (Mo. Sup.) 560.

Under Rev. St. 1899, § 2089, declaring that every person who shall offer to give money to any city officer to influence his vote on any question which may "by law" be brought before him, *held* to mean a law then effective.—*State v. Butler* (Mo. Sup.) 560.

Offer of money to city officer to influence his vote on letting of contract *held* not to constitute attempt to bribe, within Rev. St. 1899, §§ 2084, 2089, defining bribery and attempt to bribe.—*State v. Butler* (Mo. Sup.) 560.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 8.

BROKERS.

See "Factors"; "Principal and Agent."
Examination of witnesses in action for breach of contract, see "Witnesses," § 5.

§ 1. Compensation and lien.

In an action originating in the circuit court to recover on contract for commission for sale of real estate, *held* no recovery can be had on quantum meruit.—*McDonnell v. Stephens* (Mo. App.) 766.

Real estate broker *held* not entitled to commissions under a contract.—*Shinn v. Boyd* (Tex. Civ. App.) 1027.

§ 2. Actions for compensation.

In an action by broker for commissions, evidence *held* to justify a verdict for plaintiff.—*Brown & Bro. v. Lapp* (Ky.) 194.

In real estate broker's action for commissions, instruction that, if he was trying to sell land, etc., they should find for him, *held* not warranted by pleading.—*Yarborough v. Creager* (Tex. Civ. App.) 645.

In real estate broker's action for commissions, submission to jury of existence of contracts between landowner and other agents *held* error.—*Yarborough v. Creager* (Tex. Civ. App.) 645.

Fact of having advertised land *held* provable by real estate broker's testimony in his action for commissions.—*Yarborough v. Creager* (Tex. Civ. App.) 645.

Petition of real estate broker suing for commissions *held* sufficient.—*Yarborough v. Creager* (Tex. Civ. App.) 645.

§ 3. Rights, powers, and liabilities as to third persons.

Brokers, authorized to sell oil for a manufacturer, *held* to have implied authority to stipulate the quantity that the seller should put into tank cars, in which the oil was to be delivered.—*Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Tex. Civ. App.) 961.

BUCKET SHOPS.

See "Gaming," § 1.

BUILDING AND LOAN ASSOCIATIONS.

Compromise between association and member, see "Compromise and Settlement."

Where one surrenders his stock in a building association for credit on its loan to him, its value is determined by the association's then assets and liabilities.—*Peat v. Citizens' Building & Loan Ass'n's Assignee* (Ky.) 932.

Where a premium paid a building and loan association for a loan is the result of competitive bidding, resulting in the fixing of the premium in excess of that fixed by the association itself, the premium is not usurious.—*Kittredge v. Chillicothe Loan & Building Ass'n* (Mo. App.) 147.

A minimum premium fixed by a building and loan association for a loan to any member is usurious.—*Kittredge v. Chillicothe Loan & Building Ass'n* (Mo. App.) 147.

A borrowing member of a building association held to have impliedly consented to the proposition that the association would thereafter withhold one-half of the premiums paid.—*Kittredge v. Chillicothe Loan & Building Ass'n* (Mo. App.) 147.

A borrowing member of a building association held estopped from complaining of the retention of premiums by the association.—*Kittredge v. Chillicothe Loan & Building Ass'n* (Mo. App.) 147.

BUILDING CONTRACTS.

Abandonment of, see "Contracts," § 5.

Consideration of, see "Contracts," § 1.

Rescission of, see "Contracts," § 4.

Time for performance of, see "Contracts," § 2.

BUILDING REGULATIONS.

See "Municipal Corporations," § 7.

BUILDINGS.

Discriminatory execution of ordinances relating to issuance of building permits as denial of equal protection of laws, see "Constitutional Law," § 7.

BURDEN OF PROOF.

In civil actions, see "Evidence," § 3.

BURGLARY.

Arguments and conduct of counsel, see "Criminal Law," § 16.

Character of witnesses, see "Witnesses," § 7.

Continuance, see "Criminal Law," § 11.

Harmless error in arguments and conduct of counsel, see "Criminal Law," § 24.

Parties, see "Criminal Law," § 2.

Province of court and jury, see "Criminal Law," § 17.

§ 1. Offenses and responsibility therefor.

Unlocking the door of a house with intent to steal personal property contained therein is burglary.—*State v. Peebles* (Mo. Sup.) 518.

§ 2. Prosecution and punishment.

In a prosecution for burglary, or burglary and larceny, the breaking and entry may be shown by circumstantial evidence.—*State v. Peebles* (Mo. Sup.) 518.

In a prosecution for burglary, proof of breaking, entry, and taking away the property against the will of the owner justifies an inference that the opening of a door to the house was with

criminal intent to steal.—*State v. Peebles* (Mo. Sup.) 518.

In a prosecution for burglary, variance between information and charge held not fatal.—*State v. Peebles* (Mo. Sup.) 518.

An indictment charging day burglary and night burglary in separate counts held proper.—*Miller v. State* (Tex. Cr. App.) 800.

The indictment charging day burglary and night burglary, and the evidence justifying a finding of day burglary, the general verdict will be attributed to the count charging it.—*Miller v. State* (Tex. Cr. App.) 800.

Evidence held to justify a conviction of day burglary.—*Miller v. State* (Tex. Cr. App.) 800.

In a prosecution for burglary, testimony that witness told her husband where she put money in question held properly admitted.—*Washington v. State* (Tex. Cr. App.) 810.

In a prosecution for burglary, evidence as to condition of house immediately after the burglary held admissible.—*Washington v. State* (Tex. Cr. App.) 810.

BY-LAWS.

Of insurance association, see "Insurance," § 8.

CANCELLATION OF INSTRUMENTS.

See "Quieting Title"; "Reformation of Instruments."

Cancellation of deeds, see "Deeds," § 1.

Rescission of contracts, see "Contracts," § 4;

"Sales," § 3; "Vendor and Purchaser," § 3.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CARGO.

See "Shipping."

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

Admissions in pleadings in action for injuries to live stock in carriage, see "Evidence," § 6. Alder by verdict in action for injuries to passenger, see "Pleading," § 9.

Ejection of passenger as constituting assault, see "Assault and Battery," § 1.

Excessive damages for injuries to passenger, see "Damages," § 3.

Harmless error in admission of evidence in action for injuries to passengers, see "Appeal and Error," § 17.

Harmless error in instructions in action for injuries to live stock in carriage, see "Appeal and Error," § 20.

Health regulations affecting, see "Health," § 1.

Hearsay in action for injuries to live stock in carriage, see "Evidence," § 8.

Imputed negligence of passenger, see "Negligence," § 2.

Opinion evidence in action for injuries to passengers, see "Evidence," § 11.

Prohibition against limitation of liability as regulation of interstate commerce, see "Commerce," § 1.

§ 1. Control and regulation of common carriers.

Shipment of freight to a point not on a railroad held a through shipment, not in violation of Const. § 215, prohibiting discrimination in rates.—*Southern Ry. Co. v. Commonwealth* (Ky.) 207.

Const. § 215, held not to prohibit a railroad company from charging a through freight rate

less than the sum of the local rates between two points.—*Southern Ry. Co. v. Commonwealth (Ky.)* 207.

§ 2. Carriage of goods.

It is the duty of a consignee to use ordinary care to ascertain the cause of the delay in the transportation of a shipment.—*Louisville & C. Packet Co. v. Bottorff (Ky.)* 920.

It is the duty of a consignee of a machine to use ordinary care in obtaining another machine, where the one shipped is delayed in transportation.—*Louisville & C. Packet Co. v. Bottorff (Ky.)* 920.

It is the duty of a consignee to use ordinary care to remove the cause of the delay in the transportation of a shipment.—*Louisville & C. Packet Co. v. Bottorff (Ky.)* 920.

Rule for measure of damages for negligent delay of carrier in delivery of a machine stated.—*Louisville & C. Packet Co. v. Bottorff (Ky.)* 920.

Evidence considered, in action against a carrier for negligent delay in delivery of a machine, and *held* sufficient to sustain verdict for plaintiff for \$250.—*Louisville & C. Packet Co. v. Bottorff (Ky.)* 920.

A carrier is responsible for damages for negligent delay in delivery of a machine only on the ground of unreasonable delay in delivering it, after prepayment of the freight, when prepayment may be required by the carrier.—*Louisville & C. Packet Co. v. Bottorff (Ky.)* 920.

In conversion against a carrier, evidence *held* to sufficiently show the value of the goods converted.—*First Nat. Bank v. San Antonio & A. P. R. Co. (Tex. Sup.)* 410.

Refusal of carrier to deliver goods to pledgee of bill of lading, except on surrender of that instrument, *held* conversion.—*First Nat. Bank v. San Antonio & A. P. R. Co. (Tex. Sup.)* 410.

Bank furnishing money to purchasers of cotton to pay drafts attached to bill of lading *held* entitled to a lien on the cotton, on delivery of the bills of lading after payment of the draft by the purchaser of the cotton.—*First Nat. Bank v. San Antonio & A. P. R. Co. (Tex. Sup.)* 410.

Under *Sayles' Civ. St. 1897*, art. 4497, *held* that, where one applied for "stable cars" for the shipment of cattle, the railroad was not required to furnish them.—*Texas & P. Ry. Co. v. Barrow (Tex. Civ. App.)* 643.

Where a shipper demanded "stable cars" for shipment of cattle, they not being the only suitable cars, the railroad *held* not required, under *Sayles' Civ. St. 1897*, art. 4497, to furnish other suitable cars.—*Texas & P. Ry. Co. v. Barrow (Tex. Civ. App.)* 643.

Demand by a shipper on railroad company for cars *held* not to have amounted to "written demand," within *Sayles' Civ. St. 1897*, art. 4497.—*Texas & P. Ry. Co. v. Barrow (Tex. Civ. App.)* 643.

The fact that a railroad company failed to deliver a shipper stable cars, as contracted for, *held* not to warrant recovery by shipper of penalty imposed by *Sayles' Civ. St. 1897*, art. 4497.—*Texas & P. Ry. Co. v. Barrow (Tex. Civ. App.)* 643.

§ 3. Carriage of live stock.

In an action against a carrier for negligence in transportation of cattle, carrier *held* not jointly liable for the negligence of connecting carriers.—*International & G. N. R. Co. v. Startz (Tex. Sup.)* 1.

Charge in an action against carrier for negligent injury to live stock on effect of evidence *held* error.—*St. Louis Southwestern Ry. Co. v. Smith (Tex. Civ. App.)* 28.

Charge in an action against carrier for negligent injury to live stock on assessment of damages *held* error.—*St. Louis Southwestern Ry. Co. v. Smith (Tex. Civ. App.)* 28.

Contract for carriage of cattle, limiting liability to carrier's own line, exempts it from liability for delay on connecting line.—*International & G. N. R. Co. v. Earnest & Bost (Tex. Civ. App.)* 28.

Shipper cannot recover for damages to cattle resulting from shrinkage caused by his putting the cattle in the carrier's pen before the time agreed upon for their departure.—*International & G. N. R. Co. v. Earnest & Bost (Tex. Civ. App.)* 29.

An allegation that a forwarding carrier received and forwarded horses *held* sufficient to fix its obligations.—*St. Louis Southwestern Ry. Co. v. Dolan (Tex. Civ. App.)* 415.

Under *Rev. St. U. S. §§ 4386, 4388 [U. S. Comp. St. 1901, pp. 2995, 2996]*, relating to the duty of railway companies in carrying animals, the question whether a company was negligent in its care of horses *held* to be for the jury.—*St. Louis Southwestern Ry. Co. v. Dolan (Tex. Civ. App.)* 415.

§ 4. Carriage of passengers.

Person crossing railroad track with intention of boarding a train and paying his fare thereon *held* a passenger.—*Albin v. Chicago, R. I. & P. Ry. Co. (Mo. App.)* 153.

A person, entitled to passage on a train between two points, is entitled to the protection of a passenger from the starting point to the usual stopping place at the final destination.—*Hardin v. Ft. Worth & D. C. Ry. Co. (Tex. Civ. App.)* 481.

A passenger, accompanying a shipment of freight, *held* none the less a passenger, on the carrier leaving the car temporarily where it could not be unloaded, and the passenger temporarily leaving the car, but returning to it.—*Hardin v. Ft. Worth & D. C. Ry. Co. (Tex. Civ. App.)* 481.

§ 5. — Personal injuries.

One directed by railroad conductor to assist invalid in getting on train *held* entitled to rely on conductor's assurance that time would be given him to alight, and it was conductor's duty to delay train a reasonable time for that purpose.—*Bishop v. Illinois Cent. R. Co. (Ky.)* 1099.

Where a conductor knew that a person had entered a train to assist an invalid, it was his duty to use ordinary care to ascertain whether he had gotten off before the train started.—*Bishop v. Illinois Cent. R. Co. (Ky.)* 1099.

A street car company, assuming to carry a passenger in a dangerous position, *held* required to observe the requisite degree of care for his safety.—*Parks v. St. Louis & S. Ry. Co. (Mo. Sup.)* 70.

Carrying street car passenger beyond destination *held* not proximate cause of injury received while returning.—*Haley v. St. Louis Transit Co. (Mo. Sup.)* 731.

Evidence in an action by a passenger on a street car for being thrown therefrom by a lurch thereof *held* sufficient to authorize a finding of negligence.—*Ilges v. St. Louis Transit Co. (Mo. App.)* 98.

Running past a street crossing is not the proximate cause of injury to a street car passenger, hurt in an attempt to alight.—*Lynch v. St. Louis Transit Co. (Mo. App.)* 100.

Street car company *held* not negligent in selecting place for passenger to alight.—*Lynch v. St. Louis Transit Co. (Mo. App.)* 100.

A street railway company, in the management of its cars and the care of its tracks

owes to its passenger that high degree of care and foresight which skillful railroad men would exercise.—*Heyde v. St. Louis Transit Co. (Mo. App.)* 127.

Street railroad *held* liable, where passenger was injured by conductor assaulting him.—*Strauss v. St. Louis Transit Co. (Mo. App.)* 156.

Where a passenger on a street car has a young girl with her, extra time should be allowed her in alighting.—*Hannon v. St. Louis Transit Co. (Mo. App.)* 158.

A passenger's contract for carriage on an electric car covers the period needed for safely alighting therefrom, during which she is entitled to be shown the highest degree of care.—*Fillingham v. St. Louis Transit Co. (Mo. App.)* 314.

Instruction, in action for personal injuries, requiring carrier to use highest degree of care, *held* not error.—*Tillman v. St. Louis Transit Co. (Mo. App.)* 320.

It is the duty of a railroad company to furnish comfortable waiting rooms at its depots.—*Missouri, K. & T. Ry. Co. v. McCutcheon (Tex. Civ. App.)* 232.

Railroad's duty to alighting passenger, when he has been given reasonable time to alight, is to use ordinary care only not to injure him.—*St. Louis Southwestern Ry. Co. of Texas v. Turner (Tex. Civ. App.)* 255.

A carrier *held* not relieved from exercising the utmost care in the operation of a freight train for the safety of a passenger thereon.—*Hardin v. Ft. Worth & D. C. Ry. Co. (Tex. Civ. App.)* 431.

Where a train is derailed, injuring a passenger, by collision with cattle, evidence that the right of way fence there was so defective as not to prevent cattle coming through *held* admissible.—*International & G. N. R. Co. v. Thompson (Tex. Civ. App.)* 439.

The fact that plaintiff's wife was cold when entering unwarmed depot *held* not to prevent recovery for suffering thereafter resulting through such unwarmed condition.—*Texas Midland R. R. v. Little (Tex. Civ. App.)* 958.

Degree of care on part of carrier of passengers defined.—*Houston Electric Co. v. Nelson (Tex. Civ. App.)* 978.

Carrier, negligently furnishing unwarmed car, *held* liable for injury to passenger while car was being carried by connecting line.—*Missouri, K. & T. Ry. Co. v. Harrison (Tex. Civ. App.)* 1036.

Carrier, negligently furnishing unwarmed car, *held* not relieved by contractual stipulation from liability for injury to passenger while car was being carried by connecting line.—*Missouri, K. & T. Ry. Co. v. Harrison (Tex. Civ. App.)* 1036.

§ 6. — Actions for personal injuries.

Where the evidence was conflicting, the speed of the train from which plaintiff alighted was for the jury.—*Bishop v. Illinois Cent. R. Co. (Ky.)* 1099.

In action against railroad for injuries to person alighting from train, evidence examined, and *held* to raise question for jury as to conductor's knowledge of plaintiff's purpose in boarding, and whether he had alighted.—*Bishop v. Illinois Cent. R. Co. (Ky.)* 1099.

In an action by a street car passenger for injuries, an instruction *held*, under the evidence, properly refused.—*Parks v. St. Louis & S. Ry. Co. (Mo. Sup.)* 70.

In an action by a street car passenger for injuries, question of the negligence of defendants *held* for the jury.—*Parks v. St. Louis & S. Ry. Co. (Mo. Sup.)* 70.

A charge that the burden is on plaintiff "throughout the case" of proving negligence *held* proper, where contributory negligence is not referred to.—*Peck v. St. Louis Transit Co. (Mo. Sup.)* 736.

An instruction *held* not objectionable as placing stress on the stopping of a car as part of company's act of negligence.—*Peck v. St. Louis Transit Co. (Mo. Sup.)* 736.

Where plaintiff's theory was that a car had stopped, she cannot complain of instructions that, if it had not stopped, defendant was not liable.—*Peck v. St. Louis Transit Co. (Mo. Sup.)* 736.

Where it was proper to instruct that a company was not negligent, unless its car had "stopped," the use of the term "stopped still" *held* proper.—*Peck v. St. Louis Transit Co. (Mo. Sup.)* 736.

The burden *held* not shifted from a passenger to a street car company, on proof of her injury.—*Peck v. St. Louis Transit Co. (Mo. Sup.)* 736.

An instruction as to the duty of a common carrier to a passenger *held* not erroneous, because not defining "highest degree of care."—*Ilges v. St. Louis Transit Co. (Mo. App.)* 93.

In an action by a street car passenger for injuries sustained, the question of defendant's negligence *held* for the jury.—*Heyde v. St. Louis Transit Co. (Mo. App.)* 127.

Where a street car passenger shows that he was free from negligence, and that he was injured by the derailment of a car the company has the burden to show its freedom from negligence.—*Heyde v. St. Louis Transit Co. (Mo. App.)* 127.

An instruction in an action by a street car passenger for injuries sustained *held* within the issues presented by the evidence.—*Heyde v. St. Louis Transit Co. (Mo. App.)* 127.

Pleading and evidence as to time a passenger was allowed for alighting from a street car *held* not to show a variance.—*Hannon v. St. Louis Transit Co. (Mo. App.)* 158.

Petition by a passenger for injuries in alighting from electric car *held* to sufficiently allege that the place was dangerous.—*Fillingham v. St. Louis Transit Co. (Mo. App.)* 314.

Instruction, in action by passenger for injuries, requiring of defendant "utmost care, skill, and vigilance," *held* not ground for reversal.—*Fillingham v. St. Louis Transit Co. (Mo. App.)* 314.

In an action for passenger's injuries, instructions *held* to properly state law of case.—*Robinson v. St. Louis & S. Ry. Co. (Mo. App.)* 493.

Collision of cars is *prima facie* evidence of negligence in passenger's injury action, and shifts burden of proof.—*Robinson v. St. Louis & S. Ry. Co. (Mo. App.)* 493.

The question of a street railway company's negligence in causing an injury *held* to be for the jury.—*Scamell v. St. Louis Transit Co. (Mo. App.)* 1021.

In an action for injuries sustained while being exposed to the cold while in defendant's depot waiting room, evidence of custom of agent to invite persons to come into the office when the weather was cold *held* not admissible as tending to show the state of the weather at the times complained of.—*Missouri, K. & T. Ry. Co. v. McCutcheon (Tex. Civ. App.)* 232.

In an action for injuries caused by the derailling of a train, an instruction to find for plaintiff, if the train was derailed and this was the proximate cause of her injuries, *held* erroneous.—*Galveston, H. & S. A. Ry. Co. v. Fales (Tex. Civ. App.)* 234.

Derailment of a train, injuring a passenger, makes a prima facie case of negligence, which, unless rebutted, entitles him to recover.—*International & G. N. R. Co. v. Thompson* (Tex. Civ. App.) 439.

Instruction on elements of damage, in action for suffering of plaintiff's wife occasioned by defendant railroad company's unwarmed depot held erroneous.—*Texas Midland R. R. v. Little* (Tex. Civ. App.) 858.

A charge in an action against a street railroad for personal injuries caused by a collision held misleading, as warranting a construction that, if the collision and the consequent injury was shown, it established liability, irrespective of other proof.—*Houston Electric Co. v. Nelson* (Tex. Civ. App.) 978.

In an action for injury to a passenger in a street car, alleged to be due to negligence in colliding with a water cart, it was held error to refuse an instruction submitting to the jury in terms the issue of proper care.—*Houston Electric Co. v. Nelson* (Tex. Civ. App.) 978.

Instruction in passenger's action for injury from unwarmed car held not objectionable, as making railroad company insurer of car's condition.—*Missouri, K. & T. Ry. Co. v. Harrison* (Tex. Civ. App.) 1036.

§ 7. — Contributory negligence of person injured.

Whether or not a person alighting from a moving train was negligent in the manner in which he alighted was for the jury.—*Bishop v. Illinois Cent. R. Co.* (Ky.) 1099.

A plea of street car companies, sued by a passenger for injuries, if construed to charge that the injury resulted solely from his voluntary act of riding on the step of the car, held covered by the plea of general denial.—*Parks v. St. Louis & S. Ry. Co.* (Mo. Sup.) 70.

A plea of street car companies, sued by a passenger for injuries, if construed to allege that the passenger's position was obviously so dangerous that the injury could not have been avoided by the company, held defective.—*Parks v. St. Louis & S. Ry. Co.* (Mo. Sup.) 70.

A plea of street car companies, sued by a passenger for injuries, if construed to allege that the passenger's negligent act of riding on the step contributed to his injury, held covered by the plea of contributory negligence.—*Parks v. St. Louis & S. Ry. Co.* (Mo. Sup.) 70.

A street railway passenger never assumes the risk of the company's negligence.—*Parks v. St. Louis & S. Ry. Co.* (Mo. Sup.) 70.

A street car passenger, taking a dangerous position, held required to exercise the care which prudent persons would exercise under similar circumstances.—*Parks v. St. Louis & S. Ry. Co.* (Mo. Sup.) 70.

Passenger, alighting from electric car at unsafe place, held not guilty of contributory negligence.—*Fillingham v. St. Louis Transit Co.* (Mo. App.) 314.

The doctrine of assumption of risk held not to apply to a case of a passenger alighting from electric car at unsafe place.—*Fillingham v. St. Louis Transit Co.* (Mo. App.) 314.

Question of contributory negligence of passenger on street railway held for jury.—*Scamell v. St. Louis Transit Co.* (Mo. App.) 1021.

§ 8. — Ejection of passengers and intruders.

A passenger rightfully on a car held not required to leave without resistance, when directed, where he tenders lawful money for his fare, which is refused as counterfeited.—*Breen v. St. Louis Transit Co.* (Mo. App.) 78.

A passenger in an action against a carrier for a wrongful ejection may not give evidence as

to his character, it not being attacked.—*Breen v. St. Louis Transit Co.* (Mo. App.) 78.

Statement of opinion by a conductor, as ground for refusing money for fare of passenger, that it is counterfeited, held not to affect damages for wrongful ejection of passenger.—*Breen v. St. Louis Transit Co.* (Mo. App.) 78.

Elements of damages for wrongful ejection of passenger stated.—*Breen v. St. Louis Transit Co.* (Mo. App.) 78.

In an action against a street railway company for injuries sustained by a passenger, because of forcible ejection from a car by the conductor, an instruction held not open to the objection that it authorized a recovery on a different cause of action from that stated in the petition.—*Gotwald v. St. Louis Transit Co.* (Mo. App.) 125.

In action against railroad for injuries to passenger arising from forcible ejection from train, an instruction as to the circumstances under which plaintiff might recover held not erroneous.—*Texas & P. Ry. Co. v. Tams* (Tex. Civ. App.) 230.

In action against railroad for injuries to passenger arising from forcible ejection from train, question whether the ejection occurred held one for the jury.—*Texas & P. Ry. Co. v. Tams* (Tex. Civ. App.) 230.

A carrier may eject a disorderly and vicious passenger.—*Atchison, T. & S. F. Ry. Co. v. Wood* (Tex. Civ. App.) 964.

§ 9. — Passengers' effects.

What is a reasonable quantity of baggage for which a carrier should be liable held a question of fact for the jury.—*Galveston, H. & S. A. Ry. Co. v. Fales* (Tex. Civ. App.) 234.

In determining the value of baggage lost by a railroad company, the value of the wearing apparel and articles of daily use carried on the journey are not determinable by the market value of such articles at the point of destination.—*Galveston, H. & S. A. Ry. Co. v. Fales* (Tex. Civ. App.) 234.

The measure of damage for the loss of baggage is the value of the articles at their point of destination.—*Galveston, H. & S. A. Ry. Co. v. Fales* (Tex. Civ. App.) 234.

In the absence of legislative enactment, the law does not prescribe any definite limit to the value of baggage beyond which a carrier is not liable.—*Galveston, H. & S. A. Ry. Co. v. Fales* (Tex. Civ. App.) 234.

A common carrier is liable for baggage which it receives from a passenger, which is never delivered, though the owner does not inform the carrier of the specific articles the baggage contains.—*Galveston, H. & S. A. Ry. Co. v. Fales* (Tex. Civ. App.) 234.

A woman's jewelry, and all articles pertaining to her wardrobe that may be necessary or convenient to her traveling, is baggage.—*Galveston, H. & S. A. Ry. Co. v. Fales* (Tex. Civ. App.) 234.

CARRYING WEAPONS.

See "Weapons."

CATTLE.

See "Animals."

Carriage, see "Carriers," § 3.

CATTLE GUARDS.

See "Railroads," §§ 3-6.

CAUSE OF ACTION.

See "Action."

CERTIFICATE

As evidence, see "Evidence," § 9.
 Certified copies, see "Evidence," § 9.

CERTIORARI.

To determine validity of dramshop license, see "Intoxicating Liquors," § 8.

§ 1. Proceedings and determination.

Petition for certiorari, which sets out part of evidence, but does not negative every phase of the evidence, and facts which would justify the judgment, *held* insufficient.—*Gulf, C. & S. F. Ry. Co. v. Kinney* (Tex. Civ. App.) 18.

Petition for certiorari, on judgment against a carrier for damages for delay in delivering a feed shipment, *held* not to show a want of notice of the purpose of the shipment.—*Gulf, C. & S. F. Ry. Co. v. Kinney* (Tex. Civ. App.) 18.

CHALLENGE

To juror, see "Jury," § 2.

CHAMPERTY AND MAINTENANCE.

On repeal of the champerty act of 1821 (Acts 1821, c. 66) by Acts 1899, p. 321, c. 173, the existence of a champertous agreement is not a bar to a suit.—*Robertson & Hobbs v. Cayard* (Tenn.) 1056.

CHANCERY.

See "Equity."

CHANGE OF POSSESSION.

Necessity as against creditors of grantor, see "Fraudulent Conveyances," § 1.

CHANGE OF VENUE.

Of criminal prosecutions, see "Criminal Law," § 4.

CHARACTER.

Evidence as to character of passenger in action for wrongful ejection, see "Carriers," § 8.
 Of accused in criminal prosecutions, see "Criminal Law," §§ 6-10.
 Of witness, see "Witnesses," § 7.

CHARGE.

To jury in civil actions, see "Trial," § 5.
 To jury in criminal prosecutions, see "Criminal Law," § 18.

CHARTER.

Of municipal corporations, see "Municipal Corporations," § 1.

CHATTEL MORTGAGES.

See "Pledges."
 Distinguished from conditional sale, see "Sales," § 9.
 Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.
 Parol evidence as to collateral agreement, see "Evidence," § 10.

§ 1. Requisites and validity.

Description in chattel mortgage *held* sufficient to make record notice to purchaser.—*Trower Bros. Co. v. Hamilton* (Mo. Sup.) 1081.

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§ 2. Rights and liabilities of parties.

Mortgagor *held* entitled, after condition broken, to maintain an action for the conversion of chattels by a stranger.—*Bigler v. Leonori* (Mo. App.) 324.

An agreement to extend the time for payment of a debt secured by chattel mortgage does not postpone the mortgagee's right to the possession of the mortgaged property for failure to pay the debt at the time originally agreed on.—*Connorsville Buggy Co. v. Lowry* (Mo. App.) 771.

§ 3. Rights and remedies of creditors.

Liens secured by manufacturer by mortgage on merchandise sold to merchant *held* not within purview of statute invalidating mortgages on merchandise daily exposed for sale.—*Hall v. Keating Implement & Machine Co.* (Tex. Civ. App.) 1064.

§ 4. Assignment of mortgage or debt.

Assignee of notes secured by mortgage on merchandise became mortgagee, and had the right, as against other creditors, to purchase mortgagor's property in payment of debts secured.—*Hall v. Keating Implement & Machine Co.* (Tex. Civ. App.) 1064.

CHEAT.

See "False Pretenses"; "Fraud."

CHILD.

See "Adoption"; "Guardian and Ward"; "Infants"; "Parent and Child."
 Contributory negligence of, see "Negligence," § 2.

CHOSE IN ACTION.

Assignment, see "Assignments."

CIRCUMSTANTIAL EVIDENCE.

In criminal prosecutions, see "Criminal Law," §§ 10, 18.

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CITIZENS.

Citizenship ground of jurisdiction of United States courts, see "Removal of Causes," § 1.
 Equal protection of laws, see "Constitutional Law," § 7.

CIVIL RIGHTS.

See "Constitutional Law," §§ 3, 7.

Evidence considered, and *held* to show that objections based on race discrimination in the selection of juries in the county where defendant, a negro, was prosecuted for the murder of his wife, were without merit.—*Fugett v. State* (Tex. Cr. App.) 461.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against estate assigned for creditors, see "Assignments for Benefit of Creditors," § 1.
 Against estate of decedent, see "Executors and Administrators," § 4.
 Mining claims, see "Mines and Minerals," § 1.
 To property levied on, see "Attachment," § 2.

CLOUD ON TITLE.

See "Quieting Title."

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 10.

COLLATERAL ATTACK.

On judgment, see "Judgment," § 5.

COLLATERAL SECURITY.

See "Pledges."

COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 2; "Guaranty."

COLLECTION.

Of estate of decedent, see "Executors and Administrators," § 2.

Of taxes, see "Taxation," § 6.

COLLISION.

§ 1. **Suits for damages.**

In an action by a passenger on a boat for injuries sustained in a collision between it and another boat, the question of the negligence of those in charge of the latter boat *held* for the jury.—*Louisville & C. Packet Co. v. Mulligan* (Ky.) 704.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

§ 1. **Means and methods of regulation.**

Rev. St. 1899, §§ 1025, 1026, requiring foreign corporations to file with the Secretary of State a copy of their charter and certain other statements, and obtain a certificate authorizing them to do business in the state, etc., is not a regulation of interstate commerce.—*Fay Fruit Co. v. McKinney* (Mo. App.) 160.

Statute prohibiting common carriers from limiting their liability is valid, as applied to contracts for interstate transportation of property.—*Galveston H. & S. A. Ry. Co. v. Fales* (Tex. Civ. App.) 234.

COMMISSION MERCHANTS.

See "Factors."

COMMISSIONS.

Of agent, see "Principal and Agent," § 2.

Of broker, see "Brokers," § 1.

COMMON CARRIERS.

See "Carriers."

COMMON LAW.

Requisites of indictment, see "Indictment and Information," § 3.

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMMUNITY PROPERTY.

See "Husband and Wife," § 3.

COMPENSATION.

For performance of contract, see "Contracts," § 2.

For property taken for public use, see "Eminent Domain," § 2.

Of agent, see "Principal and Agent," § 2.

Of assignee for creditors, see "Assignments for Benefit of Creditors," § 1.

Of attorney, see "Attorney and Client," § 1.

Of broker, see "Brokers," § 1.

Of officers of insurance company, see "Insurance," § 1.

Of teachers, see "Schools and School Districts," § 1.

COMPETENCY.

Of evidence in civil actions, see "Evidence," § 4.

Of evidence in criminal prosecutions, see "Criminal Law," §§ 6-10.

Of jurors, see "Jury," § 2.

Of witnesses in general, see "Witnesses," §§ 2-4.

COMPLAINT.

In civil actions, see "Pleading."

In criminal prosecutions, see "Indictment and Information."

COMPOSITIONS WITH CREDITORS.

See "Compromise and Settlement."

COMPROMISE AND SETTLEMENT.

See "Release."

Evidence of offer to compromise, see "Evidence," § 6.

A contract between a Minnesota building association and a borrowing member, by which they settled the matter of usury contained in the debt, *held* valid.—*Gray v. United States Savings & Loan Co.* (Ky.) 200.

COMPUTATION.

Of interest, see "Interest," § 1.

Of period of limitation, see "Limitation of Actions," § 2.

CONCEALED WEAPONS.

See "Weapons."

CONCEALMENT.

Effect on limitation, see "Limitation of Actions," § 2.

CONCLUSION.

Of witness, see "Evidence," § 11.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 9.

CONDITIONS.

In contracts, see "Contracts," § 2.
In insurance policies, see "Insurance," § 4.
Precedent to overruling motion for new trial, see "New Trial," § 2.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 4.
Of parties to contract or conveyance, see "Fraudulent Conveyances," § 1.

CONFLICT OF LAWS.

Actions for wrongful death, see "Death," § 1.
As to usury, see "Usury," § 1.
Conflicting jurisdiction of courts, see "Courts," § 4.

CONNECTING CARRIERS.

See "Carriers," §§ 3, 5.

CONSIDERATION.

For modification of contract, see "Contracts," § 3.
Of contract, see "Contracts," § 1.
Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.
Of release, see "Release," § 1.

CONSIGNMENT.

See "Factors."

CONSPIRACY.

Evidence of acts and declarations of conspirators, see "Criminal Law," §§ 6-10.
Restraining by injunction, see "Injunction," § 1.

CONSTITUTIONAL LAW.

Protection of civil rights, see "Civil Rights."

Provisions relating to particular subjects.

See "Eminent Domain," § 1; "Infants," § 1; "Intoxicating Liquors," § 1; "Jury," § 1; "Taxation," §§ 1, 2.
Amendment of statutes, see "Statutes," § 4.
Enactment and validity of statutes, see "Statutes," § 1.
Incorporation of cities, see "Municipal Corporations," § 1.
Municipal taxes, see "Municipal Corporations," § 10.
Special or local laws, see "Statutes," § 2.
Subjects and titles of statutes, see "Statutes," § 3.

§ 1. Construction, operation, and enforcement of constitutional provisions.

Any reasonable doubt as to the constitutionality of an act must be resolved in favor of its validity.—*Ex parte Loving* (Mo. Sup.) 508.

§ 2. Distribution of governmental powers and functions.

City ordinance, prohibiting the explosion of firecrackers without the written consent of the mayor, *held* not void as a delegation of legislative power to the mayor.—*City of Centralia v. Smith* (Mo. App.) 488.

The question whether a general law can be made applicable in any case is a question for the Legislature, with whose determination the court will not interfere.—*City of Oak Cliff v. State* (Tex. Civ. App.) 24.

§ 3. Personal, civil, and political rights.

An anti-weed ordinance *held* not violative of Const. art. 2, § 4, relating to one's right to the gains of his own industry.—*City of St. Louis v. Galt* (Mo. Sup.) 876.

§ 4. Vested rights.

A statute providing the period within which a judgment shall be presumed to have been paid confers a vested right, which the Legislature cannot disturb by subsequent legislation.—*Chiles v. School Dist. of Buckner* (Mo. App.) 82.

§ 5. Obligation of contracts.

Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, is not violative of Const. U. S. art. 1, § 10, nor Const. Mo. art. 2, § 15, forbidding the passage of any law impairing the obligation of contracts.—*State ex rel. Town of Canton v. Allen* (Mo. Sup.) 888.

§ 6. Privileges or immunities, and class legislation.

Act May 12, 1899 (Supp. Sayles' Civ. St. 1899-1900, tit. 49a), *held* repugnant to Const. U. S. Amend. 14, and Const. Tex. art. 1, § 3, in exempting designated orders from general provisions of fraternal insurance law.—*Supreme Lodge United Benev. Ass'n v. Johnson* (Tex. Civ. App.) 661.

Act May 12, 1899 (Supp. Sayles' Civ. St. 1899-1900, tit. 49a), *held* not to distinguish fraternal from other insurance companies arbitrarily, and hence is not repugnant to Const. U. S. Amend. 14, and Const. Tex. art. 1, § 3.—*Supreme Lodge United Benev. Ass'n v. Johnson* (Tex. Civ. App.) 661.

§ 7. Equal protection of laws.

The discriminatory execution of an ordinance giving the common council of a city power to issue building permits, etc., is unconstitutional.—*Boyd v. Board of Councilmen of City of Frankfort* (Ky.) 669.

Laws 28th Leg. p. 68, c. 50, § 3, relative to pool selling, *held* not to deprive of equal protection of law, within Const. U. S. Amend. 14.—*Ex parte Hernan* (Tex. Cr. App.) 225.

A motion to quash an indictment against a negro because of the discrimination against the negro race in the formation of the grand jury *held* properly denied.—*Thompson v. State* (Tex. Cr. App.) 449.

A motion to quash a special venire on the trial of a negro charged with crime, because the negro race was discriminated against in the selection of the jury, *held* properly denied.—*Thompson v. State* (Tex. Cr. App.) 449.

Impanelment of a jury composed entirely of white men for the trial of a negro *held* in violation of Const. Amend. 14, guarantying equal protection of the law.—*Smith v. State* (Tex. Cr. App.) 453.

§ 8. Due process of law.

Ky. St. 1899, § 1274, prohibiting the sale of milk from cows fed on "still slop," *held* not in conflict with the fourteenth amendment of the federal Constitution.—*Sanders v. Commonwealth* (Ky.) 358.

Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, is not violative of Const. art. 2, § 30, providing that no person shall be deprived of property without due process of law.—*State ex rel. Town of Canton v. Allen* (Mo. Sup.) 888.

Conviction in the ordinary courts, with right of appeal, *held* due process of law, within Const. U. S. Amend. art. 5.—*City of St. Louis v. Galt* (Mo. Sup.) 876.

Acts 1903, p. 599, c. 257, imposing on street car and railroad companies, leasing advertising

privileges, liability for the privilege tax on the business of advertising in cars, *held* to deprive such companies of property, in contravention of Const. art. 1, § 8, and Const. U. S. Amend. 14.—*Knoxville Traction Co. v. McMillan* (Tenn.) 665.

Appointment for indefinite time of receiver to collect rents and profits of married woman's property for mortgage creditor *held* not to deprive her of property without her consent and without process of law.—*De Berrera v. Frost* (Tex. Civ. App.) 637.

CONSTRUCTIVE NOTICE.

To purchaser of note, see "Bills and Notes," § 3.

CONTEMPT.

§ 1. Acts or conduct constituting contempt of court.

An inducement of a witness for the state to falsely testify in defendant's favor *held* to constitute contempt of court.—*Ricketts v. State* (Tenn.) 1076.

Mere attempt of one to secure services of another to ascertain how juror stood with relation to case then on trial *held* not to render him guilty of a contempt.—*Ex parte McRae* (Tex. Cr. App.) 211.

CONTINGENT FEES.

See "Attorney and Client," § 1.

CONTINUANCE.

Harmless error in rulings on application for, in criminal prosecution, see "Criminal Law," § 24.

In criminal prosecution in general, see "Criminal Law," § 11.

Review of ruling on application for, as dependent on presentation of question by record, in criminal prosecutions, see "Criminal Law," § 23.

Denying continuance, on admission of plaintiff as to what absent witness would testify, *held* error, where defendants occupy hostile attitude toward each other.—*Doyle v. St. Louis Transit Co.* (Mo. App.) 471.

On trial of an action for personal injuries, defendant *held* not entitled to a continuance on ground of surprise, in that plaintiff, while testifying, was seized with convulsions, causing an adjournment.—*International & G. N. R. Co. v. Pina* (Tex. Civ. App.) 979.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Alteration, see "Alteration of Instruments."

Assignment, see "Assignments."

Damages for breach, see "Damages," § 2.

Examination of witnesses in action for breach of, see "Witnesses," § 5.

Impairing obligation, see "Constitutional Law," § 5.

Operation and effect of champerty, see "Champerty and Maintenance."

Operation and effect of usury laws, see "Usury," § 1.

Parol or extrinsic evidence, see "Evidence," § 10.

Reformation, see "Reformation of Instruments."

Contracts of particular classes of parties.

See "Carriers," §§ 2, 5; "Corporations," § 3; "Executors and Administrators," § 2; "Master and Servant"; "Municipal Corporations," §§ 5, 6; "Schools and School Districts," § 1. Highway officers, see "Highways," § 3. Married women, see "Husband and Wife," § 1.

Contracts relating to particular subjects.

See "Boundaries," § 1; "Interest"; "Mines and Minerals," § 2.

Limitation of liability of carrier, see "Carriers," § 5.

Transportation of goods, see "Carriers," § 2.

Particular classes of express contracts.

See "Bills and Notes"; "Covenants"; "Exchange of Property"; "Guaranty"; "Indemnity"; "Insurance"; "Joint Ventures"; "Partnership"; "Sales."

Agency, see "Principal and Agent."

Bills of lading, see "Carriers," § 2.

Employment, see "Master and Servant."

Leases, see "Landlord and Tenant."

Mutual benefit insurance, see "Insurance," § 8.

Sales of realty, see "Vendor and Purchaser."

Stipulations in actions, see "Stipulations."

Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Covenants," § 1; "Work and Labor."

Particular modes of discharging contracts.

See "Compromise and Settlement"; "Release."

§ 1. Requisites and validity.

Agreement of partners to pay campaign expenses of member of the firm *held* unenforceable.—*Ward v. Hartley* (Mo. Sup.) 302.

Partner *held* not liable to return to the firm money advanced him to pay campaign expenses.—*Ward v. Hartley* (Mo. Sup.) 302.

Modification of building contract by mutual consent of parties *held* valid.—*Koerper v. Royal Inv. Co.* (Mo. App.) 307.

Modification of building contract, where contractor refused to proceed with the work, *held* valid.—*Koerper v. Royal Inv. Co.* (Mo. App.) 307.

A party to building contracts *held* to have no counterclaim in action to enforce mechanic's lien for work done thereunder.—*Koerper v. Royal Inv. Co.* (Mo. App.) 307.

A contract for the sale of land, made through one acting as agent for both parties, *held* void.—*McClure v. Ullman* (Mo. App.) 325.

The retention of money paid under a fraudulent contract *held* not to constitute a ratification.—*McClure v. Ullman* (Mo. App.) 325.

A promise by a vendor to reconvey to the purchaser, after buying in the land on foreclosure of his lien, *held* to be without consideration.—*Foster v. Ross* (Tex. Civ. App.) 990.

§ 2. Construction and operation.

An option agreement for the sale of stock by the individual stockholders of a railroad corporation, and a subsequent agreement for the sale of the property of the corporation, *held* independent transactions.—*Cumberland & O. V. R. Co. v. Shelbyville, B. & O. R. Co.* (Ky.) 690.

Contract between two telegraph companies for erection and maintenance of joint line *held* void, within Ky. St. § 470, as not to be performed within a year.—*Bastin Telephone Co. v. Richmond Telephone Co.* (Ky.) 702.

Fact that outstanding note to third person, part payment of which was assumed by defendant, had not been paid by plaintiff, *held* not to prevent recovery on contract of assumption.—*Houssels v. Jacobs* (Mo. Sup.) 857.

Where no time is fixed in a building contract for completion of the building, building must be completed in a reasonable time.—*Koerper v. Royal Inv. Co. (Mo. App.) 307.*

The evidence *held* to show that extra work was performed by architects, not for an agreed amount, but for its reasonable value.—*Baker v. Pulitzer Pub. Co. (Mo. App.) 585.*

Architects, who performed extra work for defendant, *held* entitled to the reasonable value thereof, if defendant ordered them to do it, or before it was done promised to pay the reasonable value thereof.—*Baker v. Pulitzer Pub. Co. (Mo. App.) 585.*

Plaintiff, in an action to compel defendants to adopt measures to protect his buildings against an excavation about to be made adjacent thereto, *held* not entitled to benefit of contract between defendants, by which one defendant agreed to protect adjacent property.—*Carpenter v. Reliance Realty Co. (Mo. App.) 1004.*

Order for installation of irrigation pump *held* not to preclude construction that it was seller's duty to superintend its erection.—*Masterson v. Heitmann & Co. (Tex. Civ. App.) 983.*

§ 3. Modification and merger.

A contract whereby the grantee in a deed of trust was to repay a grantor a bonus required on payment of the loan before maturity *held* not void for want of consideration.—*Fullerton v. Schloss (Mo. App.) 770.*

§ 4. Rescission and abandonment.

Party to building contract, whose nonperformance caused nonperformance by the other, *held* not entitled to rescind.—*Koerper v. Royal Inv. Co. (Mo. App.) 307.*

§ 5. Performance or breach.

Fact that minor left house of person agreeing to rear him *held* matter of defense to action for failure to support and for promised gratuity.—*Jones v. Comer (Ky.) 184.*

Whether a building contract was abandoned *held* to be a question for the jury.—*Koerper v. Royal Inv. Co. (Mo. App.) 307.*

Oil company *held* to have waived bailing and casing of oil well.—*Texas Gulf Coast Land & Oil Co. v. Galveston-Chicago Well Boring & Drilling Co. (Tex. Civ. App.) 974.*

§ 6. Actions for breach.

An instruction, in an action by architects for services, *held* not open to the objection of singling out their evidence, and commenting on it, and making it unduly prominent.—*Baker v. Pulitzer Pub. Co. (Mo. App.) 585.*

CONTRADICTION.

Of witness, see "Witnesses," § 10.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 2.

CONVERSION.

Wrongful conversion of personal property, see "Trover and Conversion."

CONVEYANCES.

Contracts to convey, see "Vendor and Purchaser," § 4.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Conveyances by or to particular classes of parties.

See "Guardian and Ward," § 2; "Infants," § 2. Married women, see "Husband and Wife," § 1. Sheriffs, see "Execution," § 1.

Conveyances of particular species of property.

Mortgaged property, see "Mortgages," § 2. Separate property of married women, see "Husband and Wife," § 1.

Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CORPORATIONS.

Requiring foreign corporations to file copy of charter as regulation of commerce, see "Commerce," § 1.

Taxation of corporations and corporate property, see "Taxation," §§ 3, 5.

Particular classes of corporations.

See "Building and Loan Associations"; "Insurance," §§ 1, 8; "Municipal Corporations"; "Street Railroads," § 1.

Ferry companies, see "Ferries," § 1.

Telegraph and telephone companies, see "Telegraphs and Telephones," § 1.

Turnpike companies, see "Turnpikes and Toll Roads," § 1.

Water companies, see "Waters and Water Courses," § 4.

§ 1. Capital, stock, and dividends.

Under Const. art. 12, § 8, and Rev. St. 1899, § 962, a corporation *held* entitled to increase its capital stock without giving the notice required by statute, if all the stockholders consented.—*State ex rel. Norvell-Shapleigh Hardware Co. v. Cook (Mo. Sup.) 559.*

§ 2. Members and stockholders.

Assignees of corporate stock *held* not required to seek redress through stockholders' meeting, or appeal to officers, before instituting suit to avoid ultra vires acts.—*McC Campbell v. Fountain Head R. Co. (Tenn.) 1070.*

§ 3. Corporate powers and liabilities.

In an action on an implied contract for the recovery of money expended by plaintiff in carrying out a verbal contract, the fact that the verbal contract was void, because ultra vires, *held* no defense.—*Interstate Hotel Co. v. Woodward & Burgess Amusement Co. (Mo. App.) 114.*

A contract made by officials of an existing corporation with a new corporation, in which they have a controlling interest, without the knowledge of the directors of the existing corporation, *held* subject to annulment by equity.—*Attalla Iron Ore Co. v. Virginia Iron, Coal & Coke Co. (Tenn.) 774.*

A subscription by a railroad company to the stock of a land company is ultra vires, and its character is not altered by the fact that it was made in the names of trustees.—*McC Campbell v. Fountain Head R. Co. (Tenn.) 1070.*

Stockholders, by whose authorization ultra vires acts are done, cannot afterwards avoid the same in equity.—*McC Campbell v. Fountain Head R. Co. (Tenn.) 1070.*

Assignees of corporate stockholders cannot avoid, as ultra vires, acts of the corporation authorized by their assignors and consummated previous to the assignment, or whose consummation is necessary to protect the rights of other persons.—*McC Campbell v. Fountain Head R. Co. (Tenn.) 1070.*

Assignees of corporate stock *held* entitled to avoid ultra vires acts of officers, made pursu-

ant to authority given by assignors.—*McCampbell v. Fountain Head R. Co.* (Tenn.) 1070.

The indorsement of a negotiable paper by one corporation for the accommodation of another is *ultra vires*.—*McCampbell v. Fountain Head R. Co.* (Tenn.) 1070.

§ 4. Insolvency and receivers.

A creditor of a corporation *held* entitled to the appointment of a receiver, before reducing his claim to judgment, where, in the absence of such appointment, the corporate assets will probably be fraudulently disposed of.—*Kentucky Racing & Breeding Ass'n v. Galbreath* (Ky.) 371.

Petition and cross-petitions in a suit against an insolvent corporation *held* sufficient to justify the appointment of a receiver.—*Kentucky Racing & Breeding Ass'n v. Galbreath* (Ky.) 371.

§ 5. Dissolution and forfeiture of franchise.

Statement of rights of stockholders inter se on voluntary dissolution of the corporation.—*Craycraft v. National Building & Loan Ass'n* (Ky.) 923.

§ 6. Foreign corporations.

Foreign corporation, transacting business through a local agent, *held* not within the proviso of Rev. St. 1899, §§ 1025, 1026, allowing such corporations to take orders through drummers or traveling salesmen.—*Fay Fruit Co. v. McKinney* (Mo. App.) 160.

Return of service of summons on foreign corporation *held* insufficient, under Rev. St. 1899, § 570, subd. 4.—*Walter A. Zelnicker Supply Co. v. Mississippi Cotton Oil Co.* (Mo. App.) 321.

Service of summons on officer of foreign corporation not maintaining place of business in the state, as authorized by Rev. St. 1899, § 570, subd. 4, cl. 2, *held* insufficient to sustain personal judgment.—*Walter A. Zelnicker Supply Co. v. Mississippi Cotton Oil Co.* (Mo. App.) 321.

The courts of the state have jurisdiction of a cause of action in favor of a nonresident plaintiff against a corporation doing business in the state.—*Western Union Tel. Co. v. Shaw* (Tex. Civ. App.) 433.

CORRECTION.

Of assessment of taxes, see "Taxation," § 5.
Of record on appeal or writ of error, see "Appeal and Error," §§ 5-6.

CORROBORATION.

Of female in prosecution for rape, see "Rape," § 2.
Of female in prosecution for seduction, see "Seduction," § 1.
Of witness in general, see "Witnesses," §§ 6-10.

COSTS.

In particular actions or proceedings.

See "Garnishment," § 2.
For accounting by receiver, see "Receivers."
For rent, see "Landlord and Tenant," § 4.

§ 1. Nature, grounds, and extent of right in general.

A trial court, in the exercise of its equitable jurisdiction, may apportion the costs of the suit between the parties.—*Kittredge v. Chilli-cothe Loan & Building Ass'n* (Mo. App.) 147.

§ 2. Taxation.

Under Rev. St. 1895, art. 2324, making it the duty of the clerk to tax costs when final judgment has been rendered, the taxing of the cost

is simply the performance of a ministerial duty.—*Patton v. Cox* (Tex. Sup.) 1025.

The court in which a judgment was rendered in a cause transferred from another county has jurisdiction to retax the costs, when costs that should have been taxed were omitted by mistake of the clerk.—*Patton v. Cox* (Tex. Sup.) 1025.

§ 3. On appeal or error, and on new trial or motion therefor.

Under Sayles' Rev. Civ. St. art. 1421, a party to a cause, on whose motion the stenographer is ordered to transcribe the testimony, that such party may prepare a statement of facts, is liable for the cost.—*Allen v. Hazard* (Tex. Civ. App.) 268.

§ 4. Payment and remedies for collection.

Injunction *held* not to lie to restrain a plaintiff from prosecuting a second action without paying costs adjudged against him on nonsuit in a former action.—*Wabash Ry. Co. v. Sweet* (Mo. App.) 123.

§ 5. In criminal prosecutions.

Under Shannon's Code, §§ 7601, 7604, *held*, that costs in a small offense case, taxed by the justice against defendant, are not collectible of the county till certified to by the judge of the circuit court and the Attorney General.—*Musgrove v. Hamilton County* (Tenn.) 779.

CO-TENANCY.

See "Tenancy in Common."

COUNCIL.

See "Municipal Corporations," § 8.

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTERFEITING.

See "Forgery."

COUNTIES.

County attorneys, see "District and Prosecuting Attorneys."

Harmless error in admission of evidence in action on county officer's bond, see "Appeal and Error," § 17.

Liability of, for costs in criminal prosecutions, see "Costs," § 5.

Special and local laws relating to, see "Statutes," § 2.

§ 1. Creation, alteration, existence, and political functions.

The act of 1891 (Gen. Laws 1891, p. 30, c. 29), validating by general law certain county seats, cannot relate back, so as to invalidate Act 1887, which constitutionally established the boundaries between Jeff Davis and Presidio counties.—*Presidio County v. Jeff Davis County* (Tex. Civ. App.) 278.

Sayles' Rev. Civ. St. 1897, art. 808a, gives the district courts power to determine which of two county lines is correct.—*Presidio County v. Jeff Davis County* (Tex. Civ. App.) 278.

Term "county seat," in Const. art. 9, § 1, cl. 2, relative to creation of new counties, means legal county seat, and not *de facto*.—*Presidio County v. Jeff Davis County* (Tex. Civ. App.) 278.

State demand and limitations have no application to proceedings to determine the boundary line of counties.—*Presidio County v. Jeff Davis County* (Tex. Civ. App.) 278.

Act 1889, changing boundaries of Jeff Davis county, *held* repugnant to Const. art. 9, § 1, cl. 3, for not having been submitted to popular vote.—*Presidio County v. Jeff Davis County* (Tex. Civ. App.) 278.

§ 2. Government and officers.

Drawing, delivery, and taking receipts for warrants, as required by Sand. & H. Dig. §§ 1240, 1241, *held* not settlements of accounts for which fees are allowed by section 3309, subd. 24.—*Greene County v. Light* (Ark.) 915.

Change of county seat *held* invalid, although recognized as valid by public and officers.—*Presidio County v. Jeff Davis County* (Tex. Civ. App.) 278.

§ 3. Fiscal management, public debt, securities, and taxation.

A citizen and taxpayer of a county, suing for himself and all other taxpayers, may, as such, maintain an action to prevent the payment to the county judge of a salary as supervisor of roads, to which office he was illegally appointed by the fiscal court.—*Daviess County v. Goodwin* (Ky.) 185.

When two-thirds of those voting on free turnpikes voted therefor, it authorized the county to incur a debt in excess of the revenue provided for the year in purchasing turnpikes in the county.—*Chaplin & B. Turnpike Road Co. v. Nelson County* (Ky.) 377.

§ 4. Actions.

Under Laws 1846, p. 321, and Rev. St. 1895, art. 1194, subd. 19, § 2996, *held*, that an injunction restraining sale under execution in favor of a county was properly commenced, not in that county, but in the county in which the sheriff having charge of the sale, and on whom the writ was general, had his domicile.—*Little v. Griffin* (Tex. Civ. App.) 635.

COUNTY SEAT.

See "Counties," §§ 1, 2.

Judicial notice as to, see "Evidence," § 1.

Special acts relating to, see "Statutes," § 2.

COURTS.

Contempt of court, see "Contempt."

Judges, see "Judges."

Judicial power, see "Constitutional Law," § 2.

Justices' courts, see "Justices of the Peace."

Province of court and jury, see "Trial," § 5.

Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

Trial by court without jury, see "Trial," § 7.

Jurisdiction of particular actions, proceedings, or subjects.

See "Habeas Corpus," § 1.

Against foreign corporations, see "Corporations," § 6.

Against personal representatives, see "Executors and Administrators," § 6.

Criminal prosecutions, see "Criminal Law," § 3.

Foreclosure of mechanic's lien, see "Mechanics' Liens," § 4.

For relief against judgment, see "Judgment," § 4.

To compel replacing of farm crossing, see "Railroads," § 2.

Trial of disputed claim against estate of decedent, see "Executors and Administrators," § 4.

§ 1. Nature, extent, and exercise of jurisdiction in general.

Fact that there was no lien on land did not deprive district court of jurisdiction, under Const. art. 5, § 8, to enter judgment on note in suit brought to recover on such note, and en-

force lien.—*Bridge v. Carter* (Tex. Civ. App.) 245.

§ 2. Courts of general original jurisdiction.

Where the only damage recoverable under the allegations of a petition is a sum insufficient to give the court jurisdiction, demurrer *held* properly sustained thereto.—*Gaddis v. Western Union Tel. Co.* (Tex. Civ. App.) 37.

The demand in a complaint being reduced by demurrer to less than the amount necessary to give the court jurisdiction, the action should be dismissed.—*Western Union Tel. Co. v. Arnold* (Tex. Civ. App.) 249.

§ 3. Courts of appellate jurisdiction.

Const. art. 6, as amended by section 6 of the amendment of 1884, *held* not to authorize the certification of a case from the Court of Appeals to the Supreme Court, where all the judges deem their decision in conflict with a decision of the Supreme Court.—*Wilden v. McAllister* (Mo. Sup.) 730.

Const. art. 6, as amended by section 6 of the amendment of 1884, *held* not to authorize the certification of a case from the Court of Appeals to the Supreme Court, where all the judges of the Court of Appeals believe its decision contrary to a previous decision of the Court of Appeals.—*Wilden v. McAllister* (Mo. Sup.) 730.

Supreme Court has no jurisdiction of defendant's appeal from judgment of circuit court for \$678.75, where answer is general denial.—*Jackson v. Binnicker* (Mo. Sup.) 740.

Under Const. art. 6, § 6, as amended in 1884, the jurisdiction of the Supreme Court in a cause transferred from the St. Louis Court of Appeals *held* not to depend on the fact that there is a conflict between the decision of the latter court and a decision of the Supreme Court or a Court of Appeals, but on the fact that one of the judges of the St. Louis Court of Appeals deems such conflict to exist.—*Clark v. Missouri, K. & T. Ry. Co.* (Mo. Sup.) 882.

§ 4. Concurrent and conflicting jurisdiction, and comity.

Where a suit was brought to enjoin a judgment of the police court under an ordinance alleged to be unconstitutional, the main purpose of the action being to attack the ordinance, the circuit court had jurisdiction thereof.—*Boyd v. Board of Councilmen of City of Frankfort* (Ky.) 669.

COVENANTS.

§ 1. Requisites and validity.

Under Batts' Ann. Civ. St. 1895, art. 633, a deed containing the words "grant or convey" and a restrictive covenant not binding on the grantor, but only on his heirs, executors, and administrators, *held* to contain an implied covenant against incumbrances.—*Rotan v. Hays* (Tex. Civ. App.) 654.

§ 2. Performance or breach.

Covenant for peaceable possession of a railroad right of way "over, across, through, or upon" grantors' land *held* not broken by suits on account of maintenance of a railroad between their lots on a street.—*Hot Springs R. Co. v. Williamson* (Ark.) 916.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," §§ 6-10.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

Of testator, see "Wills," § 4.

Remedies against surety, see "Principal and Surety," § 3.

Rights and remedies of surety, see "Principal and Surety," § 4.

Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 3.

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CRIMINAL LAW.

See "Witnesses."

Bail, see "Bail," § 1.

Costs in criminal prosecutions, see "Costs," § 5.

Due process of law, see "Constitutional Law," § 8.

Equal protection of laws, see "Constitutional Law," § 7.

Grand jury, see "Grand Jury."

Indictment, information, or complaint, see "Indictment and Information."

Prosecuting officers, see "District and Prosecuting Attorneys."

Restraining criminal acts by injunction, see "Injunction," § 1.

Subjects and titles of acts relating to crimes, see "Statutes," § 3.

Offenses by particular classes of parties.

Highway officers, see "Highways," § 2.

Municipal officers, see "Municipal Corporations," § 4.

Particular offenses.

See "Assault and Battery," § 2; "Bribery"; "Burglary"; "Contempt"; "Embezzlement"; "False Pretenses"; "Forgery"; "Gaming," § 1; "Health," § 1; "Homicide"; "Incest"; "Larceny"; "Libel and Slander," § 2; "Rape"; "Seduction," § 1.

Carrying weapons, see "Weapons."

Driving cattle from range, see "Animals."

Obstruction of highway, see "Highways," § 4.

Offenses against election laws, see "Elections," § 1.

Offenses against laws relating to poisons, see "Poisons."

Offenses against liquor laws, see "Intoxicating Liquors," §§ 4, 5.

Payment of wages in nonnegotiable orders, see "Master and Servant," § 1.

Violations of municipal ordinances, see "Municipal Corporations," § 7.

§ 1. Nature and elements of crime and defenses in general.

The offense of contempt of court, committed by inducing a witness for the state to falsely testify in favor of accused, *held* not merged in the offense of subornation of perjury, so as to prevent punishment therefor.—*Ricketts v. State* (Tenn.) 1076.

§ 2. Parties to offenses.

In a prosecution of two persons for burglary and larceny, it was not necessary, to support a conviction, to prove that both defendants entered the building.—*State v. Peebles* (Mo. Sup.) 518.

The prosecuting witness, in a prosecution for violating the local option law, *held* not an accomplice.—*Smith v. State* (Tex. Cr. App.) 801.

Mere failure to tell of the commission of a crime does not make a party an accomplice.—*Cruise v. State* (Tex. Cr. App.) 818.

§ 3. Jurisdiction.

Defendant, in a prosecution for assault to commit murder, *held* entitled to an acquittal, where there is a reasonable doubt as to the jurisdiction of the court.—*Wright v. State* (Tex. Cr. App.) 809.

§ 4. Venue.

A negro, accused of homicide, *held* entitled to change of venue on his fourth trial.—*Smith v. State* (Tex. Cr. App.) 453.

§ 5. Former jeopardy.

An acquittal under an indictment charging larceny of the property of T. is no bar to a prosecution for larceny of the same property, alleged to belong to M.—*Sapp v. State* (Tex. Cr. App.) 456.

A fine imposed by a justice on a plea of guilty to a charge of affray *held* insufficient to support a plea of former jeopardy on a subsequent prosecution for aggravated assault.—*Stepp v. State* (Tex. Cr. App.) 787.

§ 6. Evidence.

The state, on cross-examination of witnesses of defendant called to prove his good character, *held* entitled to prove by the witnesses specific acts of misconduct.—*Holloway v. State* (Tex. Cr. App.) 14.

In prosecution for murder, certain evidence *held* competent for impeachment.—*Kipper v. State* (Tex. Cr. App.) 611.

In a prosecution for rape on a female under the age of 15 years, *held* error to exclude testimony that prosecutrix had been notified that defendant was a married man.—*Simpson v. State* (Tex. Cr. App.) 819.

In a prosecution for rape, family Bible *held* admissible to prove prosecutrix's age.—*Simpson v. State* (Tex. Cr. App.) 819.

§ 7. — Facts in issue and relevant to issues, and res gestæ.

In a prosecution for homicide, certain statements of defendant *held* not admissible as a part of the res gestæ.—*Davis v. Commonwealth* (Ky.) 1101.

In a prosecution for murder, evidence as to persons seen proceeding to the scene of the homicide and away from it *held* competent, though defendant was not identified.—*Kipper v. State* (Tex. Cr. App.) 611.

In a prosecution for murder, evidence as to acts of conspirators on the morning after homicide *held* competent.—*Kipper v. State* (Tex. Cr. App.) 611.

In a prosecution for murder committed in attempted rescue, evidence of offense for which the person to be rescued had been jailed *held* part of the res gestæ.—*Kipper v. State* (Tex. Cr. App.) 611.

Remarks of bystanders, not heard by the participants in a difficulty, are not res gestæ.—*Baker v. State* (Tex. Cr. App.) 618.

In a prosecution for manslaughter, a statement of a witness, made at the time of hearing the shooting, *held* not part of the res gestæ.—*Baker v. State* (Tex. Cr. App.) 618.

Evidence of remarks of one accused of murder, immediately after the affray, *held* part of the res gestæ.—*Vann v. State* (Tex. Cr. App.) 813.

§ 8. — Admissions, declarations, and hearsay.

In a prosecution against a corporation, the report of the Secretary of State *held* inadmissible to prove defendant's corporate capacity.—*Sanderfur-Julian Co. v. State* (Ark.) 593.

In prosecution for murder, declaration of decedent, communicated to defendant before homicide, *held* admissible.—*Bess v. Commonwealth* (Ky.) 349.

In prosecution for murder, defendant's evidence of declarations of decedent *held* admissible to repel proof of motive.—*Bess v. Commonwealth* (Ky.) 349.

The affidavit, procured by the acting county attorney under the guise of using it as evidence against unknown perpetrators of a crime, *held* not admissible against the affiant on his trial for the crime.—*Tines v. Commonwealth* (Ky.) 363.

In a prosecution for forging a deed, statements, not part of the *res gestæ*, made by the grantor's heir, since deceased, that the grantor made the deed, are properly excluded as hearsay.—*State v. Pyscher* (Mo. Sup.) 836.

Where, on a prosecution for murder, the defense was insanity, it was proper to exclude evidence of a physician that defendant had told him, before the crime, that he believed himself going crazy.—*State v. Dunn* (Mo. Sup.) 848.

Testimony of a conversation between witness and deceased at a time when defendant was not present *held* inadmissible.—*Wilburn v. State* (Tex. Cr. App.) 3.

Conversation between defendant and witness as to deceased *held* inadmissible as too remote.—*Wilburn v. State* (Tex. Cr. App.) 3.

Witness may not testify that he made certain declarations, defendant not having been present.—*Gipson v. State* (Tex. Cr. App.) 216.

Letter from accused to decedent *held* sufficiently identified to be admissible.—*Mathews v. State* (Tex. Cr. App.) 218.

In a prosecution for manslaughter, evidence of threats made by defendant's brother against deceased prior to the killing *held* admissible.—*Baker v. State* (Tex. Cr. App.) 618.

Evidence *held* to raise no issue as to whether statements of defendant were made while he was under arrest, or believed he was under arrest so as to make them inadmissible.—*Norsworthy v. State* (Tex. Cr. App.) 808.

§ 9. — Opinion evidence.

An expert witness may not be asked his opinion on a hypothesis including facts not shown by the evidence.—*State v. Dunn* (Mo. Sup.) 848.

In stating a hypothetical question to an expert witness, it is competent for the examiner to assume as a fact a matter which has been testified to, though it be controverted by other witnesses.—*State v. Dunn* (Mo. Sup.) 848.

On an issue as to the sanity of an accused, it is proper to include in a hypothetical question facts which have been testified to by the accused himself.—*State v. Dunn* (Mo. Sup.) 848.

In a prosecution for theft of a railroad pay check, *held* not error to allow prosecuting witness to identify the check.—*Gaines v. State* (Tex. Cr. App.) 10.

Evidence as to the similarity of tracks found at the scene of a crime and defendant's tracks is not a matter for expert testimony.—*Thompson v. State* (Tex. Cr. App.) 449.

A witness' testimony *held* too indefinite to authorize his testimony that tracks found were similar to those of a person accused of homicide.—*Smith v. State* (Tex. Cr. App.) 453.

In a prosecution for murder, it was competent for a witness to state his opinion as to the distance between two places and the time of the occurrence relative to which he was testifying.—*Kipper v. State* (Tex. Cr. App.) 611.

Question in prosecution for manslaughter, calling for defendant's opinion as to legality of his firing off pistol, *held* not ground for reversal.—*Montgomery v. State* (Tex. Cr. App.) 788.

In a prosecution for rape on a female under the age of 15 years, opinion evidence as to age

of prosecutrix *held* admissible.—*Simpson v. State* (Tex. Cr. App.) 819.

§ 10. — Weight and sufficiency.

Circumstantial evidence, to sustain conviction of murder, must exclude every other reasonable hypothesis than defendant's guilt.—*Lowe v. State* (Tex. Cr. App.) 220.

Testimony of witness called by court, in trial for violation of local option law without a jury, *held* not binding on court.—*Goldwater v. State* (Tex. Cr. App.) 221.

§ 11. Time of trial and continuance.

On a prosecution for larceny from the person, motion for continuance on the ground of an absent witness *held* properly denied.—*Gaines v. State* (Tex. Cr. App.) 10.

Application for continuance *held* properly denied.—*Leach v. State* (Tex. Cr. App.) 220.

As a general rule continuances are rarely granted to procure impeaching testimony.—*Thompson v. State* (Tex. Cr. App.) 449.

An application for a continuance for the absence of a subpoenaed witness *held* properly denied.—*Thompson v. State* (Tex. Cr. App.) 449.

An application for a continuance because of the sickness of an impeaching witness *held* properly denied.—*Thompson v. State* (Tex. Cr. App.) 449.

In prosecution for murder, evidence to be given by absent witness *held* immaterial.—*Kipper v. State* (Tex. Cr. App.) 611.

In a prosecution for murder, second application for continuance *held* properly denied for lack of diligence.—*Kipper v. State* (Tex. Cr. App.) 611.

Facts *held* not to show diligence in trying to get witness, so as to entitle defendant to continuance for his absence.—*Ford v. State* (Tex. Cr. App.) 800.

Statements in application for continuance for absent witness *held* too general as to what defendant expected to prove by him.—*Ford v. State* (Tex. Cr. App.) 800.

Where sufficient diligence was used to procure a material witness' attendance, the case should be continued.—*Dean v. State* (Tex. Cr. App.) 808.

In a prosecution for burglary, application for a continuance on the ground of absent witness *held* properly denied.—*Washington v. State* (Tex. Cr. App.) 810.

§ 12. Trial.

It is not error to refuse a requested instruction sufficiently covered by those given.—*State v. Hicks* (Mo. Sup.) 539.

In a prosecution for crime, the fact that the verdict spells the word "penitentiary," "penitentiary" is not error.—*Gaines v. State* (Tex. Cr. App.) 10.

§ 13. — Preliminary proceedings.

Action of trial court in dismissing as to one of defendants prosecuted for the same transaction, after the other had made affidavit under Code Cr. Proc. art. 707, *held* error.—*Manor v. State* (Tex. Cr. App.) 788.

The filing of a new information, after loss of the original, without attempt at substitution, *held* the commencement of a new case, entitling defendant to two days' service.—*Stepp v. State* (Tex. Cr. App.) 787.

Under Bill of Rights, § 10, and Code Cr. Proc. 1895, arts. 540-542, 567-569, an objection of defendant to going to trial on the ground that a true copy of indictment had not been served on him *held* good.—*Lightfoot v. State* (Tex. Cr. App.) 792.

§ 14. — Reception of evidence.

Provisions of Criminal Code, authorizing state to agree that witnesses would testify, on application being made by defendant for continuance, *held* not in violation of the defendant's constitutional rights.—*Davis v. Commonwealth (Ky.)* 1101.

It was within the discretion of the court to permit the state to introduce evidence learned of after it had rested this case in chief.—*State v. Dunn (Mo. Sup.)* 848.

Occurrences between state's attorney and witnesses could not be shown by *ex parte* affidavits.—*Wilburn v. State (Tex. Cr. App.)* 3.

On a prosecution for homicide, the refusal to compel the state to call an eyewitness to the transaction *held* not error.—*Holloway v. State (Tex. Cr. App.)* 14.

Testimony in prosecution for murder considered, and *held* admissible as rebuttal evidence.—*Fugett v. State (Tex. Cr. App.)* 461.

Where extraneous crimes are introduced on the cross-examination of defendant for impeachment, it is error for the court to fail to limit the effect of such testimony to defendant's credibility as a witness.—*Scoville v. State (Tex. Cr. App.)* 792.

§ 15. — Objections to evidence, motions to strike out, and exceptions.

Bill of exceptions in murder case *held* not to show error in submission of calendar to jury.—*Mathews v. State (Tex. Cr. App.)* 218.

An objection that evidence was immaterial does not raise any question on appeal from a conviction of murder.—*Kipper v. State (Tex. Cr. App.)* 611.

In a prosecution for rape, ruling of court on certain evidence, in view of exception taken and evidence previously admitted, *held* not error.—*Simpson v. State (Tex. Cr. App.)* 819.

§ 16. — Arguments and conduct of counsel.

On prosecution for murder, statement by counsel for the state that there was some feeling between the parties, which the state was not permitted to show, *held* not error.—*State v. Dunn (Mo. Sup.)* 848.

In a prosecution for theft from the person, argument of prosecuting attorney *held* not to refer to a former conviction, so as to be objectionable, under Code Cr. Proc. 1895, art. 823.—*Gaines v. State (Tex. Cr. App.)* 10.

In a prosecution for theft from the person, argument of prosecuting attorney *held* not harmful to defendant.—*Gaines v. State (Tex. Cr. App.)* 10.

Defendant's counsel having gone outside the record in argument, the state's attorney, especially with the consent of defendant's attorney to say what he pleased, may go outside the record in replying.—*Gipson v. State (Tex. Cr. App.)* 216.

Argument of state's counsel that prosecutrix stood well with the good people, notwithstanding the slanderous report, *held* error; evidence of such standing having been erroneously admitted.—*Gipson v. State (Tex. Cr. App.)* 216.

Remarks by county attorney in prosecution for murder, made in argument, *held* not prejudicial.—*Fugett v. State (Tex. Cr. App.)* 461.

In a prosecution for burglary, certain remarks of prosecuting attorney, in closing, to jury, which the court told jury to disregard, *held* not error.—*Washington v. State (Tex. Cr. App.)* 810.

§ 17. — Province of court and jury in general.

An instruction which tells the jury what presumption arises from stated facts invades the province of the jury.—*Tines v. Commonwealth (Ky.)* 363.

In a prosecution for embezzlement of a horse, an instruction assuming that prosecutor was the owner of the horse *held* error.—*State v. Bonner (Mo. Sup.)* 463.

Instruction, in prosecution for forgery, as to presumption of guilt from possession of forged instrument, *held* not objectionable as comments on the evidence.—*State v. Pyscher (Mo. Sup.)* 836.

Instruction in prosecution for forging deed, admitting a consideration of forged acknowledgment, *held* not objectionable.—*State v. Pyscher (Mo. Sup.)* 836.

An instruction on a prosecution for homicide *held* erroneous, as being on the weight of the evidence.—*Holloway v. State (Tex. Cr. App.)* 14.

A witness having denied a certain conversation with the wife of accused, an instruction that the jury should disregard the conversation, save for the purpose of affecting the credibility of the witness, was erroneous.—*Spivey v. State (Tex. Cr. App.)* 444.

In prosecution for burglary, charge *held* erroneous as on the weight of the evidence.—*Dyer v. State (Tex. Cr. App.)* 456.

In a prosecution for murder, instruction on impeaching testimony *held* not on weight of evidence.—*Kipper v. State (Tex. Cr. App.)* 611.

In prosecution for violating local option law, a charge *held* erroneous as on the weight of the evidence.—*Sinclair v. State (Tex. Cr. App.)* 621.

A charge authorizing a conviction for larceny on unexplained possession alone *held* erroneous.—*Stewart v. State (Tex. Cr. App.)* 791.

§ 18. — Necessity, requisites, and sufficiency of instructions.

Admonition proper in a criminal case, on evidence admitted for particular purpose only stated.—*Bess v. Commonwealth (Ky.)* 349.

Admonition proper in a criminal case, on rejected evidence, stated.—*Bess v. Commonwealth (Ky.)* 349.

An instruction in a criminal case which unduly accentuates certain facts shown by the evidence is erroneous.—*Tines v. Commonwealth (Ky.)* 363.

Under Cr. Code, § 223, subsec. 1, it is error, on accused's failure to testify, to charge that the jury should not comment thereon nor draw any presumption therefrom.—*Tines v. Commonwealth (Ky.)* 363.

Use of qualifying phrase "beyond a reasonable doubt" *held* not necessary in referring to each item of evidence.—*State v. Pyscher (Mo. Sup.)* 836.

Instruction, in prosecution for forgery, as to explanation of possession of forged instrument, *held* not objectionable in specifying the degree of proof.—*State v. Pyscher (Mo. Sup.)* 836.

Instruction on a reasonable doubt, based on substantial evidence, *held* proper.—*State v. Pyscher (Mo. Sup.)* 836.

Where the proof fairly raises the defense of an alibi in a prosecution for murder, the jury should be instructed that if this proof, in connection with the other proof in the case, raises a reasonable doubt as to whether the accused was at the place of the homicide or at a different place, the defendant should be acquitted.—*Legere v. State (Tenn.)* 1059.

The court *held* required to limit impeaching testimony to the purpose for which it was admitted.—Sapp v. State (Tex. Cr. App.) 456.

In a prosecution for murder, evidence *held* not to call for special instruction on impeaching testimony.—Kipper v. State (Tex. Cr. App.) 611.

In a prosecution for murder, court *held* not called upon to specially instruct on certain corroborative evidence.—Kipper v. State (Tex. Cr. App.) 611.

In prosecution for violating local option law, a charge on defendant's agency *held* erroneous in excluding from jury the fact in issue.—Sinclair v. State (Tex. Cr. App.) 621.

A charge on insanity in a criminal case should be applied to that particular case.—Stewart v. State (Tex. Cr. App.) 791.

A charge on circumstantial evidence should be given in a larceny case, which depends on circumstantial evidence as to the original taking.—Stewart v. State (Tex. Cr. App.) 791.

In a prosecution for homicide, *held* not error to fail to charge on the law of circumstantial evidence.—Jones v. State (Tex. Cr. App.) 802.

An instruction that impeaching testimony is solely to enable the jury to weigh the impeached witness' testimony *held* too restrictive.—Dean v. State (Tex. Cr. App.) 803.

The court, if referring in its charge to defendant's failure to testify, should tell the jury not to consider or discuss it.—Fine v. State (Tex. Cr. App.) 806.

In a prosecution for rape, an objection to a charge that punishment would be assessed "at" death, instead of "by" death, is hypercritical.—Hill v. State (Tex. Cr. App.) 808.

In a prosecution for rape, the omission to state that penetration must be proved beyond a reasonable doubt was not error, when the law of reasonable doubt was subsequently given.—Hill v. State (Tex. Cr. App.) 808.

An instruction in a murder trial *held* objectionable, as requiring affirmative findings, where accused is entitled to the benefit of reasonable doubt.—Vann v. State (Tex. Cr. App.) 813.

In a prosecution for homicide, where dying declarations of the deceased, as well as the testimony of eyewitnesses, showed that defendant committed the crime, there is no cause for an instruction on circumstantial evidence.—Cruse v. State (Tex. Cr. App.) 818.

In a prosecution for rape, ruling of court on argument of district attorney *held* not error.—Simpson v. State (Tex. Cr. App.) 819.

In a criminal prosecution, charge on circumstantial evidence *held* proper.—Gaines v. State (Tex. Civ. App.) 10.

§ 19. — Custody, conduct, and deliberations of jury.

In prosecution for violating the local option law, response to questions of jury *held* not open to objection of informing jury that agency was a pure question of fact.—Sinclair v. State (Tex. Cr. App.) 621.

In a prosecution for violating local option law, response to jury on a question of agency *held* not objectionable in failing to state what constituted an agent.—Sinclair v. State (Tex. Cr. App.) 621.

Conviction of homicide reversed for misconduct of jury.—McDaniel v. State (Tex. Cr. App.) 802.

New trial, after conviction of homicide, submitted by affidavits of counsel as to certain statements of juror, *held* properly denied.—Cruse v. State (Tex. Cr. App.) 818.

§ 20. Motions for new trial and in arrest.

Refusal of court to exercise its discretion to set aside a grant of appeal and allow filing of affidavits in support of motion for new trial, on erroneous ground that the discretion did not exist, *held* error.—Legere v. State (Tenn.) 1059.

New trial on the ground of newly discovered evidence *held* properly refused.—Duncan v. State (Tex. Cr. App.) 13.

Incompetency of grand juror *held* not a ground for arresting judgment.—Thomas v. State (Tex. Cr. App.) 801.

Judgment will not be arrested, for inconsistency of counts of indictment, where only one is relied on.—Thomas v. State (Tex. Cr. App.) 801.

§ 21. Appeal and error, and certiorari.

A recognizance, defective in not stating the amount of appellant's punishment, as required by Code Cr. Proc. 1895, art. 887, necessitates dismissal.—Bourland v. State (Tex. Cr. App.) 455.

An assignment of error that the court failed to define "implied malice" does not raise the question of failure of the court to charge on murder in the second degree.—Kipper v. State (Tex. Cr. App.) 611.

A motion to dismiss a criminal appeal, for escape, should be denied, where accused is still within the sheriff's custody.—Stewart v. State (Tex. Cr. App.) 791.

While Code Cr. Proc. 1895, art. 540, provides for the service of a copy of indictment on defendant, *held* not error to deny defendant's request for same, when not made till second trial.—Scoville v. State (Tex. Cr. App.) 792.

§ 22. — Presentation and reservation in lower court of grounds of review.

Under Cr. Code Prac. §§ 281, 282, objections to closing argument of commonwealth attorney *held* not available on appeal, when shown only by affidavit on motion for new trial.—Miller v. Commonwealth (Ky.) 682.

Under Cr. Code, § 281, questions raised for the first time on motion for new trial cannot be considered on appeal.—Woodruff v. Commonwealth (Ky.) 922.

Where alleged error in statements made by the prosecuting attorney to the jury is not assigned in the motion for a new trial, it cannot be reviewed.—State v. Pyscher (Mo. Sup.) 836.

Statement, made by defendant in motion for new trial, that he had excepted to the overruling of a motion to quash the information charging him with crime, *held* insufficient to raise question on appeal.—City of Centralia v. Smith (Mo. App.) 488.

In a prosecution for theft from the person, argument of prosecuting attorney *held* not reversible error, in the absence of any request to withdraw such argument from the jury.—Gaines v. State (Tex. Cr. App.) 10.

In the absence of a bill of exceptions, the action of the court in permitting a juror to remain who is prejudiced against accused cannot be reviewed.—Mathews v. State (Tex. Cr. App.) 218.

Defendant, not showing he was prejudiced, *held* not entitled to complain of a ruling on a juror.—Norsworthy v. State (Tex. Cr. App.) 803.

Defendant in a criminal prosecution must make an issue by bill of exceptions to the lower court, where he insists that the venue was not proven.—Washington v. State (Tex. Cr. App.) 810.

A bill of exceptions to admission of dying declarations must show introduction of such

declarations and that proper predicate was not laid.—*Cruse v. State* (Tex. Cr. App.) 818.

On appeal from conviction of homicide, bill of exceptions to testimony of certain witness held defective.—*Cruse v. State* (Tex. Cr. App.) 818.

§ 23. — Record and proceedings not in record.

In the absence of a bill of exceptions, the court, on appeal in a criminal case, can only review the record proper.—*State v. Cayce* (Mo. Sup.) 525.

On appeal, an assignment that the court erred in permitting the introduction in evidence of an affidavit filed by defendant for continuance cannot be considered, when not incorporated in the bill of exceptions.—*State v. Hicks* (Mo. Sup.) 539.

An assignment of error, on appeal in a criminal case, that the court erred in permitting an affidavit to be introduced by the state, cannot be considered, where the record does not show that it was so introduced.—*State v. Hicks* (Mo. Sup.) 539.

Transcript on criminal appeal held insufficient.—*Crawford v. State* (Tex. Cr. App.) 8.

Appellant held not to show excuse for the statement of facts not bearing the approval of the judge, so as to allow its consideration on appeal.—*Walls v. State* (Tex. Cr. App.) 8.

The judge may not approve the statement on appeal before the attorneys agree it is correct.—*Walls v. State* (Tex. Cr. App.) 8.

Bill of exceptions to refusal to admit testimony as part of res gestae on criminal appeal should show time of making statement.—*Freeman v. State* (Tex. Cr. App.) 17.

Denial of new trial for insufficiency of the evidence cannot be reviewed, the record containing neither statement of facts nor bill of exceptions.—*Kimble v. State* (Tex. Cr. App.) 17.

Alleged error in admission of evidence cannot be reviewed, in the absence of a bill of exceptions thereto.—*Redd v. State* (Tex. Cr. App.) 214.

In the absence of the facts, it cannot be determined that a defendant, on trial for crime, was injured by the introduction of the evidence complained of by him.—*Elgin v. State* (Tex. Cr. App.) 225.

Ruling on application for a continuance cannot be revised, in the absence of the facts.—*Elgin v. State* (Tex. Cr. App.) 225.

Statement of facts, not filed within time allowed by law, cannot be considered on criminal appeal.—*Spurlock v. State* (Tex. Cr. App.) 447.

On appeal from conviction of embezzlement, assignment on certain instructions could not be considered, in absence of statement of facts.—*Spurlock v. State* (Tex. Cr. App.) 447.

On appeal from conviction of assault with intent to murder, the propriety of giving an instruction on self-defense held not reviewable, in absence of the facts.—*Williams v. State* (Tex. Cr. App.) 447.

The question of the disqualification of a juror in a criminal case because he had not paid his poll tax cannot be raised by motion for a new trial.—*Thompson v. State* (Tex. Cr. App.) 449.

An objection to the admissibility of evidence in a criminal case can only be raised by bill of exceptions.—*Thompson v. State* (Tex. Cr. App.) 449.

An objection stated to the introduction of evidence in a bill of exceptions does not constitute a certificate by the trial judge that the facts on which the objection was predicated existed.—*Sinclair v. State* (Tex. Cr. App.) 621.

On appeal from conviction on violating local option law, bill of exceptions as to admission of certain evidence held insufficient.—*Sinclair v. State* (Tex. Cr. App.) 621.

In the absence of a bill of exceptions, alleged error in refusing a continuance cannot be reviewed.—*Jones v. State* (Tex. Cr. App.) 802.

On appeal from conviction of homicide, sufficiency of evidence and error in instructions cannot be considered, in absence of statement of facts.—*McDaniel v. State* (Tex. Cr. App.) 802.

Statement of requirements of bill of exceptions to admission of evidence.—*Norsworthy v. State* (Tex. Cr. App.) 803.

A bill of exceptions, complaining that the state offered to prove a certain state of facts, but not affirmatively showing that the state did prove the facts, is defective.—*Simpson v. State* (Tex. Cr. App.) 819.

§ 24. — Review.

A defendant's request to instruct held not to prevent him from taking advantage of the error in a similar instruction not substantially the same.—*Whitmore v. State* (Ark.) 598.

In prosecution for setting up faro bank, remarks of prosecuting attorney considered, and held not prejudicial to defendant.—*Miller v. Commonwealth* (Ky.) 682.

Under Ky. St. 1899, §§ 1960, 1961, relative to faro, and sections 459, 460, relative to construction of penal statutes, instructions as to game carried on under another name held more favorable to defendant than he was entitled to.—*Miller v. Commonwealth* (Ky.) 682.

Admission of secondary evidence to prove divorce, to show witness competent against former husband, accused of homicide, held harmless error, in view of witness' testimony that she was decedent's widow.—*Tompkins v. Commonwealth* (Ky.) 712.

The verdict in a criminal case will not be disturbed on appeal, there being any evidence to support it.—*Woodruff v. Commonwealth* (Ky.) 922.

In a prosecution for homicide, instruction submitting to jury conceded fact held not prejudicial.—*Davis v. Commonwealth* (Ky.) 1101.

The Court of Appeals has no power under the Code to disturb a verdict of guilty, if there is any evidence to support it.—*Davis v. Commonwealth* (Ky.) 1101.

On prosecution for murder, exclusion from hypothetical question put to defendant's expert of assumption that there was no motive for the crime held not error.—*State v. Dunn* (Mo. Sup.) 848.

On issue as to the sanity of an accused, an erroneous ruling that facts testified to by defendant might not be assumed in hypothetical question to his expert held not prejudicial.—*State v. Dunn* (Mo. Sup.) 848.

Verdict of conviction, supported by substantial evidence, will not be disturbed on appeal.—*State v. Sayman* (Mo. App.) 337.

A conviction in a criminal case will not be reversed because the court called the case out of its regular order, unless the bill of exceptions shows that the trial court abused its discretion in so doing.—*Redd v. State* (Tex. Cr. App.) 214.

Refusal to grant a continuance for the sickness of defendant's counsel held not ground for reversal.—*Thompson v. State* (Tex. Cr. App.) 449.

In prosecution for murder, defendant held not prejudiced by the fact that names of jurors on regular panel were not placed in box with those on special venire.—*Kipper v. State* (Tex. Cr. App.) 611.

In prosecution for murder committed in attempted rescue, evidence that person to be rescued had been jailed for drunkenness *held* not prejudicial.—*Kipper v. State* (Tex. Cr. App.) 611.

In a prosecution for murder, certain questions in impeachment *held* not prejudicial, when answered in the negative.—*Kipper v. State* (Tex. Cr. App.) 611.

Declarations of deceased, soon after the homicide, *held*, in a prosecution therefor, harmless to defendant.—*Kipper v. State* (Tex. Cr. App.) 611.

That a witness was improperly asked if he had not stated that defendant and his brothers were going to kill deceased, and answered, "No," *held* not reversible error.—*Baker v. State* (Tex. Cr. App.) 618.

In prosecution for manslaughter, state's cross-examination as to lawlessness in community and circumstances under which defendant's brother was shot *held* harmless error.—*Montgomery v. State* (Tex. Cr. App.) 788.

Defendant cannot complain of a charge, because on the weight of evidence, where it is favorable to him.—*Tate v. State* (Tex. Cr. App.) 793.

Discussion in the jury room of defendant's failure to testify is ground for reversal.—*Fine v. State* (Tex. Cr. App.) 806.

In prosecution for rape, omission in certain part of charge to state that the act must be committed on another than defendant's wife *held* not reversible error.—*Hill v. State* (Tex. Cr. App.) 808.

In a prosecution for burglary, certain remarks of prosecuting attorney, and pointing at defendant, who had not testified, *held* reversible error.—*Washington v. State* (Tex. Cr. App.) 810.

Where there is positive testimony of incestuous intercourse, a charge on the law of circumstantial evidence, while error, is harmless.—*Gibson v. State* (Tex. Cr. App.) 812.

In a prosecution for rape, certain evidence as to time of engagement to marry defendant *held* not prejudicial.—*Simpson v. State* (Tex. Cr. App.) 819.

CROSS-EXAMINATION.

See "Witnesses," § 5.

CURATORS.

See "Guardian and Ward."

CUSTODY.

Of child, see "Divorce," § 4; "Parent and Child."

Of jury, see "Criminal Law," § 19.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Merger and bar of causes of action, see "Judgment," § 6.

Remittitur of excess as condition to overruling motion for new trial, see "New Trial," § 2.

Damages for particular injuries.

See "Assault and Battery," § 1; "Death," § 1; "Fraud," § 2; "Nuisance," § 2; "Trespass," § 1.

Breach by buyer of contract for sale of goods, see "Sales," § 7.

Breach by seller of contract for sale of goods, see "Sales," § 8.

Breach of contract to furnish water, see "Waters and Water Courses," § 4.

Caused by delay in delivery of goods by carrier, see "Carriers," § 2.

Caused by maintenance of railroad, see "Railroads," § 2.

Caused by negligence in delivery of telegram, see "Telegraphs and Telephones," § 2.

Ejection of passenger, see "Carriers," § 8.

Loss of passenger's baggage, see "Carriers," § 9.

Loss of services of child, see "Parent and Child."

Loss of services of wife, see "Husband and Wife," § 2.

Obstruction of easement, see "Easements," § 2.

Torts by city, see "Municipal Corporations," § 9.

Wrongful attachment, see "Attachment," § 3.

Recovery in particular actions or proceedings.

See "Replevin," § 2; "Trove and Conversion," § 1.

§ 1. Grounds and subjects of compensatory damages.

No recovery can be had for personal injury resulting from fright occasioned by the negligence of another, when there is no physical injury or contract relation.—*Morse v. Chesapeake & O. Ry. Co.* (Ky.) 361.

In an action for a buyer's breach of a contract to purchase secondhand rails, the seller *held* entitled to recover interest on the damages, under Rev. St. 1899, § 3705.—*Nelson v. Cal Hirsch & Sons' Iron & Rail Co.* (Mo. App.) 590.

Profits lost by defendant by reason of plaintiff's breach of a contract to furnish castings of a certain character *held* recoverable on a counterclaim in an action by plaintiff to recover the price of castings furnished.—*Chisholm & Moore Mfg. Co. v. United States Canopy Co.* (Tenn.) 1062.

§ 2. Measure of damages.

Where the owner of adjoining lots, after breach of his contract to deepen for the use of the vendee of one lot a well on the division line between the lots, prevents her from so deepening it, the measure of damages *held* to be the cost of making a new well of such depth on vendee's own premises.—*Plunkett v. Meredith* (Ark.) 600.

Where the owner of two adjoining lots contracts with the vendee of one of them, as part of the consideration for the purchase thereof, to deepen a well on the line between the lots, until it affords a sufficient supply of water for the use of such vendee, and fails to do so, the measure of damages is the cost of making it of such depth.—*Plunkett v. Meredith* (Ark.) 600.

The measure of damages for the breach of a contract by the owner of adjoining lots to dig a well for use of the vendee of one of the lots *held* to be the cost of digging such well.—*Plunkett v. Meredith* (Ark.) 600.

Rule for measure of damage in action for breach of contract to furnish a certain quality of feed to cattle, resulting in injury thereto, stated.—*Hartgrove & Clegg v. Southern Cotton Oil Co.* (Ark.) 908.

§ 3. Inadequate and excessive damages.

In an action for injuries owing to plaintiff's horse having been frightened by defendant's automobile, a verdict for \$1,020 *held* not excessive.—*Shinkle v. McCullough* (Ky.) 196.

The verdict in an action for injuries sustained by reason of a defective sidewalk, *held* not excessive.—*O'Neill v. Kansas City* (Mo. Sup.) 64.

The verdict in an action by a street car passenger for injuries sustained by the derailment of the car *held* not excessive.—*Heyde v. St. Louis Transit Co.* (Mo. App.) 127.

Verdict of \$2,500 in passenger's injury action *held* not excessive.—*Robinson v. St. Louis & S. Ry. Co.* (Mo. App.) 493.

In an action for injuries to a servant, evidence reviewed, and *held* to justify a verdict for \$16,000 damages.—*Galveston, H. & S. A. Ry. Co. v. Appel* (Tex. Civ. App.) 635.

In an action for personal injuries by a railway employé, a verdict for \$7,500 *held* not excessive.—*International & G. N. R. Co. v. Pina* (Tex. Civ. App.) 979.

In action for servant's injury refusal of new trial, under Rev. St. 1879, art. 1448, for inadequacy of verdict, *held* justified.—*Farley v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 1040.

§ 4. Pleading, evidence, and assessment.

Evidence considered in action against railroad for negligent killing of valuable dog, and *held* to support verdict for \$250 damages.—*St. Louis, I. M. & S. Ry. Co. v. Philpot* (Ark.) 901.

In an action against street railway for injury to a hack, evidence *held* to support a verdict for \$800.—*South Covington & C. St. Ry. Co. v. McHugh* (Ky.) 202.

An instruction as to damages *held* not erroneous because directing the jury to find such sum as they "think" will compensate plaintiff.—*Ilges v. St. Louis Transit Co.* (Mo. App.) 93.

In an action for injuries to a passenger, it was error for the court to submit value of physician's services on question of damages where there was no evidence thereof.—*Waldopfel v. St. Louis Transit Co.* (Mo. App.) 123.

In an action for personal injuries, instruction on the measure of damages, authorizing recovery for pain and anguish which might be suffered, *held* erroneous.—*Albin v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 153.

Evidence in personal injury action *held* sufficient to authorize submission of loss of earnings as element of damages.—*Robinson v. St. Louis & S. Ry. Co.* (Mo. App.) 493.

Under Const. art. 5, § 8, Rev. St. 1895, art. 3258, Bill of Rights, art. 1, § 9, and Rev. St. 1895, art. 1451, district court, in an action for injuries, *held* to have no authority to make an order requiring plaintiff to submit to an examination by physician.—*Austin & N. W. R. Co. v. Cluck* (Tex. Sup.) 403.

Where the complaint merely alleged that plaintiff contracted a severe cold, which produced inflammation of the ovaries, proof showing effect of such diseased condition on other organs *held* admissible.—*Missouri, K. & T. Ry. Co. v. McCutcheon* (Tex. Civ. App.) 232.

In an action for damages to land by overflow, evidence that plaintiff was prevented from planting a crop thereon *held* insufficient to authorize judgment for plaintiff.—*Texas & N. O. R. Co. v. Looney* (Tex. Civ. App.) 254.

In an action by a servant for injuries, proof of his life expectancy is admissible, though the injury, while permanent, did not result in entire disability.—*Gulf, C. & S. F. Ry. Co. v. Cooper* (Tex. Civ. App.) 263.

A servant's earning capacity at the time of his injuries, which were permanent, *held* not conclusive as to his earning capacity as an element of damages.—*Galveston, H. & S. A. Ry. Co. v. Appel* (Tex. Civ. App.) 635.

In action for breach of contract to supply water, plaintiff has burden of proving damages with reasonable certainty.—*City of Van Alstyne v. Morrison* (Tex. Civ. App.) 655.

Allegations in a petition for damages for personal injuries *held* sufficient to permit proof of fits, as result of congestive condition of the

brain, and of impairment of eyesight.—*International & G. N. R. Co. v. Pina* (Tex. Civ. App.) 979.

Instruction permitting recovery for necessary and reasonable expenses for medicine and doctor's bills *held* error, where there was no evidence of reasonableness.—*Missouri, K. & T. Ry. Co. v. Harrison* (Tex. Civ. App.) 1036.

DEATH.

Harmless error in instructions in action for causing death, see "Appeal and Error," § 20. Of bankrupt, see "Bankruptcy," § 2.

Of party to action ground for abatement, see "Abatement and Revival," § 2.

Suspension of running of statute of limitation, see "Limitation of Actions," § 2.

§ 1. Actions for causing death.

In action for wrongful death, under Gen. St. Kan. 1889, par. 4518, the elements of damage which might be considered by the jury stated.—*Jones v. Kansas City, Ft. St. & M. R. Co.* (Mo. Sup.) 890.

Under Gen. St. Kan. 1889, pars. 4518, 4519, and Rev. St. Mo. 1899, §§ 541, 547, in a widow's suit for wrongful death of her husband in Kansas, the joinder of their child as a plaintiff did not constitute a defect which could be taken advantage of after a plea to the merits.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

The widow of one killed by wrongful act in Kansas *held* capable of suing in Missouri, under Gen. St. Kan. 1889, pars. 4518, 4519, and Rev. St. Mo. 1899, §§ 541, 547, without joining the child of herself and deceased as a party plaintiff.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

An instruction as to measure of damages *held* not objectionable, as calling for a verdict which might be more than enough to compensate plaintiffs for their pecuniary loss.—*Ft. Worth & D. C. Ry. Co. v. Linthicum* (Tex. Civ. App.) 40.

A wife *held* entitled to recover damages for her husband's death, notwithstanding his failure to support her for a long time prior to his death.—*De Garcia v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 275.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Declarations against interest, see "Evidence," § 7.

Estates, see "Descent and Distribution"; "Executors and Administrators."

Testimony as to transactions with persons since deceased, see "Witnesses," § 3.

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 7.

As evidence in criminal prosecutions, see "Criminal Law," § 8.

Dying declarations, see "Homicide," § 3.

DECREE.

In equity, see "Equity," § 1.

DEDICATION.**§ 1. Nature and requisites.**

A dedication by the owner and acceptance will be presumed, where a passway has been used by the public for more than 15 years.—*Magruder v. Potter* (Ky.) 919.

DEEDS.

As evidence, see "Evidence," § 9.

Covenants in deeds, see "Covenants."

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Parol or extrinsic evidence, see "Evidence," § 10.

Reformation, see "Reformation of Instruments."

Deeds by or to particular classes of parties.

See "Guardian and Ward," § 2.

Married women, see "Husband and Wife," § 1.

Sheriffs, see "Execution," § 1.

Deeds of particular species of property.

Separate property of married women, see "Husband and Wife," § 1.

Particular classes of deeds.

Of trust, see "Chattel Mortgages," § 1; "Mortgages."

§ 1. Requisites and validity.

In a suit for cancellation of deeds and other relief, evidence examined, and *held* sufficient to sustain findings as to performance of agreements by defendant, and absence of notice of adverse equities.—*Garner v. Boyle* (Tex. Civ. App.) 987.

§ 2. Construction and operation.

Where there is no latent ambiguity in a deed, its construction is for the court.—*Ashcraft v. Cox* (Ky.) 718.

Settlor of a trust could not afterwards defeat vested estates of cestuis que trustent.—*Ottomeyer v. Pritchett* (Mo. Sup.) 62.

§ 3. Pleading and evidence.

Evidence *held* to show that a deed was fully executed and delivered to the grantee.—*Williams v. Butterfield* (Mo. Sup.) 729.

An affidavit that a deed relied on by the opposite party is a forgery puts such party on proof of its genuineness.—*Williamson v. Work* (Tex. Civ. App.) 286.

DEFAMATION.

See "Libel and Slander."

DEFAULT.

Judgment by, see "Judgment," § 2.

DELAY.

In delivery of telegram, see "Telegraphs and Telephones," § 2.

In transportation or delivery of goods by carrier, see "Carriers," § 2.

DELEGATION.

Of legislative power, see "Constitutional Law," § 2.

Of power to collect estate of decedent, see "Executors and Administrators," § 2.

DELIVERY.

Of goods by carrier, see "Carriers," § 2.

Of goods sold, see "Sales," § 4.

Of goods to carrier, see "Carriers," § 2.

Of gift, see "Gifts," § 1.

Of telegram, see "Telegraphs and Telephones," § 2.

DEMAND.

For payment of bill or note, see "Bills and Notes," § 4.

On carrier to furnish cars, see "Carriers," § 2.

DEMURRER.

In pleading, see "Pleading," § 4.

DEPOSITIONS.

See "Witnesses."

Necessity of exceptions to, for purpose of review, see "Appeal and Error," § 2.

Reception in evidence, see "Trial," § 2.

Where no incompetency of a witness to testify appears, an objection to the reading of his deposition as a whole is without merit.—*Louisville & C. Packet Co. v. Bortorff* (Ky.) 920.

Proceeding for discovery of decedent's assets *held* "a suit pending," within Rev. St. 1899, § 2877, relating to the taking of depositions.—*Ex parte Gfeller* (Mo. Sup.) 552.

The sufficiency of a notice to take depositions *held* determined by the law of the state where the action is pending.—*In re Wogan* (Mo. App.) 490.

The giving of very short notice by those taking depositions *held* not conclusive evidence of bad faith on their part, so as to invalidate the proceedings.—*In re Wogan* (Mo. App.) 490.

Notary before whom deposition to be used in another state is to be taken *held* authorized to continue case to allow nonresident attorney, to whom notice was not given, to be present at the taking of the deposition.—*In re Wogan* (Mo. App.) 490.

Where an exhibit referred to in a deposition was not annexed thereto, etc., as required by Rev. St. 1899, § 2903, *held* within discretion of the court to permit party to withdraw the deposition and attach the exhibit.—*Crane Co. v. Neel* (Mo. App.) 768.

Rev. St. 1899, § 2903, relative to exhibits produced on taking of a deposition, *held* mandatory.—*Crane Co. v. Neel* (Mo. App.) 768.

DEPOSITS.

In bank, see "Banks and Banking," § 1.

DEPOTS.

Liability of carrier for failure to keep warm, see "Carriers," § 5.

DESCENT AND DISTRIBUTION.

See "Executors and Administrators"; "Wills."

§ 1. Persons entitled and their respective shares.

Laws 1895, p. 169, Rev. St. 1899, §§ 2939, 4603, and sections 2, 105, 107, and 111 of the chapter relative to administration, construed, and *held*, that a wife cannot, by will, deprive her husband of his interest in her property given by Laws 1895, p. 169.—*Waters v. Herboth* (Mo. Sup.) 305.

§ 2. Rights and liabilities of heirs and distributees.

Father cannot, after making gifts to his son, change them into debts or payments on his liabilities.—*Owsley v. Owsley* (Ky.) 394.

Property given by a parent or grandparent with a view to a portion or settlement will, if the donor die intestate, constitute an advancement, whether intended for one or not.—*Owsley v. Owsley* (Ky.) 394.

Under Ky. St. 1899, § 1407, to constitute an advancement, donor must die intestate and gift must have been intended for settlement or portion.—*Owsley v. Owsley* (Ky.) 394.

Sums advanced by a parent to his son cannot be considered as technical "advancements," so long as the son is alive.—*Owsley v. Owsley* (Ky.) 394.

Testamentary writing construed, and held to make person named therein trustee for decedent's children, and not executor de son tort, so that he was amenable to suit by children.—*Gibson v. Gibson* (Ky.) 928.

Heirs of a deceased partner held not entitled to sue for his share of an unadministered asset of the partnership.—*Pullis v. Pullis* (Mo. Sup.) 753.

The general rule that a suit to recover property of the estate of a decedent must be brought by the administrator is subject to the exception that, where there is no administrator and no necessity therefor, suit may be brought by the heirs.—*Rylie v. Stammire* (Tex. Civ. App.) 626.

To authorize a suit by heirs to recover property belonging to the estate of a decedent, they must allege and prove that there is no administration and none necessary.—*Rylie v. Stammire* (Tex. Civ. App.) 626.

DESCRIPTION.

Names of individuals, see "Names."

Of property devised or bequeathed, see "Wills," § 3.

Of property in contract to convey, see "Vendor and Purchaser," § 1.

Of property in sheriff's deed, see "Execution," § 1.

Of property mortgaged, see "Chattel Mortgages," § 1.

DESERTION.

Ground for divorce, see "Divorce," § 1.

DETINUE.

See "Replevin."

DEVISES.

See "Wills."

DILIGENCE.

In discovering evidence, see "Criminal Law," § 11.

DISABILITIES.

Care required of carrier as to passengers under disability, see "Carriers," § 5.

Contributory negligence of persons under disability, see "Negligence," § 2.

Effect on limitation, see "Limitation of Actions," § 2.

DISCHARGE.

From indebtedness, see "Bankruptcy," § 2; "Compromise and Settlement"; "Release."

From liability as surety, see "Principal and Surety," § 2.

Of judgment, see "Judgment," § 8.

DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," § 13.

Review in criminal prosecutions, see "Criminal Law," § 24.

DISCRIMINATION.

By carrier, see "Carriers," § 1.

In selection of jurors as denial of equal protection of laws, see "Constitutional Law," § 7.

Race discrimination in selection of jurors, see "Civil Rights."

DISMISSAL AND NONSUIT.

Dismissal of action for wrongful conversion, see "Trove and Conversion," § 1.

Dismissal of appeal or writ of error, see "Appeal and Error," § 9; "Criminal Law," §§ 21-24.

Statements of counsel at trial ground for nonsuit, see "Trial," § 3.

DISORDERLY CONDUCT.

Ejection of disorderly passengers, see "Carriers," § 8.

DISSOLUTION.

Of attachment, see "Attachment," § 1.

Of corporation, see "Corporations," § 5.

Of partnership, see "Partnership," § 3.

DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution."

DISTRICT AND PROSECUTING ATTORNEYS.

Arguments and conduct of, at trial, see "Criminal Law," § 16.

Harmless error in arguments and conduct of, see "Criminal Law," § 24.

Necessity of exceptions to arguments of, for purpose of review, see "Criminal Law," § 22.

Under the direct provisions of Code Cr. Proc. 1895, art. 38, a county attorney pro tem. may be appointed.—*Daniels v. State* (Tex. Cr. App.) 215.

DITCHES.

See "Drains."

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," § 1.

DIVERSION.

Of percolating waters, see "Waters and Water Courses," § 1.

DIVORCE.

Effect on competency of husband or wife as witnesses, see "Witnesses," § 2.

Sufficiency of service of process to sustain judgment for alimony, see "Judgment," § 1.

§ 1. Grounds.

Proof that a husband sent his wife away from his home without her fault, and avowed that he would not recognize her as his wife or live with her in the future, entitled her to a divorce on the ground of abandonment, under Ky. St. 1903, § 2117.—*Hall v. Hall* (Ky.) 658.

§ 2. Jurisdiction, proceedings, and relief.

Conceding that judgment of divorce can be set aside only on petition, under Civ. Code, § 426, oral consent would not confer jurisdiction to vacate same.—Greer v. Greer (Ky.) 708.

§ 3. Alimony, allowances, and disposition of property.

A wife, on being decreed a divorce on the ground of abandonment, *held* entitled to alimony and an allowance for the support of her infant child, awarded to her.—Hall v. Hall (Ky.) 668.

The part of a decree for temporary alimony which adjudged that defendant should pay \$50 "on demand, if necessary," for plaintiff's benefit, *held* void.—Cope v. Cope (Mo. App.) 92.

The petition in an action for divorce *held* to sufficiently show a ground for divorce to authorize the awarding to plaintiff of temporary alimony.—Cope v. Cope (Mo. App.) 92.

On a motion for temporary alimony, the proof *held* sufficient to show the marriage of the parties.—Cope v. Cope (Mo. App.) 92.

§ 4. Custody and support of children.

A wife *held* entitled to the custody of her infant daughter, on being decreed a divorce from her husband on the ground of abandonment.—Hall v. Hall (Ky.) 668.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 9.

As evidence in criminal prosecutions, see "Criminal Law," § 6.

DOMICILE.

Of parties as affecting venue, see "Venue," § 1.

DONATIONS.

See "Gifts."

DOWER.

On death of bankrupt, see "Bankruptcy," § 2.

DRAINS.

Drainage of surface waters, see "Waters and Water Courses," § 2.

§ 1. Assessments and special taxes.

Under Ky. St. § 2400, land assessed for a drainage ditch *held* liable therefor, notwithstanding that one to whom it was assessed had personal property from which the assessment might have been satisfied.—Scherer v. Short (Ky.) 357.

DRUGGISTS.

See "Poisons."

Regulation of liquor sales by druggists, see "Intoxicating Liquors," § 1.

Druggist's negligence in furnishing carbolic acid in place of arnica *held* the proximate cause of injury from use of the carbolic acid.—Peterson v. Westmann (Mo. App.) 1015.

Negligence of a medical student, who recommended arnica, *held* not to preclude recovery for injury from use of carbolic acid negligently furnished by a druggist in place of arnica.—Peterson v. Westmann (Mo. App.) 1015.

One *held* not guilty of negligence in not heeding a carbolic acid label on a bottle, which he had sent, with the label on it, for arnica.—Peterson v. Westmann (Mo. App.) 1015.

In action for loss of finger from use of carbolic acid on a bruise, instruction that, if the injury resulted from the bruise, there could be no recovery, *held* properly refused.—Peterson v. Westmann (Mo. App.) 1015.

DUE PROCESS OF LAW.

See "Constitutional Law," § 8.

DUPLICITY.

In indictment, see "Indictment and Information," § 4.

DYING DECLARATIONS.

See "Homicide," § 6.

EASEMENTS.

See "Dedication"; "Highways."

§ 1. Creation, existence, and termination.

Where a passway has been continuously used as a matter of right for 15 years, a presumption of grant arises.—Magruder v. Potter (Ky.) 919.

After a passway has been used for a half century, the burden is on the defendant, in an action for its obstruction, to show that the use was only permissive.—Magruder v. Potter (Ky.) 919.

Where a passway had been used for something like a half century, it is unnecessary to show that the use was claimed as a matter of right.—Magruder v. Potter (Ky.) 919.

§ 2. Extent of right, use, and obstruction.

In an action for obstructing a passway, the measure of damages is the diminution of the value of the use of plaintiff's premises during the continuance of the obstruction.—Louisville & N. R. Co. v. Carter (Ky.) 719.

EJECTION.

Of passenger, see "Carriers," § 8.

EJECTMENT.

See "Trespass to Try Title."

Bar by former adjudication, see "Judgment," § 6.

Harmless error in direction of verdict in ejectment proceedings, see "Appeal and Error," § 15.

§ 1. Right of action and defenses.

Where an answer was filed in ejectment, setting up an equitable defense, but not by way of cross-bill, it was error to discharge the jury on the ground that the action was in equity.—Hall v. Small (Mo. Sup.) 733.

§ 2. Trial, judgment, enforcement of judgment, and review.

In ejectment, where the defense was a mistake in plaintiff's deed, *held*, on the evidence, error for the trial court to grant a new trial on the ground that plaintiff's verdict was against the evidence.—Ottomeyer v. Pritchett (Mo. Sup.) 62.

§ 3. Damages, mesne profits, improvements, and taxes.

Improvements for which Sand. & H. Dig. § 2590, authorizes compensation to one holding under color of title, are measured by the increase in the value of the land, and not their cost.—Greer v. Fontaine (Ark.) 56.

ELECTION.

Between counts in indictment, see "Indictment and Information," § 4.

ELECTION OF REMEDIES.

Where a vendor of land sued to recover on the note for the purchase price and to foreclose the vendor's lien retained, and defendant pleaded the statute of limitations, the vendor could elect to sue for the land.—*Sanders v. Rawlings* (Tex. Civ. App.) 41.

ELECTIONS.

Contracts to pay campaign expenses, see "Contracts," § 1.

Keeping saloon open on election day, see "Intoxicating Liquors," § 4.

Local option elections, see "Intoxicating Liquors," § 2.

Submission of question of changing county boundaries to popular vote, see "Counties," § 1.

Submission of question of expenditures of county funds to popular vote, see "Counties," § 3.

Submission of question of increasing public debt to popular vote, see "Municipal Corporations," § 10.

§ 1. Violations of election laws.

Indictment of election judges, charging neglect of duty in failing to count ballots, *held* fatally defective.—*State v. Gassard* (Mo. App.) 473.

ELECTRICITY.

Electric street railroads, see "Street Railroads."

Validity of statute authorizing cities to purchase electric light plants as deprivation of property without due process of law, see "Constitutional Law," § 8.

Validity of statute authorizing cities to purchase electric light plants as impairing obligation of contracts, see "Constitutional Law," § 5.

EMBEZZLEMENT.

Province of court and jury, see "Criminal Law," § 17.

Review of instructions as dependent on presentation of question by record, see "Criminal Law," § 23.

In a prosecution of a bailee for embezzling a horse, an instruction assuming that defendant "hired" the horse, without evidence to support it, was error.—*State v. Bonner* (Mo. Sup.) 463.

It is not necessary that an indictment for embezzlement state that the party whose property was embezzled was a "private person."—*Spurlock v. State* (Tex. Cr. App.) 447.

EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," § 6.

§ 1. Nature, extent, and delegation of power.

Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, and authorizing the acquisition of property for the purpose by purchase or the exercise of the right of eminent domain, is not violative of Const. art. 2, § 21, forbidding the taking of private property for public use without just compensation.—*State ex rel. Town of Canton v. Allen* (Mo. Sup.) 868.

Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, and

authorizing the exercise of the right of eminent domain, is not violative of Const. art. 2, § 20, forbidding the taking of private property with or without compensation, unless by consent of the owner, except for private ways of necessity, drains, and ditches.—*State ex rel. Town of Canton v. Allen* (Mo. Sup.) 868.

Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, is not violative of Const. art. 2, § 20, forbidding the taking of private property for private use.—*State ex rel. Town of Canton v. Allen* (Mo. Sup.) 868.

An anti-weed ordinance *held* not a taking of property within Const. U. S. Amend. art. 5.—*City of St. Louis v. Galt* (Mo. Sup.) 876.

§ 2. Compensation.

Under Const. § 242, railroad could not make a change in the grade or use of a street, injuriously affecting abutting property owners, without compensation.—*Louisville & N. R. Co. v. Cumnock* (Ky.) 933.

Measure of damages for a change of grade by railroad in front of plaintiff's property *held* difference between market value of property before it was known that work would be done, and market value since completion of work.—*Louisville & N. R. Co. v. Cumnock* (Ky.) 933.

In an action against a railroad for damages resulting to property from a change of grade, verdict for \$800 *held* not excessive.—*Louisville & N. R. Co. v. Cumnock* (Ky.) 933.

EMPLOYES.

See "Master and Servant."

ENCROACHMENT.

On highways, see "Highways," § 4.

ENTRY.

Re-entry by landlord, see "Landlord and Tenant," § 5.

ENTRY, WRIT OF.

See "Ejectment."

EQUITABLE ESTOPPEL.

See "Estoppel," § 1.

EQUITY.

Equitable estoppel, see "Estoppel," § 1.

Equitable set-off, see "Set-Off and Counterclaim."

Relief against judgment, see "Judgment," § 4.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Fraudulent Conveyances"; "Injunction"; "Nuisance," §§ 1, 2; "Partition," § 1; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Trusts."

§ 1. Decree and enforcement thereof.

Where a motion to set aside a judgment in equity was made within 15 days, the court could set aside the judgment pending the motion, though more than 60 days had elapsed.—*Aubach's Ex'r v. Read* (Ky.) 204.

ERROR, WRIT OF.

See "Appeal and Error"; "Criminal Law," §§ 21-24.

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 1.
 Of counties, see "Counties," § 1.
 Of railroads, see "Railroads," § 2; "Street Railroads," § 1.
 Of telegraphs or telephones, see "Telegraphs and Telephones," § 1.
 Of trusts, see "Trusts," § 4.
 Of will, see "Wills," § 2.

ESTATES.

Created by will, see "Wills," § 3.
 Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."
 Estates for years, see "Landlord and Tenant."
 Tenancy in common, see "Tenancy in Common."
 Trusts, see "Trusts," § 2.

ESTOPPEL.

By judgment, see "Judgment," §§ 6, 7.
 Of devise by acceptance of devise, see "Wills," § 4.
 Of pledgees as to rights of purchaser from pledgor, see "Pledges."
 Of tenant to dispute title of landlord, see "Landlord and Tenant," § 1.
 To abate nuisance, see "Nuisance," § 1.
 To allege error in civil actions, see "Appeal and Error," § 12.
 To allege error in criminal prosecutions, see "Criminal Law," § 24.
 To attack validity of ordinance, see "Municipal Corporations," § 7.
 To avoid or forfeit insurance policy, see "Insurance," § 5.
 To deny corporate authority, see "Corporations," § 3.

§ 1. Equitable estoppel.

Evidence *held* to show that one had represented that a lot included the right to an alleyway over an adjoining lot, which he afterwards owned.—*Wright v. Williams* (Ky.) 1128.

One who represented that there was a right to an alley over land of which he became the owner *held* estopped to deny the right.—*Wright v. Williams* (Ky.) 1128.

Representations to a debtor's sureties *held* not to estop their denial as against the creditor.—*Citizens' Bank v. Burrus* (Mo. Sup.) 748.

Seller of an irrigation pump *held* precluded, in an action on the contract of sale, from denying the construction placed on the contract by the buyer and acquiesced in by him.—*Masterson v. Heitmann & Co.* (Tex. Civ. App.) 983.

EVIDENCE.

See "Depositions"; "Witnesses."
 Admissibility of evidence under pleading, see "Pleading," § 8.
 Applicability of instructions to evidence, see "Trial," § 5.
 Changing rules of evidence as impairing vested rights, see "Constitutional Law," § 4.
 Harmless error in admission of evidence, see "Appeal and Error," § 17; "Criminal Law," § 24.
 Harmless error in exclusion of evidence, see "Appeal and Error," § 18; "Criminal Law," § 24.
 Instructions on weight of, see "Criminal Law," § 17; "Trial," § 5.
 Necessity of exceptions to admission of, for purpose of review, see "Criminal Law," § 22.
 Newly discovered evidence ground for new trial, see "Homicide," § 8.
 Questions of fact for jury, see "Trial," § 4.
 Reception at trial, see "Criminal Law," § 14; "Trial," § 2.

Review of, as dependent on presentation of question in record, see "Appeal and Error," § 6; "Criminal Law," § 23.
 Review on appeal or writ of error, see "Appeal and Error," §§ 11, 14.
 Verdict or findings contrary to evidence, see "New Trial," § 1.

As to particular facts or issues.

See "Adverse Possession," §§ 1, 3; "Alteration of Instruments"; "Boundaries," § 1; "Damages," § 4; "Dedication," § 1; "Deeds," § 3; "Easements," § 1; "Estoppel," § 1; "Fraudulent Conveyances," § 2; "Marriage"; "Usury," § 1.

Agency, see "Principal and Agent," § 1.

Existence of community interest in property, see "Husband and Wife," § 3.

Existence of trust, see "Trusts," § 1.

Knowledge of bankruptcy proceedings, see "Bankruptcy," § 2.

Mistake in land patent, see "Public Lands," § 1.
 Negligence of bank, see "Banks and Banking," § 1.

Ordinances, see "Municipal Corporations," § 3.
 Right to custody of child, see "Parent and Child."

Settlement on public lands, see "Public Lands," § 1.

Value of turnpike, see "Turnpikes and Toll Roads," § 1.

In actions by or against particular classes of parties.

See "Brokers," § 2; "Carriers," §§ 2, 6, 8; "Executors and Administrators," § 6; "Master and Servant," § 9; "Principal and Surety," § 3; "Railroads," §§ 4-6; "Street Railroads," § 6.

Devisees, see "Wills," § 4.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

In particular civil actions or proceedings.

See "Account, Action on"; "False Imprisonment," § 1; "Libel and Slander," § 1; "Negligence," § 3; "Nuisance," § 1; "Reformation of Instruments," § 2; "Torts"; "Trespass to Try Title," § 1.

Collateral attack on judgment, see "Judgment," § 5.

For breach of contract of sale, see "Sales," § 8.

For breach of warranty, see "Sales," § 8.

For cancellation of deed, see "Deeds," § 1.

For compensation of agent, see "Principal and Agent," § 2.

For compensation of broker, see "Brokers," § 2.

For delay in delivery of goods by carrier, see "Carriers," § 2.

For delivery of forged telegram, see "Telegraphs and Telephones," § 2.

Foreclosure, see "Mechanics' Liens," § 4.

For ejection of passenger, see "Carriers," § 8.

For fires caused by operation of railroad, see "Railroads," § 6.

For injuries to animals caused by operation of railroad, see "Railroads," § 5.

For personal injuries, see "Carriers," § 6; "Master and Servant," § 9; "Railroads," § 4; "Street Railroads," § 6; "Telegraphs and Telephones," § 1.

For price of goods, see "Sales," § 7.

For price of land, see "Vendor and Purchaser," § 6.

For recovery of bank deposit, see "Banks and Banking," § 1.

On guaranty, see "Guaranty," § 2.

On insurance certificate, see "Insurance," § 8.

On insurance policy, see "Insurance," § 7.

On note, see "Bills and Notes," § 5.

Probate proceedings, see "Wills," § 2.

To enforce vendor's lien notes executed in fraud of homestead rights, see "Homestead," § 4.

Unlawful detainer, see "Landlord and Tenant," § 5.

In criminal prosecutions.

See "Assault and Battery," § 2; "Bribery"; "Burglary," § 2; "Criminal Law," §§ 6-10; "False Pretenses"; "Forgery"; "Gaming," § 1; "Homicide," § 6; "Incest"; "Larceny," § 1; "Rape," § 2; "Seduction," § 1.

For carrying weapons, see "Weapons."

For driving cattle from range, see "Animals."

For offenses against laws relating to poisons, see "Poisons."

For offenses against liquor laws, see "Intoxicating Liquors," § 5.

For violation of ordinances, see "Municipal Corporations," § 7.

§ 1. Judicial notice.

The Court of Civil Appeals will take judicial knowledge that Eagle Pass is the county seat of Maverick county.—Flynt v. Eagle Pass Coal & Coke Co. (Tex. Civ. App.) 831.

§ 2. Presumptions.

While the mailing of a notice creates no legal presumption that it has been received by the addressee, it is proper evidence on the issue of notice, and in the absence of contrary evidence is sufficient to sustain a finding of the receipt thereof.—Bloom v. Wanner (Ky.) 930.

The fact that no administration of the estate of a decedent was had authorizes the rebuttable inference that he died insolvent.—Johnson v. Burks (Mo. App.) 133.

Where plaintiff, in an action for injuries, refuses to submit to an examination by physicians, such fact is proper for the jury, as bearing on the credibility and sufficiency of the testimony on which he seeks to recover.—Austin & N. W. R. Co. v. Cluck (Tex. Sup.) 403.

§ 3. Burden of proof.

Under Civ. Code, § 526, in an action to recover the value of a turnpike transferred to defendant county, defense that the pike was of no value *held* not changed by supplementary averment that by reason thereof the writing on which the action was based was without consideration.—Chaplin & B. Turnpike Road Co. v. Nelson County (Ky.) 377.

§ 4. Relevancy, materiality, and competency in general.

What plaintiff's contract of sale of part of its road to defendant fiscal court was may not be proved by its contract with another fiscal court; the transactions being separate and distinct.—Danville, D. R. & L. Turnpike Road Co. v. Lincoln County Fiscal Court (Ky.) 379.

In action against street railway for injuries sustained by a passenger because of his having been thrown from a car by the conductor, a statement of the conductor *held* not admissible as *res gestæ*.—Gotwald v. St. Louis Transit Co. (Mo. App.) 125.

A letter in reply to one introduced in evidence by defendant *held* admissible in rebuttal.—Baker v. Pulitzer Pub. Co. (Mo. App.) 585.

Admission of evidence in action for negligent killing of child on railroad track, as to experiments elsewhere to show engineer's field of vision, *held* not ground for reversal.—Oliveras v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 981.

§ 5. Best and secondary evidence.

Copy of proofs of loss under a fire insurance policy *held* inadmissible, when loss of original was not shown.—Hartford Fire Ins. Co. v. Enoch (Ark.) 899.

The loss of a memorandum kept by the secretary of a meeting is sufficient to authorize secondary evidence of its transactions.—Morey v. Clopton (Mo. App.) 467.

Proceedings of certain meetings *held* provable by parol.—Morey v. Clopton (Mo. App.) 467.

Evidence *held* sufficient to authorize secondary evidence of the contents of letters.—Price v. Oatman (Tex. Civ. App.) 258.

Affidavit of loss of recorded instrument, so as to lay foundation for introduction of certified copy, *held* a sufficient compliance with Rev. St. 1895, art. 2312.—Williamson v. Work (Tex. Civ. App.) 266.

§ 6. Admissions.

In action for injuries sustained by plaintiff by his horse having been frightened by defendant's automobile, evidence of an admission by defendant *held* competent.—Shinkle v. McCullough (Ky.) 196.

Offer of settlement of claim for injuries done by street railway to hack *held* not conclusive as to amount of such injury.—South Covington & C. St. Ry. Co. v. McHugh (Ky.) 202.

Admissions of plaintiff that he had given defendant his farm, and his testimony to that effect in another action, *held* not conclusive against his right to recover farm in ejectment.—Owsley v. Owsley (Ky.) 397.

Admissions of a foreman of a corporation *held* inadmissible in evidence against it.—Parker's Adm'r v. Cumberland Telephone & Telegraph Co. (Ky.) 1109.

Evidence of the conversation between a supervising architect's subordinate and the builder's contractor *held* admissible in action by architect for services.—Turney v. Baker (Mo. App.) 479.

Claim against carrier for damages for negligent injury to live stock *held* to be competent as an admission of fact.—St. Louis Southwestern Ry. Co. v. Smith (Tex. Civ. App.) 28.

An abandoned pleading *held* admissible in evidence as admissions against interest, though not bearing a file mark.—Orange Rice Mill Co. v. McIlhinney (Tex. Civ. App.) 428.

Abandoned pleadings in an action for injuries to a shipment of cattle *held* to contain material admissions by plaintiff against interest, sufficient to warrant their admission in evidence.—Texas & P. Ry. Co. v. Coggin (Tex. Civ. App.) 1053.

Abandoned pleadings, containing admissions against interest, are admissible, notwithstanding they are neither signed nor sworn to by the party sought to be bound.—Texas & P. Ry. Co. v. Coggin (Tex. Civ. App.) 1053.

§ 7. Declarations.

Statements made as to the title to land in the pleadings of other parties in a suit to which plaintiff's predecessor in title was not a party, and in which no judgment was rendered, *held* inadmissible.—Hays v. Earls (Ky.) 706.

Declarations of a deceased grantor of lands as to his object and purpose in making the deed to his grantee were self-serving and inadmissible.—Johnson v. Burks (Mo. App.) 133.

§ 8. Hearsay.

In an action against a carrier for negligence in the transportation of cattle, whereby they lost weight in transit, a telegram to plaintiff stating the loss in weight was incompetent.—International & G. N. R. Co. v. Starts (Tex. Sup.) 1.

In an action against a carrier for negligence in the transportation of cattle, account sales rendered to plaintiff by his commission merchant, showing loss in weight of cattle, *held* inadmissible.—International & G. N. R. Co. v. Starts (Tex. Sup.) 1.

Recitals in executor's deed *held* hearsay as against testator's estate.—*League v. Williamson* (Tex. Civ. App.) 435.

§ 9. Documentary evidence.

Under Rev. St. 1895, art. 2305, the admission of a certified copy of parts of an assessment roll *held* proper.—*Brummer v. City of Galveston* (Tex. Civ. App.) 239.

Invalidity of deed *held* not to affect admissibility as corroborative evidence of existence of prior deed.—*Williamson v. Work* (Tex. Civ. App.) 266.

A letter from defendant's manager, accepting plaintiff's offer of work, *held* properly admitted in evidence.—*Orange Rice Mill Co. v. McIlhinney* (Tex. Civ. App.) 428.

The statement of a county treasurer, kept in the office of the state treasurer, and certified by him to be correct, is admissible in evidence.—*Harper v. Marion County* (Tex. Civ. App.) 1044.

Erroneous certificates to copies of warrants in county comptroller's office *held* not to prevent their introduction in evidence.—*Harper v. Marion County* (Tex. Civ. App.) 1044.

Certified copies of warrants in county comptroller's office *held* admissible.—*Harper v. Marion County* (Tex. Civ. App.) 1044.

§ 10. Parol or extrinsic evidence affecting writings.

A contract of a fiscal court, contained in its order as read, approved, and signed, pursuant to Ky. St. 1899, c. 52, § 1842, may not, in the absence of fraud or mistake, be varied by parol.—*Danville, D. R. & L. Turnpike Road Co. v. Lincoln County Fiscal Court* (Ky.) 379.

Chattel mortgagor *held* not entitled to show oral agreement for extension of time for payment made prior to the formal execution of the mortgage.—*Connersville Buggy Co. v. Lowry* (Mo. App.) 771.

Parol evidence is admissible to explain a latent ambiguity in a call in a deed.—*Sloan v. King* (Tex. Civ. App.) 48.

A person, signing a note on the back, *held* entitled to show that he was a surety merely.—*Marshall Nat. Bank v. Smith* (Tex. Civ. App.) 237.

Parol evidence as to the size of tank cars to be used in filling a contract for the sale of oil, which did not provide the size of the cars *held* admissible.—*Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Tex. Civ. App.) 961.

Parol evidence is not admissible to change the lines and corners of grounds as shown by unambiguous field notes.—*Jamison v. New York & T. Land Co.* (Tex. Civ. App.) 969.

Evidence in action on county treasurer's bond *held* not to contradict auditor's report, which had not been excepted to.—*Harper v. Marion County* (Tex. Civ. App.) 1044.

§ 11. Opinion evidence.

Testimony of witness, in action against railroad for the negligent killing of a bloodhound, as to the value of such animal, in answer to hypothetical question, *held* competent, in the absence of better evidence.—*St. Louis, I. M. & S. Ry. Co. v. Philpot* (Ark.) 901.

The assumption, in a hypothetical question asked a physician for the purpose of obtaining his opinion as to whether plaintiff's ailments were the result of injuries sustained by reason of a defective sidewalk, *held* sufficient.—*O'Neill v. Kansas City* (Mo. Sup.) 64.

The assumptions in a hypothetical question *held* warranted by the evidence.—*O'Neill v. Kansas City* (Mo. Sup.) 64.

Hypothetical questions put to experts may assume relevant facts which the evidence tends to establish.—*Turney v. Baker* (Mo. App.) 479.

In personal injury action, testimony of physicians as to probability of increase of curvature of plaintiff's spine *held* competent.—*Robinson v. St. Louis & S. Ry. Co.* (Mo. App.) 493.

In an action for the price of a fan and piping alleged to have been sold for the purpose of removing dust from a sand blast room in defendant's factory, expert testimony as to appliances suitable for the purpose was admissible.—*Skinner v. E. F. Kerwin Ornamental Glass Co.* (Mo. App.) 1011.

In action against street railroad for injuries to one attempting to board a car, certain question *held* properly excluded as calling for opinion.—*Von Diest v. San Antonio Traction Co.* (Tex. Civ. App.) 632.

Testimony that deed of trust was intended to cover improvements to property *held* mere opinion of witness.—*Martin v. Texas Briquette & Coal Co.* (Tex. Civ. App.) 651.

Evidence of a broker that he had a distinct understanding with the seller of oil that tank cars to contain the same should be of the capacity of 135 barrels *held* not objectionable as a conclusion.—*Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Tex. Civ. App.) 961.

EXAMINATION.

Of expert witnesses, see "Evidence," § 11.
Of witnesses in general, see "Witnesses," § 5.

EXCAVATIONS.

By adjoining landowners, see "Adjoining Landowners."

EXCEPTIONS.

Necessity for purpose of review, see "Appeal and Error," § 2; "Criminal Law," § 22.
Taking exceptions at trial, see "Criminal Law," § 15; "Trial," § 2.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," §§ 5½, 6; "Criminal Law," § 23.

§ 1. Nature, form, and contents in general.

Bill of exceptions *held* not to show exception to overruling of motion for new trial.—*Parsons v. John L. Clark & Co.* (Mo. App.) 582.

§ 2. Settlement, signing, and filing.

Unsigned bill of exceptions should be stricken out as not part of record.—*Berea College v. Powell* (Ky.) 381.

It will be presumed that the court acted properly and with discretion on extending time for filing bill of exception, under Rev. St. 1899, § 728.—*Waldopfel v. St. Louis Transit Co.* (Mo. App.) 128.

A bill of exceptions which has not been approved or allowed by the court cannot be considered.—*Ward v. Ward* (Tex. Civ. App.) 529.

EXCESSIVE DAMAGES.

See "Damages," § 3.

EXCHANGE OF PROPERTY.

One conveying lands to another in consideration of a conveyance by the latter of other lands, under an agreement for the exchange of land, is entitled to a vendor's lien on the lands con-

veyed by him to secure the portion of the consideration represented by lands to which he obtains no title.—*Johnson v. Burks* (Mo. App.) 133.

Equity will enforce a vendor's lien against the grantee, though solvent, and though the grantor has an adequate remedy at law under a covenant of warranty.—*Johnson v. Burks* (Mo. App.) 133.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXCUSABLE HOMICIDE.

See "Homicide," § 4.

EXECUTION.

See "Attachment"; "Garnishment."

Exemptions, see "Exemptions"; "Homestead." Harmless error in, see "Appeal and Error," § 23.

In particular actions or proceedings.

See "Replevin," § 3.

In justice's court, see "Justices of the Peace," § 1.

§ 1. Sale.

Description of land in sheriff's deed *held* insufficient.—*Edrington v. Hermann* (Tex. Sup.) 408.

A purchase of land at execution sale, known to be worth \$2,500, for \$53, *held* not bona fide, so as to support the conveyance.—*Carpenter v. Anderson* (Tex. Civ. App.) 291.

A vendee at an execution sale, which is set aside for invalidity of the judgment, *held* entitled to be reimbursed by the judgment debtor to the extent of the sum paid.—*Carpenter v. Anderson* (Tex. Civ. App.) 291.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Collateral attack on judgment against administrator, see "Judgment," § 5.

Effect of administration on limitation, see "Limitation of Actions," § 2.

Harmless error in exclusion of evidence in action against personal representative, see "Appeal and Error," § 18.

Requirements of statute of frauds as to contracts, see "Frauds, Statute of," § 1.

Testimony as to transactions with decedents, see "Witnesses," § 3.

Title to deposits in bank, see "Banks and Banking," § 1.

§ 1. Appointment, qualification, and tenure.

Creditors of a decedent's estate *held* not entitled to the appointment of an administrator de bonis non to sell the estate in remainder in homestead.—*Derge v. Hill* (Mo. App.) 105.

To constitute appointment of executor by will, there must be testamentary intent that person named shall fill duties of such office.—*In re Hill's Estate* (Mo. App.) 110; *Strode v. Bierman*, Id.

Will *held* not to constitute certain person executor.—*In re Hill's Estate* (Mo. App.) 110; *Strode v. Bierman*, Id.

Under Rev. St. 1899, §§ 7-11, relative to administration, nonrelatives *held* not entitled to administration of right.—*In re Hill's Estate* (Mo. App.) 110; *Strode v. Bierman*, Id.

Public administrator, taking charge of estate, under Rev. St. 1899, § 292, filing notice as re-

quired by section 295, needs no appointment by probate court.—*In re Hill's Estate* (Mo. App.) 110; *Strode v. Bierman*, Id.

§ 2. Collection and management of estate.

Executor *held* to have purchased property in his representative capacity, and not individually.—*Aulbach's Ex'r v. Read* (Ky.) 204.

Decedent's husband *held*, under Rev. St. 1899, § 2938, "a person interested," within section 74, relative to filing an affidavit preliminary to proceedings for discovery of assets.—*Ex parte Gfeller* (Mo. Sup.) 552.

The administrator of a deceased mortgagor *held* entitled to avoid the mortgage, as void as to creditors.—*Hemley v. Harmon* (Mo. App.) 136.

Executrix *held* to have power to ratify and adopt as her own agreement one made by a person assuming to act for her in the sale of real estate.—*Dyer v. Winston* (Tex. Civ. App.) 227.

Petition in action to recover commission for sale of real estate *held* insufficient, as against a special exception, to show that a person had authority from an executrix to agree to pay plaintiff the stipulated commission.—*Dyer v. Winston* (Tex. Civ. App.) 227.

Executrix *held* not to have power to delegate to an agent authority to agree, at his discretion, with a subagent on the amount of commission the latter should receive for sale of land.—*Dyer v. Winston* (Tex. Civ. App.) 227.

Executrix *held* not to have power to delegate to an agent authority to agree, at his discretion, on amount of commission for sale of land.—*Dyer v. Winston* (Tex. Civ. App.) 227.

Executrix *held* to have power to specially authorize an agent to contract for payment of a commission for the sale of land for an amount fixed by her.—*Dyer v. Winston* (Tex. Civ. App.) 227.

Executrix *held* to have authority to employ an agent to find a purchaser for land and agree to pay a commission therefor.—*Dyer v. Winston* (Tex. Civ. App.) 227.

Executrix *held* to have authority to incur reasonable and proper expense in the management and disposition of the estate in accordance with terms of the will.—*Dyer v. Winston* (Tex. Civ. App.) 227.

§ 3. Allowances to surviving wife, husband, or children.

A landlord's lien for supplies and advances *held* superior to the claim for allowance for support of tenant's widow and children.—*Walker v. Patterson's Estate* (Tex. Civ. App.) 437.

§ 4. Allowance and payment of claims.

Legal services rendered an executor are expenses of administration, and cannot be recovered in an action against the executor until allowed as a claim against the estate.—*Stephens v. Cassidy* (Mo. App.) 1089.

Under Rev. St. 1899, § 223, granting probate courts jurisdiction only to adjudicate matters on settlements made with executors and administrators, probate court *held* to have no jurisdiction of an action against an executor for legal services rendered him before an allowance of a claim against the estate therefor.—*Stephens v. Cassidy* (Mo. App.) 1089.

Estate of decedent *held* liable under implied promise for services performed in nursing him.—*Flannery v. Chidgey* (Tex. Civ. App.) 1034.

A widow and executrix is liable for the debts of her husband, and of the community, to the extent of his separate property and community property coming into her hands.—*Flannery v. Chidgey* (Tex. Civ. App.) 1034.

§ 5. Sales and conveyances under order of court.

The estate in remainder in homestead is subject to sale during administration for the payment of claims against the estate.—*Derge v. Hill* (Mo. App.) 105.

§ 6. Actions.

In an action by an administrator with the will annexed to compel the executor of a will formerly probated to turn over the proceeds of the sale of property alleged to have been purchased with assets of the estate, evidence *held* to show that the property was purchased by the defendant as executor, and not in his individual capacity.—*Aulbach's Ex'r v. Read* (Ky.) 204.

Whether services rendered for parents living in the same house were intended as a gratuity or under an implied contract for pay *held* a question for the jury.—*Lillard v. Wilson* (Mo. Sup.) 74.

A writing by a father *held* admissible, in an action after his death, against his administrator, by his son and daughter-in-law, for services in nursing him and his wife.—*Lillard v. Wilson* (Mo. Sup.) 74.

Rev. St. 1899, § 191, providing that any person having a demand against an estate may establish the same by the judgment or decree of some court of record, *held* to confer no jurisdiction on circuit courts to adjust claims of executors and administrators for services and expenses against the estate in their hands.—*Stephens v. Cassity* (Mo. App.) 1089.

Evidence in executrix's action on note *held* insufficient to show that decedent was the owner of the note.—*Hair v. Edwards* (Mo. App.) 1089.

§ 7. Foreign and ancillary administration.

Rev. St. 1895, art. 1879a, validating sales made under wills probated in other states, *held* not applicable to sale not authorized by will.—*League v. Williamson* (Tex. Civ. App.) 435.

EXEMPTIONS.

See "Homestead."

§ 1. Nature and extent.

A hog, chiefly valuable, and used for exhibitions, on account of his great size, *held* not exempt, under Rev. St. 1899, § 3159.—*Wabash R. Co. v. Bowring* (Mo. App.) 106.

§ 2. Transfer or incumbrance of exempt property.

The right of the head of a family, under Rev. St. 1899, § 3162, to claim any property to a certain value as exempt, in lieu of articles specifically exempt, *held* personal to him, so that, having assigned a judgment without making such claim, his assignee cannot make it.—*Wabash R. Co. v. Bowring* (Mo. App.) 106.

EXHIBITS.

Annexed to deposition, see "Depositions."
Annexed to pleading, see "Pleading," § 7.

EXPERIMENTS.

Competency of evidence as to results of, see "Evidence," § 4.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 11.
In criminal prosecutions, see "Criminal Law," § 9.

EXPLOSIVES.

Validity of ordinance prohibiting explosion of fire crackers without consent of mayor, as delegation of legislative power, see "Constitutional Law," § 2.

EXTENSION.

Of time for payment of note, see "Bills and Notes," § 2.

EXTRA WORK.

Compensation for, under contract, see "Contracts," § 2.

FACTORS.

See "Brokers."

Where defendant's agent exercised ordinary care to obtain the fair market value of plaintiff's cattle as a factor, defendant *held* not liable in damages to plaintiff, although the cattle were sold for less than their market value.—*Drumm-Flato Commission Co. v. Union Meat Co.* (Tex. Civ. App.) 634.

FALSE IMPRISONMENT.

Amendment of pleadings, see "Pleading," § 5.
Cure of pleading, see "Pleading," § 9.

§ 1. Civil liability.

Under Civ. Code, §§ 72-74, railroad company *held* properly sued for malicious prosecution and false imprisonment in county through which plaintiff was transported after arrest.—*Evans v. Maysville & B. S. R. Co.* (Ky.) 708.

In an action against a sheriff for false imprisonment, *held* error to exclude from evidence an executive warrant under which he acted, and testimony explanatory of his connection with the detention.—*Regan v. Jessup* (Tex. Civ. App.) 972.

FALSE PRETENSES.

In a prosecution for attempting to procure a legal school warrant by false pretenses, inducing directors to purchase books, instructions for state *held* repugnant to those given for defense.—*State v. Lawrence* (Mo. Sup.) 497.

In a prosecution for attempting to procure a legal school warrant by false pretenses, inducing directors to purchase books, instruction *held* erroneous in not properly informing the jury on proper course to have been pursued by directors.—*State v. Lawrence* (Mo. Sup.) 497.

In a prosecution for attempting to procure a legal school warrant by false pretenses, inducing school directors to purchase books, evidence examined, and *held* insufficient to sustain a conviction.—*State v. Lawrence* (Mo. Sup.) 497.

In a prosecution for attempting to procure a legal school warrant by false pretenses, inducing directors to purchase books, information *held* bad for repugnancy.—*State v. Lawrence* (Mo. Sup.) 497.

A conviction for attempting to procure a school warrant by false pretense cannot be sustained, if the warrant procured by defendant was a legal obligation against the district.—*State v. Lawrence* (Mo. Sup.) 497.

False representation, inducing purchase of books by school directors, in order to procure warrant therefor, *held* not calculated to deceive prudent men, and not basis of criminal prosecution.—*State v. Lawrence* (Mo. Sup.) 497.

School directors are presumed to know that the law (Rev. St. 1899, § 9859) prohibits the State Superintendent of Public Schools from act-

ing as agent for any author, publisher, or book-seller.—*State v. Lawrence* (Mo. Sup.) 497.

There can be no offense of procuring or attempting to procure by false pretense a legal school warrant from school directors, when such directors had no power or authority to issue such a warrant.—*State v. Lawrence* (Mo. Sup.) 497.

Pen Code 1895, art. 948, making the mere conversion of funds by a guardian swindling, *held* in the power of the Legislature, notwithstanding articles 943, 944, defining swindling.—*Walls v. State* (Tex. Cr. App.) 8.

FEES.

Of attorney, see "Attorney and Client," § 1.
Of county officers, see "Counties," § 2.

FEE SIMPLE.

Creation by will, see "Wills," § 3.

FELLOW SERVANTS.

See "Master and Servant," §§ 6, 9, 10.

FENCES.

Along railroad tracks, see "Railroads," § 5.

FERRIES.

§ 1. Establishment and maintenance.

The fact that a ferry company is engaged in an illegal pool and combination, contrary to Ky. St. 1899, § 3915, *held*, under sections 3917-3919, no defense to an action by it to enjoin a trespass on its lands.—*Wilson v. Sullivan* (Ky.) 193.

In a suit by a ferry company to enjoin trespass on its lands, the fact that the company had not complied with Ky. St. 1899, § 1808, subsec. 3, *held* no defense.—*Wilson v. Sullivan* (Ky.) 193.

FILING.

Bill of exceptions, see "Exceptions, Bill of," § 2.
Briefs on appeal or writ of error, see "Appeal and Error," § 8.
Criminal information or complaint, see "Indictment and Information," § 2.
Record on appeal or writ of error, see "Appeal and Error," §§ 5-6.
Statement of facts on appeal in criminal prosecutions, see "Criminal Law," § 23.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 1.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 14.
Special findings by jury, see "Trial," § 6.

FIRES.

Caused by operation of railroad, see "Railroads," § 6.

FIREWORKS.

Ordinances regulating, see "Municipal Corporations," § 7.

FIXTURES.

Rights as between landlord and tenant, see "Landlord and Tenant," § 1.

The right of a tenant to remove fixtures is terminated and relinquished by the acceptance of a

new lease which is silent as to such right.—*Chap Spring Co. v. B. Roth Tool Co.* (Mo. App.) 844.

A house *held* to have become a fixture, to which the owner of land onto which it was moved was entitled.—*Rotan Grocery Co. v. Dowlin* (Tex. Civ. App.) 430.

FOLLOWING TRUST PROPERTY.

See "Trusts," § 4.

FOOD.

Regulation of sales of, as deprivation of property without due process of law, see "Constitutional Law," § 8.

FORCIBLE DEFILEMENT.

See "Rape."

FORCIBLE ENTRY AND DETAINER.

Bar of ejectment by former adjudication in forcible detainer, see "Judgment," § 6.
By landlord to obtain possession of demised premises, see "Landlord and Tenant," § 5.

§ 1. Civil liability.

Proceedings in a suit for forcible entry *held* reviewable only a traverse, filed in pursuance of Civ. Code, §§ 461, 463, and not by motion for new trial, under section 714.—*Swanson v. Smith* (Ky.) 700.

Under Civ. Code, § 625, a writ of forcible entry *held* properly served by leaving a copy with defendant's wife; he being absent and not found.—*Swanson v. Smith* (Ky.) 700.

The fact that plaintiff's possession was not taken in good faith for the purpose of occupation, but was a mere sham and pretense, will defeat an action of forcible entry.—*Buck v. Endicott* (Mo. App.) 85.

That defendant and his predecessors had had possession of premises for more than three years bars an action for forcible entry, under the express provisions of Rev. St. 1899, § 3344.—*Buck v. Endicott* (Mo. App.) 85.

Rev. St. 1899, § 3368, imports into the unlawful detainer chapter section 4074, requiring 10 days' notice of appeal from justice's judgment.—*American Brass Mfg. Co. v. Philippi* (Mo. App.) 475, 765.

Rev. St. 1899, §§ 3370, 4074, relative to appeals and notice of appeal in forcible entry suits, *held* not incompatible; but appeal may be so set in term as to allow appellee 10 days' notice.—*American Brass Mfg. Co. v. Philippi* (Mo. App.) 475, 765.

An appeal from a justice's judgment in an unlawful detainer suit, which, after perfection, was allowed to rest from April to the following February, was properly dismissed.—*American Brass Mfg. Co. v. Philippi* (Mo. App.) 475, 765.

Under unlawful detainer act (Rev. St. 1899, c. 29), circuit court, in its discretion, may dismiss appeal not prosecuted with diligence.—*American Brass Mfg. Co. v. Philippi* (Mo. App.) 475, 765.

Unlawful detainer act is a penal statute, and does not impliedly incorporate section 4076, Rev. St. 1899, relative to dismissal of appeals from justices' judgments.—*American Brass Mfg. Co. v. Philippi* (Mo. App.) 475, 765.

The 10 days' notice of appeal, required by Rev. St. 1899, §§ 3368, 4074, to be given in unlawful detainer cases, should be speedily given after the perfection of the appeal.—

American Brass Mfg. Co. v. Philippi (Mo. App.) 475, 765.

FORECLOSURE.

Of lien, see "Mechanics' Liens," § 4.
Of mortgage, see "Mortgages," § 3.

FOREIGN ADMINISTRATION.

See "Executors and Administrators," § 7.

FOREIGN CORPORATIONS.

See "Corporations," § 6.

FORFEITURES.

Of insurance, see "Insurance," §§ 4, 8.

FORGERY.

Forged telegrams, see "Telegraphs and Telephones," § 2.
Hearsay, see "Criminal Law," § 8.
Instructions, see "Criminal Law," § 18.
Province of court and jury, see "Criminal Law," § 17.

Instruction as to presumption of guilt of forgery from possession of forged instrument and claim of title thereunder *held* proper.—State v. Pyscher (Mo. Sup.) 836.

In a prosecution for forging a deed, evidence to show grantor's indebtedness to defendant *held* properly excluded.—State v. Pyscher (Mo. Sup.) 836.

Evidence in a prosecution for forging a deed examined, and *held* to sustain a conviction.—State v. Pyscher (Mo. Sup.) 836.

Instruction in prosecution for forging deed, admitting a consideration of forged acknowledgment, *held* not objectionable.—State v. Pyscher (Mo. Sup.) 836.

FORMER ADJUDICATION.

See "Judgment," §§ 6, 7.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 5.

FORMS OF ACTION.

See "Ejectment"; "Replevin"; "Trespass," § 1; "Trove and Conversion."

FORNICATION.

See "Incest"; "Seduction," § 1.

FRAUD.

See "False Pretenses"; "Fraudulent Conveyances."

Effect on limitation, see "Limitation of Actions," § 2.

§ 1. Deception constituting fraud, and liability therefor.

A bank, falsely representing that a third person had signed a note, *held* liable for deceit.—Commercial Nat. Bank v. First Nat. Bank (Tex. Civ. App.) 239.

False representation by lessee to sublessee that the former had purchased the premises, whereby he obtained possession, *held* not actionable.—Furneaux v. Webb (Tex. Civ. App.) 828.

§ 2. Actions.

In an action to recover damages resulting from defendant's overvaluation of jewelry, thereby inducing plaintiff to accept the same as security for a loan, an instruction *held* properly refused, because not supported by the evidence.—Hoffman v. Gill (Mo. App.) 146.

In an action for the recovery of damages resulting from defendant's overvaluation of jewelry, thereby inducing plaintiff to accept the same as security for a loan made to a third person, punitive damages are not recoverable.—Hoffman v. Gill (Mo. App.) 146.

The allegation in a petition *held* to sufficiently charge fraud on defendant's part.—Hoffman v. Gill (Mo. App.) 146.

A petition in an action against defendant for falsely representing that third persons had signed a note as makers *held* not bad, as against a general demurrer, for failing to allege that defendant knew that the representation was false.—Commercial Nat. Bank v. First Nat. Bank (Tex. Civ. App.) 239.

Under Rev. St. 1895, art. 1194, subd. 23, an action for falsely representing that third persons had signed a note *held* properly instituted in the county where the payee received the representations and advanced money in reliance thereon.—Commercial Nat. Bank v. First Nat. Bank (Tex. Civ. App.) 239.

FRAUDS, STATUTE OF.

§ 1. Promises by executors or administrators.

A parol promise by executrix to pay for nursing her testator was void, under the statute of frauds (Rev. St. 1895, art. 2543, §§ 1, 2), as the promise of an executrix and one to answer for the debt of another.—Flannery v. Chidgey (Tex. Civ. App.) 1034.

§ 2. Promises to answer for debt, default, or miscarriage of another.

A parol promise by a widow to pay for the nursing of her husband is void, under the statute of frauds (Rev. St. 1895, art. 2543, § 2), as a promise to answer for the debt of another.—Flannery v. Chidgey (Tex. Civ. App.) 1034.

§ 3. Agreements not to be performed within one year.

Contract between two telegraph companies for erection and maintenance of joint line *held* void, within Ky. St. § 470, as not to be performed within a year.—Bastin Telephone Co. v. Richmond Telephone Co. (Ky.) 702.

An agreement to look after land and pay taxes on it for the use of it is not within the statute of frauds.—New York & Texas Land Co. v. Dooley (Tex. Civ. App.) 1030.

§ 4. Real property and estates and interests therein.

A contract between two adjoining lot owners for the use of a well on the division line between their lots is one for an interest in land, within the statute of frauds, and must be in writing.—Plunkett v. Meredith (Ark.) 600.

An agreement to dig a well on another's lot *held* not a contract for an interest in land, within the statute of frauds, and need not be in writing.—Plunkett v. Meredith (Ark.) 600.

A parol agreement for the sale by a railroad corporation of its roadbed, rolling stock, and other property *held* void within the statute of frauds.—Cumberland & O. V. R. Co. v. Shelbyville, B. & O. R. Co. (Ky.) 690.

Where a deed reserved a life estate in the grantor, a contemporaneous parol agreement that such life estate was solely to secure the grantee's agreement to support the grantor could not be proved.—Hall v. Small (Mo. Sup.) 733.

An agreement between a vendor and purchaser with reference to a reconveyance of land after the vendor's purchase thereof on foreclosure of his lien *held* to be an agreement to convey land within the statute of frauds.—Foster v. Ross (Tex. Civ. App.) 990.

§ 5. Requisites and sufficiency of writing.

A resolution adopted by the directors and stockholders of a railroad corporation, and entered on the records of the corporation, *held* not to constitute a valid contract for the sale of real estate, within the statute of frauds.—Cumberland & O. V. R. Co. v. Shelbyville, B. & O. R. Co. (Ky.) 690.

Contract for sale of land, omitting to embrace the selling price, *held* not deficient in execution.—Dyer v. Winston (Tex. Civ. App.) 227.

Purchase price of land, not embraced in contract for sale thereof, *held* may be shown by parol.—Dyer v. Winston (Tex. Civ. App.) 227.

Contract for sale of land, not signed by person agreeing to purchase, *held* not within the statute of frauds.—Dyer v. Winston (Tex. Civ. App.) 227.

§ 6. Operation and effect of statute.

Minor's abandonment of house of third person agreeing to rear him *held* not to destroy part performance of contract, relied on to take case out of statute of frauds.—Jones v. Comer (Ky.) 184.

In an action on an implied contract for the recovery of money expended by plaintiff in carrying out a verbal contract, the fact that the verbal contract was void under the statute of frauds *held* no defense.—Interstate Hotel Co. v. Woodward & Burgess Amusement Co. (Mo. App.) 114.

§ 7. Pleading, evidence, trial, and review.

A petition *held* to set forth an action for the recovery of money under an implied promise.—Interstate Hotel Co. v. Woodward & Burgess Amusement Co. (Mo. App.) 114.

A pleading is not subject to demurrer for failing to allege that an agreement concerning land was in writing, as that is a matter of proof.—New York & Texas Land Co. v. Dooley (Tex. Civ. App.) 1030.

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 1.
Of homestead, see "Homestead," § 2.

§ 1. Transfers and transactions invalid.

Conveyance of land to wife *held* not sustained, as against creditors of husband, on claim of husband owing the wife.—Reeves v. Slade (Ark.) 54.

Conveyance of land to wife *held* not sustained, as against creditors of husband, on claim that proceeds of sale of homestead were used in the purchase.—Reeves v. Slade (Ark.) 54.

Insolvent debtor's purchasing property and taking title in his wife's name *held* a fraud on creditors.—Dennis v. Ball-Warren Commission Co. (Ark.) 903.

Insolvent debtor's conveyance to father *held* a fraud on creditors.—Dennis v. Ball-Warren Commission Co. (Ark.) 903.

Creditors attaching land *held* not in position to assail as fraudulent in law a prior deed of trust.—Wood v. Porter (Mo. Sup.) 762.

Land conveyed by guardian by voluntary conveyance *held* properly sold for payment of ward's debts.—Jackson v. Crutchfield (Tenn.) 776.

§ 2. Remedies of creditors and purchasers.

In a suit by a judgment creditor to subject a half of a tract of land to the lien of the judgment, evidence *held* to warrant a finding that the judgment debtor was the owner of a half of the land.—Lewis v. Kash (Ky.) 697.

Evidence *held* to show that transactions between a husband and wife were in good faith, and not to cover up his property.—Citizens' Bank v. Burrus (Mo. Sup.) 748.

Under Rev. St. 1899, §§ 3398, 3399, a complaint by a purchaser of land to set aside a prior mortgage alleged to have been given in fraud of creditors *held* not to state a cause of action.—Reynolds v. Faust (Mo. Sup.) 855.

A conclusion of law that a conveyance by defendant was in fraud of an attaching creditor *held* error, in the absence of findings of fact supporting it.—Zachariae v. Swanson (Tex. Civ. App.) 627.

FRIGHT.

Right to recover damages for fright, see "Damages," § 1.

GAMING.

Harmless error in arguments and conduct of counsel, see "Criminal Law," § 24.

Subjects and titles of acts relating to, see "Statutes," § 3.

Validity of statute relating to pool selling as denial of equal protection of laws, see "Constitutional Law," § 7.

§ 1. Criminal responsibility.

In a prosecution for setting up a faro bank, evidence as to what witnesses saw, and as to what a game of faro is, is admissible.—Miller v. Commonwealth (Ky.) 682.

On a prosecution charging defendant with keeping a bucket shop in a certain city, evidence *held* to show that pretended purchases were made at his office in such city.—State v. Kentner (Mo. Sup.) 522.

An information charging defendant with keeping a bucket shop *held* sufficient, within Rev. St. 1899, § 2339.—State v. Kentner (Mo. Sup.) 522.

An information charging defendant with keeping a bucket shop, in violation of Rev. St. 1899, § 2339, *held* not defective for failing to allege that defendant intended to commit the offense.—State v. Kentner (Mo. Sup.) 522.

Laws 28th Leg. p. 68, c. 50, §§ 1, 2, relative to pool selling and betting, *held* not to prescribe different penalties for the same offense.—Ex parte Hernan (Tex. Cr. App.) 225.

GARBAGE.

See "Municipal Corporations," § 5.

GARNISHMENT.

See "Attachment"; "Execution."

§ 1. Persons and property subject to garnishment.

A judgment, as affirmed by the Court of Civil Appeals, *held* sufficient to form the basis for a writ of garnishment, though the time within which a petition for rehearing in the Court of Civil Appeals might have been filed had not expired when the writ was issued.—Raley v. Hancock (Tex. Civ. App.) 658.

The issuance of a writ of garnishment *held* not premature, on theory that the judgment as which it was based was not final.—Raley v. Hancock (Tex. Civ. App.) 658.

§ 2. Proceedings to support or enforce.

Garnishee *held* to be under duty to make defense that the judgment upon which the writ of garnishment is based is void for want of jurisdiction.—*Hedrix v. Chicago, R. I. & P. Ry. Co. (Mo. App.)* 495.

Garnishee *held* not guilty of inexcusable negligence in failing to file answer before dismissal of suit, and was entitled to attorney's fees for preparing its answer.—*Hamburg-Bremen Fire Ins. Co. v. Bailey (Tex. Civ. App.)* 294.

GAS.

Gas lands, see "Mines and Minerals," § 1.
Gas leases, see "Mines and Minerals," § 2.
Gas wells, see "Mines and Minerals," § 3.

GIFTS.

Adverse possession by donee, see "Adverse Possession," § 1.

§ 1. Inter vivos.

Recital in a deed *held* to constitute a gift of the interest on a note, though it was not delivered to the donee.—*Malone's Committee v. Lebus (Ky.)* 180.

Where the donee of a gift inter vivos is a person of unsound mind, the law will presume an acceptance.—*Malone's Committee v. Lebus (Ky.)* 180.

Facts *held* to show a sufficient delivery of corporate stock to constitute a gift thereof inter vivos.—*Denunzio's Receiver v. Scholtz (Ky.)* 715.

GOOD FAITH.

Of purchaser, see "Bills and Notes," § 3; "Vendor and Purchaser," § 5.

GRAND JURY.

See "Indictment and Information."

Discrimination in selection of grand jurors as denial of equal protection of laws, see "Constitutional Law," § 7.

The failure to challenge the panel *held*, under the circumstances, not to deprive accused of the right to raise the question of discrimination in formation of a jury.—*Smith v. State (Tex. Cr. App.)* 453.

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Indemnity"; "Principal and Surety."

Liability of guarantor of covenants in lease for injuries to third persons, see "Landlord and Tenant," § 3.

Requirements of statute of frauds, see "Frauds, Statute of," § 2.

§ 1. Requisites and validity.

Evidence *held* not to prevent the court's crediting defendant's testimony.—*Price v. Oatman (Tex. Civ. App.)* 258.

§ 2. Remedies of creditors.

Evidence of conversation between principal and guarantor, when the guarantor signed, *held* admissible in an action by the guarantee against the guarantor, to explain subsequent transactions between the parties.—*Price v. Oatman (Tex. Civ. App.)* 258.

Evidence *held* sufficient to prove a letter was written and signed by plaintiffs.—*Price v. Oatman (Tex. Civ. App.)* 258.

GUARDIAN AND WARD.

Guardian ad litem, see "Infants," § 3.

Limitation of actions between, see "Limitation of Actions," § 2.

§ 1. Custody and care of ward's person and estate.

A curator is bound to exercise the same measure of prudence in the care of his ward's estate that a prudent man would exercise as to his own business.—*Taylor v. Kellogg (Mo. App.)* 130.

Curator who took no steps to collect or secure rent of ward's premises *held* chargeable therewith.—*Taylor v. Kellogg (Mo. App.)* 130.

§ 2. Sales and conveyances under order of court.

A railroad company, acquiring land for a right of way through a minor's land, *held* not entitled to object to a reservation in the deed.—*Porter v. Kansas City & N. Connecting R. Co. (Mo. App.)* 582.

§ 3. Accounting and settlement.

An item not included in exceptions filed by the ward in the probate court to her curator's final account cannot be considered on appeal.—*Clopton v. Simonds (Mo. App.)* 467.

On an appeal from a judgment of the circuit court denying a ward's exceptions to her curator's settlement, only such matters as were complained of in the motion for a new trial before the circuit court can be considered.—*Clopton v. Simonds (Mo. App.)* 467.

A curator was properly allowed an attorney's fee of \$25 for defending his final settlement against the ward's exceptions.—*Clopton v. Simonds (Mo. App.)* 467.

§ 4. Liabilities on guardianship bonds.

Under Ky. St. 1899, §§ 2521, 2550, sureties on a guardian's bond *held* discharged from liability, where suit was not brought within five years after the ward became of age.—*Bybee's Ex'r v. Poynter (Ky.)* 698.

HABEAS CORPUS.

§ 1. Jurisdiction, proceedings, and relief.

Decision of probate court that husband of decedent was competent to make affidavit required by Rev. St. 1899, § 74, as a preliminary to proceedings for the discovery of assets, *held* not reviewable on habeas corpus.—*Ex parte Gfeller (Mo. Sup.)* 552.

Notary's determination as to relevancy and materiality of questions asked on taking depositions *held* conclusive on habeas corpus by witness refusing to answer.—*Ex parte Gfeller (Mo. Sup.)* 552.

Appeal by relator in habeas corpus from judgment remanding him to custody dismissed.—*Ex parte Tripp (Tex. Cr. App.)* 222.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," §§ 15-22.

In criminal prosecutions, see "Criminal Law," § 24; "Homicide," § 9.

HEALTH.

§ 1. Regulations and offenses.

It is the duty of all persons in charge of any railway train, passenger coach, steamboat, or other private conveyance, to obey the regulations of the board of health.—*Mason v. Illinois Cent. R. Co. (Ky.)* 375.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 8.
In criminal prosecutions, see "Criminal Law," § 8.

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

See "Municipal Corporations," § 9; "Turnpikes and Toll Roads."

§ 1. Establishment, alteration, and discontinuance.

Land dedicated and accepted as a public highway may not be appropriated by the owner of adjacent premises, though not put in proper condition for a highway.—*Bohne v. Blankenship* (Ky.) 919.

§ 2. Highway districts and officers.

The fiscal court is a body of limited authority, and its action in appointing a county judge as supervisor of roads is void, and vests in the judge no right to the office.—*Daviess County v. Goodwin* (Ky.) 185.

Ky. St. 1899, §§ 4306-4339, relative to duties of supervisor of roads and county judge, construed, and *held* to contemplate that the offices should be filled by different persons.—*Daviess County v. Goodwin* (Ky.) 185.

The fact that defendant could not read and write *held* no defense, in a prosecution for willfully refusing to serve as road overseer, contrary to Pen. Code 1901, art. 486.—*France v. State* (Tex. Cr. App.) 452.

§ 3. Construction, improvement, and repair.

Batts' Ann. Civ. St. art. 4744, *held* not to authorize a road overseer to purchase lumber, at the expense of the county, for the construction of causeways, at a price agreed on with the owner.—*N. A. Matthews Lumber Co. v. Van Zandt County* (Tex. Civ. App.) 960.

A road overseer *held* without authority to bind the company for materials purchased for the repair of highways.—*N. A. Matthews Lumber Co. v. Van Zandt County* (Tex. Civ. App.) 960.

§ 4. Regulation and use for travel.

The care required of one operating an automobile, who saw or could have seen that it had rendered a horse unmanageable, stated.—*Shinkle v. McCullough* (Ky.) 196.

The owner of a lot adjoining land dedicated as a highway *held* to have such a particular interest as to allow him to maintain injunction to abate obstruction of it.—*Bohne v. Blankenship* (Ky.) 919.

In a prosecution for willfully obstructing a public road, evidence *held* insufficient to sustain a conviction.—*McMillan v. State* (Tex. Cr. App.) 790.

HOMESTEAD.

See "Exemptions."

Fraudulent transfer of, see "Fraudulent Conveyances," § 1.

§ 1. Nature, acquisition, and extent.

That undivorced husband, living apart from his wife and family, contributes to their support, *held* not to affect her status, under Ky. St. 1899, § 1702, as a bona fide housekeeper with a family, preventing her claim to homestead.—*Lee & Hester v. Hughes* (Ky.) 386.

Under Ky. St. 1899, § 1702, providing for homestead exemption for debtors, a married woman, living apart from her husband, but

with her 15 year old son, *held* to be "an actual and bona fide housekeeper with a family," within the statute.—*Lee & Hester v. Hughes* (Ky.) 386.

Money, which is the proceeds of the sale of a homestead, preserved as such, *held* not subject to seizure on execution for the debt of the owner.—*Lee & Hester v. Hughes* (Ky.) 386.

Owner of a homestead, who sells in and reinvests the proceeds in other lands, on which she resides, *held* to have homestead right in the latter against debts existing at the time of its purchase.—*Lee & Hester v. Hughes* (Ky.) 386.

Whether husband's interest in a homestead previously owned by husband and wife in their joint names affects her right to set aside sale on execution of homestead purchased in her own name, where he joins with her in such action and makes no claim to the homestead in his own behalf, *held* not necessary to be decided.—*Lee & Hester v. Hughes* (Ky.) 386.

Plaintiffs *held* precluded from asserting a homestead claim to land as against one holding prior equities and incumbrances thereon.—*Cahill v. Dickson* (Tex. Civ. App.) 281.

§ 2. Transfer or incumbrance.

Evidence considered, and *held* to show fraudulent conveyance for the purpose of raising money on a homestead.—*Harbers v. Levy* (Tex. Civ. App.) 261.

Evidence considered, and *held* to show assignee before maturity of vendor's lien notes not bona fide holder, entitling him to foreclosure of lien.—*Harbers v. Levy* (Tex. Civ. App.) 261.

§ 3. Abandonment, waiver, or forfeiture.

Intention to remove from state, without a completion of the act, *held* not to constitute an abandonment of a homestead.—*Lee & Hester v. Hughes* (Ky.) 386.

Evidence *held* not to show abandonment of homestead.—*Ball v. Ramsey* (Ky.) 692.

§ 4. Protection and enforcement of rights.

Question outside the averments in the pleadings in an action to set aside sale of homestead on execution *held* not to be raised.—*Lee & Hester v. Hughes* (Ky.) 386.

Burden of proof *held* to be on plaintiffs, in action to foreclose vendor's lien, to show amount of balance due on debt.—*Harbers v. Levy* (Tex. Civ. App.) 261.

HOMICIDE.

Arguments and conduct of counsel, see "Criminal Law," § 16.

Assignments of error on appeal, see "Criminal Law," § 21.

Character of witnesses, see "Witnesses," § 7.

Change of venue, see "Criminal Law," § 4.

Circumstantial evidence, see "Criminal Law," § 10.

Conduct of jury, see "Criminal Law," § 19.

Continuance, see "Criminal Law," § 11.

Corroboration of witness, see "Witnesses," § 6.

Cross-examination of witnesses, see "Witnesses," § 5.

Declarations as evidence, see "Criminal Law," § 8.

Disclosure of privileged communication by witness, see "Witnesses," § 4.

Evidence of acts and declarations of conspirators, see "Criminal Law," §§ 6-10.

Harmless error in admission or exclusion of evidence, see "Criminal Law," § 24.

Harmless error in examination of witnesses, see "Criminal Law," § 24.

Harmless error in instructions, see "Criminal Law," § 24.

Harmless error in selection of jury, see "Criminal Law," § 24.

Hearsay, see "Criminal Law," § 8.
 Instructions, see "Criminal Law," § 18.
 Interest of witnesses, see "Witnesses," § 8.
 Jurisdiction of prosecution for, see "Criminal Law," § 3.
 Necessity of exceptions to admission of evidence for purpose of review, see "Criminal Law," § 22.
 Objections to reception of evidence, see "Criminal Law," § 15.
 Opinion testimony, see "Criminal Law," § 9.
 Province of court and jury, see "Criminal Law," § 17.
 Reception of evidence in general, see "Criminal Law," § 14.
 Redirect examination of witnesses, see "Witnesses," § 5.
 Relevancy of evidence, see "Criminal Law," § 7.
 Res gestæ, see "Criminal Law," § 7.
 Review of instructions as dependent on presentation of question by record, see "Criminal Law," § 23.
 Statement by witness inconsistent with testimony, see "Witnesses," § 9.

§ 1. Murder.

On a prosecution for murder, it is not necessary to prove a motive.—State v. Dunn (Mo. Sup.) 848.

Where, at the time of a difficulty, the parties were strangers to each other, and the difficulty arose on the spur of the moment, defendant could not be guilty of murder in the first degree in killing deceased.—Garner v. State (Tex. Cr. App.) 797.

Where A. kills B., intending to kill C., he is guilty of murder in the second degree, provided the killing would have been murder in the first or second degree, had C. been killed.—Sparks v. State (Tex. Cr. App.) 811.

§ 2. Manslaughter.

Refusal of deceased to accede to defendant's demand *held* no extenuation or mitigation of murder of deceased.—State v. Robertson (Mo. Sup.) 528.

There can be no such thing as manslaughter in the third degree, when the homicide is intentional.—State v. Robertson (Mo. Sup.) 528.

One who shot an officer out of anger *held* guilty of no higher offense than manslaughter.—Vann v. State (Tex. Cr. App.) 813.

§ 3. Assault with intent to kill.

Evidence *held* sufficient to support conviction of assault with intent to murder.—Freeman v. State (Tex. Cr. App.) 17.

Defendant, in prosecution for assault to commit murder, *held* guilty of no higher offense than simple assault.—Wright v. State (Tex. Cr. App.) 809.

§ 4. Excusable or justifiable homicide.

Instruction in homicide prosecution as to right of self-defense *held* error.—Tompkins v. Commonwealth (Ky.) 712.

In a prosecution for murder, in which defendant claimed that he shot deceased because the latter had seduced defendant's sister, an instruction that, though the jury might believe that the deceased had done so, this would not justify the defendant in lying in wait to shoot deceased, was correct.—State v. Hicks (Mo. Sup.) 539.

One's right to self-defense is unaffected by the relative strength and size of the parties, where the weapons used were six-shooters.—Vann v. State (Tex. Cr. App.) 813.

One *held* entitled to resist an arrest made in a threatening and menacing manner to the extent of taking life, if necessary to save life.—Vann v. State (Tex. Cr. App.) 813.

One attacked by a policeman, independent of any attempt to arrest, had the same right to defend as against a private individual.—Vann v. State (Tex. Cr. App.) 813.

To constitute provoking the difficulty, accused must have said or done something with intent to bring about the difficulty.—Vann v. State (Tex. Cr. App.) 813.

§ 5. Indictment and information.

Objection to information charging murder *held* untenable.—State v. Robertson (Mo. Sup.) 528.

Allegation of information and proof considered, in prosecution for murder, and *held* not to show variance.—State v. Robertson (Mo. Sup.) 528.

§ 6. Evidence.

In a prosecution for murder, evidence *held* admissible to show motive, though showing previous crime.—Bess v. Commonwealth (Ky.) 349.

Evidence in homicide prosecution to rebut state's evidence of motive *held* improperly excluded. Ky. St. 1899, § 1158.—Tompkins v. Commonwealth (Ky.) 712.

In a prosecution for homicide, evidence of ordinance of town of which defendant was marshal *held* inadmissible, where defendant did not claim to arrest deceased under such ordinance.—Davis v. Commonwealth (Ky.) 1101.

Evidence considered, and *held* to show murder in the first degree.—State v. Robertson (Mo. Sup.) 528; Same v. Dunn (Mo. Sup.) 848.

On prosecution for murder, the contention that it was a physical impossibility for defendant to have killed deceased, as claimed by witnesses, *held* without merit.—State v. Dunn (Mo. Sup.) 848.

On prosecution for murder, evidence *held* not to show such insanity as constitutes a defense.—State v. Dunn (Mo. Sup.) 848.

On prosecution for murder, evidence *held* sufficient to show that defendant was intoxicated at the time of the crime.—State v. Dunn (Mo. Sup.) 848.

In a prosecution for homicide, evidence considered, and *held* to make out a case of self-defense.—Chambliss v. State (Tex. Cr. App.) 2.

On a prosecution for murder, evidence *held* to lay a sufficient predicate for the admission of decedent's dying declaration.—Crockett v. State (Tex. Cr. App.) 4.

On a prosecution for murder, evidence as to a statement by some one that decedent would kill defendant *held* inadmissible on the issue of self-defense.—Crockett v. State (Tex. Cr. App.) 4.

On a prosecution for murder, evidence as to a statement by some one that decedent would kill defendant *held* inadmissible to reduce the offense to manslaughter.—Crockett v. State (Tex. Cr. App.) 4.

On a prosecution for homicide, testimony of threats by defendant *held* not objectionable as not referring to decedent.—Holloway v. State (Tex. Cr. App.) 14.

Evidence on the trial of defendant, charged with the murder of her child, *held* sufficient to establish that the dead body of a child found in a certain place was the body of the child alleged to have been killed.—Johnson v. State (Tex. Cr. App.) 15.

Evidence in a prosecution for homicide *held* to sustain a conviction of manslaughter.—Allen v. State (Tex. Cr. App.) 218.

Dying declaration of decedent *held* admissible.—Mathews v. State (Tex. Cr. App.) 218.

Evidence in prosecution for murder considered, and *held* sufficient to support a conviction

for murder.—*Fugett v. State* (Tex. Cr. App.) 461.

In a prosecution for manslaughter, evidence of threats by defendant's brother against deceased, prior to the killing, *held* admissible.—*Baker v. State* (Tex. Cr. App.) 618.

Evidence *held* to justify a conviction of assault with intent to murder.—*Bell v. State* (Tex. Cr. App.) 787.

Evidence, *held* insufficient to show that an assault was with a deadly weapon.—*Cage v. State* (Tex. Cr. App.) 806.

In a prosecution for homicide, evidence examined, and *held* not to raise the issue of self-defense.—*Sparks v. State* (Tex. Cr. App.) 811.

§ 7. Trial.

In prosecution for homicide, instruction on evidence admitted for particular purpose *held* so ambiguous as to be erroneous.—*Bess v. Commonwealth* (Ky.) 349.

Under Rev. St. 1889, § 3477, and Rev. St. 1899, § 2627, *held* error, on a prosecution for homicide, to refuse to charge on manslaughter in the fourth degree.—*State v. Weakly* (Mo. Sup.) 525.

Objection to charge, in prosecution for murder, *held* untenable.—*State v. Robertson* (Mo. Sup.) 528.

In a prosecution for murder, charge as to bringing on difficulty *held* not erroneous.—*State v. Hicks* (Mo. Sup.) 539.

On a prosecution for murder, an instruction on the issue of self-defense *held* not erroneous.—*Crockett v. State* (Tex. Cr. App.) 4.

In assault with intent to murder, charge on self-defense *held* erroneously qualified by reference to provoking the difficulty.—*Drake v. State* (Tex. Cr. App.) 7.

Where, on a prosecution for homicide, there was evidence tending to show that defendant was at the time of the homicide under the influence of liquor, it was not error to charge on temporary insanity caused by recent use of ardent spirits.—*Holloway v. State* (Tex. Cr. App.) 14.

On a prosecution for murder, an instruction on the law of principals *held* properly refused.—*Johnson v. State* (Tex. Cr. App.) 15.

On a prosecution for murder, an instruction that, if defendant was an accomplice, she could not be convicted, *held* properly refused under the evidence.—*Johnson v. State* (Tex. Cr. App.) 15.

Evidence of defendant *held* to make a case of aggravated assault, which should have been submitted to the jury.—*Carlisle v. State* (Tex. Cr. App.) 213.

On a prosecution for murder, an instruction that the instrument by which the homicide was committed should be taken into consideration *held* erroneous.—*Spivey v. State* (Tex. Cr. App.) 444.

On a prosecution for murder, evidence as to what accused had said to physician, who had pronounced him insane, *held* competent.—*Spivey v. State* (Tex. Cr. App.) 444.

Instruction as to murder in the second degree *held* erroneous.—*Spivey v. State* (Tex. Cr. App.) 444.

In prosecution for murder, evidence *held* not to call for instruction on acts and conduct of absent conspirators.—*Kipper v. State* (Tex. Cr. App.) 611.

In a prosecution for murder, evidence *held* not to call for instruction on murder in the second degree.—*Kipper v. State* (Tex. Cr. App.) 611.

In a prosecution for murder, evidence *held* not to call for instruction on assault with in-

tent to murder.—*Kipper v. State* (Tex. Cr. App.) 611.

Instruction, in manslaughter, on right to resist illegal arrest, *held* not defective, because failing to define the term "force."—*Montgomery v. State* (Tex. Cr. App.) 788.

In prosecution for homicide committed in resisting an illegal arrest, instruction on duty to retreat, under Pen. Code 1901, art. 878, *held* unnecessary.—*Montgomery v. State* (Tex. Cr. App.) 788.

In a prosecution for homicide, a charge on self-defense *held* insufficient.—*Garner v. State* (Tex. Cr. App.) 797.

Where defendant claimed that deceased died from disease, and not as the result of a wound inflicted on him by defendant, it was the duty of the court to charge the law specifically as applied to such contention.—*Garner v. State* (Tex. Cr. App.) 797.

In a prosecution for homicide, an instruction on manslaughter, defining adequate cause to consist of an assault and battery causing defendant pain "and" bloodshed, *held* error.—*Garner v. State* (Tex. Cr. App.) 797.

In prosecution for homicide, *held*, on the evidence, proper not to charge on protection of property in case of disputed ownership.—*Jones v. State* (Tex. Cr. App.) 802.

In a prosecution for assault with intent to murder, evidence examined, and *held* sufficient to raise the issue of aggravated assault, a charge on which should have been given.—*Spiller v. State* (Tex. Cr. App.) 809.

One accused of murder *held* entitled to a charge on manslaughter, unfettered by a charge on provocation with the apparent intention to kill.—*Vann v. State* (Tex. Cr. App.) 813.

A charge on provoking the difficulty should state what constitutes provoking the difficulty.—*Vann v. State* (Tex. Cr. App.) 813.

One accused of murder *held* entitled to a charge on self-defense, without reference to the law on provoking the difficulty.—*Vann v. State* (Tex. Cr. App.) 813.

An instruction *held* objectionable as requiring jury to find affirmatively that an officer, killed in attempting an arrest, did not attempt it in good faith.—*Vann v. State* (Tex. Cr. App.) 813.

§ 8. New trial.

Newly discovered cumulative evidence of defendant's insanity does not require the granting of a new trial in a murder case.—*Mathews v. State* (Tex. Cr. App.) 218.

§ 9. Appeal and error.

In a prosecution for murder, an instruction on the law of self-defense, when the evidence was insufficient to raise such issue, was harmless to defendant.—*State v. Hicks* (Mo. Sup.) 539.

The propriety of admitting dying declarations cannot be reviewed, in the absence of a bill of exceptions.—*Mathews v. State* (Tex. Cr. App.) 218.

Any error in a charge on express malice in a prosecution for homicide is rendered harmless by a conviction of murder in the second degree.—*Sparks v. State* (Tex. Cr. App.) 811.

HOUSEBREAKING.

See "Burglary."

HOUSEKEEPER.

See "Homestead," § 1.

HUSBAND AND WIFE.

See "Divorce"; "Marriage."

Action for wrongful death of husband, see "Death," § 1.

Competency as witnesses, see "Witnesses," §§ 2, 4.

Fraudulent conveyances between, see "Fraudulent Conveyances," § 1.

Homestead rights, see "Homestead," § 1.

Record of deed of husband and wife acknowledged by wife alone as notice, see "Vendor and Purchaser," § 5.

Right of trustee of estate of married woman to charge expenses of family against her, see "Trusts," § 3.

Rights of survivor, see "Executors and Administrators," § 3.

§ 1. Wife's separate estate.

A married woman is bound by the covenants in her deeds to her separate property.—*McGuigan v. Gaines* (Ark.) 52.

Rev. St. 1895, art. 2970, *held* not to render a wife liable for services in nursing her husband, though contracted for by her.—*Flannery v. Chidgey* (Tex. Civ. App.) 1034.

§ 2. Actions.

An action for services rendered substantially all by the wife should be brought by her alone, under Rev. St. 1899, §§ 6864, 6869, relating to rights of married women.—*Lillard v. Wilson* (Mo. Sup.) 74.

In an action by a husband for loss of services occasioned by injury to his wife, verdict *held* not excessive.—*Tandy v. St. Louis Transit Co.* (Mo. Sup.) 994.

In an action by a husband for loss of wife's services, etc., occasioned by injuries to her, instruction as to measure of damages *held* not erroneous.—*Tandy v. St. Louis Transit Co.* (Mo. Sup.) 994.

§ 3. Community property.

To authorize a suit by heirs to recover property belonging to the estate of a decedent, they must allege and prove that there is no administration and none necessary.—*Rylie v. Stamire* (Tex. Civ. App.) 626.

The rents of a married woman's separate estate are community property, and, where assigned as security by husband and wife for the former's debt, are not discharged by an extension of time of payment given to the husband.—*De Berrera v. Frost* (Tex. Civ. App.) 637.

Land conveyed to a wife *held* presumably community property.—*Flannery v. Chidgey* (Tex. Civ. App.) 1034.

On issue as to whether certain lands were community property, the presumption that they were *held* rebutted.—*Thayer v. Clarke* (Tex. Civ. App.) 1050.

Personal property, acquired during marriage, is presumed to have been earned by one or the other, or both, members of the community.—*Thayer v. Clarke* (Tex. Civ. App.) 1050.

Texas lands, acquired during marriage, are presumed to be community property.—*Thayer v. Clarke* (Tex. Civ. App.) 1050.

HYPOTHETICAL QUESTIONS.

To experts, see "Criminal Law," § 9; "Evidence," § 11.

IDEM SONANS.

See "Names."

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 5.

IMPEACHMENT.

Of witness, see "Witnesses," §§ 6-10.

IMPLIED CONTRACTS.

See "Covenants," § 1.

IMPRISONMENT.

See "Bail"; "False Imprisonment."

Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Allowance or recovery of compensation, see "Ejectment," § 3.

Liens, see "Mechanics' Liens."

Public improvements, see "Municipal Corporations," § 6.

IMPUTED NEGLIGENCE.

See "Negligence," § 2.

INADEQUATE DAMAGES.

See "Damages," § 3.

INADEQUATE REMEDY AT LAW.

As ground for relief in equity, see "Judgment," § 4.

INCEST.

An indictment by charging incest between defendants does not charge the woman to be the man's accomplice.—*Tate v. State* (Tex. Cr. App.) 793.

Even if the joint indictment of the man and woman for incest is tantamount to alleging her consent, the state may, on his trial, prove that she did not consent.—*Tate v. State* (Tex. Cr. App.) 793.

Under the evidence on a prosecution for incest, *held*, that the woman was clearly an accomplice, so as to require corroboration of her testimony.—*Tate v. State* (Tex. Cr. App.) 793.

On a prosecution for incest, *held* that a certain charge as to what would make the woman an accomplice should have been given.—*Tate v. State* (Tex. Cr. App.) 793.

INCORPORATION.

See "Municipal Corporations," § 1.

INCUMBRANCES.

On homestead, see "Homestead," § 2.

INDEBTEDNESS.

Of testator, see "Wills," § 4.

INDEMNITY.

See "Guaranty"; "Principal and Surety."

In an action for the breach of a landlord's agreement to fence a pasture, the tenant *held*

entitled to recover the amount paid by him to indemnify an adjoining owner for injuries to his crop by the tenant's cattle.—*Schenk v. Forrester* (Mo. App.) 332.

Where a landlord warranted the sufficiency of a fence surrounding a rented pasture, he was not entitled to notice to repair as a condition of his liability for damages sustained by defects in the fence.—*Schenk v. Forrester* (Mo. App.) 332.

INDICTMENT AND INFORMATION.

See "Grand Jury."

Defects in indictment ground for arrest of judgment, see "Criminal Law," § 20.

Service of copy on accused, see "Criminal Law," § 13.

Against particular classes of parties.

Municipal officers, see "Municipal Corporations," § 4.

For particular offenses.

See "Burglary," § 2; "Embezzlement"; "False Pretenses"; "Gaming," § 1; "Homicide," § 5; "Incest"; "Larceny," § 1; "Libel and Slander," § 2.

Payment of wages in nonnegotiable orders, see "Master and Servant," § 1.

Violation of election laws, see "Elections," § 1.

Violation of liquor laws, see "Intoxicating Liquors," § 5.

§ 1. Formal requisites of indictment.

An indictment beginning, "In the name and by authority of the state" is not insufficient for the omission of the word "the" between the words "by" and "authority."—*Brown v. State* (Tex. Cr. App.) 12.

§ 2. Filing and formal requisites of information or complaint.

The denial of a motion, made before verdict, to quash an information for felony, not verified by the oath of the prosecuting attorney, or some person competent to testify, or supported by affidavit, as required by Rev. St. 1899, § 2477, as amended by Act March 13, 1901, *held* error.—*State v. Bonner* (Mo. Sup.) 463.

Under Laws 1901, pp. 138, 139, relative to the verification of informations, an information *held* a substantial compliance with the statute.—*State v. Hicks* (Mo. Sup.) 539.

An information, not verified as required by Rev. St. 1899, §§ 2476-2478, as amended by Laws 1901, pp. 138, 139, *held* insufficient.—*State v. Balch* (Mo. Sup.) 547.

A complaint on which an information is based is insufficient, it stating merely that complainant has good reason to believe.—*Tompkins v. State* (Tex. Cr. App.) 800.

§ 3. Requisites and sufficiency of accusation.

Where an information charged an assault on A., it was error to charge that defendant would be guilty if he assaulted A., B., or C.—*State v. Moore* (Mo. Sup.) 522.

Indictment for assaulting election officer, drawn under Act May 31, 1895, § 80 (Laws 1895, p. 40), *held* good against demurrer, notwithstanding repeal of statute by Laws 1899, p. 179.—*State v. Murphy* (Mo. App.) 157.

In all prosecutions for felonies, everything constituting the offense must be pleaded with certainty.—*State v. Gassard* (Mo. App.) 473.

§ 4. Joinder of parties, offenses, and counts, duplicity, and election.

Indictment for setting up faro bank *held* not duplicitous, under Cr. Code Prac. § 124, relative to indictments.—*Miller v. Commonwealth* (Ky.) 682.

In a prosecution for a misdemeanor, the state cannot be compelled to elect between counts.—*Daniels v. State* (Tex. Cr. App.) 215.

§ 5. Amendment.

Allowing the filing of an amended information is discretionary, and the appellate court will not interfere, unless defendant has been deprived of some constitutional right or substantial privilege.—*State v. Pyscher* (Mo. Sup.) 836.

Allowing filing of third information *held* proper, both at common law and under Rev. St. 1899, § 2481, notwithstanding section 2641.—*State v. Pyscher* (Mo. Sup.) 836.

§ 6. Issues, proof, and variance.

An information in the language of the statute, creating a statutory offense, and which sets forth all the facts constituting the offense, is sufficient.—*State v. Kentner* (Mo. Sup.) 522.

INFANTS.

See "Adoption"; "Guardian and Ward"; "Parent and Child."

Contributory negligence on part of children, see "Negligence," § 2.

Custody and support on divorce of parents, see "Divorce," §§ 3, 4.

Exemption from operation of statute of limitations, see "Limitation of Actions," § 2.

Subject and title of acts relating to neglected and delinquent children, see "Statutes," § 3.

§ 1. Custody and protection.

Act March 28, 1903 (Sess. Acts 1903, p. 213), is not invalidated by its failure to provide for separation of neglected from delinquent children.—*Ex parte Loving* (Mo. Sup.) 508.

§ 2. Property and conveyances.

Under Civ. Code, § 498, the court had no jurisdiction to order a purchaser of trust property, where part of the beneficiaries were infants, to pay the price to the trustee, and the infants were not divested of title thereby.—*Bullock v. Gudgell* (Ky.) 1126.

The rule of caveat emptor *held* to apply to a purchaser at judicial sale of infant's property.—*Bullock v. Gudgell* (Ky.) 1126.

§ 3. Actions.

Under Civ. Code, §§ 92, 118, where infant improperly appealed in his own name, but no objection was made until submission, or before a motion to affirm as a delay case, the defect *held* waived.—*Ramsey v. Keith's Adm'r* (Ky.) 693.

Under Code, § 35, an appeal by an infant must be taken by his guardian ad litem.—*Ramsey v. Keith's Adm'r* (Ky.) 693.

In a suit under a statute by a widow for wrongful death of her husband, *held*, that her child had not, by a strict construction of the petition, been made a party plaintiff.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

The mere knowledge of a minor of the pendency of a suit against her does not preclude her from thereafter attacking the judgment rendered in the suit.—*Stephens v. Hewitt* (Tex. Civ. App.) 229.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INHERITANCE.

See "Descent and Distribution."

By adopted children, see "Adoption."

INJUNCTION.

Conclusiveness and effect of judgment, see "Judgment," § 7.

Joinder of actions for injunction and for damages, see "Action," § 1.

Restraining particular acts or proceedings.

See "Nuisance," §§ 1, 2.

Enforcement of ordinance, see "Municipal Corporations," § 3.

Maintenance of dramshop, see "Intoxicating Liquors," § 3.

Obstruction of highway, see "Highways," § 4.

Proceedings in court of same state, see "Courts," § 4.

Sale of trust property, see "Trusts," § 4.

§ 1. Subjects of protection and relief.

Injunction will not issue on a charge that defendant justice of the peace was unlawfully conspiring to issue warrants to arrest plaintiff's employes for trespass.—*Louisville & N. E. Co. v. Barrall* (Ky.) 1117.

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSANE PERSONS.

Instructions as to insanity of accused, see "Criminal Law," § 18; "Homicide," § 7.

Newly discovered evidence of insanity of accused ground for new trial, see "Homicide," § 8.

INSANITY.

As defense to action for slander, see "Libel and Slander," § 1.

Instructions as to insanity of accused, see "Criminal Law," § 18; "Homicide," § 7.

Newly discovered evidence of insanity of accused ground for new trial, see "Homicide," § 8.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of corporation, see "Corporations," § 4.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

INSTRUCTIONS.

In civil actions, see "Trial," § 5.

In criminal prosecutions, see "Criminal Law," § 18; "Homicide," § 7.

INSURANCE.

Departure in pleading, see "Pleading," § 3.

Grants of special privileges to fraternal insurance companies, see "Constitutional Law," § 6.

Partial invalidity of act relating to, see "Statutes," § 1.

Secondary evidence as to loss under insurance policy, see "Evidence," § 5.

Stipulations in action on mutual benefit insurance certificate, see "Stipulations."

§ 1. Insurance companies.

Officers of an insurance association held to be without power or authority to fix their compensation.—*Quintance v. Farmers' Mut. Aid Ass'n* (Ky.) 1121.

§ 2. Insurance agents and brokers.

Subagents of a general insurance agent held authorized to bind the insurer by the acceptance of past-due premiums after a loss had been

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incurred, and thereby estop insurer from insisting on a forfeiture.—*Ætna Life Ins. Co. v. Fallow* (Tenn.) 937.

§ 3. Insurable interest.

A woman held to have an insurable interest in the life of a man who supported her, independent of the validity of her marriage to him.—*Scott's Adm'r v. Scott* (Ky.) 1122.

§ 4. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Insured cannot complain that a certificate of health, sent to the company for the purpose of having the policy revived, was kept six days and then returned not approved.—*Fidelity Mut. Life Ins. Co. v. Price* (Ky.) 384.

Forfeiture of a life policy for nonpayment of the annual premium held not waived for the whole year by extension for four months of time of payment.—*Fidelity Mut. Life Ins. Co. v. Price* (Ky.) 384.

The statutory provision that no insurance company shall make any contract of insurance or agreement as to such contract, other than in the policy, held, if making void the conditions of an extension of time of payment of premiums, to also make void the agreement for extension.—*Fidelity Mut. Life Ins. Co. v. Price* (Ky.) 384.

A provision requiring assured to keep a set of books held not complied with by books of others showing the same facts.—*Rives v. Fire Ass'n of Philadelphia* (Tex. Civ. App.) 424.

Assured held not excused from producing books required by his policy, by their destruction through his negligence.—*Rives v. Fire Ass'n of Philadelphia* (Tex. Civ. App.) 424.

A person held guilty of negligence who, by his failure to store them in a safe, permitted a set of books required by his fire insurance policy to be burned.—*Rives v. Fire Ass'n of Philadelphia* (Tex. Civ. App.) 424.

§ 5. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

An insurance company, by paying the insurance after knowledge of the fraud inducing it to issue the policy, ratifies the contract, and cannot afterwards recover the money paid.—*New York Life Ins. Co. v. Hord* (Ky.) 380.

Forfeiture of a life policy for nonpayment of a note for a premium held not waived by demand of payment after maturity, accompanied by a certificate of health showing forfeiture was claimed.—*Fidelity Mut. Life Ins. Co. v. Price* (Ky.) 384.

A general agent of an insurance company, having general authority to waive a forfeiture for nonpayment of premiums, held authorized to waive such conditions, though the policy provided to the contrary, and declared that no waiver should be binding, unless signed by certain officers of the company.—*Ætna Life Ins. Co. v. Fallow* (Tenn.) 937.

Where premiums on an accident policy were paid, after they became due, on the date they were called for by insurer's agent, according to a previous uniform course of dealing between the parties, insurer was estopped to deny liability on the ground that the premium had not been paid prior to the accident.—*Ætna Life Ins. Co. v. Fallow* (Tenn.) 937.

§ 6. Extent of loss and liability of insurer.

Rev. St. 1899, §§ 7969, 7970, relative to conclusive character of amount of insurance representing value of property, held applicable to case of equitable title to realty.—*Bode v. Firemen's Ins. Co. of Newark* (Mo. App.) 116.

§ 7. Actions on policies.

Evidence *held* insufficient to show waiver of a condition in a fire insurance policy.—*Hartford Fire Ins. Co. v. Enoch* (Ark.) 899.

Burden *held* to be on insured to show waiver of a condition of a fire insurance policy.—*Hartford Fire Ins. Co. v. Enoch* (Ark.) 899.

In action on fidelity bond, defendant *held* entitled to go to jury on issue of plaintiff's due care to ascertain truth of statement made as preliminary to issuance of bond.—*United States Fidelity & Guaranty Co. of Blackly, Hurst & Co.* (Ky.) 709.

In action on fidelity bond, special instructions submitting plaintiff's knowledge of his employer's speculations, in making statement as to his deserving confidence, *held* necessary.—*United States Fidelity & Guaranty Co. v. Blackly, Hurst & Co.* (Ky.) 709.

Rev. St. 1899, § 7969, *held* to render unnecessary allegation in petition on fire insurance policy as to value of property or of insured's interest.—*Bode v. Firemen's Ins. Co. of Newark* (Mo. App.) 116.

Petition in action on fire insurance policy *held* to sufficiently allege insured's interest.—*Bode v. Firemen's Ins. Co. of Newark* (Mo. App.) 116.

Where, in an action on a fire insurance policy, the pleadings admit that the structure insured was a building, it will be regarded as having acquired identity as a building, though not completed.—*Bode v. Firemen's Ins. Co. of Newark* (Mo. App.) 116.

Pleadings in action on fire insurance policy *held* not to present issue as to whether insured had any interest in property.—*Bode v. Firemen's Ins. Co. of Newark* (Mo. App.) 116.

§ 8. Mutual benefit insurance.

Notice of sickness of a member of a beneficiary association may be given by any one knowing the facts.—*Smith v. Sovereign Camp of Woodmen of the World* (Mo. Sup.) 862.

Notice of sickness of a member of a beneficiary association *held* insufficient, where it does not state that he is unable to pay his dues.—*Smith v. Sovereign Camp of Woodmen of the World* (Mo. Sup.) 862.

A beneficiary certificate, suspended *ipso facto* for the nonpayment of an assessment, *held* not renewable after death of the member.—*Smith v. Sovereign Camp of Woodmen of the World* (Mo. Sup.) 862.

Nonpayment of dues *held* to render void *ipso facto* a certificate in a beneficiary association.—*Smith v. Sovereign Camp of Woodmen of the World* (Mo. Sup.) 862.

A clerk's custom of accepting overdue dues from members in good health *held* no waiver of prompt payment.—*Smith v. Sovereign Camp of Woodmen of the World* (Mo. Sup.) 862.

Submission to jury of question whether notice of sickness of a member of a beneficiary association was given *held* erroneous, where the notice relied on is insufficient.—*Smith v. Sovereign Camp of Woodmen of the World* (Mo. Sup.) 862.

Under Rev. St. 1889, §§ 1396, 1408-1410, and Rev. St. 1889, §§ 2823, 2824, *held*, that a foreign beneficiary association, which has complied with the statutes of Missouri relative to such associations, is subject to the statutes relative to beneficiary associations, and not to the general insurance law.—*Hudnall v. Modern Woodmen of America* (Mo. App.) 84.

One *held* not entitled to recover out of insurance of deceased payable to his parents any sum incurred in caring for him during his last illness and in burying him.—*Voelker v. Grand Lodge of Brotherhood of Locomotive Firemen* (Mo. App.) 999.

Evidence *held* to sustain finding that a deceased member of beneficiary association was the son of persons who sought to recover on his benefit certificate.—*Voelker v. Grand Lodge of Brotherhood of Locomotive Firemen* (Mo. App.) 999.

Continuance of former designation of widow of reinstated member of benefit society as beneficiary could be effected by ratification by member and acceptance by society of such designation.—*St. Louis Police Relief Ass'n v. Strode* (Mo. App.) 1091.

Beneficiary heir at law of member of fraternal insurance society has no vested right in certificate, and member may change designation of beneficiary.—*St. Louis Police Relief Ass'n v. Strode* (Mo. App.) 1091.

Strict compliance with rules of fraternal insurance society as to change of beneficiary is not necessary, when waived by society.—*St. Louis Police Relief Ass'n v. Strode* (Mo. App.) 1091.

Transaction between beneficiary in life policy and other persons *held* to have amounted to a binding contract, whereby the others were entitled to the proceeds of the policy, irrespective of whether the assignment had complied with the laws of the insurer.—*Kendall v. Morrison* (Tex. Civ. App.) 31.

By-laws of mutual benefit insurance association *held* not to require publication in official organ of adopted amendment to by-laws.—*Eversberg v. Supreme Tent Knights of Maccabees of the World* (Tex. Civ. App.) 246.

Holder of mutual benefit insurance certificate *held* bound by subsequent amendment of by-laws amplifying defense of suicide.—*Eversberg v. Supreme Tent Knights of Maccabees of the World* (Tex. Civ. App.) 246.

A member of a mutual benefit association *held* bound by a provision of its by-laws rendering his certificate void in case of self-destruction.—*United Moderns v. Colligan* (Tex. Civ. App.) 1032.

Constitution and by-laws of a mutual benefit society *held* a part of the benefit contracts made with its members.—*United Moderns v. Colligan* (Tex. Civ. App.) 1032.

INTENT.

Criminal intent, see "Rape," § 2.

In annexing personal to real property, see "Fixtures."

To make advancement, see "Descent and Distribution," § 2.

INTEREST.

See "Usury."

Element of damages, see "Damages," § 1.

Payment in advance as ground for discharge of surety, see "Principal and Surety," § 2.

On particular classes of liabilities.

Trust funds, see "Trusts," § 8.

Pecuniary interest in particular subjects.

Effect as to credibility of witness, see "Witnesses," § 8.

Insurable interest, see "Insurance," § 3.

§ 1. Time and computation.

In an action by broker for commissions, interest was properly allowed from the filing of the petition.—*Brown & Bro. v. Lapp* (Ky.) 194.

In an action for breach of a contract to purchase secondhand rails, the court *held* to have properly restricted the computation of interest on the damages to the commencement of the suit.—*Nelson v. Cal Hirsch & Sons' Iron & Rail Co.* (Mo. App.) 590.

INTERPLEADER.

Limitation of actions as against interveners, see "Limitation of Actions," § 2.

INTERSTATE COMMERCE.

Regulation, see "Commerce."

INTERVENTION.

In attachment proceedings, see "Attachment," § 2.

INTER VIVOS.

See "Gifts," § 1.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Character of witnesses in prosecution for violation of local option law, see "Witnesses," § 7. Deliberations of jury in prosecution for violation of local option law, see "Criminal Law," § 19.

Instructions in prosecution for violation of local option law, see "Criminal Law," § 18.

Parties to violation of local option law, see "Criminal Law," § 2.

Province of court and jury in prosecution for violation of local option law, see "Criminal Law," § 17.

Review of evidence in prosecution for violation of local option law, see "Criminal Law," § 23.

Weight of evidence in prosecution for violation of local option law, see "Criminal Law," § 10.

§ 1. Constitutionality of acts and ordinances.

Rev. St. 1899, § 3051, prohibiting druggists from allowing intoxicating liquors to be drunk on the premises, *held* not void as an unwarrantable exercise of the police power as against a physician owning a drug store.—*State v. Finney* (Mo. Sup.) 992.

§ 2. Local option.

Under local option law, the fact that the order of publication of order declaring law in effect did not specify particular newspaper *held* not to invalidate order.—*Sinclair v. State* (Tex. Cr. App.) 621.

Order of the commissioners' court declaring local option in effect *held* not invalid for not stating that court "opened" the polls.—*Sinclair v. State* (Tex. Cr. App.) 621.

§ 3. Licenses and taxes.

Under Rev. St. 1899, § 3022, whether petition for granting dramshop license was on file as required by Sess. Acts 1901, p. 142, and whether petitioners withdrew their names, is a matter of record, determinable on certiorari.—*Cooper v. Hunt* (Mo. App.) 483.

Certiorari is the proper method for determining the validity of dramshop licenses, when the facts necessary to such a determination appear of record.—*Cooper v. Hunt* (Mo. App.) 483.

Judicial action of excise commissioners in granting dramshop license *held* conclusive as to facts found.—*Cooper v. Hunt* (Mo. App.) 483.

Finding of excise commissioner as to number of persons signing petition for liquor license *held* conclusive in injunctive proceedings, unless assailed for fraud.—*Cooper v. Hunt* (Mo. App.) 483.

It must be presumed, in injunctive proceedings, that excise commissioner acted on conviction

as to eligibility of signers of liquor license petition.—*Cooper v. Hunt* (Mo. App.) 483.

There is no equity for injunction against maintenance of dramshop, when validity of license is determinable by certiorari, and excise commissioner's findings are otherwise conclusive.—*Cooper v. Hunt* (Mo. App.) 483.

Excise commissioner *held* to have acquired jurisdiction to issue dramshop license on presentation of petition properly signed.—*Cooper v. Hunt* (Mo. App.) 483.

That an applicant for a liquor license promised plaintiff to withdraw the same *held* no ground for equitable relief against the granting of the license.—*Cooper v. Hunt* (Mo. App.) 483.

Under Rev. St. 1899, § 2997, and Sess. Acts 1901, p. 142, a liquor license granted December 8th, on petition filed December 2d, is void.—*Cooper v. Hunt* (Mo. App.) 483.

An alleged false statement made to petitioners for a dramshop license *held* no ground for equitable relief against the granting of the license.—*Cooper v. Hunt* (Mo. App.) 483.

Evidence *held* not to justify recovery on a liquor dealer's bond, though sale was to a minor.—*Tinkle v. Sweeney* (Tex. Sup.) 609.

§ 4. Offenses.

In a prosecution for soliciting orders for intoxicating liquors, in violation of Acts 1901, p. 125, an instruction that it was sufficient if defendant's agent took orders for liquors in the forbidden territory *held* error.—*Sanderfur-Julian Co. v. State* (Ark.) 596.

That one solicits another to permit him to order whisky for him *held* not to constitute a sale.—*Whitmore v. State* (Ark.) 598.

That one who purchases whisky for another pays for it before he receives pay does not render it a sale.—*Whitmore v. State* (Ark.) 598.

One's guilt as to making a sale of intoxicating liquor, instead of a purchase for another, *held* to depend on his own good faith.—*Whitmore v. State* (Ark.) 598.

To purchase whisky for others without a license *held* not a violation of the liquor license laws.—*Whitmore v. State* (Ark.) 598.

Under Pen. Code 1895, art. 185, *held*, an instruction on a prosecution for keeping open a saloon on election day need not state that it must have been kept open unlawfully and willfully.—*Knox v. State* (Tex. Cr. App.) 13.

The sale of intoxicating liquors in a local option district, except on prescription or for sacramental purposes, *held* a violation of the law.—*Williams v. State* (Tex. Cr. App.) 215.

That defendant bought whisky from A. prior to application to defendant from B., and defendant then sold to B., is evidence of sale by defendant.—*Taylor v. State* (Tex. Cr. App.) 221.

A physician is not liable for a violation of the local option law, because of a prescription given.—*Williams v. State* (Tex. Cr. App.) 783.

A sale of liquor for checks of a company, redeemable at its store in goods, will sustain a conviction of violation of the local option law.—*Ford v. State* (Tex. Cr. App.) 800.

§ 5. Criminal prosecutions.

In a prosecution for the illegal sale of liquor, testimony *held* to sufficiently show that the beverage purchased was intoxicating.—*Williams v. State* (Ark.) 597.

Where an indictment charged a sale of liquor on a certain Sunday, evidence that it was made on a different Sunday within a year before the finding of the indictment will support a conviction.—*Webb City v. Parker* (Mo. App.) 119.

Evidence of giving away liquor, and pointing to the bar, and saying, "There is some," *held* admissible on a prosecution for keeping open a saloon.—*Knox v. State* (Tex. Cr. App.) 13.

In a prosecution for violation of the local option law, requested charge *held* properly modified.—*Redd v. State* (Tex. Cr. App.) 214.

On a prosecution for the sale of intoxicating liquors, evidence that defendant had no knowledge that the liquor would intoxicate was inadmissible.—*Williams v. State* (Tex. Cr. App.) 215.

An instruction on a prosecution for the sale of intoxicating liquors *held* not defective for failing to explain to the jury what constitutes a violation of the law.—*Williams v. State* (Tex. Cr. App.) 215.

An instruction on a prosecution for the sale of intoxicating liquors *held* not a charge on the weight of the evidence.—*Williams v. State* (Tex. Cr. App.) 215.

An instruction, on a prosecution for the sale of intoxicating liquors, *held* not bad for failing to make defendant's guilt depend on his having unlawfully sold liquor.—*Williams v. State* (Tex. Cr. App.) 215.

An instruction, on a prosecution for selling intoxicating liquors, *held* not defective for failing to define a sale.—*Williams v. State* (Tex. Cr. App.) 215.

Evidence *held* to sustain a conviction of violating the local option law.—*Goldwater v. State* (Tex. Cr. App.) 221; *Taylor v. Same, Id.*; *Johnson v. Same* (Tex. Cr. App.) 225.

In a prosecution for violation of local option law, instruction *held* to sufficiently present defense of agency.—*Taylor v. State* (Tex. Cr. App.) 221.

In prosecution for violation of local option law, memoranda made by telephone company of calls placed by defendant *held* admissible against him.—*Sinclair v. State* (Tex. Cr. App.) 621.

In prosecution for violating local option law, evidence of a custom in the community in telephoning whisky orders *held* properly excluded.—*Sinclair v. State* (Tex. Cr. App.) 621.

In a prosecution for violating local option law, charge of the court in accordance with Act 27th Leg. p. 262, c. 96, relative to C. O. D. sales of liquor and sales on solicitation, *held* erroneous on the evidence.—*Sinclair v. State* (Tex. Cr. App.) 621.

In a prosecution for violating the local option law, proof *held* insufficient to create a variance as to the person alleged to have purchased the liquor.—*Parker v. State* (Tex. Cr. App.) 783.

To authorize a conviction of violation of the local option law, it must be shown that local option was in force at the time and place of the acts complained of.—*Watkins v. State* (Tex. Cr. App.) 799.

INTOXICATION.

Instructions as to insanity of accused caused by use of liquor, see "Homicide," § 7.

IRRIGATION.

See "Waters and Water Courses," § 4.

ISSUES.

In civil actions, see "Pleading," § 8.

In criminal prosecutions, see "Indictment and Information," § 6.

Presented for review on appeal, see "Appeal and Error," § 2.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 5.

JOINDER.

Of causes of action, see "Action," § 1.

Of offenses in indictment, see "Indictment and Information," § 4.

JOINT ADVENTURES.

Contracts for subscription to land *held* to constitute majority of vendees agents for all, and that scheme that it adopted for diversion of lots was within its power.—*Morey v. Clopton* (Mo. App.) 467.

Majority of vendees of land, who were to apportion the several lots bought, *held* not required to give individual vendees notice of its meetings.—*Morey v. Clopton* (Mo. App.) 467.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."

Prohibition, see "Prohibition," § 1.

§ 1. Special or substitute judges.

Under Rev. St. 1899, §§ 1678, 1679, providing for appointment of acting judge, as well as under the court's inherent power, circuit judge *held* authorized to call in another judge to try cause in disbarment proceedings.—*State ex rel. Lentz v. Fort* (Mo. Sup.) 741.

§ 2. Rights, powers, duties, and liabilities.

Rev. St. 1899, § 731, giving the successor of a judge authority to sign a bill of exceptions, carries with it power to pass on a motion for a new trial.—*Fehlauer v. City of St. Louis* (Mo. Sup.) 843.

JUDGMENT.

Effect as curing defects in pleadings, see "Pleading," § 9.

Garnishment of, see "Garnishment," § 1.

Harmless error in, see "Appeal and Error," § 22.

Review, see "Appeal and Error."

Validity of statute changing time within which judgment is presumed to have been paid as impairing vested rights, see "Constitutional Law," § 4.

In actions by or against particular classes of parties.

See "Infants," § 3.

In particular civil actions or proceedings.

See "Divorce," § 2; "Trespass to Try Title," § 1.

Decree in equity, see "Equity," § 1.

On appeal or writ of error, see "Appeal and Error," § 24.

§ 1. Nature and essentials in general.

Rev. St. 1899, § 582, providing for actual service on a defendant outside the state, *held* not to authorize a judgment for alimony.—*Hedrix v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 495.

§§ 2, 3. By default.

Under Rev. St. 1895, art. 1375, the right to open up a judgment after the adjournment of the term at which it was rendered must be availed of within the time limited, or the right

and remedy are lost.—*Bean v. Dove* (Tex. Civ. App.) 242.

A citation containing no statement of the nature of plaintiff's demand, except a reference to a certified copy of the petition attached, *held* insufficient to support a judgment by default.—*Delaware Western Const. Co. v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 628.

Citation failing to state the names of both defendants in action on a joint note *held* insufficient to support a judgment by default.—*Delaware Western Const. Co. v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 628.

An order setting aside a default *held* to limit the hearing to the merits.—*Erwin v. Archenholt Co.* (Tex. Civ. App.) 823.

A judgment by default entered before the defendant is commanded by the citation to answer is void.—*Oden & Co. v. Vaughn Grocery Co.* (Tex. Civ. App.) 967.

§ 4. Equitable relief.

Where the injured party could not have secured a review of a fraudulent judgment on appeal, she may have it set aside by a court of equity.—*De Garcia v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 275.

Joinder of minors, as defendants, with a railway company with which they acted in collusion, *held* not necessary in an action to set aside the judgment fraudulently obtained, where the judgment as to them is not complained of.—*De Garcia v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 275.

A complaint in an action to set aside a judgment *held* not defective as being too vague in its allegations of fraud.—*De Garcia v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 275.

§ 5. Collateral attack.

Judgment of a probate court, founded on a balance struck, against an administrator, *held* not subject to attack in action in circuit court against sureties of the administrator.—*Bonner v. Gorman* (Ark.) 602.

Judgment appointing receiver for schoolhouse at instance of contractor *held* not open to collateral attack for constitutional invalidity of contract by taxpayer in proceedings to enjoin collection of tax to pay rent of schoolhouse.—*Bank of Cumberland v. Simpson* (Ky.) 695.

An action to set aside a judgment *held* a direct attack, in which proof outside the record as to service of process is admissible.—*Carpenter v. Anderson* (Tex. Civ. App.) 291.

§ 6. Merger and bar of causes of action and defenses.

A judgment in proceedings of forcible entry to recover possession of land is not a bar to an action in ejectment to recover the land.—*Swanson v. Smith* (Ky.) 700.

Recovery by property owner of damages for construction of a road on the street in front of his property *held* not to bar a subsequent action for damages resulting from change of grade.—*Louisville & N. R. Co. v. Cumnock* (Ky.) 933.

The plea of *res judicata* *held* not available in an action to set aside a fraudulent judgment, though the party complaining of the judgment was properly joined in the action in which it was obtained, under Rev. St. 1895, art. 3022, relating to parties in actions for death.—*De Garcia v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 275.

§ 7. Conclusiveness of adjudication.

Husband, uniting with wife to set aside sale of her homestead on execution, and not asserting any claim thereto in his own behalf, *held* to be estopped to make such claim in the future.—*Lee & Hester v. Hughes* (Ky.) 386.

Where the title to a strip of land in controversy was determined in plaintiff's favor in an action of trespass, the judgment in such action was conclusive on defendant in a suit in equity to restrain trespasses on the same land.—*Moran v. Vicroy* (Ky.) 668.

A judgment on the merits is conclusive, not only as to all matters actually litigated and determined, but as to every ground of recovery or defense which might have been determined therein, either at law or in equity.—*Moran v. Vicroy* (Ky.) 668.

Suit to enjoin prosecution under city ordinance *held* not *res judicata* in a subsequent suit by different parties to enjoin prosecution under a different ordinance.—*Boyd v. Board of Councilmen of City of Frankfort* (Ky.) 669.

In *replevin*, record in an injunction suit *held* admissible in evidence as against the plaintiff, although he was not a party to that suit.—*Hanlon v. Goodyear* (Mo. App.) 481.

§ 8. Payment, satisfaction, merger, and discharge.

Judgment in existence before 1895 *held*, under Rev. St. 1889, § 6797, not affected by Laws 1895, p. 221, amending section 6796, relative to the period after which judgments are presumed to have been paid.—*Chiles v. School Dist. of Buckner* (Mo. App.) 82.

Written acknowledgment of indebtedness, unaccompanied by promise to pay, *held* sufficient to avoid effect of Rev. St. 1879, § 3251, prescribing period after which judgments are presumed to have been paid.—*Chiles v. School Dist. of Buckner* (Mo. App.) 82.

Right to set-off in equity of cross-judgments *held* not affected by an assignment of one of them to one having knowledge of the other, or by an assignment of a half interest therein.—*Wabash R. Co. v. Bowring* (Mo. App.) 106.

Equity will set off plaintiff's judgment against defendant's; plaintiff's being prior to defendant's and for costs in an action on the same cause of action, and defendant being insolvent.—*Wabash R. Co. v. Bowring* (Mo. App.) 106.

§ 9. Pleading and evidence of judgment as estoppel or defense.

Judgment relied on as bar to an action *held* not available, unless pleaded.—*Interstate Nat. Bank v. Claxton* (Tex. Civ. App.) 44.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JUDICIAL POWER.

See "Constitutional Law," § 2.

JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 5.

Of property of infant, see "Guardian and Ward," § 2.

On execution, see "Execution," § 1.

JURISDICTION.

Amount in controversy, see "Appeal and Error," § 1; "Courts," §§ 2, 3.

Jurisdiction of particular actions or proceedings. See "Habeas Corpus," § 1.

Against foreign corporations, see "Corporations," § 6.

Against personal representatives, see "Executors and Administrators," § 6.

Criminal prosecutions, see "Criminal Law," § 3.

Foreclosure of mechanic's lien, see "Mechanics' Liens," § 4.
 For relief against judgment, see "Judgment," § 4.
 To compel replacing of farm crossing, see "Railroads," § 2.
 Trial of disputed claim against estate of decedent, see "Executors and Administrators," § 4.

Special jurisdictions.

Particular courts, see "Courts."

JURY.

See "Grand Jury."
 Custody and conduct, see "Criminal Law," § 19.
 Discrimination in selection of jurors as denial of equal protection of law, see "Constitutional Law," § 7.
 Examination of juror, on motion for new trial, see "Witnesses," § 5.
 Harmless error in conduct and deliberations of, see "Appeal and Error," § 15; "Criminal Law," § 24.
 Instructions in civil actions, see "Trial," § 5.
 Instructions in criminal prosecutions, see "Criminal Law," § 18.
 Misconduct affecting jury as contempt, see "Contempt," § 1.
 Questions for jury in civil actions, see "Trial," § 4.
 Questions for jury in criminal prosecutions, see "Criminal Law," § 17.
 Race discrimination in selection of jurors, see "Civil Rights."
 Review of competency of jury as dependent on presentation of question by record, see "Criminal Law," § 23.
 Taking case or question from jury at trial, see "Trial," § 4.
 Verdict in civil actions, see "Trial," § 6.
 Verdict in criminal prosecutions, see "Criminal Law," § 12.

§ 1. **Nature and constitution of juries.**
 Amendment to Const. art. 2, § 28, providing for verdict by three-fourths of jury, *held* legally adopted as a part of Constitution.—*Smith v. Sovereign Camp of Woodmen of the World* (Mo. Sup.) 862.

§ 2. **Competency of jurors, challenges, and objections.**
 Each of several defendants, having conflicting claims, *held* entitled to six peremptory challenges.—*First Nat. Bank v. San Antonio & A. P. R. Co.* (Tex. Sup.) 410.

In an action against several defendants, entitled to six peremptory challenges each, it was not error to allow the defendants to consult in exercising their challenges.—*First Nat. Bank v. San Antonio & A. P. R. Co.* (Tex. Sup.) 410.

Where a juror who had formed an opinion stated that he could give defendant a fair trial, *held* not error for the court to overrule a challenge for cause.—*Parker v. State* (Tex. Cr. App.) 783.

JUSTICES OF THE PEACE.

Restraining conspiracy by justice to arrest employees of plaintiff, see "Injunction," § 1.

§ 1. **Procedure in civil cases.**
 Under Rev. St. 1899, § 3852, statement in justice's court *held* sufficient.—*Manley v. Crescent Novelty Mfg. Co.* (Mo. App.) 489.

Rev. St. 1896, arts. 1602, 1647, relating to service of "citations" by justices' courts, *held* not to authorize the commencement of actions by "notice" to nonresidents, as provided for district courts in article 1230.—*Carpenter v. Anderson* (Tex. Civ. App.) 291.

The attempted use by a justice of the peace of a notice, instead of a citation, to commence an action, is wholly without force or effect.—*Carpenter v. Anderson* (Tex. Civ. App.) 291.

Rights acquired by innocent strangers for value under an execution on a judgment of a justice of the peace fair on its face will not be disturbed, though the judgment be invalid.—*Carpenter v. Anderson* (Tex. Civ. App.) 291.

§ 2. **Review of proceedings.**

In an action for breach of contract, plaintiff may, on appeal from a justice, amend his pleadings.—*City of Van Alstyne v. Morrison* (Tex. Civ. App.) 635.

Appeal bond *held* to sufficiently identify the court in which the judgment was rendered.—*Kusmierz v. Mahula* (Tex. Civ. App.) 966.

Appeal bond *held* to sufficiently identify the judgment from which the appeal was taken.—*Kusmierz v. Mahula* (Tex. Civ. App.) 966.

JUSTIFICATION.

Of homicide, see "Homicide," § 4.

KNOWLEDGE.

Effect of ignorance of cause of action on limitation, see "Limitation of Actions," § 2.

LACHES.

In rescinding contract of sale, see "Sales," § 3.

LANDLORD AND TENANT.

Indemnity by landlord for loss by tenant sustained by defects in fence, see "Indemnity."
 Lease of public lands, see "Public Lands," § 1.
 Lease of turnpike, see "Turnpikes and Toll Roads," § 1.
 Mining leases, see "Mines and Minerals," § 2.

§ 1. **Landlord's title and reversion.**

Removal of certain fixtures by tenant *held* waste, for which damages were recoverable in unlawful detainer, under Rev. St. 1899, § 3333.—*Champ Spring Co. v. B. Roth Tool Co.* (Mo. App.) 344.

The statute of limitations does not begin to run in favor of a tenant until he repudiates his tenancy.—*New York & Texas Land Co. v. Doolley* (Tex. Civ. App.) 1030.

§ 2. **Terms for years.**

Notice to tenants, stipulated for in lease, after receipt of which premises were to be surrendered, *held* sufficient when served by mail.—*Bloom v. Wanner* (Ky.) 930.

§ 3. **Premises, and enjoyment and use thereof.**

A lessor of a mill *held* not liable to an employé of the lessee for failing to inspect and keep the same in repair.—*King v. Creekmore* (Ky.) 689.

An allegation *held* not to charge a lessor of a boiler with actionable negligence for injuries to an employé of the lessee, sustained by reason of the explosion of the boiler.—*King v. Creekmore* (Ky.) 689.

A landlord *held* not liable to a tenant for injury to his property from a collapse of the building, owing to inherent defects in its construction.—*Franklin v. Tracy* (Ky.) 1113.

A landlord *held* not liable for injuries sustained by one by falling into the open doorway in the sidewalk in front of the premises, unless the door and its use was per se a nuisance.—*Fehlauer v. City of St. Louis* (Mo. Sup.) 843.

A cellar door in a sidewalk, the door being in good repair, and affording, when closed, a safe

passway for those traveling on the sidewalk, is not a nuisance per se.—*Fehlhauer v. City of St. Louis* (Mo. Sup.) 843.

A landlord *held* not liable for injuries sustained by one falling into the open door of a cellar-way in a sidewalk in front of the premises.—*Fehlhauer v. City of St. Louis* (Mo. Sup.) 843.

Guarantors of performance by tenant of the usual covenants in his lease *held* not liable in an action against the tenant for injuries sustained by one by falling into an open cellar door in the sidewalk.—*Fehlhauer v. City of St. Louis* (Mo. Sup.) 843.

§ 4. Rent and advances.

A landlord *held* not to have waived his statutory lien on crop of tenant.—*Johnston v. Klein-smith* (Tex. Civ. App.) 36.

By analogy to *Batts' Civ. Ann. St. arts. 4871, 4872*, costs for care and custody of property taken on distress warrant *held* included in judgment for costs of court.—*Jackson v. Jernigan* (Tex. Civ. App.) 271.

A landlord's lien for supplies and advances *held* to extend only to the crop raised the same year.—*Walker v. Patterson's Estate* (Tex. Civ. App.) 437.

§ 5. Re-entry and recovery of possession by landlord.

Under Rev. St. 1899, §§ 3321, 4137, a purchaser of leased premises *held* not required to exhibit to the lessee his deed, when making a demand for the possession of the premises after the expiration of the term.—*Tucker v. McClenny* (Mo. App.) 151.

A grantee of land in possession of a lessee *held* entitled to maintain an action against the lessee for unlawful detainer, though he conveyed the land to others.—*Tucker v. McClenny* (Mo. App.) 151.

A lessee holding over *held* not entitled to defend by showing that he had sublet the premises to third persons, who were not made parties.—*Tucker v. McClenny* (Mo. App.) 151.

A complaint in an action for unlawful detainer *held* sufficient, under Rev. St. 1899, § 3321, defining unlawful detainer.—*Tucker v. McClenny* (Mo. App.) 151.

Rev. St. 1899, § 3353, *held* to place the grantee of a lessor in the place of the lessor as to remedies against a lessee holding over, and in an action for unlawful detainer evidence of grantee's title is made admissible by section 3355.—*Tucker v. McClenny* (Mo. App.) 151.

LANDS.

See "Public Lands."

LARCENY.

See "Embezzlement"; "False Pretenses."

Argument and conduct of counsel, see "Criminal Law," § 16.

Continuance, see "Criminal Law," § 11.

Former jeopardy, see "Criminal Law," § 5.

Impeachment of witnesses, see "Witnesses," § 6.

Instructions, see "Criminal Law," § 18.

Necessity of objections to arguments of counsel for purpose of review, see "Criminal Law," § 22.

Opinion evidence, see "Criminal Law," § 9.

Parties, see "Criminal Law," § 2.

Province of court and jury, see "Criminal Law," § 17.

§ 1. Prosecution and punishment.

Indictment for theft *held* to sufficiently describe the property.—*Gaines v. State* (Tex. Cr. App.) 10.

On a prosecution for cattle theft, the court *held* required to give an instruction on the law of alibi.—*Sapp v. State* (Tex. Cr. App.) 456.

Where, on a prosecution for cattle theft, evidence of an unrecorded brand was admitted, it was the duty of the court to limit the effect of the testimony to the question of identity of the animal.—*Sapp v. State* (Tex. Cr. App.) 456.

On a prosecution for cattle theft, an instruction *held* misleading as impairing defendant's defense.—*Sapp v. State* (Tex. Cr. App.) 456.

On a prosecution for cattle theft, the court *held* required to charge on the law of accomplice in reference to the testimony of a witness.—*Sapp v. State* (Tex. Cr. App.) 456.

On a prosecution for cattle theft, evidence of the disposition of the animal after defendant's arrest and in his absence was inadmissible.—*Sapp v. State* (Tex. Cr. App.) 456.

On a prosecution for cattle theft, an unrecorded brand may be used, in connection with other testimony, to identify the animal.—*Sapp v. State* (Tex. Cr. App.) 456.

On a prosecution for cattle theft, evidence that the alleged owner of the cattle, who was dead, had during his lifetime attended several terms of court as a witness, *held* admissible to show want of consent.—*Sapp v. State* (Tex. Cr. App.) 456.

An indictment for theft, charging the ownership of the property to be in a servant of the true owner, such servant being in possession, was sufficient.—*Kush v. State* (Tex. Cr. App.) 790.

In a prosecution for theft of railroad tickets, it was not necessary that the indictment should charge possession in a servant of the agent of the railroad company who had physical custody thereof.—*Kush v. State* (Tex. Cr. App.) 790.

In a prosecution for theft of railroad tickets, the state was not bound to prove the exact number or value of the tickets stolen, as alleged in the indictment.—*Kush v. State* (Tex. Cr. App.) 790.

Where the evidence connects defendant with another in a theft, evidence of the finding of part of the stolen article with the other is admissible.—*Norsworthy v. State* (Tex. Cr. App.) 803.

LATERAL SUPPORT.

See "Adjoining Landowners."

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 10.

LEADING QUESTIONS.

To witnesses, see "Witnesses," § 5.

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

LEGISLATIVE POWER.

See "Constitutional Law," § 2.

LETTERS.

As evidence, see "Evidence," § 9.

LIBEL AND SLANDER.

Arguments and conduct of counsel, see "Criminal Law," § 16.
Judgment on appeal in action for slander, see "Appeal and Error," § 24.

§ 1. Actions.

After verdict for plaintiff in libel, the court will construe the libelous language in that sense, if it is susceptible thereof, which will support the verdict.—*Berea College v. Powell* (Ky.) 381.

Under Civ. Code Prac. § 116, petition in libel must be verified.—*Berea College v. Powell* (Ky.) 382.

Total mental derangement on the subject to which slanderous words relate is a complete defense to an action therefor.—*Irvine v. Gibson* (Ky.) 1106.

In action for slander, *held*, under evidence, error to fail to instruct on defense of insanity.—*Irvine v. Gibson* (Ky.) 1106.

In an action against a newspaper for libel, an instruction allowing the jury to consider the absence of an apology, without any evidence of a demand therefor, *held* error.—*Friedman v. Pulitzer Pub. Co.* (Mo. App.) 340.

In an action against a newspaper for libel, evidence of defendant's reporter, who prepared the article, that he bore plaintiff no ill will, *held* admissible.—*Friedman v. Pulitzer Pub. Co.* (Mo. App.) 340.

Where a petition for libel contained no allegation of special damages, evidence that plaintiff had been suspended from an association of persons engaged in his business was inadmissible.—*Friedman v. Pulitzer Pub. Co.* (Mo. App.) 340.

§ 2. Criminal responsibility.

There is no material variance between an indictment charging that defendant stated he had intercourse with prosecutrix, and evidence that he said he and another had intercourse with her.—*Gipson v. State* (Tex. Cr. App.) 216.

Admission of evidence, on a trial for slander, as to how prosecutrix was treated and received in society at the time of the trial, *held* error.—*Gipson v. State* (Tex. Cr. App.) 216.

Information charging criminal libel *held* insufficient for failure to single out libelous matter.—*Jackson v. State* (Tex. Cr. App.) 223.

LICENSES.

For sale of intoxicating liquors, see "Intoxicating Liquors," § 3.

Injuries to licensees, see "Railroads," §§ 3-6.
Validity of statute imposing license as deprivation of property without due process of law, see "Constitutional Law," § 8.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

Particular classes of liens.

See "Mechanics' Liens."

For drainage assessments, see "Drains," § 1.
For expense of public improvements, see "Municipal Corporations," § 6.

Landlord's lien for rent, see "Landlord and Tenant," § 4.

Of agent for compensation, see "Principal and Agent," § 2.

Of attorney, see "Attorney and Client," § 1.

On homestead, see "Homestead," § 2.

Pledge, see "Pledges."

Vendor's lien on lands sold, see "Vendor and Purchaser," § 6.

LIFE ESTATES.

Creation by will, see "Wills," § 3.

LIMITATION.

Of tax rate, see "Taxation," § 2.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Running of limitations as between landlord and tenant, see "Landlord and Tenant," § 1.

Particular actions or proceedings.

See "Forcible Entry and Detainer," § 1.

Against devisees, see "Wills," § 4.

By contractor for public improvement, see "Municipal Corporations," § 6.

On guardian's bond, see "Guardian and Ward," § 4.

On notary's bond, see "Notaries."

To determine county boundaries, see "Counties," § 1.

§ 1. Statutes of limitation.

Provisions of general limitation law are, under Rev. St. 1899, § 4292, inapplicable to actions on notaries' bonds, for which special limitation is prescribed by section 8836.—*State ex rel. Barringer v. Hawkins* (Mo. App.) 98.

The statute relative to limitations of actions for recovery of real estate, as against state, taking effect August 1, 1866 (Gen. St. 1866, c. 191, § 7), *held* to have commenced to run at the time it took effect as against one in possession of state lands at that time.—*Dice v. Hamilton* (Mo. Sup.) 299.

§ 2. Computation of period of limitation.

Ky. St. 1899, § 2531, *held* not to stop the running of limitations in favor of a defendant who was not a resident of the state at the time plaintiff's cause of action accrued.—*Bybee's Ex'r v. Poynter* (Ky.) 698.

The statute of limitations does not run against an infant.—*Gibson v. Gibson* (Ky.) 923.

Death of creditor *held* not to prolong the period of limitations on matured obligation until an administrator is appointed.—*Stanton v. Gibbins* (Mo. App.) 95.

The fraudulent concealment by a notary of a false acknowledgment certified by him postponed the starting of limitations, not only as against him, but as against the sureties on his bond as well.—*State ex rel. Barringer v. Hawkins* (Mo. App.) 98.

Ward *held* entitled to 10 years to sue guardian after right of action accrued, which time was not cut down by Shannon's Code, § 4418.—*Jackson v. Crutchfield* (Tenn.) 776.

Under Rev. St. 1895, art. 1375, an application to open a judgment and decree determining heirship and partitioning and distributing an estate, and for a new trial, *held* not to inure to benefit of other adverse claimants, intervening after expiration of time limited by statute.—*Bean v. Dove* (Tex. Civ. App.) 242.

§ 3. Acknowledgment, new promise, and part payment.

In the absence of rebutting evidence, a part payment raises a presumption that the debtor recognized the debt and promised to pay the balance.—*Gorman v. Pettus & Buford* (Ark.) 907.

Facts *held* to show that decedent authorized part payment of indebtedness, so as to remove bar of limitations.—*Gorman v. Pettus & Buford* (Ark.) 907.

§ 4. Operation and effect of bar by limitation.

Rev. St. 1899, § 4277, *held*, in view of section 4276, to bar in two years from passage of statute action to foreclose mortgage to secure an obligation already barred when statute was passed.—*Stanton v. Gibbins* (Mo. App.) 95.

Where, in action on vendor's lien note, defense of limitations was made, plaintiff *held* entitled to recover the land.—*Finks v. Abeel* (Tex. Civ. App.) 650.

§ 5. Pleading, evidence, trial, and review.

In action on notary's bond, court should have been instructed, on limitations, as to whether plaintiff could have discovered fraud sooner.—*State ex rel. Barringer v. Hawkins* (Mo. App.) 93.

In the absence of special plea, coverture cannot be proved.—*Meineke v. Edmundson* (Tex. Civ. App.) 238.

LIMITATION OF LIABILITY.

Of carrier, see "Carriers," §§ 5, 9.

Prohibition against carrier's limitation of liability as regulation of commerce, see "Commerce," § 1.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIVE STOCK.

Carriage of, see "Carriers," § 8.

Injuries from operation of railroads, see "Railroads," § 5.

LOAN COMPANIES.

See "Building and Loan Associations."

LOCAL LAWS.

See "Statutes," § 2.

LOCAL OPTION.

Traffic in intoxicating liquors, see "Intoxicating Liquors," §§ 2, 5.

LOCAL PREJUDICE.

Ground for change of venue in criminal prosecutions, see "Criminal Law," § 4.

LOCATION.

Of mining claim, see "Mines and Minerals," § 1.

MACHINERY.

Assumption of risk as to dangerous machinery, see "Master and Servant," § 7.

Liability of employer for defects, see "Master and Servant," § 3.

MALICE.

See "Assault and Battery," § 1.

MALICIOUS PROSECUTION.

See "False Imprisonment."

Amendment of pleading, see "Pleading," § 5.

Cure of pleading, see "Pleading," § 9.

MANSLAUGHTER.

See "Homicide," § 2.

MARKETABLE TITLE.

See "Vendor and Purchaser," § 4.

MARRIAGE.

See "Divorce"; "Husband and Wife."

Validity of, as affecting rights of wife to insurance on life of husband, see "Insurance," § 3.

The presumption of the legality of a marriage, created by the evidence, *held* to shift to parties, claiming the proceeds of an insurance policy in opposition thereto, the burden of establishing its illegality.—*Scott's Adm'r v. Scott* (Ky.) 1122.

The presumption of the legality of a third marriage, created by the evidence in support of a claim of the wife to insurance on the life of her husband, *held* not overthrown by the mere denial of the first wife, wholly unsupported, that he was divorced from her.—*Scott's Adm'r v. Scott* (Ky.) 1122.

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

See "Work and Labor."

Assessment of damages for injuries to servant, see "Damages," § 4.

Inadequate and excessive damages for injuries to employé, see "Damages," § 3.

Issues presented for review on appeal in action for personal injuries, see "Appeal and Error," § 2.

Necessity of objections to pleadings in action for compensation for purpose of review, see "Appeal and Error," § 2.

§ 1. The relation.

Issuance of a statement by an employer to a laborer, reciting the number of days he had worked, the rate per day, amount due him, etc., *held* not unlawful, under Laws 1895, p. 206, and Rev. St. 1899, § 8142.—*State v. Balch* (Mo. Sup.) 547.

An information on a prosecution under Laws 1895, p. 206, and Rev. St. 1899, § 8142, *held* insufficient.—*State v. Balch* (Mo. Sup.) 547.

§ 2. Master's liability for injuries to servant—Nature and extent in general.

A foreman of a gang of men *held* guilty of negligence in ordering certain timber lowered into a trench in which another servant was at work.—*Chesapeake & O. Ry. Co. v. Board* (Ky.) 189.

A railroad is not liable for injuries to an employé occasioned by cars standing on a siding being driven upon the main track by a storm of such extraordinary violence that it could not reasonably have been anticipated.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

In action against master for injuries to servant, fact that the place was insufficiently lighted did not render the master liable.—*Anderson v. Forrester-Nace Box Co.* (Mo. App.) 486.

Evidence of slipping of fellow servant's feet in placing push car on track *held* insufficient to show negligence.—*Seery v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 950.

§ 3. — Tools, machinery, appliances, and places for work.

In action against master for injuries to servant, owing to a nail flying from its place as he struck it, the character of the nail *held* not such as to render the master liable for the injuries.—*Anderson v. Forrester-Nace Box Co.* (Mo. App.) 486.

At common law the master is not required to guard dangerous machinery, as regards an employé of sufficient age and experience.—*Bair v. Heibel* (Mo. App.) 1017.

Master *held* not guilty of negligence in failing to furnish a servant with a reasonably safe hammer, where hammer furnished was rendered dangerous solely by servant's acts.—*Hettich v. Hillje* (Tex. Civ. App.) 641.

The maintenance of a post so close to a railroad track that a brakeman could be struck thereby while riding on the side of a car in the performance of his duties *held* negligence, entitling a brakeman so injured to recover.—*Galveston, H. & S. A. Ry. Co. v. Brown* (Tex. Civ. App.) 832.

§ 4. — Methods of work, rules, and orders.

In an action for personal injuries, a mine owner *held* not negligent in not making an examination, after explosion of blasts, to ascertain whether all the shots had been exploded.—*Livengood v. Joplin-Galena Consol. Lead & Zinc Co.* (Mo. Sup.) 1077.

§ 5. — Warning and instructing servant.

A common carrier is not chargeable with notice that Texas cattle carried by it are dangerous and vicious, and liable to injure employes.—*Clark v. Missouri, K. & T. Ry. Co.* (Mo. Sup.) 882.

The owner of a mine *held* not liable for failing to inform an employé, engaged in drilling, that shots had been exploded at the place of work the preceding week.—*Livengood v. Joplin-Galena Consol. Lead & Zinc Co.* (Mo. Sup.) 1077.

Failure of a master to instruct an employé as to a danger, which he otherwise learned, does not affect the master's liability.—*Bair v. Heibel* (Mo. App.) 1017.

In action against railroad for injuries to servant, *held*, that engineer was guilty of negligence in backing locomotive without signal or warning.—*Gulf, C. & S. F. Ry. Co. v. Cooper* (Tex. Civ. App.) 263.

Servant *held* not an inexperienced workman, in the sense of imposing on his employer the duty of warning him of danger.—*Hettich v. Hillje* (Tex. Civ. App.) 641.

Railway company *held* not negligent in failing to notify a section foreman of the unusual weight of a push car.—*Seery v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 950.

§ 6. — Fellow servants.

Death of a locomotive engineer because of train running into unattended cars, which had escaped from a side track, *held* not due to the negligence of a fellow servant.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

The operator of a steam drill, used in a mine to drill holes in which to insert explosives, is a fellow servant of his helper.—*Livengood v. Joplin-Galena Consol. Lead & Zinc Co.* (Mo. Sup.) 1077.

A servant, loading stone into a box attached to arm of a derrick, *held* a fellow servant with one whose duty was to observe when the box was filled and give notice to the engineer to elevate the box.—*Shaw v. Bambrick-Bates Const. Co.* (Mo. App.) 96.

A foreman in charge and control of a crew of miners *held* not a fellow servant with the men while taking part in their work.—*Donnelly v. Aida Min. Co.* (Mo. App.) 130.

A master *held* liable for the injuries received by a servant while handling a wooden beam with inadequate assistance.—*San Antonio Traction Co. v. De Rodriguez* (Tex. Civ. App.) 420.

Railway employes, placing a push car on track, *held* to be operating a car, within *Sayles' Ann. Civ. St. 1897*, art. 4560f, relating to railway company's liability for injuries to servants.—*Seery v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 950.

The washhouse foreman in a brewery and the person piling the kegs to be washed *held* fellow servants of one engaged in washing them, so that he cannot recover for injury from their negligence.—*Houston Ice & Brewing Co. v. Pisch* (Tex. Civ. App.) 1047.

§ 7. — Risks assumed by servant.

In action against railroad for injuries sustained by a servant while endeavoring to round up a Texas steer, which had escaped from a wreck, *held*, that plaintiff had knowledge as to the vicious character of the steer at the time plaintiff was placed in peril.—*Clark v. Missouri, K. & T. Ry. Co.* (Mo. Sup.) 882.

A locomotive engineer does not assume the risk of cars which, having escaped from a siding, are unattended on the main track, where they are liable to be run into by a regular train.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

Servant *held* not entitled to recover for injuries received in obeying unreasonable order of foreman.—*Zentz v. Chappell* (Mo. App.) 86.

Fact that servant was only 17 years of age *held* not to affect assumption of risk.—*Leitner v. Grieb* (Mo. App.) 764.

Servant, injured in attempt to move stone, for which task he had requested help, *held* to have assumed the risk.—*Leitner v. Grieb* (Mo. App.) 764.

An employé *held* not to assume the risk from the master's failure to guard dangerous machinery, as required by *Rev. St. 1899*, § 6433, though he may be guilty of contributory negligence in continuing to work.—*Bair v. Heibel* (Mo. App.) 1017.

In action against railroad for injuries to servant, *held*, that he had not assumed the risk by remaining in service of defendant after discovering defect in a coupler.—*Gulf, C. & S. F. Ry. Co. v. Cooper* (Tex. Civ. App.) 263.

A servant, knowing the weight of a wooden beam and the number of men required to handle it, *held* to assume the risks arising from inadequate assistance.—*San Antonio Traction Co. v. De Rodriguez* (Tex. Civ. App.) 420.

Servant *held* to have assumed risk in performing work alone, and could not count on negligence of master in failing to provide more men for work.—*Hettich v. Hillje* (Tex. Civ. App.) 641.

The fact that work in performance of which servant was injured was outside of his duties *held* not to affect doctrine of assumed risk under circumstances disclosed.—*Hettich v. Hillje* (Tex. Civ. App.) 641.

An employé assumes the risk of injury from known danger, if he undertakes or continues to expose himself to it, except where he acts under peremptory orders from the master under circumstances not admitting of delay or reflection.—*Hettich v. Hillje* (Tex. Civ. App.) 641.

Servant *held* to have assumed the risk of danger in working under the circumstances that he did.—*Hettich v. Hillje* (Tex. Civ. App.) 641.

The question of master's negligence in failing to provide a reasonably safe place to work does not arise, where it is shown that the servant himself selected the place at which he performed the work.—*Hettich v. Hillje* (Tex. Civ. App.) 641.

Section foreman *held* to have assumed the risk of injury from operating a push car with the assistance of too few men.—*Seery v. Gulf, O. & S. F. Ry. Co.* (Tex. Civ. App.) 950.

An employé, having known of the slanting, slippery floor of the room in which he worked, and the throbbing from the engine, *held* to have assumed the risk.—*Houston Ice & Brewing Co. v. Fisch* (Tex. Civ. App.) 1047.

§ 8. — Contributory negligence of servant.

A servant's injuries *held* to have been due to his gross negligence.—*Calvert v. Brosius* (Ky.) 1098.

The doctrine of discovered peril *held* not to apply to sectionmen, until engineer of approaching train has good reason to believe they will not get out of the way.—*Evans v. Wabash R. Co.* (Mo. Sup.) 515.

Sectionman, struck and killed by approaching train, *held* guilty of contributory negligence.—*Evans v. Wabash R. Co.* (Mo. Sup.) 515.

In an action for death of a railroad crossing flagman, plaintiff *held* not entitled to recover, notwithstanding decedent's contributory negligence, under the humanitarian doctrine.—*Koons v. Kansas City S. B. R. Co.* (Mo. Sup.) 755.

In an action against railroad for injuries sustained by a servant while endeavoring to round up a Texas steer, which had escaped from a wreck, *held*, that defendant's failure to warn plaintiff of the vicious character of the steer was not the proximate cause of the injury.—*Clark v. Missouri, K. & T. Ry. Co.* (Mo. Sup.) 882.

In action against master for injuries to servant, *held*, that the fact that the place was insufficiently lighted was the result of servant's negligence.—*Anderson v. Forrester-Nace Box Co.* (Mo. App.) 486.

In action against railroad for injuries to servant, refusal to charge on a rule of the company forbidding employes to put themselves in a dangerous position until they know the engineer has seen and obeyed a signal *held* proper.—*Gulf, C. & S. F. Ry. Co. v. Cooper* (Tex. Civ. App.) 263.

In action against railroad for injuries to servant, evidence *held* not to show him guilty of contributory negligence.—*Gulf, C. & S. F. Ry. Co. v. Cooper* (Tex. Civ. App.) 263.

A railroad brakeman, injured by striking a post in dangerous proximity to the track while riding on a freight car, *held* not bound to inspect the premises and discover the dangerous position of the post.—*Galveston, H. & S. A. Ry. Co. v. Brown* (Tex. Civ. App.) 832.

§ 9. — Pleading and evidence.

In an action for death of a railway crossing flagman, evidence *held* insufficient to establish wilful negligence on the part of defendant's employes.—*Koons v. Kansas City S. B. R. Co.* (Mo. Sup.) 755.

In an action against a railroad for the death of a servant occasioned by cars escaping to the main track from a siding, evidence considered, and *held* sufficient to justify the jury in finding that the brakes had not been properly set.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

In action against a railroad for death of servant owing to cars standing on a siding having escaped to the main track, evidence as to existence and use of derailing switches was

proper.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

In action against railroad for death of servant owing to escape of cars from a siding onto the main track, *held* not error to admit evidence as to use of derailing switches at other side tracks or in admitting printed rules regarding precautions to prevent escape of cars.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

In action for death of servant because of cars on a siding escaping to the main track, it was to be presumed that there was something defective with the brakes or their setting.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

In action against railroad for wrongful death of servant, the burden was on the railroad to show freedom from negligence.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

Verdict, based on the evidence given in servant's injury action, *held* not responsive to petition.—*Zentz v. Chappell* (Mo. App.) 86.

One relying on the absence of the relation of fellow servants has the burden of establishing its nonexistence.—*Shaw v. Bambrick-Bates Const. Co.* (Mo. App.) 96.

In an action against railway contractors for personal injuries to a locomotive engineer, evidence *held* to support a verdict for plaintiff on the issues of defective appliance.—*Robertson & Hobbs v. Cayard* (Tenn.) 1056.

In an action by a servant for personal injuries, certain evidence *held* properly excluded, because variant from the pleadings.—*Jernigan v. Houston Ice & Brewing Co.* (Tex. Civ. App.) 260.

Evidence on the issue as to whether plaintiff, injured in coupling cars, had a good reason for his presence between the cars, *held* to sustain a finding for plaintiff.—*Gulf, C. & S. F. Ry. Co. v. Cooper* (Tex. Civ. App.) 263.

In an action for personal injuries by a railway employé, evidence *held* not to make out a prima facie case of contributory negligence.—*International & G. N. R. Co. v. Pina* (Tex. Civ. App.) 979.

§ 10. — Trial.

An instruction as to an employé not assuming the risk from absence of props, if he continued to work relying on the master's promise to furnish them, *held* misleading; the question of his negligence depending on all the circumstances.—*Kansas & T. Coal Co. v. Chandler* (Ark.) 912.

An instruction as to the employer's duty to furnish a safe place to work *held*, without qualification, to be misleading.—*Kansas & T. Coal Co. v. Chandler* (Ark.) 912.

An instruction as to the master's duty to warn an employé of dangers *held* abstract and misleading, the employé having learned of the dangers before the accident.—*Kansas & T. Coal Co. v. Chandler* (Ark.) 912.

In action for death of servant, an instruction *held* not erroneous as omitting any reference to assumed risk.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

In action against railroad for death of servant owing to the escape of cars to the main track from a siding, an instruction that the jury might consider appliances in general use at sidings *held* not erroneous.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

In action against railroad for death of servant occasioned by the escape of cars to the main track from a siding, an instruction that, if defendant negligently failed and omitted to secure the cars, plaintiff was entitled to recover, *held* not erroneous as imposing duty of mak-

ing cars incapable of getting loose.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

In action against railroad for death of servant owing to cars having escaped to the main track from a siding, an instruction *held* to have presented the defense that the cars were blown out by a storm, severe beyond anticipation, as favorably as defendant could have asked.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

In action against railroad for death of locomotive engineer, the fact that he had continued in service, knowing that there was no derailing switch at a certain siding, *held* not contributory negligence as a matter of law.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

In an action against a railroad for the death of a servant owing to cars escaping to the main track from a siding, the fact that there was no derailing switch did not show negligence per se.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

In action against railroad for death of servant occasioned by cars escaping to the main track from a siding, *held* that the question whether the siding, without a derailing switch, was a reasonably safe appliance, was one for the jury.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

Where the essential facts for determining who are fellow servants are not in controversy, the question is one of law.—*Shaw v. Bambrick-Bates Const. Co.* (Mo. App.) 96.

Under Rev. St. 1899, § 6433, it is a question of fact whether it is practicable to guard dangerous machinery, so as to make the master liable to an employé for not doing so.—*Bair v. Heibel* (Mo. App.) 1017.

In an action by a servant for personal injuries from defective appliances, evidence *held* to require submission to the jury of the issue as to the existence of defect.—*Jernigan v. Houston Ice & Brewing Co.* (Tex. Civ. App.) 260.

In an action by a servant for personal injuries, evidence considered, and *held* to require submission to the jury of the issue as to whether the person in charge of the work was an independent contractor.—*Jernigan v. Houston Ice & Brewing Co.* (Tex. Civ. App.) 260.

In an action against railroad for injuries to a servant, *held* proper to refuse to instruct on a rule of the company relative to the exposure of hands and arms to defective coupling.—*Gulf, C. & S. F. Ry. Co. v. Cooper* (Tex. Civ. App.) 263.

In an action against a railroad for injuries to a servant, refusal to instruct on a rule of the company requiring operatives to inspect a freight train at every stop, and repair any defective apparatus, *held* proper.—*Gulf, C. & S. F. Ry. Co. v. Cooper* (Tex. Civ. App.) 263.

In an action against a railroad for injuries to a servant, refusal to instruct on a rule of the company relative to going between moving cars *held* proper.—*Gulf, C. & S. F. Ry. Co. v. Cooper* (Tex. Civ. App.) 263.

It is proper, in an action by a servant for injuries, to refuse to charge that the burden of proof was on plaintiff to relieve himself from contributory negligence, where contributory negligence as a matter of law was not shown.—*Gulf, C. & S. F. Ry. Co. v. Cooper* (Tex. Civ. App.) 263.

In an action for servant's injuries, where it is evident that the risk was one assumed by plaintiff, there is no necessity for a submission of issues of contributory negligence.—*Hettich v. Hillje* (Tex. Civ. App.) 641.

In an action for injuries to a servant, the issue of assumed risk *held* properly withdrawn, where plaintiff did not know of the danger.—*Galveston, H. & S. A. Ry. Co. v. Brown* (Tex. Civ. App.) 832.

In the absence of a plea of assumed risk, in an action for injuries to a servant the master is not entitled to a special charge submitting such issue.—*Galveston, H. & S. A. Ry. Co. v. Brown* (Tex. Civ. App.) 832.

MATERIALITY.

Of alteration of written instrument. see "Alteration of Instruments."

MEASURE OF DAMAGES.

See "Damages," § 2.

MECHANICS' LIENS.

Priorities between vendors' liens and mechanics' liens, see "Vendor and Purchaser," § 6.

§ 1. Right to lien.

In action to enforce a materialman's lien, evidence that the material had been delivered on the premises *held* not to tend to show that it was sold on the credit of the building.—*Crane Co. v. Neel* (Mo. App.) 766.

§ 2. Proceedings to perfect.

Where a discount was credited to defendant by a materialman by mistake and without consideration, the materialman was not bound to allow the same.—*Smith v. Noyes* (Tex. Civ. App.) 649.

§ 3. Operation and effect.

New contract for furnishing material *held* not to continue whatever lien prior contract for similar material had superior to that of deed of trust.—*Martin v. Texas Briquette & Coal Co.* (Tex. Civ. App.) 651.

Contract to furnish material *held* insufficient to give seller superior lien to that obtained under deed of trust of property, executed after date of contract, but before use of material.—*Martin v. Texas Briquette & Coal Co.* (Tex. Civ. App.) 651.

A mechanic's lien for improvements, based on real estate subject to a vendor's lien, *held* subsequent to the latter.—*Watson v. Markham & Reese* (Tex. Civ. App.) 660.

§ 4. Enforcement.

In action to enforce a materialman's lien, certain testimony of the contractor *held* incompetent, as not tending to show that the goods were sold on the credit of the building.—*Crane Co. v. Neel* (Mo. App.) 766.

The district court of a county in which real estate is situated has jurisdiction to foreclose a materialman's lien thereon.—*Smith v. Noyes* (Tex. Civ. App.) 649.

In a suit to foreclose a materialman's lien, evidence *held* to warrant a finding that the lumber was used in the construction of the building on which the lien was sought.—*Smith v. Noyes* (Tex. Civ. App.) 649.

MEDICINES.

See "Druggists"; "Poisons."

MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 5.

MENTAL SUFFERING.

Element of damages in general, see "Damages," § 1.
 Element of damages for negligence in delivery of telegram, see "Telegraphs and Telephones," § 2.

MERGER.

Of cause of action in judgment, see "Judgment," § 6.
 Of criminal offenses, see "Criminal Law," § 1.

MINES AND MINERALS.

Mine operators as employers, see "Master and Servant."

§ 1. Public mineral lands.

An owner of a gas well *held* not entitled to waste the supply for the purpose of withdrawing the supply from wells of others located on adjoining land.—*Louisville Gas Co. v. Kentucky Heating Co. (Ky.) 368; Calor Oil & Gas Co. v. McGehee, Id.*

§ 2. Title, conveyances, and contracts.

Facts *held* insufficient to justify a decree vacating a lease of gas land for fraud, on the ground that the lessee had wasted the gas, to the injury of other lessees.—*Louisville Gas Co. v. Kentucky Heating Co. (Ky.) 368; Calor Oil & Gas Co. v. McGehee, Id.*

§ 3. Operation of mines, quarries, and wells.

Acts 1891-93, pp. 60, 61 (Ky. St. 1899, §§ 3910-3914), enjoining the plugging of gas wells, applies both to abandoned wells and those not abandoned, but not in use.—*Commonwealth v. Trent (Ky.) 390.*

Acts 1891-93, pp. 60, 61 (Ky. St. 1899, §§ 3910-3914), enjoining plugging of gas wells, construed, and *held* to forbid owner to permit gas to escape at point other than well.—*Commonwealth v. Trent (Ky.) 390.*

Under Acts 1891-93, pp. 60, 61 (Ky. St. 1899, §§ 3910-3914), enjoining plugging of gas wells, it cannot be contended that owner may use gas as he will after reducing it to possession.—*Commonwealth v. Trent (Ky.) 390.*

Acts 1891-93, pp. 60, 61 (Ky. St. 1899, §§ 3910-3914), enjoining plugging of gas wells, is a valid exercise of legislative power.—*Commonwealth v. Trent (Ky.) 390.*

MINORS.

See "Infants."

MISJOINDER.

Of parties, see "Parties," § 2.

MISREPRESENTATION.

See "False Pretenses": "Fraud."

Affecting liability of surety, see "Principal and Surety," § 4.

Affecting validity of note, see "Bills and Notes," § 1.

MISTAKE.

Ground for reformation of instrument, see "Reformation of Instruments," § 1.

MODIFICATION.

Of contract, see "Contracts," § 3.

Of judgment or order on appeal, see "Appeal and Error," § 24.

MORTGAGES.

Bar of debt as affecting security, see "Limitation of Actions," § 4.

Of personal property, see "Chattel Mortgages." Priorities between mortgages and mechanics' liens, see "Mechanics' Liens," § 3.

§ 1. Requisites and validity.

Where the issue is whether a certain deed was intended to be a deed absolute or to operate as a mortgage, it is the duty of the court to submit the instrument, with attending circumstances, to the jury, with such instructions on the effect of the instrument as will meet the phases of the case.—*Bradford v. Malone (Tex. Civ. App.) 22.*

In action to correct deed for possession, etc., submission to jury of issue as to conditional sale *held* error.—*Bradford v. Malone (Tex. Civ. App.) 22.*

§ 2. Transfer of property mortgaged or of equity of redemption.

Vendee of land, embraced with other property in outstanding unrecorded mortgage, *held* entitled to have such other property first sold.—*Bagley v. Weaver (Ark.) 903.*

§ 3. Foreclosure by action.

Fact that a mortgage creditor could sue tenant for rents does not prevent appointment of receiver at his instance to collect and apply rents.—*De Berrera v. Frost (Tex. Civ. App.) 637.*

Right of mortgage creditor to sue for rents, where outstanding lease would not afford rents enough to pay his debt, was not an adequate legal remedy, and appointment of receiver was proper.—*De Berrera v. Frost (Tex. Civ. App.) 637.*

Under Rev. St. 1895, art. 1465, § 2, receiver may be appointed to collect rents for mortgage creditor, entitled by mortgage to rents and profits.—*De Berrera v. Frost (Tex. Civ. App.) 637.*

The fact that a lease of property is void is no answer to an application of a mortgage creditor for the appointment of a receiver to collect and apply to his debts the rents and profits thereof.—*De Berrera v. Frost (Tex. Civ. App.) 637.*

Sequestration proceedings, under Rev. St. 1895, arts. 4873, 4882, are not an adequate remedy at law to collect and apply rents of real estate to mortgage debt, and receiver was properly appointed.—*De Berrera v. Frost (Tex. Civ. App.) 637.*

MOTIONS.

Arrest of judgment in criminal prosecutions, see "Criminal Law," § 20.

Continuance in civil actions, see "Continuance."

New trial in civil actions, see "New Trial," § 2.

New trial in criminal prosecutions, see "Criminal Law," § 20.

Opening or setting aside default judgment, see "Judgment," § 2.

Presentation of objections for review, see "Appeal and Error," § 2.

Revocation of order, entered at one term of court, at a subsequent term, *held* of no effect.—*State ex rel. Lentz v. Fort (Mo. Sup.) 741.*

MOTIVE.

As element of crime, see "Homicide," §§ 1, 6.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1.

Bribery of city officer, see "Bribery."

Discriminatory execution of ordinances as denial of equal protection of laws, see "Constitutional Law," § 7.

Duty to keep turnpike, in repair, see "Turnpikes and Toll Roads," § 1.

Excessive damages for injuries from defective walk, see "Damages," § 3.

Harmless error in admission of evidence in action for personal injuries, see "Appeal and Error," § 17.

Limitation of municipal tax rate, see "Taxation," § 2.

Rights of telegraph companies in streets, see "Telegraphs and Telephones," § 1.

Street railroads, see "Street Railroads."

Subjects and titles of acts relating to, see "Statutes," § 3.

Validity of laws authorizing cities to purchase electric light plants as impairing obligation of contracts, see "Constitutional Law," § 5.

Validity of ordinance as in violation of right to hold property, see "Constitutional Law," § 3.

Validity of ordinance prohibiting explosion of fire crackers as delegation of legislative power, see "Constitutional Law," § 2.

Validity of statute authorizing cities to purchase electric light plants as deprivation of property without due process of law, see "Constitutional Law," § 8.

Water supply, see "Waters and Water Courses," § 4.

§ 1. Creation, alteration, existence, and dissolution.

The provisions of a city charter are subject to general laws.—*Ex parte Loving* (Mo. Sup.) 508.

Const. art. 3, § 56, art. 11, §§ 4, 5, relative to incorporation of cities, construed, and *held*, that Legislature may by special act repeal charter of city of less than 10,000 and annex it to a city of over 10,000.—*City of Oak Cliff v. State* (Tex. Civ. App.) 24.

Const. art. 3, § 56, relative to incorporation of cities by special act, *held* not to apply to cities of more than 10,000 inhabitants, charters of which, under Const. art. 11, § 5, may be granted or amended by special act.—*City of Oak Cliff v. State* (Tex. Civ. App.) 24.

Sp. Laws 28th Leg. p. 391, relative to incorporation of city of Oak Cliff, within city of Dallas, *held* to sufficiently describe territory.—*City of Oak Cliff v. State* (Tex. Civ. App.) 24.

§ 2. Governmental powers and functions in general.

The absence of power in a municipal assembly to pass an ordinance can never be supplied by construction or acquiescence.—*State v. Butler* (Mo. Sup.) 560.

If there is a fair, reasonable doubt concerning the existence of power in the charter of a city, it will be resolved against the city, and the exercise of the power denied.—*State v. Butler* (Mo. Sup.) 560.

Rule of construction of city ordinance *held* to have no application, where the question is as to power granted in charter to pass the ordinance.—*State v. Butler* (Mo. Sup.) 560.

§ 3. Proceedings of council or other governing body.

Where a city ordinance affects a large number of people, one of the number affected is entitled to prosecute a suit for injunction to prevent its enforcement.—*Boyd v. Board of Councilmen of City of Frankfort* (Ky.) 669.

A city ordinance is not, as a matter of law, effective until approved by the mayor.—*State v. Butler* (Mo. Sup.) 560.

In a prosecution for violation of a city ordinance, the ordinance *held* to have been sufficiently proved.—*Webb City v. Parker* (Mo. App.) 119.

Statutes and ordinances must be reasonably construed.—*Von Diest v. San Antonio Traction Co.* (Tex. Civ. App.) 632.

§ 4. Officers, agents, and employees.

An indictment charging a city officer, in language of Rev. St. 1899, § 2346, with making contracts with the city, *held* sufficient.—*State v. Kelly* (Mo. App.) 996.

That Rev. St. 1899, § 2346, provides for removal of a city officer for certain misconduct, does not exempt him from criminal punishment therefor.—*State v. Kelly* (Mo. App.) 996.

Member of city legislative body *held* to be a city officer, within Rev. St. 1899, § 2346, relating to contracts by city officers with the city.—*State v. Kelly* (Mo. App.) 996.

A provision of a city charter *held* to have sufficiently provided a mode of procedure on charges against an officer.—*Riggins v. Richards* (Tex. Sup.) 946.

Members of a city council, who had preferred charges against the mayor, *held* not thereby disqualified from participating in his trial before the council. Const. art. 5, § 11.—*Riggins v. Richards* (Tex. Sup.) 946.

Rev. St. 1895, art. 3268, subd. 5, and the provisions of a city charter, construed, and *held* that, on charges preferred against the mayor, he could be tried by a quorum of the city council, presided over by its president.—*Riggins v. Richards* (Tex. Sup.) 946.

The provisions of a city charter *held* to have authorized the removal of an officer by council, irrespective of whether he had been elected by the people or by the council.—*Riggins v. Richards* (Tex. Sup.) 946.

§ 5. Contracts in general.

St. Louis City Charter, art. 3, § 26, cl. 6, granting city assembly power to pass ordinances to prevent the introduction and spread of contagious disease and to maintain the health and welfare of the city, *held* not to authorize an ordinance placing power in board of health to let contract for removal and disposal of city garbage.—*State v. Butler* (Mo. Sup.) 560.

Ordinance placing power in board of health to let contract for removal and disposal of city garbage *held* void, under St. Louis City Charter, art. 6, § 27, requiring contracts for public work to be let by board of public improvements.—*State v. Butler* (Mo. Sup.) 560.

§ 6. Public improvements.

In apportioning the cost of a street improvement, action of the city council in treating a street running parallel to the improved street for part of the distance as running parallel the entire distance, and dividing the territory on this basis, *held* proper.—*Wymond v. Barber Asphalt Pav. Co.* (Ky.) 203.

Where a street which was to be improved had been improved along part of its distance by original construction, the action of the city authorities in paying for the construction of this portion of it with funds of the city was not prejudicial to the property owners.—*Wymond v. Barber Asphalt Pav. Co.* (Ky.) 203.

Repairs on a turnpike included in city limits *held* not an original construction, relieving owners of abutting lots from liability for a subsequent improvement.—*Wymond v. Barber Asphalt Pav. Co.* (Ky.) 203.

A cause of action *held* to accrue, so that limitations run from the time plaintiffs are enjoined from completing their contract for defendant city, because of the city's neglect.—

Ash & Gentry v. City of Independence (Mo. App.) 104.

Under Rev. St. 1899, § 5860, *held*, that a resolution of a city council declaring a street improvement necessary did not sufficiently describe the work by declaring it should be paved.—*City of Kirksville ex rel. Fleming Mfg. Co. v. Coleman* (Mo. App.) 120.

Under Rev. St. 1899, § 5859, *held* that, to allow the work of bringing a street to grade to be included in a special assessment, the resolution of the city council should describe such work.—*City of Kirksville ex rel. Fleming Mfg. Co. v. Coleman* (Mo. App.) 120.

An estimate by the city engineer of the cost of a street improvement, made after a resolution of the council declaring the work necessary, but not describing it, and before an ordinance describing the work and ordering it to be done, *held* not to satisfy Rev. St. 1899, § 5858.—*City of Kirksville ex rel. Fleming Mfg. Co. v. Coleman* (Mo. App.) 120.

Under Kansas City Charter, art. 9, § 23, *held*, that the lien of a special tax bill continues, for all its installments, for a year after the last installment becomes due on its face, though it became due earlier because of default in payment of the other installments.—*Barber Asphalt Pav. Co. v. Meservey* (Mo. App.) 137.

A lot owner, who constructed a sidewalk in front of his own premises, *held*, under ordinances of the city, not relieved from liability for his pro rata share of cost of constructing intersections in the improvement district.—*Heman Const. Co. v. McManus* (Mo. App.) 310.

§ 7. Police power and regulations.

Under Ky. St. 1899, § 3290, subsecs. 23, 25, 26, cities of the third class *held* without authority to prohibit the erection of a brick church building made as nearly fireproof as possible.—*Boyd v. Board of Councilmen of City of Frankfort* (Ky.) 669.

Ordinance relative to buildings *held* unconstitutional, because giving arbitrary power to the city council.—*Boyd v. Board of Councilmen of City of Frankfort* (Ky.) 669.

Under Ky. St. 1899, § 3290, subsecs. 14, 16, city *held* without authority to declare a church building erected by a colored congregation to be a nuisance.—*Boyd v. Board of Councilmen of City of Frankfort* (Ky.) 669.

Evidence *held* to sustain a conviction of violating an ordinance as to weeds on premises.—*City of St. Louis v. Galt* (Mo. Sup.) 876.

Const. art. 9, §§ 20–25, and a charter provision passed thereunder, authorizing the abatement of nuisances, *held* to give power to pass an anti-weed ordinance.—*City of St. Louis v. Galt* (Mo. Sup.) 876.

City ordinance prohibiting the explosion of firecrackers *held* to be within police power of the city.—*City of Centralia v. Smith* (Mo. App.) 488.

Defense to prosecution for violation of city ordinance against exploding firecrackers considered, and *held* insufficient.—*City of Centralia v. Smith* (Mo. App.) 488.

Under St. Louis City Charter, art. 3, § 26, par. 12, providing that the municipal assembly shall have authority to "provide for the safe construction, inspection and repair of all private and public buildings within the city," an ordinance limiting the depth a lot owner can excavate on his premises, without taking care of contiguous buildings at his own expense, is a nullity.—*Carpenter v. Reliance Realty Co.* (Mo. App.) 1004.

Defendants' calling plaintiff's attention to an ordinance, in notifying him to protect his property from an excavation about to be made by defendants, *held* not to estop defendants, in ac-

tion to compel them to adopt measures at their own expense to protect plaintiff's buildings, to attack the validity of the ordinance.—*Carpenter v. Reliance Realty Co.* (Mo. App.) 1004.

A city charter and ordinances, authorizing policemen to arrest without warrant when an ordinance is violated in their view, is valid.—*Vann v. State* (Tex. Cr. App.) 813.

A horse, running to his stable unattended, according to custom, *held* running at large, within an ordinance making it unlawful for horses to run at large.—*Allen v. Hazzard* (Tex. Civ. App.) 268.

§ 8. Use and regulation of public places, property, and works.

A city *held* not to have acquired by prescription the right to maintain a sewer on a person's land.—*City of Chillicothe v. Bryan* (Mo. App.) 465.

§ 9. Torts.

City *held* liable for negligent maintenance of sidewalk, though constructed by property owner without any requirement from city.—*Town of Bromley v. Bodkin* (Ky.) 696.

The question of notice to the town authorities of a defect in a sidewalk *held* one for the jury.—*Town of Bromley v. Bodkin* (Ky.) 696.

Evidence *held* to show clearly that a sewer was sufficient to meet the demands on it under ordinary conditions.—*Gulath v. City of St. Louis* (Mo. Sup.) 744.

Evidence *held* insufficient to show that a sewer had not been kept in repair, or had become obstructed.—*Gulath v. City of St. Louis* (Mo. Sup.) 744.

Flooding of land from a well-built sewer, caused by an extraordinary rain, *held* an act of God, for which city is not liable.—*Gulath v. City of St. Louis* (Mo. Sup.) 744.

In action against city and others for injuries sustained by plaintiff by falling into the open door of a cellarway in a sidewalk, evidence *held* not to show such a use of the door previously as should have amounted to notice to the city.—*Fehlauer v. City of St. Louis* (Mo. Sup.) 843.

Instruction as to measure of city's duty in keeping its streets in repair *held* error.—*Jero-witz v. Kansas City* (Mo. App.) 1088.

Exemplary damages cannot be recovered against city for an injury to land, except under exceptional circumstances.—*Ostrom v. City of San Antonio* (Tex. Civ. App.) 829.

§ 10. Fiscal management, public debt, securities, and taxation.

In a suit to enjoin the collection of a personal property tax, evidence *held* insufficient to rebut plaintiff's positive statements showing his non-residence.—*Town of London v. Boyd* (Ky.) 931.

Ky. St. 1903, § 3673, *held* not to confer on sixth-class towns the power to tax for local purposes personal property of nonresidents.—*Town of London v. Boyd* (Ky.) 931.

Under Rev. St. 1899, § 6276 (Laws 1873, p. 210), providing that the legislative authority of cities of a certain class shall "order" an election to be held for the purpose of testing the sense of the qualified voters, on propositions to become indebted or to increase the debt thereof, an order or resolution passed with the same formalities as an ordinance *held* sufficient.—*State ex rel. Town of Canton v. Allen* (Mo. Sup.) 863.

A resolution of a city council, ordering an election for the purpose of testing the sense of the qualified voters on a proposition to increase the debt of the city, requiring 15 days' previous notice of the election, *held* to be complied with.—*State ex rel. Town of Canton v. Allen* (Mo. Sup.) 863.

City ordinance, ordering issuance of bonds to purchase or erect electric light plant, *held* not violative of Const. art. 10, §§ 1, 3, 10, relating to the taxing power.—State ex rel. Town of Canton v. Allen (Mo. Sup.) 868.

Objection to proposition, submitted to voters of city to test their sense as to propriety of increasing the city debt, *held* without merit.—State ex rel. Town of Canton v. Allen (Mo. Sup.) 868.

Objection to resolution of city council, ordering a special election to test sense of voters as to propriety of increasing debt of city, *held* without merit.—State ex rel. Town of Canton v. Allen (Mo. Sup.) 868.

MURDER.

See "Homicide," § 1.

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 8.

MUTUAL INSURANCE COMPANIES.

See "Insurance," § 1.

NAMES.

"Doorley" is idem sonans with "Dooley."—New York & Texas Land Co. v. Dooley (Tex. Civ. App.) 1030.

NAVIGABLE WATERS.

See "Ferries"; "Waters and Water Courses."

NEGLIGENCE.

Causing death, see "Death," § 1.

By particular classes of parties.

See "Carriers," §§ 2, 5, 6; "Druggists"; "Municipal Corporations," § 9.

Banks, see "Banks and Banking," § 1.

Employers, see "Master and Servant," §§ 2-10.

Insured, see "Insurance," § 4.

Railroad companies, see "Railroads," §§ 3-6.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Traveler on highway, see "Highways," § 4.

Condition or use of particular species of property, works, or machinery.

See "Railroads," §§ 3-6; "Street Railroads," §§ 2-7; "Turnpikes and Toll Roads," § 2.

Automobile, see "Highways," § 4.

Demised premises, see "Landlord and Tenant," § 3.

Contributory negligence.

Injury avoidable notwithstanding contributory negligence of person injured by operation of street railroad, see "Street Railroads," § 5.

Of owner of animals injured by operation of railroad, see "Railroads," § 5.

Of owner of property destroyed by fire caused by operation of railroad, see "Railroads," § 6.

Of parent, see "Parent and Child."

Of passenger, see "Carriers," § 7.

Of person injured by operation of railroad, see "Railroads," §§ 3-6.

Of person injured by operation of street railroad, see "Street Railroads," §§ 4, 7.

Of servant, see "Master and Servant," §§ 8-10.

Of shipper of live stock, see "Carriers," § 3.

§ 1. Acts or omissions constituting negligence.

In action by servant for injuries, an instruction on gross negligence *held* not erroneous.—Chesapeake & O. Ry. Co. v. Board (Ky.) 189.

A railroad is required to keep a wagon way leading into its stockyards in reasonable repair only.—Meyers v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 149.

§ 2. Contributory negligence.

In an action against a railroad company for injuries to a child, evidence *held* to justify a finding that the child was not *sui juris*.—St. Louis, I. M. & S. Ry. Co. v. Colum (Ark.) 596.

The negligence of a carrier of passengers is not imputed to a passenger, who is injured by the concurrent negligence of the carrier and another.—Louisville & O. Packet Co. v. Mulligan (Ky.) 704.

Negligence, such as to preclude a recovery for injuries, is merely the absence of such care as a person of ordinary prudence would exercise under similar circumstances.—Meyers v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 149.

Plaintiff, in action for injuries received in driving on premises of a railroad, approaching its stock lots, *held* guilty of contributory negligence.—Meyers v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 149.

§ 3. Actions.

Whether a boy 12 years old exercised reasonable care when he touched a live electric wire *held* a question for the jury.—City of Owensboro v. York's Adm'r (Ky.) 1130.

The burden is on plaintiff, in an action for negligent killing, not only to prove the negligence and injury complained of, but also a causal connection between them.—Warner v. St. Louis & M. R. R. Co. (Mo. Sup.) 67.

Where the facts are undisputed, and are such that reasonable minds can draw but one inference therefrom, the question of contributory negligence is one of law for the court.—Meyers v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 149.

An instruction requiring the jury to find that plaintiff fell when she was using ordinary care for her own safety does not authorize a recovery, without regard to her contributory negligence.—Kean v. Schoening (Mo. App.) 335.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEGROES.

Discrimination in selection of jurors as denial of equal protection of laws, see "Constitutional Law," § 7.

Race discrimination in selection of jurors, see "Civil Rights."

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," § 1.

Ground for new trial in criminal prosecutions, see "Criminal Law," § 20.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 20; "Homicide," § 8.

In ejectment, see "Ejectment," § 2.

In suit for forcible entry, see "Forcible Entry and Detainer," § 1.

Necessity of motion for purpose of review, see "Appeal and Error," § 2; "Criminal Law," § 22.

Power of successor in office of judge to pass on motion for, see "Judges," § 2.

Remand by appellate court for new trial, see "Appeal and Error," § 24.

§ 1. Grounds.

Newly discovered evidence of an account book *held* not cumulative evidence, but such as to entitle defendant in ejectment to new trial.—*Owsley v. Owsley* (Ky.) 397.

Where newly discovered evidence is unerring and convincing, satisfying the mind of the judge that it will probably have a preponderating influence upon another trial, a new trial should be granted.—*Owsley v. Owsley* (Ky.) 397.

Private memorandum or account book of party, disclosed by his testimony in another suit, *held* material evidence, not producible by ordinary diligence.—*Owsley v. Owsley* (Ky.) 397.

The trial court did not abuse its discretion in refusing a new trial in a personal injury action, on the ground of newly discovered evidence going only to the extent of plaintiff's injuries.—*Louisville & C. Packet Co. v. Mulligan* (Ky.) 704.

Court *held* to have authority to set aside, on ground of surprise, judgment non obstante veredicto for failure to reply to answer.—*Illinois Cent. R. Co. v. Beauchamp* (Ky.) 1096.

Affidavits of witnesses, unknown and not discoverable by exercise of due diligence at the time of trial of an action for breach of marriage contract, *held* to entitle defendant to a new trial.—*Meisch v. Sippy* (Mo. App.) 141.

§ 2. Proceedings to procure new trial.

The four days after the trial in which Rev. St. 1899, § 803, requires motion for new trial to be filed, that matters of exception may be reviewed on appeal, are calendar days, not court days.—*Long v. Hawkins* (Mo. Sup.) 77.

Statements of juror that he had already formed an opinion before trial, contrary to his answers to questions on the voir dire examination, *held* incapable of proof to impeach verdict.—*Meisch v. Sippy* (Mo. App.) 141.

Under the direct provisions of *Sayles' Civ. St.* 1897, art. 1029a, it is proper for the trial court to require a remittitur of excessive damages as a condition to his overruling a motion for a new trial.—*Ft. Worth & D. O. Ry. Co. v. Linthicum* (Tex. Civ. App.) 40.

NEXT OF KIN.

See "Descent and Distribution."

NONRESIDENCE.

Effect on limitation, see "Limitation of Actions," § 2.

NOTARIES.

Limitation of action on notarial bond, see "Limitation of Actions," §§ 1, 2, 5.

Under Rev. St. 1899, § 8836, cause of action for fraud of notary does not accrue till its discovery, or until it ought to have been discovered.—*State ex rel. Barringer v. Hawkins* (Mo. App.) 98.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of particular facts, acts, or proceedings.

Action or process, see "Process," § 2.
Bankruptcy proceedings, see "Bankruptcy," § 2.
Defects in street, see "Municipal Corporations," § 9.
Increase of capital stock, see "Corporations," § 1.

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Meetings of persons engaged in joint adventure, see "Joint Adventures."
Nonpayment or protest of bill or note, see "Bills and Notes," § 4.
Sickness of member of insurance association, see "Insurance," § 8.
Taking of depositions, see "Depositions."
Termination of tenancy, see "Landlord and Tenant," § 2.

To particular classes of parties.

See "Municipal Corporations," § 9; "Principal and Agent," § 3.
Purchaser of note, see "Bills and Notes," § 3.
Purchaser of realty, see "Vendor and Purchaser," § 5.

NUISANCE.

Harmless error in instructions in action for damages caused by nuisance, see "Appeal and Error," § 20.

Liability of lessor for maintenance of, see "Landlord and Tenant," § 3.

Regulation by municipalities, see "Municipal Corporations," § 7.

§ 1. Private nuisances.

Certain municipal ordinances *held* inadmissible in action for damages from a nuisance, consisting in the operation of a candle factory.—*Danker v. Goodwin Mfg. Co.* (Mo. App.) 338.

A person, injured by a nuisance occasioned by a sewer having its outlet on his land, *held* estopped from obstructing the outlet.—*City of Chillicothe v. Bryan* (Mo. App.) 465.

A person, injured by a nuisance occasioned by a sewer having its outlet on his land, *held* not entitled to obstruct the outlet.—*City of Chillicothe v. Bryan* (Mo. App.) 465.

A person injured by a nuisance has the right to abate it, but in so doing must not be guilty of any excess.—*City of Chillicothe v. Bryan* (Mo. App.) 465.

§ 2. Public nuisances.

In suit to abate a public nuisance on land alleged to have been dedicated to the public, but claimed by defendants, *held*, that the court was not required to determine the question of dedication, defendant's title, etc.—*Baker v. McDaniel* (Mo. Sup.) 531.

In suit to abate a nuisance, a finding *held* to have amounted to a finding on the existence of the nuisance.—*Baker v. McDaniel* (Mo. Sup.) 531.

In order to enable an individual to maintain an action for injuries from a public nuisance, it is necessary for him to show special damages.—*Baker v. McDaniel* (Mo. Sup.) 531.

OBJECTIONS.

Necessity for purpose of review in criminal prosecutions, see "Criminal Law," § 22.

To deposition, see "Depositions."

To evidence in criminal prosecutions, see "Criminal Law," § 15.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 5.

OBSTRUCTIONS.

Of easements, see "Easements," § 2.
Of highways, see "Highways," § 4.

OFFER.

Of proof, see "Trial," § 2.

OFFICERS.

Bribery, see "Bribery."
Embezzlement, see "Embezzlement."

Particular classes of officers.

See "District and Prosecuting Attorneys"; "Judges"; "Justices of the Peace"; "Notaries"; "Receivers."

Corporate officers, see "Corporations," § 3.

County officers, see "Counties," § 2.

Highway officers, see "Highways," § 2.

Insurance company officers, see "Insurance,"

§ 1.

Municipal officers, see "Municipal Corporations," § 4.

OILS.

Oil lands, see "Mines and Minerals," § 1.

OPENING.

Judgment, see "Judgment," § 2.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 11.

In criminal prosecutions, see "Criminal Law," § 9.

ORDER OF PROOF.

At trial, see "Trial," § 2.

ORDERS.

Of court, see "Motions."

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," §§ 3, 6, 7.

PARENT AND CHILD.

See "Adoption"; "Guardian and Ward"; "Infants."

Custody of children on divorce, see "Divorce," § 4.

A father, leaving a boy eight years old, and incapable of appreciating the danger, unattended at a railway station, where he is injured by a moving train, is guilty of contributory negligence, barring his right to recover for loss of service occasioned by injury to the boy.—*St. Louis, I. M. & S. Ry. Co. v. Colum* (Ark.) 596.

Verdict for \$1,500 in favor of a mother for loss of son's services *held* not excessive.—*Scamell v. St. Louis Transit Co.* (Mo. App.) 1021.

Mother's right to recover for loss of son's services *held* not impaired by occurrence of the loss pending a contract with him to which she was a stranger.—*Scamell v. St. Louis Transit Co.* (Mo. App.) 1021.

After the father's decease, a minor's services belong to the mother, while he lives with and is supported by her.—*Scamell v. St. Louis Transit Co.* (Mo. App.) 1021.

A minor child cannot recover from its father and stepmother civil damages for personal injuries inflicted on it by the latter.—*McKelvey v. McKelvey* (Tenn.) 664.

In a contest between a paternal grandfather and a mother for the custody of an infant, it is error to exclude the issue as to the mother's reputation for chastity and veracity.—*Ward v. Ward* (Tex. Civ. App.) 829.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 10.

PARTIES.

Death ground for abatement, see "Abatement and Revival," § 2.

Defects ground for abatement, see "Abatement and Revival," § 1.

Domicile or residence as affecting venue, see "Venue," § 1.

Entitled to allege error, see "Appeal and Error," § 12; "Criminal Law," § 24.

Entitled to assign errors, see "Appeal and Error," § 7.

Persons concluded by judgment, see "Judgment," § 7.

In actions by or against particular classes of parties.

See "Husband and Wife," § 2; "Infants," § 3.

In particular actions or proceedings.

Criminal prosecutions, see "Criminal Law," § 2.

For causing death, see "Death," § 1.

To vacate judgment, see "Judgment," § 4.

To particular classes of conveyances, contracts, or transactions.

See "Contracts," § 2.

Joint interests, see "Joint Adventures."

§ 1. Plaintiffs.

Under Rev. St. 1899, § 540, requiring actions to be by the real party in interest, an action against a debtor and sureties *held* not an action in behalf of the sureties.—*Citizens' Bank v. Burrus* (Mo. Sup.) 748.

Where plaintiff sold certain material to defendant on behalf of himself and certain associates, engaged in reconstructing a street railway, he was entitled to sue for breach of such contract in his own name as a trustee of an express trust, under Rev. St. 1899, § 541.—*Nelson v. Cal Hirsch & Sons' Iron & Rail Co.* (Mo. App.) 590.

§ 2. Defects, objections, and amendment.

The circumstances under which the joinder of an improper or unnecessary party plaintiff, the defect not being fatal to recovery, is to be deemed waived by defendant, stated.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

The joinder of an improper or unnecessary party plaintiff, which renders the petition insufficient to support a judgment, can neither be waived nor cured, but can be brought up on motion in arrest or during the trial.—*Jones v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 890.

Question of misjoinder of parties, not raised by demurrer, *held* not available.—*Doyle v. St. Louis Transit Co.* (Mo. App.) 471.

PARTITION.**§ 1. Actions for partition.**

One bringing action in partition under Civ. Code, § 499, need not file with the petition the written evidence of defendant's title.—*Salver v. Elkhorn Land Imp. Co.* (Ky.) 370.

One bringing action in partition, under Civ. Code, § 499, should set forth the interest of each of the parties, both plaintiff and defendant, if same are known to him or can be ascertained from the records.—*Salver v. Elkhorn Land Imp. Co.* (Ky.) 370.

Petition in partition proceedings, brought under Civ. Code, § 499, alleging that plaintiff would be at great trouble to ascertain the number of those having an interest in the land, *held*

insufficient.—*Salzer v. Elkhorn Land Imp. Co.* (Ky.) 370.

Circumstances held to warrant the setting aside of a sale of land in partition for an inadequate price.—*Lipp's Guardian v. Allphin* (Ky.) 1105.

PARTNERSHIP.

See "Joint Adventures."

Assessment of tax on property of, see "Taxation," § 5.

Harmless error in instructions as to existence of, see "Appeal and Error," § 20.

Place of taxation of property of, see "Taxation," § 4.

§ 1. The relation.

Contract for the sale of cattle held not to create a partnership between the parties.—*Houssels v. Jacobs* (Mo. Sup.) 857.

§ 2. Rights and liabilities as to third persons.

Partnership may be put in issue, under Rev. St. 1899, § 746, by answer, properly verified, denying same.—*Donk Bros. Coal & Coke Co. v. Aronson* (Mo. App.) 132.

§ 3. Dissolution, settlement, and accounting.

In an action to settle a partnership, judgment ordering sale of the firm property held not premature.—*Whitney v. Whitney* (Ky.) 206.

PART PAYMENT.

Within statute of limitations, see "Limitation of Actions," § 3.

PART PERFORMANCE.

Within statute of frauds, see "Frauds, Statute of," § 6.

PASSENGERS.

See "Carriers," §§ 4-9.

Injuries by collision of vessels, see "Collision."

PATENTS.

To public lands, see "Public Lands," § 1.

PAYMENT.

See "Compromise and Settlement."

Part payment within statute of limitations, see "Limitation of Actions," § 3.

Of particular classes of obligations or liabilities

See "Costs," § 4; "Judgment," § 8.

Claims against estate of decedent, see "Executors and Administrators," § 4.

PENALTIES.

Construction of penal statutes, see "Statutes," § 5.

PERCOLATING WATERS.

See "Waters and Water Courses," § 1.

PERFORMANCE.

Part performance within statute of frauds, see "Frauds, Statute of," § 6.

PERSONAL INJURIES.

See "Assault and Battery," § 1; "Negligence."

Assessment of damages, see "Damages," § 4.

Caused by construction of telephone line, see "Telegraphs and Telephones," § 1.

Caused by negligence in maintenance of demolished premises, see "Landlord and Tenant," § 3.

Caused by operation of street railroad, see "Street Railroads," §§ 2-7.

Excessive damages, see "Damages," § 3.

Harmless error in admission of evidence, see "Appeal and Error," § 17.

Harmless error in instructions, see "Appeal and Error," § 20.

Harmless error in rulings on questions to witnesses, see "Appeal and Error," § 15.

Harmless error in submission of issues to jury, see "Appeal and Error," § 19.

Impertinence and scandal in pleading, see "Pleading," § 1.

Issues presented for review on appeal, see "Appeal and Error," § 2.

Opinion evidence, see "Evidence," § 11.

Physical examination, see "Damages," § 4.

Province of court and jury, see "Trial," § 5.

Release of claim for, see "Release," §§ 1, 2.

Requests for instructions, see "Trial," § 5.

Res gestæ, see "Evidence," § 4.

To employé, see "Master and Servant," §§ 2-10.

To licensee, see "Railroads," §§ 3-6.

To passenger, see "Carriers," §§ 5, 6; "Collision."

To person on or near railroad tracks, see "Railroads," § 4.

To traveler on highway, see "Municipal Corporations," § 9.

To trespasser, see "Railroads," § 4.

PETITION.

For certiorari, see "Certiorari," § 1.

PHYSICIANS AND SURGEONS.

Expert testimony, see "Evidence," § 11.

PLACE.

Of taxation, see "Taxation," § 4.

PLEADING.

Admissions in pleadings, see "Evidence," § 6.

Applicability of instructions to pleadings, see "Trial," § 5.

Harmless error in pleadings, see "Appeal and Error," § 16.

Necessity of objections to, for purpose of review, see "Appeal and Error," § 2.

Allegations as to particular facts, acts, or transactions.

See "Adverse Possession," § 3; "Damages," § 4; "Statutes," § 6.

Amount in controversy, see "Courts," § 2.

Contributory negligence of passenger, see "Carriers," § 7.

Former adjudication, see "Judgment," § 9.

Statute of frauds, see "Frauds, Statute of," § 7.

Statute of limitations, see "Limitation of Actions," § 5.

In actions by or against particular classes of parties.

See "Carriers," §§ 3, 6; "Master and Servant," § 9; "Partnership," § 2; "Principal and Agent," § 3; "Railroads," § 5.

In particular actions or proceedings.

See "Fraud," § 2; "Libel and Slander," § 1; "Partition," § 1; "Trespass," § 1; "Trove and Conversion," § 1.

For breach of contract, see "Contracts," § 6.

For injuries from negligence of lessor, see "Landlord and Tenant," § 3.

For injuries to animals caused by operation of railroad, see "Railroads," § 5.

For injury to live stock in transportation, see "Carriers," § 3.

For personal injuries, see "Carriers," § 6; "Master and Servant," § 9.

For price of goods, see "Sales," § 7.

For taxes, see "Taxation," § 6.

Indictment or criminal information or complaint, see "Indictment and Information."

In justice's court, see "Justices of the Peace," § 1.

On appeal from justice's court, see "Justices of the Peace," § 2.

On insurance policy, see "Insurance," § 7.

To set aside sale of homestead, see "Homestead," § 4.

To vacate judgment, see "Judgment," § 4.

§ 1. Form and allegations in general.

In a suit to recover for certain property alleged to have been taken by defendants, where no exemplary damages were asked, an allegation as to the manner of taking the property *held* a conclusion of the pleader and improper.—Rylie v. Stammer (Tex. Civ. App.) 626.

Allegations in a petition for injuries to a brakeman *held* not demurrable as unnecessary, denunciatory, and inflammatory.—Galveston, H. & S. A. Ry. Co. v. Appel (Tex. Civ. App.) 635.

§ 2. Plea or answer, cross complaint, and affidavit of defense.

Instruction in personal injury action, allowing recovery for loss of time and medical attention, *held* within the pleadings.—Illinois Cent. R. Co. v. Beauchamp (Ky.) 1096.

Plaintiff *held* not entitled to separate, for his own purposes, an admission in defendant's abandoned answer from a further allegation of the answer militating against plaintiff.—Clark v. Missouri, K. & T. Ry. Co. (Mo. Sup.) 882.

§ 3. Replication or reply and subsequent pleadings.

In the absence of a rejoinder, all the well-pleaded facts in the reply are taken as true; and, in the absence of evidence, the allegations in the answer, denied by the reply, are taken as untrue.—Gray v. United States Savings & Loan Co. (Ky.) 200.

A reply that a member of a beneficiary association was suspended, when he should not have been, *held* no departure from the petition, alleging membership in good standing.—Smith v. Sovereign Camp of Woodmen of the World (Mo. Sup.) 862.

§ 4. Demurrer or exception.

Where one paragraph of the complaint states a cause of action, a demurrer to the whole complaint should be overruled.—Bagley v. Weaver (Ark.) 903.

Where but one paragraph in a petition is defective, a demurrer to the whole is properly overruled.—Albin Co. v. Kuttner (Ky.) 181.

Where, after demurrer had been sustained to a petition, plaintiff does not ask leave to amend, *held* not error for court to dismiss the suit.—Gaddis v. Western Union Tel. Co. (Tex. Civ. App.) 37.

§ 5. Amended and supplemental pleadings and replender.

It does not constitute a change of a cause of action for malicious prosecution and false imprisonment, that in an amended petition allegations are inserted bringing the venue within the county where the suit was instituted.—Evans v. Maysville & B. S. R. Co. (Ky.) 708.

Defect in petition for purchase price of goods, as to venue, *held* cured by amendment.—Flynt v. Eagle Pass Coal & Coke Co. (Tex. Civ. App.) 831.

§ 6. Signature and verification.

Granting of leave to have plea sworn to during trial *held* within discretion of the court.—Dyer v. Winston (Tex. Civ. App.) 227.

§ 7. Profert, oyer, and exhibits.

An exhibit in a complaint for goods sold *held* sufficient under the statute to authorize the admittance of evidence to support it.—Brierre v. Cereal Sugar Co. (Mo. App.) 111.

§ 8. Issues, proof, and variance.

Under an answer setting up a counterclaim based on fraud, the defendant cannot recover on proof of breach of warranty.—Halliwell Cement Co. v. Stewart (Mo. App.) 124.

Where the illegality of a contract sued on appears from plaintiff's evidence, the defendant may take advantage of this defense, though not pleaded.—McClure v. Ullman (Mo. App.) 325.

§ 9. Defects and objections, waiver, and aid by verdict or judgment.

Under the express provisions of Sand. & H. Dig. § 5776, an objection to a complaint for want of verification cannot be taken after judgment.—Randall v. Sanders (Ark.) 56.

After going to trial on an answer, plaintiff cannot complain of its insufficiency on appeal.—Hartford Fire Ins. Co. v. Enoch (Ark.) 899.

Petition in libel *held* good, when construed with the answer.—Berea College v. Powell (Ky.) 381.

The defect in a controverted answer of defendant in an action to recover damages for cutting timber on certain land, pleading estoppel, *held* cured by the proof and judgment.—Bryant v. Main (Ky.) 680.

Petition in an action for malicious prosecution and false imprisonment, defective in failing to allege facts sustaining venue, *held* cured by answer.—Evans v. Maysville & B. S. R. Co. (Ky.) 708.

Where an answer stated no defense whatever, the court properly excluded evidence offered in support thereof.—Hall v. Small (Mo. Sup.) 733.

Objection that petition is too uncertain to state cause of action *held* not available after commencement of trial.—Harrison v. Self (Mo. App.) 91.

By pleading to the merits, defendant waives all objections to mere formal defects.—Strauss v. St. Louis Transit Co. (Mo. App.) 156.

Answer on the merits, after demurrer on the ground that defendant is not a necessary party to a complete determination of the action set forth in a petition, *held* waiver of demurrer, under Rev. St. 1899, § 602, relating to waiver of objections.—Strauss v. St. Louis Transit Co. (Mo. App.) 156.

Defects in a petition in an action against a street railroad for injuries to passenger by conductor assaulting him *held* cured by verdict, under Rev. St. 1899, § 629, requiring pleadings to be liberally construed.—Strauss v. St. Louis Transit Co. (Mo. App.) 156.

Any defect of a petition in stating the relationship of master and servant between mother and son, for loss of whose services she sues, *held* cured by verdict.—Scamell v. St. Louis Transit Co. (Mo. App.) 1021.

PLEDGES.

Lien of bank on cotton, to the purchasers of which it had advanced money on the bills of lading, *held* terminated by the delivery to the bank of the proceeds of the sale of the cotton.—First Nat. Bank v. San Antonio & A. P. R. Co. (Tex. Sup.) 410.

Where a bank to which cotton had been pledged for advances entered a credit to the buyer from the pledgor under a mistake as to the price, it was not estopped to deny the buyer's right to deduct a portion of the price in settlement of a previous debt of the pledgor.—

First Nat. Bank v. C. A. Andrews & Co. (Tex. Civ. App.) 956.

A pledgee of cotton, without notice of the claim of a subsequent purchaser against the pledgor, *held* entitled to the entire purchase price, where it amounted to less than the debt for which the cotton was pledged.—First Nat. Bank v. C. A. Andrews & Co. (Tex. Civ. App.) 956.

Where a buyer of cotton misled a previous pledgee as to the price, the fact that the pledgee could not put the parties in statu quo did not estop it from claiming the entire purchase price necessary to satisfy the debt.—First Nat. Bank v. C. A. Andrews & Co. (Tex. Civ. App.) 956.

POISONS.

Under Pen. Code 1895, art. 647, imposing a punishment on any one mixing any noxious potion, etc., with any drink, food, or medicine, the offense is complete when the noxious potion is mingled, although there be in fact not enough of it mingled to injure or kill any one.—Runnels v. State (Tex. Cr. App.) 458.

The phrase "noxious potion or substance," in Pen. Code 1895, art. 647, *held* to mean something of the character of poison.—Runnels v. State (Tex. Cr. App.) 458.

Pen. Code 1895, art. 647, punishing any one who shall mingle a noxious potion with any drug, food, or medicine, with intent to kill or injure, *held* to define an offense.—Runnels v. State (Tex. Cr. App.) 458.

On a prosecution under Pen. Code 1895, art. 647, *held*, that question whether defendant had "mingled" strychnine with a drink should have been submitted to the jury, with an instruction on circumstantial evidence.—Runnels v. State (Tex. Cr. App.) 458.

On a prosecution, under Pen. Code 1895, art. 647, for mingling a noxious potion with a drink, *held* not error to submit to jury that simple syrup was a drink.—Runnels v. State (Tex. Cr. App.) 458.

On a prosecution under Pen. Code 1895, art. 647, an instruction on the crime charged *held* as liberal as defendant was entitled to.—Runnels v. State (Tex. Cr. App.) 458.

On a prosecution, under Pen. Code 1895, art. 647, for mixing a noxious substance with a drink, *held* error to permit state to show that one of defendant's employers had found a bottle of strychnine in an unusual place in his store.—Runnels v. State (Tex. Cr. App.) 458.

On prosecution under Pen. Code 1895, art. 647, the admission of certain evidence *held* erroneous, as showing facts not sufficiently connected with the offense.—Runnels v. State (Tex. Cr. App.) 458.

On a prosecution under Pen. Code 1895, art. 647, *held*, that the question as to the propriety of a question put to a witness was sufficiently presented, and that the court should have excluded the question.—Runnels v. State (Tex. Cr. App.) 458.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 7.

POLICY.

Of insurance, see "Insurance."

POLITICAL RIGHTS.

Suffrage, see "Elections."

POOL SELLING.

Validity of statute relating to, as denial of equal protection of laws, see "Constitutional Law," § 7.

POSSESSION.

See "Adverse Possession."

Of demised premises, see "Landlord and Tenant," § 5.

Of mortgaged property, see "Chattel Mortgages," § 2.

Retention by grantor in fraudulent conveyance, see "Fraudulent Conveyances," § 1.

POST OFFICE.

Presumptions as to delivery of mail matter, see "Evidence," § 2.

POWERS.

Of attorney, see "Principal and Agent."

PRACTICE.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Account, Action on"; "Divorce," § 2; "Ejectment"; "Habeas Corpus," § 1; "Prohibition"; "Replevin"; "Trespass to Try Title," § 1.

Particular proceedings in actions.

See "Abatement and Revival"; "Continuance"; "Costs"; "Damages," § 4; "Depositions"; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Motions"; "Parties"; "Pleading"; "Process"; "Reference"; "Removal of Causes"; "Stipulations"; "Trial"; "Venue."

Verdict, see "Trial," § 6.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers"; "Sequestration."

Procedure in criminal prosecutions.

See "Bail," § 1; "Criminal Law."

For violation of liquor laws, see "Intoxicating Liquors," § 5.

Procedure in exercise of special jurisdictions.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 1.

Procedure on review.

See "Appeal and Error"; "Certiorari," § 1; "Exceptions, Bill of"; "Justice of the Peace," § 2; "New Trial."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

In fraudulent conveyance, see "Fraudulent Conveyances," § 1.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," §§ 15-22.

PREMIUMS.

For insurance, see "Insurance," § 4.

On loans from building and loan associations, see "Building and Loan Associations."

PREScription.

Acquisition of rights, see "Adverse Possession," § 1; "Easements," § 1; "Municipal Corporations," § 8; "Waters and Water Courses," § 3.

PRESENTMENT.

Of bill or note, see "Bills and Notes," § 4.
Of claims against estate of decedent, see "Executors and Administrators," § 4.

PRESUMPTIONS.

In civil actions, see "Evidence," § 2.
On appeal or error, see "Appeal and Error," § 10.

PRINCIPAL AND ACCESSORY.

See "Criminal Law," § 2.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers"; "Factors."

Admissions by agent, see "Evidence," § 6.
Insurance agents, see "Insurance," § 2.
Notice to agent in bankruptcy proceedings, see "Bankruptcy," § 2.

§ 1. The relation.

Agency *held* not established by proof of general reputation.—Dyer v. Winston (Tex. Civ. App.) 227.

Declarations of agent *held* inadmissible to prove his agency.—Dyer v. Winston (Tex. Civ. App.) 227.

On an issue as to whether a defendant acted as the agent of codefendants, railroad contractors, in making the contract sued on, evidence *held* to authorize the jury to conclude that he acted as such agent, and not as an independent subcontractor.—McCabe & Stein v. Farrell (Tex. Civ. App.) 1049.

§ 2. Mutual rights, duties, and liabilities.

Evidence in an action by a salesman for commissions on sales made by subordinates *held* to show the making of a contract for such commissions by the defendant.—Albin Co. v. Kuttner (Ky.) 181.

In an action between principal and agent for wrongful act of latter in taking a conveyance of land, *held* not error to decree a conveyance to principal and retain question as to settlement and liens for further adjudication.—Hoskins v. Morton (Ky.) 195.

Contract for sale of land *held* to evidence agreement to pay amount named therein as commission.—Dyer v. Winston (Tex. Civ. App.) 227.

An obligation in a power of attorney to recover land and clear the title to the same does not require the obligor to pay taxes, or any other debt due by the obligee, for which a lien on the land might exist.—Garner v. Boyle (Tex. Civ. App.) 987.

§ 3. Rights and liabilities as to third persons.

An answer of estoppel to the conduct of plaintiff's agent, which fails to show scope of the agent's authority, is insufficient.—J. I. Porter Lumber Co. v. Hill (Ark.) 905.

Person having knowledge of fraudulent representations to induce a surety to sign a note *held* not an agent of the payee.—Hardin & Riehm v. Chennault (Ky.) 192.

Pleadings *held* to put in issue the question whether a defendant acted as the agent of codefendants, railroad contractors, in making the contract sued on, and to render it the duty of the court to submit such issue, if warranted by the evidence.—McCabe & Stein v. Farrell (Tex. Civ. App.) 1049.

PRINCIPAL AND SURETY.

See "Bail"; "Guaranty"; "Indemnity."

Harmless error in admission of evidence in action against surety, see "Appeal and Error," § 17.

Harmless errors in instruction in action against surety, see "Appeal and Error," § 20.

Liabilities of sureties as affected by fraud of principal postponing limitation of action, see "Limitation of Actions," § 2.

Liabilities of sureties on bonds for performance of duties of office or trust, see "Guardian and Ward," § 4.

§ 1. Nature and extent of liability of surety.

A surety of a building contractor *held* not relieved from liability on proof that some of the installments due the contractor were not promptly paid.—Bagwell v. American Surety Co. (Mo. App.) 327.

§ 2. Discharge of surety.

The surety on a note *held* not released from liability by the conduct of payee bank.—Lee v. Grant County Deposit Bank (Ky.) 374.

A surety of a building contractor *held* not relieved from liability, on proof that owner of the building caused delay in the work.—Bagwell v. American Surety Co. (Mo. App.) 327.

A surety of a building contractor *held* not relieved from liability on proof of changes in the plans.—Bagwell v. American Surety Co. (Mo. App.) 327.

Extension of time before maturity of note, and acceptance of new note from which one of sureties was omitted, *held* to have released a trust deed, indemnifying the sureties.—Westbrook v. Belton Nat. Bank (Tex. Sup.) 942.

Surety on contract for delivery of cattle *held* to have acquiesced in, and ratified, forbearance as to time of delivery extended to his principals.—Stanley v. Evans (Tex. Civ. App.) 17.

The extension of a note without the knowledge of surety *held* to relieve him from liability.—Marshall Nat. Bank v. Smith (Tex. Civ. App.) 237.

Surety on note *held* not discharged by payment of interest in advance by maker without surety's knowledge.—Guerguin v. Boone (Tex. Civ. App.) 630.

§ 3. Remedies of creditors.

The presumption arising from the payment of interest in advance on a note is a presumption of fact, not of law.—Guerguin v. Boone (Tex. Civ. App.) 630.

Objection by defendant to charge, in action against a surety on note, that burden of proof was on defendant to show by a preponderance of the evidence that an agreement to extend the note existed, *held* without merit.—Guerguin v. Boone (Tex. Civ. App.) 630.

Charge in action against surety on note that payment of interest in advance is *prima facie*, and not conclusive, evidence of an agreement to extend the note, *held* not objectionable as requiring defendant to make conclusive proof of extension.—Guerguin v. Boone (Tex. Civ. App.) 630.

§ 4. Rights and remedies of surety.

Sureties, who have not paid principal's debt, *held* not entitled to relief for misrepresenta-

tions as to his property.—*Citizens' Bank v. Burrus* (Mo. Sup.) 748.

PRIORITIES.

Between landlord's lien for supplies and claims for allowance to decedent's widow and children, see "Executors and Administrators," § 3.

Of conflicting land patents, see "Public Lands," § 1.

Of mechanics' liens, see "Mechanics' Liens," § 3.

PRIVATE NUISANCE.

See "Nuisance," § 1.

PRIVATE ROADS.

Rights of way, see "Easements."

PRIVILEGE.

Effect on limitation, see "Limitation of Actions," § 2.

Of witness as to testimony, see "Witnesses," § 5.

PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see "Witnesses," § 4.

PROBATE.

Of will, see "Wills," § 2.

PROCESS.

Defects in service ground for abatement, see "Abatement and Revival," § 1.

To sustain judgment, see "Judgment," §§ 1, 2.

In actions against particular classes of parties.

Foreign corporations, see "Corporations," § 6.

In particular actions or proceedings.

See "Forcible Entry and Detainer," § 1.

Particular forms of writs or other process.

See "Execution"; "Garnishment"; "Injunction"; "Prohibition"; "Replevin"; "Sequestration."

Process in special jurisdictions.

See "Justices of the Peace," § 1.

§ 1. *Nature, issuance, requisites, and validity.*

Batts' Ann. Civ. St. art. 1215, held not to change the statutory requirement that a citation shall contain a statement of the nature of plaintiff's demand.—*Delaware Western Const. Co. v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.) 628.

§ 2. *Service.*

Affidavits required by Rev. St. 1899, §§ 575, 582, providing for actual service of process and service by publication, omitting to state that the ordinary process prescribed by law cannot be served "in this state," held void.—*Hedrix v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 495.

Process issued, under Rev. St. 1899, § 582, providing for actual service on a defendant outside the state, held to confer no jurisdiction.—*Hedrix v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 495.

PROFITS.

Loss of, as element of damages, see "Damages," § 1.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

§ 1. *Nature and grounds.*

Prohibition proceedings will lie in the Supreme Court to prevent a circuit judge from taking further action in a disbarment proceeding, wherein he called in another judge because of bias, and revoked order at subsequent term.—*State ex rel. Lentz v. Fort* (Mo. Sup.) 741.

PROMISSORY NOTES.

See "Bills and Notes."

PROPERTY.

See "Adjoining Landowners"; "Animals"; "Fixtures"; "Mines and Minerals"; "Shipping."

Adverse possession, see "Adverse Possession." Constitutional guaranties of rights of property, see "Constitutional Law," §§ 4, 8.

Dedication to public use, see "Dedication."

Taking for public use, see "Eminent Domain."

Taxable by municipal corporation, see "Municipal Corporations," § 10.

PROSECUTING ATTORNEYS.

See "District and Prosecuting Attorneys."

PROTEST.

Of bill or note, see "Bills and Notes," § 4.

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 5.

In criminal prosecutions, see "Criminal Law," § 17.

PROVOCATION.

For commission of homicide, see "Homicide," § 2.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.

Of injury to passenger, see "Carriers," § 5.

PUBLIC ADMINISTRATORS.

See "Executors and Administrators," § 1.

PUBLICATION.

Service of process, see "Process," § 2.

PUBLIC DEBT.

See "Counties," § 3; "Municipal Corporations," § 10.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 6.

PUBLIC LANDS.

Mineral lands, see "Mines and Minerals," § 1.

§ 1. *Disposal of lands of the states.*

A subsequent patent to land, including land previously patented by the state, held void as to such land.—*Hays v. Earls* (Ky.) 706.

Priority of conflicting land patents issued on the same day held determined by dates of their surveys.—*Hall v. Blanton* (Ky.) 1110.

Evidence *held* to sustain a finding that one was not an actual settler, as required by Sayles' Ann. Civ. St. 1897, art. 4218f, relating to sale of school and public lands.—*Mann v. Greer* (Tex. Civ. App.) 34.

Award of school lands to applicant at a reduced price *held* valid.—*Threadgill v. Butler* (Tex. Civ. App.) 43.

Court properly disregarded title in trespass to try title, depending on purchase from Land Commissioner by one not a settler, and concerning whose occupancy no certificate had issued.—*Nowlin v. Hall* (Tex. Civ. App.) 419.

Right of persons to purchase public lands as detached sections *held* not prevented by their inducing another to buy other lands, so as to make such sections detached, where he purchased in good faith.—*Maney v. Eyres* (Tex. Civ. App.) 428.

An actual settler on school land, who claims the right to purchase additional land, must not only have actually occupied and settled upon his land, but must intend to make it his home.—*Mahoney v. Tubbs* (Tex. Civ. App.) 822.

Under Act Feb. 23, 1900 (Laws 1900, p. 29, c. 11), as amended by Act April 15, 1901 (Laws 1901, p. 253, c. 88), and, under act providing for sale of school lands generally, title bond given by prospective purchaser *held* void.—*Mahoney v. Tubbs* (Tex. Civ. App.) 822.

Claimant to vacate public domain, in action of trespass to try title, *held* entitled to show that the land claimed as vacant was outside the corrected boundaries of original surveys under which plaintiff claimed.—*Austin v. Espuela Land & Cattle Co.* (Tex. Civ. App.) 830.

Only the state can attack as collusive a purchase of public school lands, made on proper affidavit and compliance with all legal requirements.—*Maney v. Eyres* (Tex. Civ. App.) 969.

An outstanding lease of public school lands precludes an application to purchase them, though the lessee is ineligible as a purchaser.—*Pruitt v. Scrivner* (Tex. Civ. App.) 976.

Error in patent regarding grantee's name *held*, on the evidence, not to vitiate title.—*New York & Texas Land Co. v. Dooley* (Tex. Civ. App.) 1030.

Field notes are admissible to show a mistake in the patent in relation to the name of the grantee.—*New York & Texas Land Co. v. Dooley* (Tex. Civ. App.) 1030.

PUBLIC NUISANCE.

See "Nuisance," § 2.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Dedication of property, see "Dedication."
Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 4.

QUANTUM MERUIT.

See "Work and Labor."

QUASHING.

Attachment, see "Attachment," § 1.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 4.
In criminal prosecutions, see "Criminal Law," § 17.

QUIET ENJOYMENT.

Breach of covenants for, see "Covenants," § 2.

QUIETING TITLE.

§ 1. Right of action and defenses.

A deed with restrictions to plaintiffs from defendant *held* to constitute a cloud on title which plaintiffs were entitled to have removed.—*Murphy v. Metz* (Ky.) 191.

RAILROADS.

See "Street Railroads."

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Evidence as to damages in action for injuries by operation of railroad, see "Damages," § 4.

Evidence as to results of experiments in actions for death caused by operation of railroad, see "Evidence," § 4.

Expert testimony in action for negligent killing of animal, see "Evidence," § 11.

Harmless error in admission of evidence in action for injuries to live stock caused by operation of, see "Appeal and Error," § 17.

Harmless error in instructions in action for personal injuries, see "Appeal and Error," § 20.

Necessity of requesting instructions in action for killing live stock for purpose of review, see "Appeal and Error," § 2.

Taxation of, see "Taxation," § 3, 5.

§ 1. Right of way and other interests in land.

Payment by a railroad company for its right of way and damages to the remaining land *held* no defense to an action for damages growing out of its obstructing a right of way reserved to the landowner.—*Porter v. Kansas City & N. Connecting R. Co.* (Mo. App.) 582.

A railroad company, acquiring a right of way over a person's land subject to the reserved right of the landowner to a way over the railroad track, cannot materially interfere with the landowner's reserved rights.—*Porter v. Kansas City & N. Connecting R. Co.* (Mo. App.) 582.

A clause in a deed *held* a reservation.—*Porter v. Kansas City & N. Connecting R. Co.* (Mo. App.) 582.

§ 2. Construction, maintenance, and equipment.

The owner of land crossed by a railroad *held* entitled to maintenance by the company of a farm crossing.—*Louisville & N. R. Co. v. Brooks* (Ky.) 693.

A circuit court *held* to have jurisdiction to compel a railroad company to replace a farm crossing.—*Louisville & N. R. Co. v. Brooks* (Ky.) 693.

Evidence *held* to show that complainants were the owners of land crossed by a railroad.—*Louisville & N. R. Co. v. Brooks* (Ky.) 693.

In an action against a railroad company for wrongfully obstructing the entrance to lessee's place of business, the question whether he was a lessee for a year or from month to month *held* immaterial.—*International & G. N. R. Co. v. Capers* (Tex. Civ. App.) 39.

The measure of damages for a railroad company wrongfully obstructing the entrance to one's place of business *held* the loss of profits

in the business thereby sustained.—*International & G. N. R. Co. v. Capers* (Tex. Civ. App.) 39.

A tenant *held* entitled to recover damages occasioned by a railroad company wrongfully obstructing the entrance to his place of business.—*International & G. N. R. Co. v. Capers* (Tex. Civ. App.) 39.

An owner of property adjoining a railroad is not required to repair railroad cattle guards to protect his property from cattle on the railroad's right of way.—*Houston & T. C. R. Co. v. Dugger* (Tex. Civ. App.) 1046.

In an action against a railroad company for damages to cotton by cattle entering plaintiff's cotton pen from the railroad's right of way, the owner of the cotton *held* not guilty of contributory negligence in failing to move the cotton or make the pen stock-proof.—*Houston & T. C. R. Co. v. Dugger* (Tex. Civ. App.) 1046.

§ 3. Operation.

Consignee's servant *held* to have no right to rely on the presumption that carrier had supplied a safe car.—*Sykes v. St. Louis & S. F. R. Co.* (Mo. Sup.) 723.

Intermediate carrier *held* to owe no duty to consignee's servant, rendering it liable for injury from defective car.—*Sykes v. St. Louis & S. F. R. Co.* (Mo. Sup.) 723.

Question as to propriety of erecting cattle guards *held* not for railroad company's determination, but triable as question of fact.—*Gilpin v. Missouri, K. & T. Ry. Co.* (Mo. App.) 118.

§ 4. — Injuries to persons on or near tracks.

In an action against a railroad company for running over a child on its track, evidence *held* not to justify the jury in finding that defendant's engineer was negligent in failing to discover the child.—*Goodman's Adm'r v. Louisville & N. R. Co.* (Ky.) 174.

A railroad company owes no duty to trespassers on its tracks at places not frequented by the public by right or permission until their peril has been discovered.—*Goodman's Adm'r v. Louisville & N. R. Co.* (Ky.) 174.

The mere occasional passage of unauthorized pedestrians on a railroad track with the knowledge of the company *held* not sufficient to convert a trespasser there to a licensee.—*Goodman's Adm'r v. Louisville & N. R. Co.* (Ky.) 174.

A railroad company is liable for its engineer's mistake of judgment in supposing that a child would get off a bridge, which led him to omit efforts to check the train in time to avoid killing it.—*Louisville & N. R. Co. v. Vanarsdell's Adm'r* (Ky.) 1103.

In an action against a railroad company for negligence, causing death of a child attempting to cross the track, evidence *held* insufficient to support verdict for plaintiff.—*International & G. N. R. Co. v. Wear* (Tex. Civ. App.) 272.

Instruction in action for negligent killing of child on railroad track, as to care to be exercised by trainmen, *held* error.—*Olivaras v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 981.

§ 5. — Injuries to animals on or near tracks.

In an action against a railroad for the negligent killing of a valuable dog, the contributory negligence of the owner of the dog must be pleaded.—*St. Louis, I. M. & S. Ry. Co. v. Philpot* (Ark.) 901.

In an action against a railroad company for the killing of horses, the accident *held* to have been caused by plaintiff's negligence.—*Dickinson v. Wabash R. Co.* (Mo. App.) 88.

Manner in which gate in fencing of railroad right of way came open *held* immaterial to question of company's liability for killing of stock straying onto track.—*Bumpas v. Wabash R. Co.* (Mo. App.) 115.

Under Rev. St. 1899, § 1105, railroad company *held* liable for killing animals on track which entered through gate opened for so long that the company should have known its condition.—*Bumpas v. Wabash R. Co.* (Mo. App.) 115.

It is the place where an animal gets upon a railroad track, and not the place where it is killed, that fixes the liability of the company, under Rev. St. 1899, § 1105.—*Bumpas v. Wabash R. Co.* (Mo. App.) 115.

Evidence in action for the killing of animals on railroad track *held* to rebut presumption that they strayed on the track at the point where they were killed.—*Bumpas v. Wabash R. Co.* (Mo. App.) 115.

Evidence in action for killing animals on railroad track *held* insufficient to sustain finding that cattle guards could have been erected without endangering safety of company's employes.—*Gilpin v. Missouri, K. & T. Ry. Co.* (Mo. App.) 118.

Rev. St. 1899, § 2867, providing for recovery against railroads for killing live stock *held* not to entitle plaintiff to recover.—*Redmond v. Missouri, K. & T. Ry. Co.* (Mo. App.) 768.

Rev. St. 1899, §§ 1105, 1106, providing for recovery of damages in action against a railroad for killing stock, *held* not to entitle plaintiff to recover for stock going on track in station grounds.—*Redmond v. Missouri, K. & T. Ry. Co.* (Mo. App.) 768.

A railroad company is not required to fence its tracks at a station.—*Redmond v. Missouri, K. & T. Ry. Co.* (Mo. App.) 768.

§ 6. — Fires.

In an action against a railroad for fire caused by the escape of sparks from one of defendant's locomotives, evidence of the setting of other fires by other locomotives *held* competent.—*Louisville & N. R. Co. v. Short* (Tenn.) 936.

In action against railroad for destruction of bale of cotton, owing to escape of sparks from one of defendant's locomotives, *held*, that plaintiff was not guilty of contributory negligence.—*Louisville & N. R. Co. v. Short* (Tenn.) 936.

RAPE.

Books as evidence of female's age, see "Criminal Law," §§ 6-10.

Competency of evidence, see "Criminal Law," §§ 6-10.

Exceptions to evidence at trial, see "Criminal Law," § 15.

Harmless error in admission of evidence, see "Criminal Law," § 24.

Harmless error in instructions, see "Criminal Law," § 24.

Instructions, see "Criminal Law," § 18.

Opinion evidence, see "Criminal Law," § 9.

§ 1. Offenses and responsibility therefor.

Neglect to speedily complain of rape goes only to weight of prosecutrix's testimony, and does not foreclose prosecution.—*Hill v. State* (Tex. Cr. App.) 808.

§ 2. Prosecution and punishment.

In prosecution for rape, there was, under the evidence and charge given, no reversible error in refusal to charge on feigned resistance.—*Leach v. State* (Tex. Cr. App.) 220.

Evidence, on a prosecution for assault with intent to rape, *held* sufficient to show defendant's purpose to use sufficient force to compel

intercourse.—*Riddling v. State* (Tex. Cr. App.) 808.

In a prosecution for rape, neglect to charge on aggravated assault *held* not error.—*Hill v. State* (Tex. Cr. App.) 808.

A conviction of rape may be had on the uncorroborated testimony of prosecutrix.—*Hill v. State* (Tex. Cr. App.) 808.

In a prosecution for rape, certain testimony as to actions of parties other than defendant *held* admissible.—*Simpson v. State* (Tex. Cr. App.) 819.

In a prosecution for rape on a female under the age of 16, *held* proper to prove that defendant had promised to marry prosecutrix, and had assured her that he was not a married man.—*Simpson v. State* (Tex. Cr. App.) 819.

RATIFICATION.

Of contract, see "Contracts," § 1.

REAL ACTIONS.

See "Ejectment"; "Forcible Entry and Detainer," § 1; "Trespass to Try Title."

REAL-ESTATE AGENTS.

See "Brokers."

REASONABLE DOUBT.

Instructions as to, see "Criminal Law," § 18.

REBUTTAL.

Evidence, see "Trial," § 2.

RECEIVERS.

Appointment of receiver as deprivation of property without due process of law, see "Constitutional Law," § 8.

In action to foreclose mortgage, see "Mortgages," § 3.

Of corporations in general, see "Corporations," § 4.

Where court, in receivership, ordered certain costs paid, etc., after which the receiver was to stand discharged, *held* that it had, at a term not directly succeeding that at which the order was made, authority to order an allowance of fees for the receiver's counsel.—*State ex rel. Gray v. Active Building & Loan Ass'n No. 2* (Mo. App.) 171.

Under Rev. St. 1899, § 755, services of receiver's attorneys in the administration of the estate *held* a part of the taxable costs.—*State ex rel. Gray v. Active Building & Loan Ass'n No. 2* (Mo. App.) 171.

RECORDS.

As evidence, see "Evidence," § 9.

Transcript on appeal or writ of error, see "Appeal and Error," §§ 5-6; "Criminal Law," § 23.

Certified copy of record in new county of certified copy of record of deed in parent county *held* not admissible, under Batt's Rev. Ann. St. art. 4668.—*Williamson v. Work* (Tex. Civ. App.) 266.

Under Rev. St. 1895, arts. 1498-1500, *held* proper not to permit proof of lost affidavit, bond, and writ in garnishment by the testimony of the county clerk.—*Strohmeyer v. Wing* (Tex. Civ. App.) 977.

In garnishment, *held* proper for court of its own motion to raise question as to the loss of the affidavit, bond, and writ.—*Strohmeyer v. Wing* (Tex. Civ. App.) 977.

REDIRECT EXAMINATION.

Of witnesses, see "Witnesses," § 5.

REFERENCE.

Necessity of exceptions to findings of referee for purpose of review, see "Appeal and Error," § 2.

§ 1. **Report and findings.**

An auditor's report, which has not been excepted to, is conclusive, and cannot be contradicted on the trial.—*Harper v. Marion County* (Tex. Civ. App.) 1044.

REFORMATION OF INSTRUMENTS.

§ 1. **Right of action and defenses.**

Mistake, as a basis for reformation of a deed, must be clearly shown to have been mutual.—*McGuigan v. Gaines* (Ark.) 52.

§ 2. **Proceedings and relief.**

Reformation of a written instrument should be decreed, if dependent on parol evidence, only on clear and conclusive evidence.—*McGuigan v. Gaines* (Ark.) 52.

On the issue of mistake in the description of a deed, evidence examined, and *held* insufficient to so conclusively establish the fact of mistake as to justify a reformation of the deed.—*McGuigan v. Gaines* (Ark.) 52.

REGISTRATION.

See "Records."

Of conditional sales, see "Sales," § 2.

REHEARING.

See "New Trial."

REJOINDER.

See "Pleading," § 3.

RELEASE.

See "Compromise and Settlement."

Of liability as surety, see "Principal and Surety," § 2.

§ 1. **Requisites and validity.**

Release for personal injuries *held* supported by valuable consideration.—*Quebe v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 442.

§ 2. **Construction and operation.**

Release of a claim for personal injuries *held* to include injuries to the injured party's eyesight, though the existence of such injuries was not known when the release was executed.—*Quebe v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 442.

§ 3. **Pleading, evidence, trial, and review.**

In an action for personal injuries, construction of a written release introduced by defendant *held* for the court.—*Quebe v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 442.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 4.

Of evidence in criminal prosecutions, see "Criminal Law," § 7.

REMOVAL.

Of fixtures, see "Fixtures."

Of municipal officers, see "Municipal Corporations," § 4.

REMOVAL OF CAUSES.**§ 1. Citizenship or alienage of parties.**

A state is not a citizen, within the meaning of the statute authorizing the removal of causes from the state to the federal court on the ground of diversity of citizenship.—*Commonwealth v. Ayer & Lord Tie Co.* (Ky.) 686.

REMOVAL OF CLOUD.

See "Quieting Title."

RENEWAL

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

RENT.

See "Landlord and Tenant," § 4.

Of community property, see "Husband and Wife," § 3.

REOPENING CASE.

For further evidence, see "Criminal Law," § 14.

REPAIRS.

Of highway, see "Highways," § 3.

Of streets, see "Municipal Corporations," § 6.

Of turnpikes, see "Turnpikes and Toll Roads," § 1.

REPEAL.

Of champerty act, see "Champerty and Maintenance."

REPLEVIN.

Bar by former adjudication, see "Judgment," § 7.

§ 1. Right of action and defenses.

Joint owner of cattle *held* entitled to replevin for his equal share against co-tenant, who had repudiated the ownership of plaintiff.—*Cornett v. Hall* (Mo. App.) 122.

§ 2. Damages.

In replevin, in which the property was delivered to plaintiff and never redelivered to defendant, that defendant had in a subsequent action recovered possession of the property could not be considered in determining the question of damages.—*Hanlon v. Goodyear* (Mo. App.) 481.

§ 3. Trial, judgment, enforcement of judgment, and review.

Execution in replevin, under Rev. St. 1899, § 4478, *held* not to give the party against whom it issues option to keep the property or pay the value.—*Koelling v. August Gast Bank Note & Lithographing Co.* (Mo. App.) 474.

In replevin for certain corn, an instruction relative to right to the corn, as affected by proceedings under a former forcible entry and detainer suit, *held* proper.—*Hanlon v. Goodyear* (Mo. App.) 481.

In replevin, in which the property was delivered to plaintiff and not redelivered to defendant, an instruction authorizing recovery by plaintiff of a money judgment and damages *held* error.—*Hanlon v. Goodyear* (Mo. App.) 481.

REPLICATION.

See "Pleading," § 3.

REPLY.

See "Pleading," § 3.

REPORT.

On reference, see "Reference," § 1.

REPRESENTATIONS.

Estoppel by representations, see "Estoppel," § 1.

REQUESTS.

For instructions in civil actions, see "Trial," § 5.

For instructions in criminal prosecutions, see "Criminal Law," § 12.

RESALE.

Of goods by seller, see "Sales," § 7.

RESCISSION.

Of contract for sale of goods, see "Sales," § 3.

Of contract for sale of land, see "Vendor and Purchaser," § 3.

Of contract in general, see "Contracts," § 4.

RESERVATIONS.

In grants of rights of way, see "Railroads," § 1.

RES GESTÆ.

In civil actions, see "Evidence," § 4.

In criminal prosecutions, see "Criminal Law," § 7.

RES INTER ALIOS ACTA.

Exclusion of evidence as, see "Evidence," § 4.

RES JUDICATA.

See "Judgment," §§ 6, 7.

RESOLUTION.

Preliminary resolution for public improvement, see "Municipal Corporations," § 6.

RESULTING TRUSTS.

See "Trusts," § 1.

REVENUE.

See "Taxation."

REVERSIONS.

Of lessor, see "Landlord and Tenant," § 1.

REVIEW.

See "Appeal and Error"; "Certiorari"; "Criminal Law," §§ 21-24; "Justices of the Peace," § 2.

REVOCATION.

Of will, see "Wills," § 1.

RIGHT OF WAY.

See "Easements."

Of railroads, see "Railroads," § 1.

RISKS.

Assumed by employé, see "Master and Servant," §§ 7, 10.

Assumed by passenger, see "Carriers," § 7.

ROADS.

See "Highways"; "Turnpikes and Toll Roads." Streets in cities, see "Municipal Corporations," § 9.

RULES OF COURT.

Orders, see "Motions."

SALES.

See "Vendor and Purchaser."

Assignability of contract for sale of goods, see "Assignments," § 1.

By brokers, see "Brokers," § 3.

Harmless error in instructions in action for breach of contract of sale, see "Appeal and Error," § 20.

Harmless error in submission of issues to jury in action for breach of contract of sale, see "Appeal and Error," § 19.

Of bill of exchange or promissory note, see "Bills and Notes," § 3.

Of intoxicating liquors, see "Intoxicating Liquors."

Of property exempt from execution, see "Exemptions," § 2.

Of property of decedent under order of court, see "Executors and Administrators," § 5.

Of property of infant in general, see "Infants," § 2.

Of property of infant under order of court, see "Guardian and Ward," § 2.

Of school lands, see "Public Lands," § 1.

Of turnpikes, see "Turnpikes and Toll Roads," § 1.

On execution, see "Execution," § 1.

Partition sales, see "Partition," § 1.

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§ 1. Requisites and validity of contract.

Where correspondence preceding an offer and acceptance for a sale of goods stated the time for the delivery, it was immaterial that such time was not specified in the offer and acceptance.—*Nelson v. Cal Hirsch & Son's Iron & Rail Co.* (Mo. App.) 590.

A contract for the sale of secondhand rails held not void for indefiniteness as to the quantity sold.—*Nelson v. Cal Hirsch & Son's Iron & Rail Co.* (Mo. App.) 590.

§ 2. Construction of contract.

Rights of purchasers under a contract for sale of wool, as to the refusal of the same, determined.—*D. Davis & Son v. Allen* (Ky.) 1125.

In an action for breach of a contract for the sale of oil, a requested instruction as to the quantity of oil the seller was bound to deliver held improperly refused.—*Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Tex. Civ. App.) 961.

§ 3. Modification or rescission of contract.

Vendee in sale of chattels held to have lost his right to rescind by unreasonable delay.—*Manley v. Crescent Novelty Mfg. Co.* (Mo. App.) 489.

Question of reasonableness of time in which vendee in sale of chattels rescinds held for jury.—*Manley v. Crescent Novelty Mfg. Co.* (Mo. App.) 489.

While vendee in sale of warranted chattels may rescind, right must be exercised in reasonable time.—*Manley v. Crescent Novelty Mfg. Co.* (Mo. App.) 489.

§ 4. Performance of contract.

Where one orders goods to be delivered by a certain time, he need not accept them when delivered later.—*White-Branch-McConkin-Shelton Hat Co. v. Carson & Co.* (Ky.) 366.

Acts on delivery of goods after the time specified in the order held not to constitute an acceptance.—*White-Branch-McConkin-Shelton Hat Co. v. Carson & Co.* (Ky.) 366.

§ 5. Operation and effect.

A contract of sale which has not been completely executed will not entitle the purchaser thereunder to retain the goods as against a subsequent purchaser.—*Low v. E. J. Broad & Co.* (Tex. Civ. App.) 28.

§ 6. Warranties.

Conditions under which it was held that a seller could not recover, if the appliance sold was not suitable, and he was so notified within a reasonable time.—*Skinner v. E. F. Kerwin Ornamental Glass Co.* (Mo. App.) 1011.

From the fact that apparatus ordered was intended by the purchaser for a particular purpose known to the seller, an implied warranty arose that it was reasonably fit for such purpose.—*Skinner v. E. F. Kerwin Ornamental Glass Co.* (Mo. App.) 1011.

Under an express warranty of quality, the buyer may accept the article without inspection.—*Barnum Wire & Iron Works v. Seley* (Tex. Civ. App.) 827.

§ 7. Remedies of seller.

An offer in evidence of an abandoned count held to have been properly excluded as immaterial in the trial of an issue on the remaining count.—*Brierre v. Cereal Sugar Co.* (Mo. App.) 111.

A declaration on quantum meruit for goods sold is supported by proof of an express contract.—*Brierre v. Cereal Sugar Co.* (Mo. App.) 111.

Where a seller resold the goods, on the buyer's refusal to accept, without notice, the measure of the buyer's damages is the difference between the price and the market value of the goods at the time and place of delivery.—*Nelson v. Cal Hirsch & Son's Iron & Rail Co.* (Mo. App.) 590.

Certain correspondence between a buyer and seller of secondhand rails held insufficient to constitute a repudiation of the contract by the seller.—*Nelson v. Cal Hirsch & Son's Iron & Rail Co.* (Mo. App.) 590.

On breach of a contract for the sale of secondhand rails, resale of the rails refused for the buyer's account 53 days after the breach held within a reasonable time.—*Nelson v. Cal Hirsch & Son's Iron & Rail Co.* (Mo. App.) 590.

A seller held entitled to recover damages for breach of buyer's contract to accept the goods, notwithstanding delay in delivery which was in part caused by an unwarranted demand by the buyer.—*Nelson v. Cal Hirsch & Son's Iron & Rail Co.* (Mo. App.) 590.

§ 8. Remedies of buyer.

A merchant, not having accepted goods delivered after the time specified in the order, may recover of the shippers the freight paid by him by mistake.—*White-Branch-McConkin-Shelton Hat Co. v. Carson & Co.* (Ky.) 366.

A petition to recover money spent by a purchaser of a machine under a contract of warranty in installing it, and for alterations and repairs, *held* to constitute an action on an implied assumpsit, and not for damages for breach of the warranty.—*Griffith v. Williams Patent Crusher & Pulverizer Co.* (Mo. App.) 330.

Money spent by a purchaser of a machine under a contract of warranty in installing it, and for alterations and repairs, *held* not recoverable from the seller on an implied assumpsit.—*Griffith v. Williams Patent Crusher & Pulverizer Co.* (Mo. App.) 330.

In an action for the price of machinery sold, evidence *held* to import an implied warranty, and it was therefore wrongfully excluded.—*Skinner v. E. F. Kerwin Ornamental Glass Co.* (Mo. App.) 1011.

Evidence as to what would have been a suitable apparatus, and of defects in the one furnished, *held* competent in an action for the purchase price.—*Skinner v. E. F. Kerwin Ornamental Glass Co.* (Mo. App.) 1011.

In an action for breach of a broker's contract for the sale of oil, a letter written by the broker to the seller *held* admissible for the purpose of determining the capacity of tank cars in which the oil was to be delivered.—*Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Tex. Civ. App.) 961.

§ 9. Conditional sales.

Contract of sale, reserving title in seller until payment for property by buyer, *held* valid immediately on execution, regardless of registration, as against all parties except lien creditors and bona fide purchasers or mortgagees.—*Hall v. Keating Implement & Machine Co.* (Tex. Civ. App.) 1054.

Instrument for sale of merchandise *held* a chattel mortgage.—*Hall v. Keating Implement & Machine Co.* (Tex. Civ. App.) 1054.

SATISFACTION.

See "Compromise and Settlement"; "Release."
Of judgment, see "Judgment," § 8.

SCHOOLS AND SCHOOL DISTRICTS.

School lands, see "Public Lands," § 1.

§ 1. Public schools.

A teacher, having taught school under contract with a person acting as trustee, *held* entitled to the compensation provided for.—*Noble v. White* (Ky.) 678.

Under Ky. St. 1899, § 4427, the creation of a new school district by changing the boundaries of an existing district without written notice to the trustees of the district *held* ineffectual.—*Noble v. White* (Ky.) 678.

Possession of a schoolhouse having been taken from the trustees by order of court appointing a receiver therefor, the trustees had the right, and it was their duty, to rent a suitable place for conducting the school.—*Bank of Cumberland v. Simpson* (Ky.) 695.

Under Rev. St. 1899, § 9761, in order for school directors to issue binding warrant, they must meet as a board, in presence of clerk, and there act.—*State v. Lawrence* (Mo. Sup.) 497.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 5.

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Of relative by deceased as justification for homicide, see "Homicide," § 4.

§ 1. Criminal responsibility.

Continuous association of defendant and prosecutrix for two years is not alone sufficient corroboration of her testimony as to their engagement, on a prosecution for seduction.—*Fine v. State* (Tex. Cr. App.) 806.

SELF-DEFENSE.

See "Assault and Battery," § 1; "Homicide," §§ 4, 7.

SELF-SERVING DECLARATIONS.

Admissibility in evidence, see "Criminal Law," § 8.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 1.

SEQUESTRATION.

Plaintiff, in sequestration, *held* not to have elected to pursue the defendant, who had given a replevin bond pending suit, so as to estop him from proceeding against the purchaser of the property.—*Crawford v. Southern Rock Island Plow Co.* (Tex. Civ. App.) 280.

Where, in sequestration, defendant gives a bond, under Rev. St. 1895, art. 4874, he is not entitled to sell the property pending the sequestration proceedings.—*Crawford v. Southern Rock Island Plow Co.* (Tex. Civ. App.) 280.

In sequestration, where defendant replevies the goods and sells them pending suit, motion for execution against the purchaser, after judgment for plaintiff, *held* not prejudicial to the purchaser.—*Crawford v. Southern Rock Island Plow Co.* (Tex. Civ. App.) 280.

SERVICE.

Of process, see "Process," § 2.

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See "Work and Labor."

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SET-OFF AND COUNTERCLAIM.

Set-off of judgments, see "Judgment," § 8.
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§ 1. Subject-matter.

Debts of a husband to a trustee of his wife's estate cannot be set off by the trustee against the wife's estate in his hands.—*Owsley v. Owsley* (Ky.) 394.

An open account for the keep of a horse and the lien therefor may be asserted by way of counterclaim against a suit for the animal's conversion, though the action sounds in tort.—*Gooch v. Isbell* (Tex. Civ. App.) 973.

§ 2. Operation and effect.

Where an answer sets up a counterclaim, the reply thereto performs the office of an answer to a petition.—*Turney v. Baker* (Mo. App.) 479.

SETTLEMENT.

See "Compromise and Settlement"; "Release."
By assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 2.
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Of bill of exceptions, see "Exceptions, Bill of," § 2.

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SHERIFFS AND CONSTABLES.

Sheriff's deed, see "Execution," § 1.

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See "Collision"; "Ferries."
Situs of taxation of vessels, see "Taxation," § 3.

§ 1. Regulation in general.

Place where vessel is registered held to be its home port, under Rev. St. U. S. §§ 4178, 4334 [U. S. Comp. St. 1901, pp. 2830, 2968], in reference to the port of registered vessels, as amended by Act Cong. June 26, 1884, c. 121, § 21, 23 Stat. 58 [U. S. Comp. St. 1901, p. 2831], entitled "An act to remove burdens on the American merchant marine," etc.—Commonwealth v. Ayer & Lord Tie Co. (Ky.) 686.

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Boundaries of counties, see "Counties," § 1.
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Statute of frauds, see "Frauds, Statute of."

§ 1. Enactment, requisites, and validity in general.

Conceding a part of Sp. Laws 28th Leg. p. 391, relative to the incorporation of city of Oak Cliff, within city of Dallas, to be void as not within title, yet other parts would be allowed to stand, under Const. art. 3, § 36.—City of Oak Cliff v. State (Tex. Civ. App.) 24.

Act May 12, 1899 (Supp. Sayles' Civ. St. 1899-1900, tit. 49a), held an entire act, which cannot be rendered constitutional by expunging provision exempting designated orders from general provisions of fraternal insurance law.—Supreme Lodge United Benev. Ass'n v. Johnson (Tex. Civ. App.) 661.

§ 2. General and special or local laws.

Act March 23, 1903 (Sess. Acts 1903, p. 213), regulating the treatment of neglected and delinquent children in counties of 150,000 and over, held not violative of Const. art. 4, § 53, relating to local or special laws.—Ex parte Loving (Mo. Sup.) 508.

The question whether a general law can be made applicable in any case is not affected by the fact that a general law has been passed on the same subject.—City of Oak Cliff v. State (Tex. Civ. App.) 24.

Const. art. 3, § 56, forbidding change of county seat by special act, precluded Legislature from validating establishment of county seat by special act.—Presidio County v. Jeff Davis County (Tex. Civ. App.) 278.

§ 3. Subjects and titles of acts.

Act March 23, 1903 (Sess. Acts 1903, p. 213), relating to treatment of "neglected and delinquent" children, held not violative of Const. art. 4, § 28, relating to subject and title of bills.—Ex parte Loving (Mo. Sup.) 508.

Act March 23, 1897 (Laws 1897, p. 49), providing for the purchase or erection of electric light plants by cities, held not violative of Const. art. 4, § 28, providing that no bill shall contain more than one subject.—State ex rel. Town of Canton v. Allen (Mo. Sup.) 868.

Acts 1901, p. 334, c. 174, § 31, relating to back assessments, held not violative of the constitutional provision relating to subjects and titles of acts.—Arbuckle Bros. v. McCutcheon (Tenn.) 772.

Act 28th Leg. p. 68, c. 50, relative to pool selling, held not repugnant to Const. art. 3, § 35,

requiring subject of act to be expressed in title.—*Ex parte Hernan* (Tex. Cr. App.) 225.

Title of Sp. Laws 28th Leg. p. 391, relative to incorporation of city of Oak Cliff, within city of Dallas, held sufficient, under Const. art. 3, § 35, forbidding bill to contain more than one subject, to be expressed in title.—*City of Oak Cliff v. State* (Tex. Civ. App.) 24.

§ 4. Amendment, revision, and codification.

Const. art. 3, § 36, providing that no law shall be revived or amended by reference to its title, does not apply when the sections added are entire and complete in themselves.—*City of Oak Cliff v. State* (Tex. Civ. App.) 24.

§ 5. Construction and operation.

In construing statute, the court will look to the whole act and the purpose of the makers in its enactment.—*Commonwealth v. Trent* (Ky.) 390.

Under Ky. St. 1899, §§ 459, 460, penal statutes must be liberally construed to effectuate legislative intent.—*Commonwealth v. Trent* (Ky.) 390.

A statute defining a criminal offense must be strictly construed.—*State v. Butler* (Mo. Sup.) 560.

Though compilers of the Code failed to bring forward provisions of the statute, the original statute may be looked to in construing the Code provisions, though the court cannot bring forward any portion of the statute as it formerly existed.—*Runnels v. State* (Tex. Cr. App.) 458.

Statutes and ordinances must be reasonably construed.—*Von Diest v. San Antonio Traction Co.* (Tex. Civ. App.) 632.

§ 6. Pleading and evidence.

Where a petition sufficiently states a cause of action based on a public statute of the state, it is immaterial that it does not mention the statute.—*Bair v. Heibel* (Mo. App.) 1017.

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§ 1. Establishment, construction, and maintenance.

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§ 2. Regulation and operation.

Street car company *held* liable for injuries to driver or pedestrian for failure to keep lookout and give warning, though the car was running at reasonable speed, and though driver used every means to avert the injury.—*South Covington & C. St. Ry. Co. v. McHugh* (Ky.) 202.

An ordinance *held* not to require electric railroad to provide trailers with fender and motorman.—*Von Diest v. San Antonio Traction Co.* (Tex. Civ. App.) 632.

§ 3. — Injuries to persons on or near tracks.

The servants of a street railway company in charge of a car are required to stop the car when they see, or may see by the exercise of reasonable care, that a child is in a position of peril by being on the track, or is about to be placed in such peril.—*Meeker v. Metropolitan St. Ry. Co.* (Mo. Sup.) 58.

That a street car company ran its car at the same rate as usual at the place where an injury occurred, though faster than was usual in other parts of the city, was not negligence.—*Warner v. St. Louis & M. R. R. Co.* (Mo. Sup.) 67.

Where the motoneer of a street car sounded the gong 1,000 feet from the place of accident, and again sharply three times about 100 feet from the place, there was no negligence in this respect.—*Warner v. St. Louis & M. R. R. Co.* (Mo. Sup.) 67.

A motorman of street car *held* to have had a right to presume that children, walking along the track ahead of the car, would get out of

the way.—*Jett v. Central Electric Ry. Co.* (Mo. Sup.) 738.

§ 4. — Contributory negligence of person injured.

Plaintiff's intestate, who was killed while attempting to cross a street in front of an approaching street car, *held* guilty of contributory negligence, precluding recovery.—*Ries v. St. Louis Transit Co.* (Mo. Sup.) 734.

A girl 11 years of age and a boy about 9, walking on the tracks of a street railway without looking for a car, are guilty of negligence.—*Jett v. Central Electric Ry. Co.* (Mo. Sup.) 738.

§ 5. — Injury avoidable notwithstanding contributory negligence.

Where the contributory negligence of plaintiff's decedent, who was killed by a street car at a crossing, was contemporaneous and coincident with his injury, and concurrent with the negligence of the motorman, no recovery could be had under the humanitarian doctrine.—*Ries v. St. Louis Transit Co.* (Mo. Sup.) 734.

Where a motorman sees one walking along the track, and that he is oblivious of his danger, in time to avert accident, but fails to do so, the company is liable.—*Jett v. Central Electric Ry. Co.* (Mo. Sup.) 738.

§ 6. — Evidence.

Evidence in an action against a street railway company for death *held* insufficient to show it guilty of any negligence.—*Warner v. St. Louis & Meramec R. R. Co.* (Mo. Sup.) 67.

Evidence *held* insufficient to show that the motoneer of a street car could have seen the person injured in danger soon enough to have checked the car and permitted an escape from the peril.—*Warner v. St. Louis & M. R. R. Co.* (Mo. Sup.) 67.

In action for death of plaintiff's 11 year old daughter, that there was no evidence that she was unmarried *held* no ground for sustaining a demurrer to the evidence.—*Jett v. Central Electric Ry. Co.* (Mo. Sup.) 738.

It will be presumed that plaintiff, in a suit for personal injuries, was in the exercise of due care.—*Priesmeyer v. St. Louis Transit Co.* (Mo. App.) 313.

§ 7. — Trial.

In an action against a street railway for injury to a hack, evidence *held* sufficient to justify submission of question of gross negligence.—*South Covington & C. St. Ry. Co. v. McHugh* (Ky.) 202.

An instruction in an action against a street railway company for the killing of a child on its track *held* not outside of the issues.—*Meeker v. Metropolitan St. Ry. Co.* (Mo. Sup.) 58.

In an action against a street railway company for the killing of a child on its track, *held*, that defendant's negligence was for the jury.—*Meeker v. Metropolitan St. Ry. Co.* (Mo. Sup.) 58.

In action against street railway for death of a child, which was run over by the car, *held* a question for the jury whether the motorman knew or should have known of deceased's peril in time to have avoided the injury.—*Jett v. Central Electric Ry. Co.* (Mo. Sup.) 738.

Held not negligence as a matter of law for a person to fail to look and listen before attempting to cross a street railway track.—*Priesmeyer v. St. Louis Transit Co.* (Mo. App.) 313.

In an action against a street railway company, the question of whether the motorman could have stopped the car, so as to avoid injury to plaintiff, *held* to be for the jury.—*Priesmeyer v. St. Louis Transit Co.* (Mo. App.) 313.

In action against street railroad for injuries to a wagon, nonsuit *held* properly denied.—*Jer-*

sey Farm Dairy Co. v. St. Louis Transit Co. (Mo. App.) 346.

In action against street railroad for injuries to a wagon, instructions for plaintiff *held* in conflict with instructions on behalf of defendant.—Jersey Farm Dairy Co. v. St. Louis Transit Co. (Mo. App.) 346.

In action against street railroad for injuries to a wagon, instruction for plaintiff *held* to incompletely hypothesize conditions of recovery.—Jersey Farm Dairy Co. v. St. Louis Transit Co. (Mo. App.) 346.

In an action against a street railway company for injuries to a team and wagon, question of defendant's negligence *held* for the jury.—Moritz v. St. Louis Transit Co. (Mo. App.) 477.

In an action against a street railroad for personal injuries, contributory negligence *held* a question for the jury.—Linder v. St. Louis Transit Co. (Mo. App.) 997.

Modification of charge, in action against street railroad for personal injuries, as to meaning of ordinary care, *held* not cause for reversal.—Linder v. St. Louis Transit Co. (Mo. App.) 997.

STREETS.

See "Highways"; "Municipal Corporations," §§ 6, 9.

SUBTERRANEAN WATERS.

See "Waters and Water Courses," § 1.

SUIT.

See "Action."

SUMMARY PROCEEDINGS.

Collection of taxes, see "Taxation," § 6.
Recovery of possession by landlord, see "Landlord and Tenant," § 5.

SUMMONS.

See "Process."

SUNDAY.

Sale of liquor on Sunday, see "Intoxicating Liquors," § 5.

SUPPORT.

Of child on divorce of parents, see "Divorce," § 3.

SUPREME COURTS.

See "Courts," § 3.

SURETYSHIP.

See "Principal and Surety."

SURFACE WATERS.

See "Waters and Water Courses," § 2.

SURPRISE.

Ground for new trial, see "New Trial," § 1.

SURVIVAL.

Of cause of action, see "Abatement and Revival," § 2.

SUSPENSION.

Of benefit insurance, see "Insurance," § 8.

SWINDLING.

See "False Pretenses."

TAXATION.

License taxes as deprivation of property without due process of law, see "Constitutional Law," § 8.

Subjects and titles of acts relating to, see "Statutes," § 3.

Local or special taxes.

See "Drains," § 1; "Municipal Corporations," § 10.

Assessments for municipal improvements, see "Municipal Corporations," § 6.

Occupation or privilege taxes.

See "Intoxicating Liquors," § 3.

§ 1. Nature and extent of power in general.

Act March 23, 1903 (Sess. Acts 1903, p. 213), requiring localities for whose benefits it is enacted to pay the expenses in carrying out its provisions, *held* not violative of Const. art. 4, § 28, relating to taxation by the General Assembly.—Ex parte Loving (Mo. Sup.) 508.

§ 2. Constitutional requirements and restrictions.

Under Acts 1891-93, p. 308, art. 4, § 7, *held*, that a turnpike aid tax cannot be collected from a railroad for years in which no assessment thereof on individual property was made.—Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co. (Ky.) 1118; Same v. Bruce, Id.

Under Const. art. 10, §§ 1, 10, 11, relative to taxation and limiting the tax rate in cities of the third class, a tax levied under Rev. St. 1899, § 6406, as amended by Act March, 1901 (Laws 1901, p. 84), *held* invalid.—Brooks v. Schultz (Mo. Sup.) 861.

Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric plants for public and private lighting, is not violative of Const. art. 10, § 3, requiring taxes to be uniform.—State ex rel. Town of Canton v. Allen (Mo. Sup.) 868.

Assessment of railroad property for taxation *held* not to be double.—Galveston & W. Ry. Co. v. City of Galveston (Tex. Civ. App.) 269.

§ 3. Liability of persons and property.

A railroad corporation is not a bailee in possession of its capital stock, within Ky. St. 1899, § 4023, relative to taxation of property in possession of bailee.—Commonwealth v. Chesapeake & O. Ry. Co. (Ky.) 186.

Ky. St. 1899, § 4058, requiring stock in corporations to be listed by owner, shows conclusively that such stock is to be listed by individual stockholders, and not by corporation.—Commonwealth v. Chesapeake & O. Ry. Co. (Ky.) 186.

The home port of a vessel engaged in interstate commerce is its situs for taxation, though its owner resides in a different state.—Commonwealth v. Ayer & Lord Tie Co. (Ky.) 686.

§ 4. Place of taxation.

Notwithstanding Rev. St. 1899, § 9121, partnership personalty *held* assessable where firm does business, rather than at residences of firm members.—School Dist. of Plattsburg v. Bowman (Mo. Sup.) 880.

§ 5. Levy and assessment.

Fact that county assessor, in assessing turnpike aid taxes, after void assessment, does not

again call on taxpayers to list their property, *held* not to invalidate assessments.—Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co. (Ky.) 1118; Same v. Bruce, Id.

Ky. St. 1903, § 4736, *held* not to prevent collection of turnpike aid tax, where taxpayer had not sought judgment of fiscal court or county commissioners exonerating his property thereunder.—Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co. (Ky.) 1118; Same v. Bruce, Id.

A turnpike tax assessment, void because made by an unauthorized person, does not prevent a reassessment by the county assessor.—Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co. (Ky.) 1118; Same v. Bruce, Id.

Under Rev. St. 1899, § 9148, an assessment *held* not invalid because the assessor failed to go upon the property, and prepared the assessment from the assessment books of his predecessor.—State ex rel. Hudson v. Carr (Mo. Sup.) 543.

Rev. St. 1899, § 9148, construed in connection with other sections of the statute, *held* directory, and not mandatory, so that failure of an assessor to make out a list of property does not render the assessment invalid.—State ex rel. Hudson v. Carr (Mo. Sup.) 543.

Rev. St. 1899, § 9182, *held* not to require that partnership property be assessed to the firm members in the proportion that each owns.—School Dist. of Plattsburg v. Bowman (Mo. Sup.) 880.

Under Acts 1901, p. 334, c. 174, § 31, back assessment *held* void, if it does not state the amount of the tax due.—Arbuckle Bros. v. McCutcheon (Tenn.) 772.

Railroad company, whose agent rendered its property for taxation, *held* not entitled to take advantage of rendition not being in statutory form.—Galveston & W. Ry. Co. v. City of Galveston (Tex. Civ. App.) 269.

§ 6. Collection and enforcement against persons or personal property.

Requiring turnpike company, suing for aid tax, to elect whether it would rely on assessment under 2 Acts 1889-90, p. 1385, c. 1034, or under Acts 1891-93, p. 308, *held* error.—Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co. (Ky.) 1118; Same v. Bruce, Id.

§ 7. Sale of land for nonpayment of tax.

Under Act April 7, 1893 (Acts 1893, p. 230), amending Act March 31, 1883 (Acts 1883, p. 268) § 134, to include collector's fee for certificate of purchase in amount for which land sold, *held* not to invalidate tax sale.—Trimble v. Allen-West Commission Co. (Ark.) 898.

TAXATION OF COSTS.

See "Costs," § 2.

TEACHERS.

See "Schools and School Districts," § 1.

TELEGRAPHS AND TELEPHONES.

Review of action for delay in delivery of message, see "Appeal and Error," § 1.

§ 1. Establishment, construction, and maintenance.

Under Rev. St. 1895, art. 698, telegraph company *held* not authorized to place its poles in a public street, so as to render the same dangerous.—Alice, W. C. & C. C. Telephone Co. v. Billingsley (Tex. Civ. App.) 255.

In an action against a telephone company for injuries alleged to have been caused by the negligent placing of a telephone pole in the street, evidence *held* to show that the location of the pole was the proximate cause of the injuries.—Alice, W. C. & C. C. Telephone Co. v. Billingsley (Tex. Civ. App.) 255.

In an action against a telephone company for personal injuries alleged to have been caused by the negligent location of a pole in a street, question of contributory negligence of the injured person *held* for the jury.—Alice, W. C. & C. C. Telephone Co. v. Billingsley (Tex. Civ. App.) 255.

§ 2. Regulation and operation.

Proof of delivery of forged message and of loss resulting from reliance thereon *held* a prima facie case against telegraph company, casting burden of showing freedom from negligence on it.—Western Union Tel. Co. v. Uvalde Nat. Bank (Tex. Sup.) 603.

Proof that forged message was sent over company's wire and deceived its servants *held* not to show freedom from negligence in delivering such message, in the absence of proof of precautionary measures against such frauds.—Western Union Tel. Co. v. Uvalde Nat. Bank (Tex. Sup.) 603.

Telegraph company *held* not to warrant authenticity of forged message, so as to render it liable, even though free from negligence.—Western Union Tel. Co. v. Uvalde Nat. Bank (Tex. Sup.) 603.

Telegraph company, negligent in delivery of message, *held* not liable for language used in the message, nor effect produced on plaintiff's mind, different from its purpose, in action to recover damages for mental anguish.—Gaddis v. Western Union Tel. Co. (Tex. Civ. App.) 37.

Negligence of telegraph company in failing to promptly deliver a message *held* not proximate cause of mental anguish.—Gaddis v. Western Union Tel. Co. (Tex. Civ. App.) 37.

Evidence *held* sufficient for finding that the funeral of plaintiff's son would have been delayed until plaintiff's arrival, if the telegraph company had transmitted correctly a notice of the son's death.—Western Union Tel. Co. v. Chambers (Tex. Civ. App.) 273.

Evidence *held* to present for the jury the question whether plaintiff knew of the mistake complained of in the transmission of a telegram.—Western Union Tel. Co. v. Chambers (Tex. Civ. App.) 273.

A telegraph company *held* guilty of negligence in delaying the delivery of a message, which negligence was the proximate cause of plaintiff's mental anguish.—Western Union Tel. Co. v. Shaw (Tex. Civ. App.) 433.

Whether a telegraph company's ordinary rule as to closing its office at night applied in a particular instance *held* a question for the jury.—Western Union Tel. Co. v. Shaw (Tex. Civ. App.) 433.

TENANCY IN COMMON.

§ 1. Mutual rights, duties, and liabilities of co-tenants.

A tenant in common, holding land adversely to his co-tenant, is properly charged with the value of the use of the premises.—Stephens v. Hewitt (Tex. Civ. App.) 229.

TERMS.

Of leases, see "Landlord and Tenant," § 2.

TESTAMENT.

See "Wills."

THEFT.

See "Larceny."

THREATS.

As evidence in prosecution for homicide, see "Homicide," § 6.

TIME.

For application for new trial, see "New Trial," § 2.
 For filing bill of exceptions, see "Exceptions, Bill of," § 2.
 For filing briefs on appeal or writ of error, see "Appeal and Error," § 8.
 For filing transcript on appeal or writ of error, see "Appeal and Error," §§ 5-6.
 For opening default judgment, see "Judgment," § 2.
 For payment of interest, see "Interest," § 1.
 For performance of contract, see "Contracts," § 2.
 For resale of goods by seller, see "Sales," § 7.
 For rescission of contract of sale, see "Sales," § 3.
 For taking appeal or suing out writ of error, see "Appeal and Error," § 8.

TITLE.

See "Replevin," § 1.
 Color of title, see "Adverse Possession."
 Marketable title, see "Vendor and Purchaser," § 4.
 Of lessor, see "Landlord and Tenant," § 1.
 Of statutes, see "Statutes," § 3.
 Removal of cloud, see "Quieting Title."
 Retention of apparent title by grantor, see "Fraudulent Conveyances," § 1.
 Sufficiency of title of vendor of land, see "Vendor and Purchaser," § 4.
 Title insurance, see "Insurance," § 6.
 To fee of highway, see "Highways," § 1.

TOLLS.

Toll roads, see "Turnpikes and Toll Roads."

TOOLS.

Liability of employer for defects, see "Master and Servant," § 3.

TORTS.

Causing death, see "Death," § 1.

By particular classes of parties.

See "Municipal Corporations," § 9.

Particular remedies for torts.

See "Trespass," § 1; "Trove and Conversion," § 1.

Particular torts.

See "Assault and Battery," § 1; "Collision"; "False Imprisonment"; "Forcible Entry and Detainer," § 1; "Fraud"; "Libel and Slander"; "Negligence"; "Nuisance"; "Trespass"; "Trove and Conversion."

Defendant railroad held not liable for case of smallpox communicated to dweller near road after defendant's train and employees affected with disease were taken in charge by health officers.—*Mason v. Illinois Cent. R. Co.* (Ky.) 375.

In action for tort, when the answer did not controvert the petition, but pleaded in avoidance, the burden of proof was on defendants.—*Dovey v. Lam* (Ky.) 383.

TOWNS.

See "Counties"; "Municipal Corporations"; "Schools and School Districts," § 1.

TRANSCRIPTS.

Harmless error in refusal of court to order transcript, see "Appeal and Error," § 23.
 Of record for purpose of review, see "Appeal and Error," §§ 5, 6; "Criminal Law," § 23.

TRESPASS.

Ejection of trespasser, see "Carriers," § 8.
 Harmless error in instructions in action for, see "Appeal and Error," § 20.
 Injuries to trespassers, see "Railroads," § 4.
 To the person, see "Assault and Battery," § 1; "False Imprisonment."

§ 1. Actions.

In trespass to real property, it is not necessary that the complaint contain a particular description of the close on which the trespass was committed.—*Randall v. Sanders* (Ark.) 56.

In an action against a municipal corporation for trespass on land, plaintiff cannot recover for vexation, humiliation, and annoyance.—*Ostrom v. City of San Antonio* (Tex. Civ. App.) 829.

In trespass to realty, the measure of damages is the amount which will compensate plaintiff for the injury done.—*Ostrom v. City of San Antonio* (Tex. Civ. App.) 829.

TRESPASS TO TRY TITLE.

See "Ejectment."

§ 1. Proceedings.

A judgment for land held not to sufficiently describe it.—*Giddings v. Fischer* (Tex. Sup.) 209.

In trespass to try title, it was error to render judgment against plaintiff's vendor, who defaulted when cited on his warranty, on an amended petition not served on the vendor and claiming special damages not claimed in original.—*Coreth v. McNatt* (Tex. Civ. App.) 33.

In trespass to try title, the prima facie inference that the possessor is the owner of the property is rebutted, where such property is vacant public domain.—*Austin v. Espuela Land & Cattle Co.* (Tex. Civ. App.) 830.

Evidence held insufficient to warrant submitting issue of sale of land to jury.—*New York & Texas Land Co. v. Dooley* (Tex. Civ. App.) 1030.

TRIAL.

See "New Trial"; "Reference"; "Witnesses."
 Abandonment of contract as question for jury, see "Contracts," § 5.

Adverse possession as question for jury, see "Adverse Possession," § 3.

Assessment of damages, see "Damages," § 4.
 Character of instrument as mortgage as question for jury, see "Mortgages," § 1.

Construction of deed as question for court, see "Deeds," § 2.

Construction of release as question for jury, see "Release," § 3.

Contributory negligence of passenger as question for jury, see "Carriers," § 7.

Harmless error in conduct and deliberations of jury, see "Appeal and Error," § 15; "Criminal Law," § 24.

Harmless error in direction of verdict, see "Appeal and Error," § 15.

Harmless error in findings of court, see "Appeal and Error," § 21.

Harmless error in instructions to jury, see "Appeal and Error," § 20; "Criminal Law," § 24.

Harmless error in submission of issues or questions to jury, see "Appeal and Error," § 19.

Necessity of motion for new trial for purpose of review of verdict, see "Appeal and Error," § 2.

Necessity of objections to reception of evidence for purpose of review, see "Appeal and Error," § 2.

Necessity of requesting instructions for purpose of review, see "Appeal and Error," § 2.

Review of instructions as dependent on presentation of question by record, see "Criminal Law," § 23.

Specification of errors in verdict in assignment of errors, see "Appeal and Error," § 7.

Trial of right to property levied on, see "Attachment," § 2.

Proceedings incident to trials.

See "Continuance."

Trial of particular civil actions or proceedings.

See "Assault and Battery," § 1; "Fraud," § 2; "Libel and Slander," § 1; "Negligence," § 3; "Replevin," § 3; "Trove and Conversion," § 1.

Against personal representatives, see "Executors and Administrators," § 6.

Against surety, see "Principal and Surety," § 3. Disputed claims against estate of decedent, see "Executors and Administrators," § 4.

For causing death, see "Death," § 1.

For compensation of broker, see "Brokers," § 2.

For delay in delivery of telegram, see "Telegraphs and Telephones," § 2.

For ejection of passenger, see "Carriers," § 8.

For injuries to live stock in transportation, see "Carriers," § 3.

For loss of passenger's baggage, see "Carriers," § 9.

For loss of wife's services, see "Husband and Wife," § 2.

For personal injuries, see "Carriers," § 6; "Collision"; "Druggists"; "Master and Servant," § 10; "Municipal Corporations," § 9; "Street Railroads," § 7; "Telegraphs and Telephones," § 1.

On insurance certificate, see "Insurance," § 8.

On insurance policy, see "Insurance," § 7.

To recover money deposited on purchase price of land, see "Vendor and Purchaser," § 7.

To set aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

Trespass to try title to real property, see "Trespass to Try Title."

Trial of criminal prosecutions.

See "Assault and Battery," § 2; "Bribery"; "Burglary," § 2; "Criminal Law," §§ 11-19; "Embezzlement"; "False Pretenses"; "Forgery"; "Homicide," § 7; "Incest"; "Larceny," § 1; "Rape," § 2.

For offenses against laws relating to poisons, see "Poisons."

For offenses against liquor laws, see "Intoxicating Liquors," § 5.

§ 1. Course and conduct of trial in general.

Right to open and close, in action on joint and several note, where the principal defaulted and the surety filed the statutory admission, held properly denied to the surety.—Guerzuin v. Boone (Tex. Civ. App.) 630.

§ 2. Reception of evidence.

Testimony of proponent in a will contest, offered after the contestant has rested, held rebuttal, and not in violation of Civ. Code, prohibiting a party from testifying in chief after having introduced other testimony in chief.—Savage v. Bulger (Ky.) 717.

An objection to a hypothetical question, asked an expert, that the facts assumed were not to be found in the evidence, did not raise the objection that the question left out facts shown in the evidence.—O'Neill v. Kansas City (Mo. Sup.) 64.

Admission of improper testimony without objection does not justify admission of similar testimony over objection.—Smith v. Sovereign Camp of Woodmen of the World (Mo. Sup.) 562.

Defendant held to have waived his right to object to a variance by failing to object to the evidence.—Albin v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 153.

Exclusion of evidence simply cumulative held not error.—Siegelman v. Jones (Mo. App.) 307.

Action of court, in action for injuries, in sustaining objection to question put to plaintiff as to whether a proposition had been made to him to have the court appoint a committee of physicians to examine him, held erroneous.—Austin & N. W. R. Co. v. Cluck (Tex. Sup.) 403.

Where part of an answer to an interrogatory is impertinent, the court may exclude such part and admit the balance.—Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co. (Tex. Civ. App.) 961.

Opening of trial of action on county treasurer's bond, after argument begun, to let in evidence, held not an abuse of discretion.—Harper v. Marion County (Tex. Civ. App.) 1044.

§ 3. Arguments and conduct of counsel.

The preliminary statement of counsel as to what he expects the evidence to disclose will not form a basis for a nonsuit.—Fillingham v. St. Louis Transit Co. (Mo. App.) 314.

An instruction that the jury should not consider certain remarks of plaintiff's counsel held error.—Texas Cent. Ry. Co. v. Parker (Tex. Civ. App.) 42.

§ 4. Taking case or question from jury.

A peremptory instruction is properly refused, where the evidence is conflicting.—Louisville & C. Packet Co. v. Bottorff (Ky.) 920; Alexander & Kneeland v. Von Koehring (Tex. Civ. App.) 629.

Where all the evidence tends to prove a fact, so that but one finding could be made by the jury, it is proper for the court to withdraw the issue from them, and decide the matter itself.—New York & Texas Land Co. v. Dooley (Tex. Civ. App.) 1030.

§ 5. Instructions to jury.

Charges not supported by the evidence are properly refused.—St. Louis, I. M. & S. Ry. Co. v. Philpot (Ark.) 901.

A fact about which there is no dispute, and which is conceded to be true, notwithstanding the allegations in the pleadings, may be assumed in an instruction to be true.—Parks v. St. Louis & S. Ry. Co. (Mo. Sup.) 70.

In action on notes, an instruction held not erroneous as having given undue prominence to the testimony of certain witness.—Sanders v. North End Building & Loan Ass'n (Mo. Sup.) 833.

An instruction calling attention to facts in evidence, and stating that these circumstances may be considered as to whether notice was received, held erroneous.—Smith v. Sovereign Camp of Woodmen of the World (Mo. Sup.) 562.

In an action for negligence, failure to specifically define reasonable care is not error, where no such definition was requested.—Priesmeyer v. St. Louis Transit Co. (Mo. App.) 313.

A requested instruction, which is broader than the pleadings, or which omits references to facts

therein alleged and embraces others not included, is properly refused.—*Turney v. Baker* (Mo. App.) 479.

An instruction submitting a case on the theory of plaintiff's petition is not erroneous because it ignores the defense.—*Turney v. Baker* (Mo. App.) 479.

Where an issue is sufficiently submitted by instructions given, the refusal to give a requested charge *held* prejudicial.—*Turney v. Baker* (Mo. App.) 479.

The trial court is not required to instruct upon the different issues arising in a case, unless asked to do so.—*Redmond v. Missouri, K. & T. Ry. Co.* (Mo. App.) 768.

Instruction as to city's duty to keep street in repair *held* harmless error, in view of other instructions.—*Jerowitz v. Kansas City* (Mo. App.) 1088.

A charge *held* not erroneous, on the state of the record, though the language of the petition was more general than that of the charge.—*Ft. Worth & D. C. Ry. Co. v. Linthicum* (Tex. Civ. App.) 40.

A charge on the measure of damages from mental anguish *held* not erroneous as assuming that the mental anguish had been proved.—*Western Union Tel. Co. v. Chambers* (Tex. Civ. App.) 273.

The refusal to submit a certain issue was not error, where the subject of the inquiry, so far as material and proper for submission, was embraced in other issues submitted.—*Cahill v. Dickson* (Tex. Civ. App.) 281.

A charge *held* not objectionable as assuming the fact to be that a car had stopped before plaintiff attempted to alight therefrom.—*San Antonio Traction Co. v. Welter* (Tex. Civ. App.) 414.

A charge requested, containing nothing more than that which has substantially been given, and more favorably to the complaining party, *held* properly refused.—*Guerquin v. Boone* (Tex. Civ. App.) 630.

The court properly refused to present a case not presented by the pleadings or evidence.—*Von Diest v. San Antonio Traction Co.* (Tex. Civ. App.) 632.

Failure to submit a particular issue in general charge was not error, where such issue was submitted by a charge given at defendant's request.—*Galveston, H. & S. A. Ry. Co. v. Appel* (Tex. Civ. App.) 635.

Where a defendant in a personal injury case fails to request additional charges, he cannot complain of a charge correctly announcing the law and presenting favorably for him all defensive issues.—*Boettler v. Tumlinson* (Tex. Civ. App.) 824.

Though, ordinarily, referring the jury to the pleadings for the issues might not be reversible error, it is a practice not to be encouraged, as the issues made thereby are a question of law for the court, and should be so determined and presented in the charge.—*Houston Electric Co. v. Nelson* (Tex. Civ. App.) 978.

A charge in an action for injury to a passenger in a street car *held* to be on the weight of the evidence, and hence not authorized.—*Houston Electric Co. v. Nelson* (Tex. Civ. App.) 978.

§ 6. Verdict.

New trial awarded in unlawful detainer on ground that jury were confused and verdict not according to instructions.—*Champ Spring Co. v. B. Roth Tool Co.* (Mo. App.) 344.

Because the verdict is contrary to an erroneous instruction, it does not follow that the case should be reversed.—*Johnston v. Kleinsmith* (Tex. Civ. App.) 36.

Findings in action for recovery of land *held* inconsistent, so as to necessitate reversal of judgment for plaintiff.—*Taylor v. Flynt* (Tex. Civ. App.) 964.

§ 7. Trial by court.

A conclusion of law does not supply or take the place of a finding of fact, except in cases where the law gives a conclusive effect to the fact established, or where the evidence is of such a certain and conclusive character that the minds of men of ordinary intelligence will not differ as to its effect.—*Zachariae v. Swanson* (Tex. Civ. App.) 627.

TRIAL OF RIGHT OF PROPERTY.

See "Attachment," § 2.

TROVER AND CONVERSION.

Conversion of goods by carrier, see "Carrier," § 2.

Conversion of mortgaged property, see "Chattel Mortgages," § 2.

§ 1. Actions.

Whether interest should be recovered on the value of goods converted from the date of the conversion to that of the verdict is a question for the jury.—*Bigler v. Leonori* (Mo. App.) 324.

The measure of damages for conversion, in case of cutting down of lumber under a mistaken belief of right, *held* to be the value of the trees and not of the manufactured lumber.—*Texas & N. O. R. Co. v. Jones' Ex'rs* (Tex. Civ. App.) 955.

Where plaintiffs, suing for the conversion of a horse, claim his entire value, they cannot show, on defendants' counterclaiming for the animal's keep, that defendants were part owners.—*Gooch v. Isbell* (Tex. Civ. App.) 973.

Where, in an action by several plaintiffs for the conversion of a horse, defendants counterclaim for the animal's keep, it is error to permit part of the plaintiffs to be dismissed from the suit.—*Gooch v. Isbell* (Tex. Civ. App.) 973.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Deposit of trust funds in bank, see "Banks and Banking," § 1.

Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Creation, existence, and validity.

So long as an express trust exists and is recognized by the trustee, it never becomes stale.—*Owsley v. Owsley* (Ky.) 394.

Evidence examined, and *held* to show that appellant received appellee's property under an agreement to hold and employ it for appellee's sole use.—*Owsley v. Owsley* (Ky.) 394.

Trust *held*, at the maturity of the cestuis que trustent, a dry trust, executed by the statute of uses.—*Ottomeyer v. Pritchett* (Mo. Sup.) 62.

A parol agreement that a reserved life estate in a deed was intended only as security for the grantee's performance of a contract to support the grantor *held* unenforceable as an implied or resulting trust.—*Hall v. Small* (Mo. Sup.) 733.

A transaction between a vendor and purchaser, as evidenced by an agreement by the former to buy in the land on a foreclosure of his lien, and to reconvey the same to the purchaser, *held* not to constitute a trust.—*Foster v. Ross* (Tex. Civ. App.) 990.

§ 2. Construction and operation.

Testamentary writing construed, and *held* not to give trustee individual right in property.—*Gibson v. Gibson* (Ky.) 928.

§ 3. Management and disposal of trust property.

Presumption that payments for support of family by a trustee of married woman were made by her direction cannot be indulged, where evidence is to contrary.—*Owsley v. Owsley* (Ky.) 394.

Trustee of married woman *held* not entitled to charge expense of maintaining family against her.—*Owsley v. Owsley* (Ky.) 394.

Trustee *held* chargeable with interest on principal of trust fund.—*Owsley v. Owsley* (Ky.) 394.

§ 4. Establishment and enforcement of trust.

Fund retained by factors as the proceeds of a sale made in the course of their business *held* to constitute a trust fund, the character of which is not changed by a deposit thereof to their individual credit.—*Interstate Nat. Bank v. Olaxton* (Tex. Civ. App.) 44.

Allegations as to possession by agent, which, if adverse to him, would have given them title, when contradicted by other allegations of petition, *held* not to entitle plaintiffs to injunction restraining sale of land on execution against agent.—*Brown v. Ikard* (Tex. Civ. App.) 967.

Equitable title holders *held* not entitled to injunction restraining sale of land on execution directed against stranger to legal title.—*Brown v. Ikard* (Tex. Civ. App.) 967.

TURNPIKES AND TOLL ROADS.

Turnpike aid tax, see "Taxation," §§ 2, 5, 6.

§ 1. Establishment, construction, and maintenance.

In an action by a turnpike company to recover the value of a turnpike transferred to a county, the inquiry should have been confined to ascertainment of actual value of the property, including its franchise.—*Chaplin & B. Turnpike Road Co. v. Nelson County* (Ky.) 377.

In an action by a turnpike company to recover the value of a turnpike transferred to a county, instructions as to its actual value *held* erroneous.—*Chaplin & B. Turnpike Road Co. v. Nelson County* (Ky.) 377.

In an action by a turnpike company to recover the value of a turnpike transferred to a county, evidence that it was of no value *held* inadmissible.—*Chaplin & B. Turnpike Road Co. v. Nelson County* (Ky.) 377.

Act March 9, 1867 (Acts 1867, p. 539, c. 2035) relative to a turnpike road, construed as to the tax in aid of its construction.—*Salt Lick E. & Mt. C. Turnpike Road Co. v. Gilfillin* (Ky.) 934.

Individual indebtedness, contracted by turnpike company directors to build road, when company could not have contracted indebtedness under its charter, *held* not a defense to action for turnpike aid tax to build uncompleted road.—*Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co.* (Ky.) 1118; *Same v. Bruce*, *Id.*

Turnpike company's lease to county *held* not to terminate its charter, etc., under Ky. St. 1903, § 4748b, subsec. 8, in view of section 4306.—*Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co.* (Ky.) 1118; *Same v. Bruce*, *Id.*

The extension of the limits of a city, so as to include a portion of a turnpike, does not deprive the turnpike of its character, nor the owner of the turnpike of its right of property

therein.—*Columbia & Cedar Creek Turnpike Co. v. Vivion* (Mo. App.) 89.

Where a portion of a turnpike is included in city limits, it is not the duty of the city to keep that portion in repair.—*Columbia & Cedar Creek Turnpike Co. v. Vivion* (Mo. App.) 89.

§ 2. Regulation and use for travel.

In an action by a turnpike company to recover tolls, evidence *held* to show that plaintiff did not maintain the road in good repair, as required by Rev. St. 1899, § 1234.—*Columbia & Cedar Creek Turnpike Co. v. Vivion* (Mo. App.) 89.

Under Rev. St. 1899, §§ 1234, 1235, turnpike company *held* not entitled to charge tolls, if part of its road is out of repair, though the remainder is kept in good repair.—*Columbia & Cedar Creek Turnpike Co. v. Vivion* (Mo. App.) 89.

ULTRA VIRES.

Acts of corporations, see "Corporations," § 3.

UNITED STATES.

Courts, see "Removal of Causes."

UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

USURY.

See "Building and Loan Associations."

§ 1. Usurious contracts and transactions.

Chattel mortgage and usurious note secured thereby *held* Kansas contracts, so as to be governed by Gen. St. Kan. 1901, § 3592, and not by Rev. St. Mo. 1899, § 3710.—*Trower Bros. Co. v. Hamilton* (Mo. Sup.) 1081.

Evidence *held* insufficient to establish the defense of usury.—*Siegelman v. Jones* (Mo. App.) 307.

VACATION.

Vacating particular proceedings.

See "Attachment," § 1; "Judgment," § 2.

Decree in equity, see "Equity," § 1.

Judgment in divorce proceedings, see "Divorce," § 2.

Orders of court, see "Motions."

Partition sale, see "Partition," § 1.

VALUE.

Limits of jurisdiction, see "Appeal and Error," § 1; "Courts," §§ 2, 3.

VARIANCE.

Between pleading and proof in civil action, see "Pleading," § 8.

Between pleading and proof in criminal prosecutions, see "Indictment and Information," § 6.

VENDOR AND PURCHASER.

See "Exchange of Property"; "Sales."

Operation and effect of defense of limitation in action on vendor's lien notes, see "Limitation of Actions," § 4.

Priorities between vendor's and mechanic's liens, see "Mechanics' Liens," § 3.

Purchasers at sale on execution, see "Execution," § 1.

Requirements of statute of frauds, see "Frauds, Statute of," §§ 4, 5.

§ 1. Requisites and validity of contract.

Contract for sale of land *held* to evidence agreement to convey to plaintiff or to any one he might direct.—*Dyer v. Winston* (Tex. Civ. App.) 227.

Contract for sale of land *held* to sufficiently describe the land.—*Dyer v. Winston* (Tex. Civ. App.) 227.

§ 2. Construction and operation of contract.

Several contracts for purchase of land, entered into in furtherance of common purpose, *held* to be construed as if one contract.—*Morey v. Clopton* (Mo. App.) 467.

Contract for sale of land *held* not inconsistent with a previous one in reference to same land, agreeing to pay a commission for the sale.—*Dyer v. Winston* (Tex. Civ. App.) 227.

§ 3. Modification or rescission of contract.

In action to rescind sale on the ground of fraud, *held* error to award rescission, but that plaintiff should have had relief by pecuniary compensation.—*Hogan v. Tucker* (Ky.) 197.

§ 4. Performance of contract.

A decree reforming a deed *held* to vest in the grantee, as against her possible heirs, an estate in fee.—*Kendall v. Crawford* (Ky.) 864.

Failure to include a personal provision in a contract for the sale of land in the deed *held* not a breach of the contract.—*Reitz v. Lotz's Adm'r* (Mo. App.) 145.

A deduction from purchase price of land sold will be allowed for deficiency, in case of mutual mistake as to the boundaries.—*Willard v. Sanford* (Tex. Civ. App.) 290.

§ 5. Rights and liabilities of parties.

Possession of land is sufficient to put a purchaser thereof on inquiry as to the possessor's rights.—*Bryant v. Main* (Ky.) 680.

Under Rev. St. 1899, § 3118, the record of a deed of husband and wife, with the acknowledgment of the wife alone, *held* constructive notice to one who purchased five years later.—*Williams v. Butterfield* (Mo. Sup.) 729.

Attorney in fact, who performed services in consideration of conveyance of half interest in land, *held* bona fide purchaser.—*Garner v. Boyle* (Tex. Civ. App.) 987.

The title of a vendee of one who has obtained title as an innocent purchaser is good, though the vendee, at the time of his purchase, be charged with notice of the adverse equities.—*Garner v. Boyle* (Tex. Civ. App.) 987.

§ 6. Remedies of vendor.

Remote alienee of land, on which a lien was reserved to secure a note, *held* bound thereby.—*Malone's Committee v. Lebus* (Ky.) 180.

The allegations in a petition *held* sufficient in trespass to try title.—*Sanders v. Rawlings* (Tex. Civ. App.) 41.

A mechanic's lien for improvements, based on real estate subject to a vendor's lien, *held* subsequent to the latter.—*Watson v. Markham & Reese* (Tex. Civ. App.) 660.

Burden *held* on grantor, suing on purchase-money notes, to show that stipulation in deed for clear title had been complied with.—*Zimmermann v. Owen* (Tex. Civ. App.) 971.

§ 7. Remedies of purchaser.

Question whether there was a contract and whether it was broken by plaintiff, in an action by a prospective vendee to recover money deposited with persons negotiating the transaction, to bind the sale, *held* for the jury.—*Alexander & Kneeland v. Von Koehring* (Tex. Civ. App.) 629.

VENUE.

Necessity of objections to, for purpose of review, see "Criminal Law," § 22.

Of particular actions or proceedings.

See "False Imprisonment," § 1; "Fraud," § 2.

Against counties, see "Counties," § 4.

Criminal prosecutions, see "Criminal Law," § 4.

§ 1. Domicile or residence of parties.

Where a defendant resided in one county a part of the year, and spent the balance of his time in another county, an action against him might be properly brought in either county, under Rev. St. 1895, art. 1194.—*Pearson v. West* (Tex. Sup.) 944.

Where defendant resided in different counties during different parts of the year, plaintiff's right to sue in one of such counties did not depend on whether defendant by his acts had estopped himself to deny that he resided in such county.—*Pearson v. West* (Tex. Sup.) 944.

Debtor's letter to creditor, promising to pay balance of account, *held* not a written contract executed in county of creditor's residence, so as to permit suit thereon, under Rev. St. 1895, art. 1194, subd. 5.—*Flynt v. Eagle Pass Coal & Coke Co.* (Tex. Civ. App.) 831.

VERDICT.

In civil actions, see "Trial," § 6.

In criminal prosecutions, see "Criminal Law," § 12.

Operation and effect as curing defects in pleadings, see "Pleading," § 9.

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See "Pleading," § 9.

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Of rights or remedies.

Privilege of communication, see "Witnesses," § 4.

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Right to forfeiture of insurance policy, see "Insurance," §§ 4, 5.

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WARRANT.

Orders for payment from public funds, see "Schools and School Districts," § 1.

WARRANTY.

On sale of goods, see "Sales," §§ 6, 8.

WATERS AND WATER COURSES.

See "Drains."

§ 1. Subterranean and percolating waters.

Railroad's use of a well, constructed on its land and fed by percolating waters, *held* limited to a reasonable use, in connection with its land as land, as against an adjoining well owner.—*East v. Houston & T. Cent. R. Co. (Tex. Civ. App.)* 646.

§ 2. Surface waters.

Complaint *held* to show an easement for drainage of water into ditch no further, at most, than right to have water so drained, and not to extend to having ditch kept open by defendant.—*Robertson v. Daviess Gravel Road Co. (Ky.)* 189.

The right of the owner of property to have surface water naturally drained extends no further than natural flow of water.—*Robertson v. Daviess Gravel Road Co. (Ky.)* 189.

§ 3. Appropriation and prescription.

Instruction *held* to properly define arid portion of state.—*Hall v. Carter (Tex. Civ. App.)* 19.

Prescriptive right to use water for irrigation only embraces extent of use actually made of water while acquiring right.—*Hall v. Carter (Tex. Civ. App.)* 19.

Point to which water would flow *held* proper measure of extent of prescriptive right acquired to the same.—*Hall v. Carter (Tex. Civ. App.)* 19.

Facts *held* to authorize a finding that defendant's prescriptive right to use water did not go to extent of use exercised by him in certain years.—*Hall v. Carter (Tex. Civ. App.)* 19.

§ 4. Public water supply.

Measure of damages, in action for breach of contract to furnish water for irrigating purposes, stated.—*Raywood Rice, Canal & Milling Co. v. Wells (Tex. Civ. App.)* 253.

Instruction, in action for breach of contract to furnish water for irrigating purposes, as to circumstances mitigating damages, *held* properly refused.—*Raywood Rice, Canal & Milling Co. v. Wells (Tex. Civ. App.)* 253.

The action of a city in violating its contract to furnish a citizen with water *held* not justified by the fact that the citizen drained his water into the street, and thereby created a nuisance.—*City of Van Alstyne v. Morrison (Tex. Civ. App.)* 655.

Action of city in shutting off water supply without notice *held* not justified by fact that citizen was using water for bathtub and not paying therefor.—*City of Van Alstyne v. Morrison (Tex. Civ. App.)* 655.

Action of city in shutting off water supply without notice *held* not justified by fact that citizen's family consisted of six persons, and he was only paying for five.—*City of Van Alstyne v. Morrison (Tex. Civ. App.)* 655.

WAYS.

Private rights of way, see "Easements."

Public ways, see "Highways"; "Municipal Corporations," § 9.

WEAPONS.

In a prosecution for unlawfully carrying a pistol, evidence *held* not to require a charge defin-

ing a traveler.—*Harris v. State (Tex. Cr. App.)* 610.

WELLS.

Oil or gas wells, see "Mines and Minerals," § 3.

WIDOWS.

Dower on death of bankrupt, see "Bankruptcy," § 2.

WILLS.

See "Descent and Distribution"; "Executors and Administrators."

Harmless error in admission of evidence in will contest, see "Appeal and Error," § 17.

Harmless error in instruction in will contest, see "Appeal and Error," § 20.

Harmless error in submission of issues to jury in will contest, see "Appeal and Error," § 19.

§ 1. Requisites and validity.

In order to establish a letter as a testamentary instrument, which would supplant a will duly executed, it must be shown that such letter was written subsequent to the date of the will.—*Thruston's Adm'r v. Prather (Ky.)* 354.

Letter *held* not to raise a precatory trust, in order to constitute testamentary disposition of property sufficiently strong to overcome plain language of will.—*Thruston's Adm'r v. Prather (Ky.)* 354.

Under Ky. St. 1899, § 4828, the use of the word "credible," in an instruction with reference to the character of the subscribing witnesses to a will, *held* improper.—*Savage v. Bulger (Ky.)* 717.

§ 2. Probate, establishment, and annulment.

Evidence *held* insufficient to establish the execution of a will, under Ky. St. 1899, §§ 4828, 4833.—*Thruston's Adm'r v. Prather (Ky.)* 354.

§ 3. Construction.

A will construed, and *held* to give a daughter of testator a fee, subject to be defeated if she died without bodily issue.—*Smith v. Ballard (Ky.)* 714.

A will *held* to authorize a widow to dispose of such portion of the testator's estate as might be necessary for her maintenance.—*Martin v. Barnhill (Ky.)* 1097.

A will construed to give to testator's widow a life estate in land devised in remainder to testator's son.—*Gentry v. Gentry (Ky.)* 1115.

§ 4. Rights and liabilities of devisees and legatees.

Where an action against defendant's deceased father as surety on a guardian's bond was barred by limitations, defendant was entitled to plead such limitations to relieve real estate descended to him from his father from liability.—*Bybee's Ex'r v. Poynter (Ky.)* 698.

Evidence *held* to show that a contract between a widow and her son was a suitable arrangement for her support.—*Martin v. Barnhill (Ky.)* 1097.

Where a son received under his father's will, subject to the life estate of his mother, land on which he was living, but for which he had never received a deed, he could not claim the remainder under the will, and also claim compensation for his improvements.—*Gentry v. Gentry (Ky.)* 1115.

WITHDRAWAL.

Of deposition, see "Depositions."

WITNESSES.

See "Depositions"; "Evidence."

Absence ground for continuance in criminal prosecution, see "Criminal Law," § 11.

Experts, see "Criminal Law," § 9; "Evidence," § 11.

Harmless error in examination of witnesses, see "Criminal Law," § 24.

Harmless error in rulings on questions to, see "Appeal and Error," § 15.

Inducing witness to testify falsely as contempt, see "Contempt," § 1.

Instructions as to failure of accused to testify, see "Criminal Law," § 18.

Opinions, see "Evidence," § 11.

To wills, see "Criminal Law," § 9; "Wills," § 1.

§ 1. Attendance, production of documents, and compensation.

Provisions of Criminal Code authorizing state to agree that witnesses would testify on application being made by defendant for continuance, *held* not in violation of the defendant's constitutional rights.—*Davis v. Commonwealth* (Ky.) 1101.

§ 2. Competency—Capacity and qualifications in general.

Under Code Prac. §§ 605, 606, relative to competency of witnesses, and Ky. St. 1899, § 12, relative to verdict in action for tort, wife of one of several defendants is competent witness for defendants other than her husband.—*Dovey v. Lam* (Ky.) 383.

The fact that wife of joint defendant in tort testified for defendants *held* not ground for reversal of judgment for defendants, except as to witness' husband.—*Dovey v. Lam* (Ky.) 383.

Evidence *held* to raise presumption of divorce, so as to render witness competent against accused as to matters subsequent thereto.—*Tompkins v. Commonwealth* (Ky.) 712.

The amendment to Civ. Code Prac. § 606, subd. 1, relative to husband and wife testifying in regard to the agency, where one is agent for the other, construed.—*Logsdon v. Stern* (Ky.) 927.

Certain testimony *held* properly excluded, on a criminal prosecution, as having been confidential, between accused and his wife, and after arrest. Code Cr. Proc. arts. 774, 775.—*Spivey v. State* (Tex. Cr. App.) 444.

A witness, convicted and sentenced for a felony, *held* incompetent to testify, though the sentence of the court was not produced in support of the objection.—*Gulf, C. & S. F. Ry. Co. v. Johnson* (Tex. Civ. App.) 648.

§ 3. — Testimony of parties or persons interested, for or against representatives, survivors, or successors in title or interest of persons deceased or incompetent.

Evidence of a foreman of a corporation is admissible in action against it for death of a servant working under him.—*Parker's Adm'r v. Cumberland Telephone & Telegraph Co.* (Ky.) 1109.

A grantee, claiming under a deed from her deceased father, is incompetent to show that the consideration of the deed was other than that therein expressed.—*Johnson v. Burks* (Mo. App.) 133.

A widow is not a competent witness to prove the transactions between her deceased husband and his grantee leading up to the conveyance.—*Johnson v. Burks* (Mo. App.) 133.

Defendant to suit by guardian of minor heir of decedent *held* not competent witness as to transactions with such decedent.—*Bridge v. Carter* (Tex. Civ. App.) 245.

In an action against administrator on note of his intestate, certain evidence *held* not incompetent as concerning a transaction with deceased.—*Adam v. Sanger* (Tex. Civ. App.) 954.

§ 4. — Confidential relations and privileged communications.

Under Civ. Code Proc. § 606, subsec. 5, an attorney *held* not incompetent to testify to statements made to him by his client not connected with his professional services.—*Denunzio's Receiver v. Scholts* (Ky.) 715.

Questions asked an attorney for decedent in proceedings for discovery of assets *held* not to require violation of professional confidences.—*Ex parte Gfeller* (Mo. Sup.) 552.

Executors' institution of proceedings for discovery of assets *held* a waiver of privileged character of communications between decedent and her attorney, called as a witness.—*Ex parte Gfeller* (Mo. Sup.) 552.

Under Code Cr. Proc. 1895, art. 774, testimony of divorced wife to communication made to her before the divorce, involving threat against decedent for whose murder her husband is prosecuted, *held* inadmissible.—*Davis v. State* (Tex. Cr. App.) 451.

§ 5. Examination.

Questions asked witness in proceedings for discovery of assets *held* not to call for matters tending to incriminate him.—*Ex parte Gfeller* (Mo. Sup.) 552.

Witness' refusal to answer questions *held* not to constitute a claim of privilege, on the ground that his answers would tend to incriminate him.—*Ex parte Gfeller* (Mo. Sup.) 552.

It was not error to refuse to permit plaintiff's counsel to again ask concerning facts already testified to.—*Ries v. St. Louis Transit Co.* (Mo. Sup.) 734.

Refusal to permit further cross-examination as to witness' interest *held* not error in criminal prosecution.—*State v. Pyscher* (Mo. Sup.) 833.

In a prosecution for murder, certain evidence of state's witness as to immunity to be tendered to witnesses testifying *held* competent.—*Kipper v. State* (Tex. Cr. App.) 611.

In prosecution for manslaughter, cross-examination by state as to lawlessness in community and circumstances under which defendant's brother was shot *held* not error.—*Montgomery v. State* (Tex. Cr. App.) 788.

The court has a sound discretion to permit leading questions, when a witness shows disinclination to answer, or is inexperienced or timid.—*Hill v. State* (Tex. Cr. App.) 808.

Question asked of juror, when called as witness on submission of motion for new trial after conviction of homicide, as to expression of opinion of guilt, *held* not objectionable in form.—*Cruise v. State* (Tex. Cr. App.) 818.

The court, in permitting a leading question, *held* not to have abused its discretion in allowing leading questions.—*Missouri, K. & T. Ry. Co. v. McOutcheon* (Tex. Civ. App.) 232.

In an action for breach of a broker's contract for the sale of oil, an answer to an interrogatory in the broker's deposition *held* properly excluded as not responsive.—*Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Tex. Civ. App.) 961.

§ 6. Credibility, impeachment, contradiction, and corroboration—in general.

On a prosecution for cattle theft, the state *held* entitled to impeach its own witness.—*Sapp v. State* (Tex. Cr. App.) 456.

In a prosecution for murder, fact that witness was contradicted *held* not sufficient to authorize

proof of his veracity.—*Kipper v. State* (Tex. Cr. App.) 611.

§ 7. — Character and conduct of witness.

In a prosecution for burglary, evidence that defendant had 20 years before been convicted of assault with intent to murder was too remote to be admissible as affecting his credibility as a witness.—*Dyer v. State* (Tex. Cr. App.) 456.

Where, on a criminal prosecution, a witness for the state had been attacked by defendant by showing that they had testified to material facts at the examining trial, different from other testimony on the trial, it was proper to permit the state to prove the good character of the witness for truth and veracity.—*Runnels v. State* (Tex. Cr. App.) 458.

In prosecution for murder, certain evidence held competent for impeachment.—*Kipper v. State* (Tex. Cr. App.) 611.

In a prosecution for burglary, it was proper for the state, on cross-examination of defendant, to show for impeachment purposes that he had previously been convicted of crime.—*Scoville v. State* (Tex. Cr. App.) 792.

In a prosecution for burglary, testimony of defendant, elicited on cross-examination, as to former crimes, held not inadmissible for remoteness.—*Scoville v. State* (Tex. Cr. App.) 792.

Defendant, in a prosecution for violating the local option law, cannot prove that a witness for the state has the reputation of violating the local option law.—*Smith v. State* (Tex. Cr. App.) 801.

Evidence of witness' remark, showing his opinion of an alleged murder, held inadmissible to impeach him.—*Vann v. State* (Tex. Cr. App.) 813.

§ 8. — Interest and bias of witness.

Certain evidence held admissible to show the prejudice of a witness for the state.—*Sapp v. State* (Tex. Cr. App.) 456.

In a prosecution for murder, it was proper for the court to permit an officer in the company to which defendant belonged to explain how he paid \$5 toward the prosecution.—*Kipper v. State* (Tex. Cr. App.) 611.

§ 9. — Inconsistent statements by witness.

Statement of the conductor of a street car at the time of the accident held admissible to impeach his testimony in regard thereto.—*Hannon v. St. Louis Transit Co.* (Mo. App.) 158.

Where a witness has made previous statements of the transaction contradicting those made on the trial, evidence is inadmissible to show that he had made previous statements agreeing with those made on the trial, as corroborative thereof.—*Legere v. State* (Tenn.) 1059.

The state cannot read in evidence defendant's application for a continuance for the purpose of impeaching one of defendants' witnesses.—*Wilburn v. State* (Tex. Cr. App.) 8.

In a prosecution for murder, certain evidence corroborative witness held competent; his veracity having been impeached on cross-examination.—*Kipper v. State* (Tex. Cr. App.) 611.

Evidence proving contradictory statements of prosecuting witness on material issue held admissible on part of the state.—*Gibson v. State* (Tex. Cr. App.) 812.

The state may show, by testimony of grand jury, statements made by prosecuting witness before them, where she had denied making the same.—*Gibson v. State* (Tex. Cr. App.) 812.

§ 10. — Contradiction and corroboration of witness.

A witness who has not been impeached cannot be corroborated by showing that he has made the same statement testified to at other times to other parties.—*Davis v. State* (Tex. Cr. App.) 451.

Wholly irrelevant evidence, drawn out on cross-examination, cannot be impeached by evidence to the contrary.—*Drumm-Flato Commission Co. v. Union Meat Co.* (Tex. Civ. App.) 634.

WORK AND LABOR.

Liens for work and materials, see "Mechanics' Liens."

Where one is prevented from performing his contract by acts of the other party to the contract, the failure to perform is not a defense in an action on a quantum meruit.—*Turney v. Baker* (Mo. App.) 479.

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TABLES OF SOUTHWESTERN CASES

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